

In The Matter of a Dispute

between

ST. JOHN’S HEALTH CARE CORPORATION
REPRESENTED BY THE NEWFOUNDLAND AND LABRADOR HEALTH
BOARDS ASSOCIATION

(hereinafter referred to as the “Employer” or the “HCC”)

and

NEWFOUNDLAND ASSOCIATION OF PUBLIC EMPLOYEES

(hereinafter referred to as the “Union”)

The Grievance

By way of the following letter dated February 3, 2000, the Employer terminated the grievor’s employment, viz:

Margaret Denine
391 Blackhead Road
St. John’s, NF A0A 1J0

Dear Ms. Denine:

This letter is to follow-up the meeting of January 27, 2000 attended by you, your Union representatives- Steve Porter and Ruby Kelly, Donna Hoskins of Employee Wellness, and the undersigned. The purpose of the meeting was to discuss the fact that since April 1, 1999 to January 24, 2000 you were being paid for a work related injury by both your employer, the Health Care Corporation of St. John’s, and the Workers’ Compensation Commission. Immediately prior to this date you were paid by the Health Care Corporation of St. John’s only.

You have been overpaid by \$8080.00. At no point during the approximately ten months that you were double paid did you bring this to anyone's attention. The error was only discovered by chance. Your explanation of why you thought you were receiving double payments was not reasonable. You offered two explanations that justified this to you. One was your claim had been previously fooled-up and the other had to do with a notice of reduction in income tax. Neither of the above was reasonable in view of being double paid for ten months.

As stated in the meeting this is a serious matter. We feel that there was an obligation on you to report the overpayments. We also feel that there was an obligation on you not to spend money that was not rightfully yours. We regard your actions as theft. Due to the seriousness of this incident we feel that we have no other choice but to terminate your employment effective immediately.

You will be obligated to repay the overpayment. Following consultation with the Workers' Compensation Commission you will be notified as to whom this payment is to be made.

Yours truly,

John Gillis
Human Resources Officer

On February 3, 2000, Ms. Margaret Denine, filed a written grievance alleging:
Unfair, unjust dismissal - Violation of Article 13 - HSS Collective Agreement and all other pertinent Articles.

Full redress was sought.

Arbitration hearings were held at St. John's, Newfoundland, on October 6th, 7th and November 5th, 2003.

For the Employer: Mr. Geoff Williams, *et al.*
For the Union: Mr. Jerry Earle, *et al.*

Employer Nominee: Mr. Gerry Curnew
Union Nominee: Mr. Peter Ivany
Chair: Mr. David Alcock

The parties agreed:

- 1) to the composition of the board;
- 2) that the board had jurisdiction to deal with the dispute;
- 3) that the board would remain seized of the matter for a period of 90 days from the date of publication of the award to deal with questions of interpretation which might arise from the award, including the *quantum* of compensation, if any, should the parties not be able to agree;
- 4) that witnesses would be excluded;
- 5) that collective agreement and/or statutory time limits for the filing of the award were extended.

The following items were received into evidence by consent:

- 1) collective agreement;
- 2) grievance form, February 3, 2000, signed by Steve Porter;
- 3) grievance form, February 3, 2000, signed by Vina Gould.

Appearances for the Employer:

Ms. Donna Hoskins, Human Resources Officer, St. John's Health Care Corporation (HCC)
 Ms. Heather Hanrahan, Director of Human Resources, HCC
 Ms. Agnes Brennan, Payroll Clerk, HCC

Appearances for the Union:

Ms. Vina Gould, Employee Relations Officer, NAPE
 Ms. Carolyn Daley, Case Manager - Workers' Compensation Commission (WCC)
 Ms. Joanne Trenholm, Client Services Assistant - WCC
 Ms. Bernadette Chalker, Appeals Manager, WCC
 Ms. Margaret Denine, Grievor

The following items were introduced into evidence by witnesses:

- | | |
|-------|--|
| DH#1 | termination letter, February 3, 2000; |
| DH#2A | letter dated June 28, 1994, from Bernadette Chalker, WCC Case Manager, to Ms. Denine, advising acceptance of her claim 593306 and entitlement to compensation of \$200 weekly; |
| DH#2B | letter dated May 4, 1994, from WCC to Ms. Denine asking for return of Form 6; |
| DH#3 | letter dated January 18, 1995, from WCC to Mike Johnson, HCC, regarding Ease Back To Work Program for Claim No. 604662; |
| DH#4 | letter dated March 31, 1995, from Bernadette Chalker to Mike Johnson, re Claim No. 604662, requesting confirmation that Ms. Denine had sustained an additional injury |

- while participating in her Ease Back program;
- DH#5 letter dated July 20, 1995, from Bernadette Chalker to Margaret Denine, re Claim No. 604662, advising that, since WCC had been unable to contact her, no further benefits will be processed;
- DH#6 letter dated February 13, 1996, from Bernadette Chalker to Margaret Denine, re Work Hardening for Claim No. 604662 Ease Back Program and warning about missed appointments;
- DH#7 letter dated May 1, 1996, from Bernadette Chalker to Margaret Denine, re Claim No. 604662, advising of suspension of benefits because she did not attend the Work Hardening program;
- DH#8 letter dated December 20, 1996, from Bernadette Chalker to Margaret Denine, re Claim No. 604662, advising of revised return to work plan;
- DH#9 letter dated January 15, 1997, from Bernadette Chalker to Margaret Denine, re Claim No. 604662, advising of suspension of benefits because she missed an OT appointment;
- DH#10 letter dated February 21, 1997, from Bernadette Chalker to Margaret Denine, re Claim No. 604662, advising that she had been cleared to return to her pre-injury position on February 20, 1997, with no modifications;
- DH#11 Summary Report, Functional Capacities Evaluation, dated February 14, 1997, re Claim No. 604662:
- DH#12 letter dated April 1, 1997, from Bernadette Chalker to Margaret Denine, re Claim No. 604662, advising that any further interruption in her Ease Back program would result in cancellation of her benefits and returning to her pre-injury position full-time;
- DH#13 letter dated April 18, 1997, from Bernadette Chalker to Margaret Denine, re Claim No. 604662, advising of revised return to work plan, faxed to Donna Hoskins April 24, 1997;
- DH#14 e-mail dated April 25, 1997, from Donna Hoskins to various HCC personnel, advising that Ms. Denine neglected to inform them that her Ease Back program could have occurred on April 18th, but would now commence on April 28th, and her benefits would be suspended for one week;
- DH#15 letter dated April 25, 1997, from Bernadette Chalker to Margaret Denine, advising of revised return to work plan;
- DH#16 letter dated June 27, 1997, from Bernadette Chalker to Margaret Denine, re Claim No. 604662, closing her claim because of her interruptions to and failure to adhere to each Ease Back attempted;
- DH#17 e-mail dated December 16, 1997, from Donna Hoskins to HR Staff, advising that WCC had reinstated Ms. Denine's benefits and she would be paid the minimum weekly rate of \$200;
- DH#18 letter dated January 30, 1998, from Bernadette Chalker to Margaret Denine, re Claim No. 604662, concerning receipt of money by Ms. Denine from Social Services;
- DH#19 letter dated May 6, 1998, from Bernadette Chalker to Margaret Denine, re Claim No. 604662, advising of reinstatement of her claim and adjustments made because of Social Service payments;
- DH#20 letter dated May 4, 1998 from Ann Marie Mooney, Internal Review Specialist to Ed Hogan,

NAPE Employee Relations Officer, concerning final decision of the Commission re Claim No. 604662;

- AB#1 e-mail dated January 20, 1999, from Agnes Brennan to Donna Hoskins, copied to Mervin House, re reinstating Margaret Denine effective January 4, 1999;
- VG#1 letter dated April 13, 2000, from Vina Gould to Michelle MacDonald, WCC, appealing the decision finding an overpayment of Claim No. 647453;
- CD#1 various notes compiled by WCC personnel concerning Claim No. 647453 for Margaret Denine;
- JT#1 letter dated March 2, 2000, from Joanne Trenholm to Margaret Denine, advising of an overpayment of \$8,120 re Claim No. 647453;
- JT#2 letter dated March 28, 2000, from Joanne Trenholm to Margaret Denine, advising of the overpayment recovery plan for Claim No. 647453;
- JT#3 letter dated January 10, 2003, from Joanne Trenholm to Ms. D. Cole, HCC, re Claim No. 647453, indicating that the amount of \$7800 would be reimbursed to the HCC on January 14, 2003;
- JT#4 letter dated June 18, 2002, from Joanne Trenholm to Donna Hoskins, HCC, re Claim No. 647453, suggesting that the WCC's delay in forwarding benefits to the HCC for the period April 1, 1999 to January 10, 2000, was that Ms. Hoskins' e-mail to Carolyn Daly on February 8, 2000 indicated that the HCC would advise further regarding possible recovery;
- JT#5 e-mail dated September 6, 2002 from Donna Cole, HCC, to Joanne Trenholm, WCC, listing the paid benefits received by Ms. Denine for the period April 1, 1999 to January 10, 2000;
- JT#6 WCC printout showing payment of \$7800 made to HCC on May 27, 2003;
- BC#1 various notes compiled by WCC personnel concerning Claim No. 647453 for Margaret Denine;
- BC#2 WCC Overpayment Policy, effective September 9, 1998;
- MD#1 Direct Deposit Advice stub for \$282.40 cheque dated February 17, 2000;
- MD#2 WCC Cheque and stub for \$320 dated February 17, 2000.

BACKGROUND AND EVIDENCE

Since the evidence submitted was extensive, the board has set forth those portions of witnesses' testimony which we consider most relevant and essential for the purposes of rendering a decision on the dispute.

Case Manager Notes

At the hearings, considerable attention was devoted to examining selected excerpts from detailed notes by Case Managers and other WCC employees who had been involved with the grievor's various claims and circumstances over the years. The board has closely examined the relevant notes and, in our view, not only are they too voluminous to reproduce in this award, we do not feel that reproduction is necessary. On balance, the board is satisfied that this evidence was led to establish that the grievor has performed very little work for the Employer over the years and has a history of missing scheduled appointments, not being available when the WCC has tried to contact her, and being unable to complete Ease Back To Work programs.

Ms. Denine was hired in December 1991 as a part time employee and after one year she attained temporary status. In 1993, she incurred a work related injury and began receiving WCC benefits. From that time on Ms. Denine participated in a number of Ease Back to Work Programs, but few were ever completed because she always seemed to suffer a setback of some kind or other. Since her first claim in 1993, which entitled her to the minimum payment of \$200 per week, she has never returned to full time duty. On a number of occasions, WCC discontinued her benefits for a variety of reasons, such as failing to show up for work, missing appointments with medical and other professionals and becoming re-injured while on Ease Back. Ms. Denine's record demonstrates that she and the WCC were in constant conflict and disagreement, which often resulted in reviews and

appeals of WCC decisions. Her evidence is that she always contacted WCC when her benefits ceased, were delayed, or were reduced, but she attempted no contact when her benefits increased because there always a written document or notice included which provided an explanation. In her view, it was common for WCC to “fool up” things so that overpayments occurred and recovery schedules subsequently had to be set up.

Donna Hoskins’ Evidence

A lower back injury on November 29, 1994, resulted in Claim No. 604662 for Ms. Denine. She was cleared to return to work on an Ease Back Program on January 16, 1995, but two (2) days later she incurred another injury to her spine as well as to her neck. This fell into the category of the “Enhanced Disability” (or Second Injury) fund, a WCC reserve fund (1% of annual assessment revenue) for such injuries, which paid the total cost of new injuries sustained while employees were participating in a rehabilitative program. In other words, the claims experience of the Employer was not affected by the cost of that type of injury. Rather than receiving payment from the Employer as was the norm for TEL claims (and the Employer being reimbursed at some point by the WCC) the injured employee would receive a cheque from the WCC.

As time went on, Ms. Denine’s WCC claim followed the normal route whereby she was paid cheques by the Employer. After a number of missed appointments with medical specialists and a number of days missed at work, her benefits were suspended accordingly and the Employer was notified that the WCC would not refund it for those particular days. In February 1997, a Functional Capacities Evaluation was done on the grievor and it was determined that she was could return to her pre-injury position. However, Ms. Denine did not return to work as indicated above. Rather, an

Ease Back program was approved for March 1997 and the grievor was scheduled to return to regular duties on April 7, 1997. However, Ms. Denine did not show up for work in the second week of this program, whereupon another Ease Back program was arranged for April. When Ms. Denine failed to advise the Employer that she could start that program on April 18th, the start date was re-scheduled to April 27th and her benefits were suspended for the period in between. The Employer was advised by WCC that it would not sponsor any more Ease Backs if there were further interruptions. But interruptions did continue and, in June 1997, the grievor's WCC benefits were discontinued.

For some reason, Ms. Denine's benefits were reinstated by WCC on September 30, 1997. Her rate of payment was determined to be the minimum \$200 per week, the same rate as her original claim in 1994. On January 30, 1998, the grievor was reminded by WCC why her claim was not approved back to May 17th when it was last closed and she was further advised that her benefits were again suspended for two (2) days she missed during her current Ease Back program. On May 6, 1998, Ms. Denine was advised that an Internal Review decision had reinstated her benefits retroactively and that the relevant amount had been processed to the Employer on her behalf.

Commencing January 4, 1999, Ms. Denine's claim entitled her to be paid the minimum \$200 per week. Each two week period until the grievor's termination occurred in February 2000, payment of \$400 was made by the Employer. However, for the period April 1, 1999 to January 2000, the WCC also issued her weekly \$200 payments for the same claim. During this whole ten (10) month period, the grievor did not advise the Employer that she was receiving the same amount of payment from the WCC. In fact, the double payment was discovered by accident only when Ms. Hoskins had a telephone conversation with WCC Case Manager, Carolyn Daly, at the end of January 2000 about

another employee's claim and the subject came up about who pays for "Enhanced Disabilities" claims. Ms. Daly said that the WCC always pays for such claims, but Ms. Hoskins told her that could not be so because the Employer was paying Ms. Denine's cheques. The double payment was subsequently confirmed and Ms. Hoskins and Mr. John Gillies met with Ms. Denine in late January or early February 2000 to discuss the matter and to give her the opportunity to explain why she had not reported the double payment by WCC. She responded by saying that it had something to do with Revenue Canada.

Ms. Hoskins agreed that the grievor did not do anything to cause the Employer to issue her any cheques. The Employer was responsible for paying the grievor the cheques she received, but the double payment was caused by the WCC's clerical error. Essentially, the cheques issued by the WCC to Ms. Denine should have been issued to the Employer for purposes of reimbursement. Since such reimbursement did not occur as it should have, the Employer was out \$200 per week for ten months. Ms. Hoskins was not aware that both the Employer and the WCC each issued Ms. Denine another cheque two (2) weeks after she had been terminated. She was also not aware that the grievor received WCC cheques after her termination for approximately two (2) years.

Ms. Heather Hanrahan

Ms. Hanrahan confirmed that the termination letter was written by Mr. Gillies (who has since left the Employer), but she explained that she was the advisor on how to proceed with the grievor's case and that she gave Mr. Gillies direction to write the termination letter and take the required action against her. Since another employee had received cheques from both the Employer and the WCC, but had advised the Employer of her situation, Ms. Hanrahan felt that, in case Ms. Denine

also had a plausible explanation, she should be given an opportunity to explain why she accepted double payments without reporting them to the Employer. Ms. Denine was sick for the first scheduled appointment, but she attended the next day with her Union representative. The Employer simply did not accept her explanation that her receiving two (2) cheques had something to do with her income tax or that her claim had been “fooled up” by WCC.

In Ms. Hanrahan’s view, what Ms. Denine did was fraud. The amount Ms. Denine received from WCC came out of the Employer’s budget twice because the Employer did not receive reimbursement from WCC for the amount of the cheques issued by the Employer. The total amount fraudulently obtained by the grievor was \$8,000, which left the Employer no other option but to terminate. After all, it was Ms. Denine’s responsibility to question why she was receiving double payments. Although she agreed that the termination letter does not say fraud, it does say theft, which to Ms. Hanrahan is the same thing. Ms. Hanrahan agreed that Ms. Denine was entitled to the \$8,000 in cheques that the Employer issued during the ten (10) month period in dispute. She also agreed that the Employer has no way to disprove the grievor’s tax story, but she felt that it was the grievor’s responsibility to substantiate such a claim.

Although she was aware that there have been other cases where employees have been overpaid for annual leave or and such overpayments have been recovered, Ms. Hanrahan was not aware that some employees had been overpaid 115 days of sick leave without being disciplined. Since she was not aware of any of the circumstances surrounding this allegation, Ms. Hanrahan was not prepared to speculate on it further. However, she did say that it was the Employer’s policy to investigate overpayments and, if the action proved to be other than innocent, discipline might apply.

In Ms. Hanrahan’s view, the WCC was supposed to do a manual override on its computer

system so that the Commission would not pay Ms. Denine. That manual override did not occur. Therefore, twenty (20) pay days occurred where Ms. Denine received twice as much as she should have.

Ms. Hanrahan explained that the WCC administers a demerit system which is directly related to an employer's experience as determined by a three (3) year moving average. Therefore, the more money that the Employer must pay to the WCC, the less there is available to put to other uses. Any money paid to employees by the WCC directly or indirectly would have to be paid back by the Employer. In Ms. Hanrahan's view, the cheques issued by the WCC and the Employer would not be exactly the same amount. She also confirmed that, if the WCC did not reimburse the Employer for the amount owing in this case, the Employer's experience rating would not be affected.

Ms. Agnes Brennan

Ms. Brennan testified that, after the grievor called her asking how long it would take to receive her reinstatement money, she corresponded with Ms. Denine in January 1999 on the subject of getting her benefits reinstated and getting the money owed to her as soon as possible and that the Employer would then be paying her the appropriate WCC amount.

Ms. Vina Gould

In her capacity as Employee Relations Officer with NAPE, Ms. Gould has experienced a variety of interactions with the St. John's Health Care Corporation on Workers' Compensation issues.

It is her responsibility to contact the Claims Officer if an employee's benefits are discontinued and

to attend meetings with the Employer where return-to-work issues arise. Also, because of the requirements of Article 26 of the collective agreement that benefits are to be paid immediately until a decision is made on a disputed claim, Ms. Gould has had to deal with a number of overpayments when reversals have occurred. For example, some employees initially received 100% sick leave from the Employer, which was then recovered from Workers' Compensation at a lesser rate, thereby causing an overpayment situation. Similarly, employees receiving WCC benefits are often required to repay some portion of those benefits if they happen to receive retroactive pension payments. In all cases, payment schedules are negotiated. Ms. Gould further stated that both overpayments and underpayments of WCC benefits have occurred. Therefore it is not at all uncommon for employees to receive the wrong amount of benefit payments.

Once an employer files a Form 7 for a WCC claim, TEL benefits for the first 13 weeks are determined on the basis of the average of the employee's last four (4) pay periods. After 13 weeks, the benefit rate is recalculated on the basis of the average of the employee's twelve (12) months earnings. Once a claim is established, the Employer continues to pay the employee, less the usual deductions for pension, Blue Cross, etc. Even in some cases where the WCC ultimately determines that an employee cannot return to his/her pre-injury job, some HS employers might continue paying cheques for EEL benefits. Normally, however, since 1998, the Employer has paid where TEL benefits were concerned and the WCC has paid where EEL benefits were concerned.

Ms. Gould first became involved in Ms. Denine's case in February 2000. Although she did accompany Ms. Denine to meetings with the Commission, she did not attend any meetings with the Employer. Ms. Gould recalled that the WCC advised the grievor that she had been receiving cheques from the Commission and the Employer for the same claim and that she was in an

overpayment situation, which the Commission wanted to recover. Ms. Denine did not deny that she had been receiving cheques from both the WCC and the Employer, but she said that payments for her various claims had been “wacky” before and that, this time she had received a piece of paper in one envelope explaining a change in income tax, however, she did not know what that meant. The WCC officials did not accept her explanation, saying her overpayment was so large, i.e., approximately \$8000, that she should have known something was amiss. Ms. Carolyn Daly told Ms. Denine that the WCC legal department would be consulted on the matter and that she would have to repay the overpaid amount. A repayment schedule of \$75 bi-weekly commencing on March 16th was settled subsequently, not at the initial meeting. Ms. Gould conceded that she was not privy to the explanations Ms. Denine offered in meetings with the Employer.

After Ms. Denine was terminated, Ms. Gould represented her interests before the Commission for Review Division purposes. Therefore, she read her entire WCC file, which revealed correspondence notes indicating a number of occasions when there had been problems with her receiving incorrect benefit payments, or no payments at all. Ms. Denine’s file revealed that she had to contact the Commission when the Commission failed to send her a cheque. Apparently, there was a problem because the WCC’s and the Employer’s payroll occurred at different times. Ms. Denine received assurances that this would not happen again. Despite being advised by the WCC on October 16, 1998, to start paying the grievor again, she was still not on the Employer’s payroll on December 3, 1998. Therefore, Ms. Denine was concerned that an overpayment situation would affect her. And even after overpayment recovery commenced post termination, Ms. Denine still maintained that she was entitled to the cheques she had received.

As an employees’ Workers’ Compensation advocate, Ms. Gould explained that it is not

uncommon for a claim to be operating for four (4) years. During such periods, it is not uncommon for employees to miss some scheduled appointments. And it is also not uncommon for employees to experience difficulties in their Ease Back programs. However, Ms. Gould could recall no previous disciplinary action against HCC employees whose circumstances resulted in overpayment situations. Nevertheless, Ms. Gould conceded that she had never previously dealt with a case where an employee received payments from two sources for 10 months.

Ms. Carolyn Daley

Ms. Daley, a Case Manager with WCC since February 1997, recalled that her first involvement with Ms. Denine's claim occurred in late 1998. Her notes indicate that, on January 24, 2000, Donna Hoskins told her that Ms. Denine had been fired. Ms. Daley met with WCC counsel to discuss the matter and subsequently met with the grievor and Vina Gould. On February 22, 2000, the notes show that there was no referral of the matter to legal authorities. In Ms. Daley's view, the Commission did things correctly by paying Ms. Denine directly and, therefore, the Employer bore responsibility for the matter. However, Ms. Daley advised all parties on February 22, 2000 that a repayment schedule had been set up to recover \$8,120 it had paid to Ms. Denine. The records show that \$75 bi-weekly was recovered commencing on March 16, 2000. The claim was closed on August 29, 2002, but notes indicate that a follow-up call was made to Donna Cole, HR Officer with the HCC in reference to a letter sent by Joanne Trenholm to Donna Hoskins dated June 18, 2002. It was noted that, before the WCC could reimburse the Employer for benefits paid for the period April 1, 1999 to January 10, 2001, verification would be required for any benefits received for which the grievor received sick leave or annual leave, etc.

Ms. Daley did agree that, once the Employer had commenced paying an employee, any WCC payments should have stopped.

In cross examination, Ms. Daley explained that the dates designated in her notes specify when she made those notes, not necessarily when meetings and events occurred. She agreed that her notes do not show any discussion with the Employer advising that the WCC position was that it had followed policy and, therefore, it would not have been appropriate to refer the matter to the WCC legal department.

In the meeting held with Ms. Denine to discuss why she took two cheques for the same 10 month period, the grievor claimed that she had been confused about the increase of benefits from 75% of net to 80% of net. However, Ms. Daley did not consider that explanation acceptable because the 5% increase in benefits had occurred for everybody some 15 months earlier. Also, while the increase may have resulted in a slight increase in an employee's benefit rate, it certainly would not have accounted for a doubling of benefits received. Similarly, the grievor claimed that she assumed that the tax slip she received explained the extra benefits she was receiving. Ms. Daley testified that annual tax table changes occur in July, which are explained by a slip included in claimants' cheques. However, any such tax changes would amount to no more than an increase of \$2.00, i.e., an amount which could not possibly be relied on to justify a claim by Ms. Denine that she was entitled to a double cheque each payday.

Ms. Joanne Trenholm

Ms. Trenholm has been a Client Services Assistant for 16 years, working with three (3) Case Managers. Her role has been to calculate benefit rates, etc. She remembered that Ms. Denine's

overpayment schedule was set up and that Ms. Denine cancelled an appointment that was subsequently rescheduled. Although the recovery schedule for \$8,120 was initially considered a temporary arrangement, that schedule continued with only a minor adjustment at the rate of \$75 bi-weekly until the overpayment was collected from Ms. Denine. Ms. Trenholm confirmed that before the WCC could reimburse the Employer for benefits it paid to Ms. Denine, verification was required for any benefits for which the grievor received sick leave or annual leave, etc. As of August 30, 2002, the Employer had not forwarded this information to the WCC. .

Ms. Trenholm also confirmed that minor tax table changes are implemented in January and July. However, the extent to which claimants' cheques could be affected is a dollar or so. Another minor adjustment could occur after benefit payments have been made for 13 weeks. At that time, benefits are calculated on the basis of an employee's salary for the 12 month pre-injury period, instead of the previous four (4) pay periods.

Prior to testifying at the arbitration hearing, Ms. Trenholm refreshed her memory by reviewing the relevant case work sheet notes that were on file plus any correspondence that might have been directed to Ms. Denine. She indicated that clients are advised in writing whenever their benefits are adjusted. She also confirmed that the tax table change for Ms. Denine in July 2000 would have increased her benefit by \$1 or \$2, but could in no way explain a 100% increase in her benefit. rate.

Ms. Trenholm agreed that it was three (3) years before the Employer was reimbursed by the WCC for the amount (less statutory holidays) paid by the Employer to Ms. Denine. This information is essentially contained in three pieces of correspondence. First, a letter from Ms. Trenholm to Donna Hoskins dated June 18, 2002, viz:

Dear Ms. Hoskins:

**RE: MARGARET DENINE
WHSCC CLAIM NO. 647453**

Please find attached a copy of your e-mail dated February 8, 2000 sent to Carolyn Daley. After referencing this e-mail, it became apparent as to why the Commission had not forwarded benefits to the Health Care Corporation for the period April 1, 1999, to January 10, 2000.

The Commission had paid the worker directly for the period April 1, 1999, to January 10, 2000, totalling \$8,120.00. Ms. Denine is currently repaying the Commission at the rate of \$75.00 biweekly. In the meantime, before the Commission directs payment to the Health Care Corporation, we require, in writing, a breakdown of any payments made to Ms. Denine such as annual leave, stst holidays, etc. and the dates of such benefit.

Donna, once we receive verification from you we will proceed to process benefit entitlement for the period April 1, 1999, to January 10, 2000. If you have any questions pertaining to this matter, please feel free to contact me at 778-1345.

Sincerely,

Joanne Trenholm
Client Services Assistant

Second, an e-mail from Donna Cole to Joanne Trenholm dated Friday, September 6, 2002, viz:

Hi Joanne:

In response to your inquiry, the following are the paid benefits the worker received the period og [sic] April; 1, 1999 to January 10, 2000.

Benefit	Date	Hours
Stat PT	April 1, 1999	7.5
Stat PT	May 24, 1999	7.5
Stat PT	July 1, 1999	7.5
Stat PT	Sept. 6, 1999	7.5
Stat PT	Oct. 11, 1999	7.5
Stat PT	Nov. 11, 1999	7.5
Stat PT	Dec. 24, 1999	7.5
Stat PT	Dec. 28, 1999	7.5

If you need any additional information, please feel free to contact me.

Thanks,

Donna Cole
Employee Wellness

Third, a letter from Ms. Trenholm to Ms. Donna Cole dated January 10, 2003, viz:

Dear Ms. Cole:

**RE: MARGARET DENINE
WHSCC CLAIM NO. 647453**

Compensation benefits have been calculated for the period April 2, 1999, to January 10, 2000. During this period, compensation benefits should have been directed to the Health Care Corporation on behalf of Ms. Denine. An error resulted and compensation was processed to Ms. Denine directly for the above noted. Consequently, Ms. Denine has an overpayment with the Commission and thus a retroactive adjustment is warranted to be paid to the employer.

As this is an employer-paid claim, benefits will be adjusted accordingly. Contact was made with the Health Care Corporation to determine what benefits were paid to the worker during this period. Upon receipt of your e-mail dated September 2, 2002, it was determined that Ms. Denine was paid for several statutory days commencing April 1, 1999, to December 28, 1999. Thus those statutory days were deducted from the commission entitlement. Attached please find a breakdown of the retroactive payment totalling \$7,800 for which will be paid to the Health Care Corporation on January 14, 2003.

If you have any questions pertaining to this retroactive adjustment, feel free to contact the undersigned at 778-1000.

Sincerely,

Joanne Trenholm
Client Services Assistant

It appears that the Commission waited more than 2 years before seeking information from the Employer on Statutory Holidays, etc. When the \$7,800 was paid to the Employer (usually paid within two weeks of receiving all relevant information from the Employer, but not paid in this case

until May 27, 2003) the reimbursement could have been for a larger amount, which would include other claims as well, but an attached “advice statement” would have provided breakdowns for all individual claims.

Ms. Bernadette Chalker

Ms. Chalker has been a Commission employee since 1984. She was previously a Case Manager and now handles appeals.

Ms. Chalker was Case Manager responsible for the HCC and most of Ms. Denine’s claims until June of 1999. From her notes, she explained an unusual situation in March 1998 when Ms. Denine was paid directly because she injured herself during a WCC Rehabilitation sponsored program. The grievor called on March 24th wondering when she would receive another cheque. She was advised that a cheque was mailed to her on that date. An entry on October 16, 1998 indicated that Ms. Denine had come to the WCC office the week before and was extremely upset that she had not received a full cheque. The balance was issued to her and Ms. Chalker apologised for the error which was caused because she failed to extend the sub-program. She also advised the grievor that the Employer was going to set her up on their payroll. However, it appears that it is a matter of convenience when the WCC stops payment and the Employer begins to do so. In this case, the Employer did not set the grievor up on its payroll until January 4, 1999. Nevertheless, at no time did Ms. Chalker leave Ms. Denine with the impression that she would be entitled to receive payments for her claim from both the Employer and the WCC. Indeed, Ms. Chalker made it clear to Ms. Denine that, at some point in time, it would be the Employer who would issue her payments, which event actually commenced in early January 1999.

Asked why the WCC did not pay Ms. Denine from January to April 1, 1999, Ms. Chalker explained that the sub-program may have been extended for that period, but when her claim was reviewed in April, she may have forgotten to go into the computer program and specify “other employer,” which caused Ms. Denine to be paid directly by the WCC. This was not the only time Ms. Chalker had experienced problems with the sub-program. One previous time, another employee called her to advise that she had received two cheques instead of one, i.e., one from the Employer and one from the WCC. Since Ms. Chalker ceased to be responsible for the grievor’s claim in June of 1999, she did not check to see if the payments being received by Ms. Denine were correct.

Margaret Denine

Ms. Denine confirmed that, from April 1, 1999 to January 10, 2000, she received cheques from both the Employer and the Commission. In April 1999 she received a memo from the Commission that there would be an increase in the amount of her cheques for income tax reasons.

She also confirmed that she attended a meeting with Employer representatives on January 27, 2000, to discuss the issue of double payments. Ms. Denine did not deny receiving both cheques and she was then told that the Employer considered her conduct to be theft, not fraud. She also recalled attending a meeting with Carolyn Daley where she was assisted by Vina Gould. In that meeting, the Commission declared that she had been overpaid. Again, she did not deny receiving and cashing both cheques, and she gave her reasons for assuming that she was entitled to them. No police investigation occurred and no criminal charges were laid against her by the WCC.. Also, legal action was never mentioned by the Employer.

Although she was terminated on February 3, 2000, Ms. Denine presented direct deposit

evidence of another claim cheque (with 7.5 hours missing) from the Employer which was deposited in her account on February 17, 2000. Another cheque from the WCC was deposited at the same time. Ms. Denine cashed the WCC cheque and returned the Employer's cheque.

During her various claims, Ms. Denine indicated that she had often experienced problems receiving WCC benefits. For example, for a period she was in receipt of social assistance because the WCC had cut off her benefits. In the result, she had no means of living. It was probably 10 months before her WCC benefits were reinstated on appeal, whereupon Social Assistance was reimbursed by the WCC and Ms. Denine received the balance.

After her termination on February 3, 2000, Ms. Denine continued to receive WCC benefits until sometime in 2002. Although she has never seen the WCC overpayment policy, an overpayment schedule of \$75 bi-weekly was imposed on her. When her WCC benefits ceased, despite the fact that she was still in pain because of her physical condition, within a couple of days a friend found her a position as a Labourer for Avalon Steamatic until she was laid off in May 2003. At the current time, Ms. Denine is receiving Employment Insurance benefits of \$304 every 2 weeks. Her education level is Grade XII. She has no personal vehicle; her transportation is by taxi. And her housing situation is a rent-to-own arrangement. Under such conditions, Ms. Denine finds it difficult to make ends meet.

In cross examination, Ms. Denine said that, when she first went off work in 1994, she received differing amounts of compensation. In February 1998, the WCC commenced paying her \$400 bi-weekly except for "fool ups." When she received a cheque amount different from \$400, she contacted the Commission to complain. This was the case when she began to receive the Employer's cheques, which were sometimes reduced for one reason or another. However, when she

began to receive additional money, Ms. Denine conceded that she did not contact anybody. In her view, the WCC always supplied her with written explanation for the different amount. However, Ms. Denine testified that she could not find the correspondence received by the WCC for the time period in dispute. Although she told Carolyn Daley about her income tax explanation in January 2000, she did not know whether Ms. Daley believed her. But after she was terminated, she knew that she was not entitled to both cheques. That is why she returned the Employer's February 17, 2000 cheque.

Ms. Denine insisted that there was some kind of notice with her cheques advising her of some income tax changes. She filed her own income tax return in March 2000. Her understanding was that, when the WCC started to send her cheques in April with the notice concerning income tax changes, the extra money was owed to her by WCC because of income tax reasons. Ms. Denine confirmed that WCC benefits are not taxable, but she was certain that she had asked for an extra \$30 tax to be deducted from her Employer's cheque. The grievor agreed that she received an extra \$400 bi-weekly for 10 months and that the total amount was more than she earned for the entire previous year. Yet she believed this extra money had something to do with previous claim problems and "fool ups" by the WCC going back to 1994. In that year, initial TEL benefits increased from 75% to 80%. She thought that the extra \$400 cheques she was receiving had something to do with that as well, despite the fact that she had never before received double cheques for any claim.

From April 1, 1999 to January 24, 2000, she contacted the WCC on many occasions for other reasons, but she never asked about the extra \$400 cheques because she assumed that the Commission knew what they were doing. In fact, she would have continued to receive both cheques to this day unless she had found out that she was not entitled to them. Except when she had received

written explanation for changes in her benefits, she appealed WCC decisions on many occasions and obtained Union representation to help her receive her proper entitlement. She conceded that she did not advise her Union when she started to receive the extra cheques.

ARGUMENT

The Employer

The issue is straightforward: Did the Employer have just cause to discipline the grievor in February 2000? If so, was the penalty appropriate? If the penalty was not appropriate, what should the appropriate alternative penalty be? In the Employer's view, just cause has been established and the facts support discharge as the appropriate penalty.

The grievor's letter of termination states the reason for her discharge. From April 1, 1999 to January 24, 2000, Ms. Denine received two (2) bi-weekly cheques instead of one. Although the letter states that the amount she received for which she was not entitled was \$8,080, it was not until 2002 that the amount of \$7,800 was determined (which was not reimbursed to the Employer until May 2003). The difference in amount is not an issue. What is significant is that for ten (10) months the grievor received double the money she was entitled to for a WCC claim without bringing the matter to the attention of either the Employer or the WCC. Indeed, the error was only discovered by chance when Ms. Hoskins and Ms. Daley were discussing another individual's claim. This must be considered as an aggravating factor. Ms. Denine had the responsibility to advise the Employer and the WCC that she was receiving two payments instead of one. The Employer viewed the grievor's

conduct as theft and argued that the reasons she offered for her actions were not acceptable.

Bi-weekly payments had been made by the Employer since January 1999. Those were the only cheques the grievor received until April 1999. The evidence does not clearly establish why the Commission also started paying Ms. Denine for the same claim in April 1999, but there is some suggestion that someone at WCC failed to do a manual override of a sub-program. This practically doubled Ms. Denine's income for a ten (10) month period. In the Employer's view, an honest reasonable employee would have enquired of such a huge change in her income. Actually another employee in similar circumstances did exactly that.

Ms. Denine's history with the WCC reveals that she is no stranger to the workings of that institution. Since 1995, she had experienced much correspondence, changes in programs, decisions of the Commission, and appeals of those decisions with Union representation, etc. She was also quick to contact the Commission when her cheques were late or for an amount less than she expected, but she said that she never contacted the Commission when she received a greater amount because she was always supplied with an explanation for the increase. In the instant case, Ms. Denine said that she received a slip from the Commission explaining that her increase had something to do with tax changes. Ms. Trenholm testified that tax table changes occur twice a year and claimants are written to explain how such changes will affect their cheques -- not more than a dollar or two according to Ms. Trenholm. Ms. Denine's benefit for this particular claim was set at \$200 per week in 1994 and that was the same amount she had received from the Employer from January to April 1999. In those circumstances, it is not reasonable that Ms. Denine would have believed that her income would have doubled because of a tax table change. In the Employer's view, her failure to advise either the Employer or the WCC of her windfall was deliberate.

DH#19 shows that the grievor was aware on May 6, 1998, that she had been receiving a period of benefits from both the Department of Social Services and the Employer. She had to repay what the Department of Social Services paid to her. Therefore, in 1999 she was fully aware that she would be entitled to only one payment for any claim. Also Ms. Denine was advised by Agnes Brennan that, as of January 4, 1999, the Employer would be taking over payment of her claim. Yet she did not enquire why she could be suddenly entitled to double payment from the Commission for her claim in April 1999.

The Employer accuses the grievor of theft. Ms. Hanrahan explained that the Commission requires the Employer to pay an annual assessment fee. In other words, all WCC expenses are associated with ongoing claims. When the Employer started to be the sole payer of benefits to Ms. Denine in January 1999, the system was for the WCC to reimburse the Employer for the amount paid, i.e., \$400 bi-weekly, less any relevant deductions. In April 1999, the Commission paid Ms. Denine instead of reimbursing the Employer. Whenever money is paid out to claimants by the Commission, such as benefits, medical costs are billed to the Employer and factored into the Employer's assessment. Although the double payment should not have been paid to Ms. Denine, it was billed to the Employer and it took three and one-half (3½) years to receive reimbursement from the Commission. This was a loss for the Employer. It was money it should have had available to put towards other things. Had the grievor advised the Employer or the Commission of this double payment on a timely basis, the loss to the Employer would have been minimized.

In the Employer's view, when she was confronted with the facts in January 2000, she was not forthright. First she said that she had received notice for three (3) months that her cheque amount would change because of income tax changes. Therefore, she received at least three (3) notices. In

the Employer's view, a reasonable person would ask what a tax change has to do with a cheque she was not receiving. Clearly, the second notice did not affect the amount of her next cheque, and so on. Therefore, one wonders what effect was intended by the second notice, etc.

Second, any reasonable individual would surely have to question why Revenue Canada would have notified the WCC to make an adjustment in benefit level that would double her entitlement overnight. Clearly, the grievor's reliance on that reason is not believable.

Third, the grievor also suggested that she thought her increase had something to do with the increase in benefits from 75% to 80%. Yet the evidence is that legislation for that 5% increase occurred some fifteen (15) months earlier. Therefore, it is not plausible that the grievor would believe that the doubling of her income would have occurred because her benefits increased by 5% fifteen (15) months earlier. Clearly, a 5% jump does not account for a 100% jump on any benefit amount.

Fourth, the grievor offered that the WCC had "fooled up" her cheques before and she thought that her increase had something to do with those "fool ups." In the Employer's view, it is simply not plausible that such "fool ups" could result in a doubling of her benefit for ten (10) months.

On the basis of the foregoing, the Employer feels that it has established just cause to discipline Ms. Denine in these circumstances. She had an obligation to report her windfall, but she deliberately did not do so. Her conduct was an act of theft against the Employer. In light of the nature and seriousness of the offense, the fact that Ms. Denine's failure to report her significantly changed circumstances was an aggravating factor, and the fact that her excuses were not believable, the penalty of discharge should be upheld. Each time she cashed another WCC cheque without

disclosing the extra payment, her conduct was premeditated.

In support of its positions, the Employer relied on *Re Canada Safeway Ltd. and United Food and Commercial Workers' International Union, Local 2000* (1988), 71 L.A.C.(4th) 107 (Sanderson) and *Re New Tel Communications and Communications Energy and PaperWorkers' Union of Canada, Local 410* (1998), 71 L.A.C. (4th) 73 (Oakley) and *Re Burnaby Hospital and Hospital Employees' Union* (2001), 95 L.A.C. (4th) 117 (Gordon).

In *Canada Safeway, supra*, the issue of breach of trust was dealt with. There the grievor, a Deli Clerk, willfully engaged in an act of deceit against the Employer by making a false claim of disability for WI benefits. In determining that discharge was appropriate in those circumstances, the arbitrator relied on a number of reported cases dealing with the trust, truthfulness and honesty that must exist in applications for sick leave and LTD claims, such that “an employee who deliberately makes a false claim is guilty of a serious breach of trust – not only against the employer but also against her working colleagues.” (See p. 125 quoting from *Fraser University and C.U.P.E. at p.21*). The grievor in that case consistently and deliberately made a false claim and exhibited no remorse or acceptance of responsibility. Despite the grievor’s 17 years service, the arbitrator determined that, if he were to find the penalty of discharge to be excessive, he would be acting for reasons of personal sympathy rather than compelling mitigating circumstances.

In *New Tel Communications, supra*, the Employer accidentally discovered that the grievor falsified credit card expenses for personal gain. The action was determined to be fraudulent. He did not come clean on being confronted, did not express remorse or regret and he was found to have been dishonest to the extent that the trust relationship was destroyed. Discharge was upheld.

In *Burnaby Hospital, supra*, the grievor worked shifts with the employer while falsely

claiming sick pay from a related employer. The jobs in question at both Hospitals were identical. It was found that dishonesty in one of those jobs was sufficient to indicate dishonesty in the other. Therefore, the grievor, who also was dishonest in the investigation and during the arbitration hearing, was found to be properly discharged.

For the foregoing reasons, the Employer urges the board to deny the grievance and uphold the penalty of termination. In determining the reasonableness of the penalty, the board is urged to consider that the aggravating factors of no remorse, failure to accept responsibility, etc., outweigh the mitigating factors such as the grievor's short service and her economic circumstances.

The Union

Dealing first with the Employer's jurisprudence, the Union dismissed all three as being irrelevant. In *Burnaby Hospital, supra*, the subject was off-duty conduct, which has nothing to do with the instant case. In *Newtel Communications, supra*, the grievor deliberately falsified records to obtain a benefit, which Ms. Denine did not do. And in *Canada Safeway, supra*, the issue was whether the injury was compensable at all, a matter not applicable to the instant case.

Ms. Denine had been a temporary employee for nine (9) years before she was terminated on February 3, 2000. The parties do not differ on most of the facts, but the Union maintained that the Employer must be held to the reasons on the termination letter, i.e., she committed theft and had a duty to report her additional cheques. The Employer must also be able to prove just cause.

The evidence is that the grievor was entitled to the benefits she received from the Employer. Therefore, the receipt of those benefits can hardly be construed as theft. Ms. Hanrahan said that fraud is the same as theft. She also said that she did not author the termination letter, but that John

Gillis wrote it on her direction with assistance from the Health Boards Association. The termination letter does not mention fraud. Theft was the charge. In the Union's view, theft and fraud are different in law.

Section 80.(1) of the *Workplace Health, Safety and Compensation Act, Chapter W-11* explains how, for compensation purposes, average weekly earnings are calculated. Then section 83.1 describes how the Commission may recover an overpayment of benefits made to a worker. Contrary to Ms. Hanrahan's evidence, it is clear that the Commission operates under its own legislation and is a separate and independent entity from the Employer.

In this case, the Employer agrees that the grievor did not initiate any improper action to receive the extra payments for ten months. By all accounts, the WCC witnesses view the payment of the extra cheques to the grievor as an error. The evidence clearly demonstrates that, over the years, there were many errors and delays made by the Commission concerning the grievor's benefits. For example, notes by Bernadette Chalker (BC#1) on October 16, 1998, documents a Commission error for which it apologized. The same notes also show that further delays in issuing her benefits would occur in the process of having the Employer payroll take over her payments. The evidence indicates that this was not done until January 1999. On examination of all the evidence, it is abundantly clear that it was the Commission who caused the error at that time, not the grievor. Indeed, the evidence is that errors by the Commission are not unusual. Most revealing is the fact that the note of January 25, 1999 refers to Ms. Chalker running into problems in the past with extending the sub-program. Then on Carolyn Daley's note (CD#1) of January 24, 2000, there is indication that both sides have suddenly realised that they have been paying Ms. Denine the same benefit.

Ms. Hanrahan said that the Employer had not received payment from the Commission for the payments made to Ms. Denine for the 10 month period in dispute. Later evidence proved her testimony untrue. The fact is that the Employer has received all the money to which was entitled, albeit somewhat delayed. However, Ms. Denine had nothing whatsoever to do with that delay. The system whereby the Commission makes such repayments is entirely beyond her control.

When overpayments have occurred to employees for sick leave, etc., no disciplines have been imposed. Rather, the Employer has simply set up a repayment schedule.

According to Ms. Daley's note on February 22, 2000, in the grievor's initial meeting with the Commission (represented by Vina Gould), Ms. Denine said that

. . . she felt that this money was owed to her as a result of the notification the previous July (included with her cheque from WHSCC) of the Revenue Canada adjustments. She stated that she assumed the 200.00 a week that she received was due to these changes. She also stated that she was confused with the change in legislation which increased the wkr's entitlement from 75% of net to 80% of net, although this change took place 15 months prior. All parties advised her that this claim has been referred to our legal dept for review. All parties were advised that an O/P will be set up on this claim.

In other words, Ms. Denine genuinely believed that she had been entitled to the double benefits she received. The Union notes that the Employer took no legal issue with the grievor with its initial meeting. Indeed no charges were laid against the grievor either by the WCC or the Employer. In *Re Newfoundland Hospital and Nursing Home Association (General Hospital) and Newfoundland Association of Public Employees* (August 23, 1993) unreported (Oakley), the same Employer called in the Police when an employee was accused of stealing three (2) two-litre cartons of milk. It is curious why the Police were not called where there was an allegation of theft of \$8,000.

The board must hold the Employer to the reasons it has alleged in its termination. First, the cheques the grievor received from the Employer were rightfully hers. Second, during the meeting of

January 27, 2000, the Employer had an opportunity to raise the subject that theft had been committed against a secondary source, or the matter could have been expressed in the letter of termination. However, that is not what the Employer did. In the Union's view, that allegation should not now be permitted. To reiterate: the reasons in the termination letter are the only ones the Employer may rely upon.

Therefore, a number of questions arise. Did the grievor commit theft against the Employer? In other words, did the Employer have just cause to terminate the grievor for theft against it? The Employer suggests that jurisprudence indicates that theft is among the gravest of misconduct in the employment relationship and that arbitrators have been disposed to uphold discharge for such conduct. However, Canadian Labour Arbitration, at para. 7:3310 -- Theft, the point is made:

However, in the vast majority of the more recent awards, after examining the particulars of the circumstances surrounding the grievances, arbitrators have come to the conclusion that the competing interests of the employer and the grievor could be reconciled in a way and with a penalty less severe than a discharge, and that this balancing exercise should take place even regarding a temporary reinstatement pending adjudication.

In *Re Toronto Transit Commission and A.T.U. Loc. 113* (1997), 62 L.A.C. (4th) 30, a number of employees were accused of theft involving fare transactions. Since theft was not defined in that collective agreement (it is similarly not defined in the instant agreement), there was an argument over whether the words "the offence of theft" ("act of theft" in the instant case) should be given their plain and ordinary meaning rather than the definition of theft under s. 322 of the Criminal Code, or whether the words should be interpreted from their "meaning in law" because they are "legal terms of art," as supported by 12 Halsbury's Laws of England, 4th ed. The findings of the board of arbitration appears to be in agreement with an award by Arbitrator Swan in *Re Canada Packers Inc. and U.F.C.W., Loc. 114P* (1989), 6 L.A.C. (4th) 25 in which arbitrator Swan concluded at p. 46, that:

Based on the submissions of the parties, we have come to the conclusion that the use of the word “theft” both in the collective agreement and the memorandum of understanding must be taken to import the elements of the Criminal Code including not only a prohibitive act, but also the various aspects of the mental element which the criminal law requires. We frankly do not have any difficulty in coming to this conclusion, since there are a number of circumstances imaginable in which it would be grossly unfair to consider theft to mean only unauthorized removal of company property. To apply the final penalty of discharge to an employee who acted without guilty intention, [page 57] or with a colour of right, or for some specific intent quite apart from the deprivation of the employer of its property, it would be wholly unreasonable, if the parties had intended such a result, they surely would have used very specific language to set out their intention. In the absence of such language, we think that the word “theft” ought to be given the meaning which virtually everyone would assign to it, namely the criminal offense of that name.

The notions of “colour of right” and “clear and cogent evidence” were also espoused in *Toronto Transit, supra*, both of which are applicable to Ms. Denine’s circumstances. She genuinely believed she did have the colour of right to the cheques. in dispute.

In further support of its positions, particularly on the point that discharge is not the only penalty that may apply, the Union submitted *Re Canadian Broadcasting Corporation and Canadian Union of Public Employees* (1979), 23 L.A.C. (2d) 227 (Arthurs); *Re New Dominion Stores and Canadian Auto Workers’, Local 414* (2002), 111 L.A.C. (4th) 265 (Herlich); *Re Department of Development and Rural Renewal and Newfoundland Association of Public Employees* (February 14, 2000) unreported (Panjabi); *Re Brinks Canada Limited and Newfoundland Association of Public Employees* (June 24, 1998) unreported (Clarke); *Re Newfoundland Farm Products Corporation and Newfoundland Association of Public Employees* (October 25, 1993) unreported (Oakley); *Re Department of Works, Services and Transportation and Newfoundland Association of Public Employees* (May 21, 1996) unreported (Kelsey); *Re Banque Laurentienne Du Canada and Syndicat Des Employees et Employes Professionels -Les et De Bureau, Local 434* (1994), 40 L.A.C. (4th) 342 Frumkin); *Re Canada Post Corporation and Canadian Union of Postal Workers’* (1983), 11

L.A.C. 3d) 368 (Arthurs).

Ms. Denine may have made an error in judgement, but she did not make a serious error in judgement. She was not in a position of trust. Neither the Commission nor the Employer concluded that Ms. Denine had committed theft against either one of them, otherwise they would have laid charges against her. Even where employees have been found to have committed theft against employers, some of them involving positions of trust in financial institutions, discharge has not always been the appropriate penalty.

Despite Ms. Hanrahan's testimony to the contrary, it is not the case that the grievor's actions had any affect on the Employer's expense rating for Workers' Compensation purposes. While some factors might have an impact over a three year period, Ms. Denine's single overpayment of \$8,000 definitely did not change the Employer's experience rating. And the Employer could have had its money reimbursed by the Commission much earlier if it had provided the information asked for by the Commission. The fact of the matter is that the Employer was repaid all the money to which it was entitled. It lost nothing. The mere fact that the grievor did not enquire about her extra payments when they began does not constitute theft against the Employer.

In any event, Canadian Labour Arbitration at Para. &:3314 and Discipline and Discharge, by Krashinsky and Sack, at p. 143 make similar points that, even where theft is determined, discharge is not the only penalty to be applied. If the board finds that some discipline is warranted for the grievor's actions, it should take the modern approach to determining a lesser penalty. While Article 12.04 of the collective agreement reminds the board that it does not have the power to alter, modify or amend any of the provisions of the agreement, it also gives the board the power to dispose of a grievance by any arrangement which it deems just and equitable. In the Union's view, if some

penalty is required, discharge should be rescinded but “time served” should not be chosen as the substitute. Ms. Denine should be credited for all lost time and benefits from July, 2002.

Employer Rebuttal

The Union has argued that the Employer cannot discipline the grievor for what it considers “off-duty conduct.” However, the Employer does not accept that these circumstances fall under off-duty conduct. The parties have chosen to negotiate Article 26.02, an extensive clause incorporating the operation of the Workers’ Compensation Commission into the benefit structure and application of the collective agreement. This is not a situation of an employee going to work with another employer and being disciplined for her actions with that employer. Ms. Denine was a recipient of WCC benefits and was covered by Article 26.02. For example, 26.02(h) says that an employee shall continue to receive the benefits of the collective agreement while on compensation. Article 26.02(g) deals with what happens while a claim for compensation is pending. Also, in Article 15.08 – Incapacitated Worker Provision, Workers’ Compensation Commission is mentioned again. In the result, the grievor’s conduct was not off-duty conduct. Since she was receiving WCC benefits and had been involved in many attempts to get her back to work, which were the subject of Article 26.02, her conduct fell squarely within the parameters of the collective agreement. Although the WCC is not party to the collective agreement, it provides a service to the Employer in determining benefit entitlement for employees and assisting them to return to work.

Ms. Trenholm explained the difference between the amount of \$8,080 and the amount of \$7,800. The latter represents the total owing after adjustments were made for statutory holidays that

were paid by the Employer. In other words, those adjustments demonstrate that this is one of numerous intricate linkages between benefits, employees and Workers' Compensation. Therefore, this is not off-duty conduct. It is employee conduct.

The Employer is not attempting to change any grounds for termination as stated in DH#1. The Union argued that many of the exhibits entered into evidence by Ms. Hoskins were not authored by her but were copied to her. That is true. What those documents do is simply describe a lengthy relationship about claims, work hardening and ease back programs, etc., between Ms. Denine and the Commission. That relationship is not in dispute. Therefore, it begs the question whether it was reasonable to expect Ms. Denine not to have been aware that she was not entitled to the extra payments commencing in April 1999.

The Union has attempted to challenge some of Ms. Hanrahan's evidence. It argues that Ms. Hanrahan's evidence on experience rating is not correct. However, the board has to rule on issues on the evidence presented, not on Union Counsel's say so. Once the Employer presented Ms. Hanrahan's *prima facie* testimony, the Union had opportunity to cross examine her on any matter. However, it did not cross examine her on whether her testimony regarding experience rating was correct or incorrect. Therefore, the onus switched to the Union to bring further evidence on the experience rating that would contradict her evidence. As the matter stands, the board has only Ms. Hanrahan's uncontradicted evidence that Ms. Denine's extra payments from April 1999 to January 2000 did have an adverse effect on the Employer's Workers' Compensation experience rating. Just because counsel for the Union has a different personal view does not change her evidence.

Part of the Union's submission was incorrect. The Union made reference to two (2) entries by Ms. Chalker on page 18 of BC#1: entry 1998/11/20 and entry 1998/12/09. The Union's

submission was that the Commission was trying to find a way to stop payments directly to Ms. Denine and have the Employer make the payments. That part is correct. However, the Union then stated that the Commission never stopped the payments. That is factually incorrect. The evidence of Ms. Trenholm, Ms. Hoskins and Ms. Chalker was that in January 1999, the Employer commenced paying Ms. Denine directly. The Commission did not pay Ms. Denine until April 1999.

The Union has suggested that Ms. Gould's evidence should guide the board in that she has never heard of or encountered a situation involving an overpayment where someone was terminated. The inference is that, on Ms. Gould's experience, the Employer's action to terminate Ms. Denine was inappropriate. In cross examination, it was put to Ms. Gould that she has never been involved in a circumstance where an employee had received money from the Employer and the Commission for a ten month period. The Union also said that Ms. Gould was the first one involved with Ms. Denine in that she attended the meeting in 2002/02/22. That is not true. Mr. Hogan wrote the Commission on Ms. Denine's behalf in February 1998. The Commission then provided additional benefits to Ms. Denine based on Mr. Hogan's letter. The reason this point is important is that, as the Employer has submitted, the grievor had numerous options of people she could call or contact to verify whether or not her income should have doubled for the ten month period in dispute.

The Union has alleged that, because the Employer did not call the police, it could not have seriously regarded Ms. Denine's actions as theft. The arbitration board can draw no inferences on whether the Employer did or did not call the police. It should be noted that there is no context disclosed why the Employer did call the police in the case of the employee who walked out of the hospital with three two-litre cartons of milk.

DH#1 states in the third paragraph, "We regard your actions as theft." There is nowhere in

that letter that says “actions of theft against the Employer,” or “actions of theft against the Commission.” All the employer said was “we regard your actions as theft.”

The Union argued by reference to *Re Toronto Transit, supra*, that, if theft is not defined in the collective agreement, one must use the definition in the Criminal Code. However, the context of the *Toronto Transit* collective agreement is important. In that agreement, there was a provision requiring a specific penalty for a number of offences, including theft. The grievance procedure in that agreement said that, if the arbitration panel can establish the factual basis for the offence, e. g., theft, then the board will not enquire into the propriety of the specific penalty. It was in that context that the Criminal Code definition of theft was adopted, i.e., because the parties had used the term “the offense of theft” in their agreement. There is no reference to theft in the HS Collective agreement. Therefore, reference need not be made to the definition of theft in the Criminal Code.

The Union also suggested that, on the grievor’s testimony that she believed that she had the colour of right to the money she received, there was no theft involved. However, in the context of Ms. Denine’s experience with Workers’ Compensation and the fact that she had been told that the Employer would take over her payments in January 1999, it is simply not credible that she had an honest belief that she had the colour of right to that money. If she was so honest, then one would think that she would enquire to make certain that the extra payments were for a valid entitlement.

In this case, the Union argued that, since the money involved was not the Employer’s money, there could be no offense of theft against the Employer. That argument contains a fatal flaw. The evidence in JT#3 indicates reference to a retroactive payment of \$7,800 to be paid to the Employer on January 14, 2003. In JT#6, it is indicated that a cheque for \$7,800 was indeed paid to the Employer on May 27, 2003. So if this is an act of theft that does not involve the Employer, why

then was the money returned to the Employer by the third party? Clearly the Commission recognized that

this money belonged to the Employer in the first place.

Numerous cases were presented by the Union concerning lesser penalties for employees in positions of trust. An equal number of cases was presented by the Employer demonstrating why termination was upheld where employees were in positions of trust. What all the cases stand for is that, when considering the employment relationship, trust is a factor. Also all the cases say that arbitrators must consider the contextual background and all the facts surrounding the relevant circumstances. In the instant case, the grievor indicated no remorse for her actions. Therefore, there is no indication that she would do anything different next time. The Employer submits that Ms. Denine's explanations were not plausible. In other words, she was not honest when she was first confronted. Maybe it could be argued that she could not be faulted for the first cheque she received in April 1999, but that is certainly not the case for each succeeding cheque she received. After the first one, her actions of cashing all the rest were premeditated. For the foregoing reasons, trust has been irreparably damaged in this employment relationship.

In the result, the Employer is convinced that the board will be satisfied that the grievor committed an act of theft against the Employer. It is further submitted that there are no mitigating factors that would reduce the penalty of discharge. Therefore, the grievance should be dismissed in its entirety.

CONSIDERATIONS

The comments that follow are those of the Chairperson. The Nominees are free to comment as they see fit.

In any case of this nature, the first question to be addressed is whether the Employer had just cause to discipline the grievor. If the answer is no, the result will be the immediate reinstatement of the grievor and reimbursement of all lost pay and benefits. However, if the answer is yes, then the next question is whether the particular penalty imposed by the Employer was just and equitable in all the circumstances.

Whether The Employer Had Just Cause to Discipline The Grievor:

The grievor's termination letter of February 3, 2000, sets forth the reasons relied on by the Employer for the grievor's discipline and for the particular penalty of termination, viz:

Dear Ms. Denine:

This letter is to follow-up the meeting of January 27, 2000 attended by you, your Union representatives- Steve Porter and Ruby Kelly, Donna Hoskins of Employee Wellness, and the undersigned. The purpose of the meeting was to discuss the fact that since April 1, 1999 to January 24, 2000 you were being paid for a work related injury by both your employer, the Health Care Corporation of St. John's, and the Workers' Compensation Commission. Immediately prior to this date you were paid by the Health Care Corporation of St. John's only.

You have been overpaid by \$8080.00. At no point during the approximately ten months that you were double paid did you bring this to anyone's attention. The error was only discovered by chance. Your explanation of why you thought you were receiving double payments was not reasonable. You offered two explanations that justified this to you. One was your claim had been previously fooled-up and the other had to do with a notice of reduction in income tax. Neither of the above was reasonable in view of being double paid for ten months.

As stated in the meeting this is a serious matter. We feel that there was an obligation on you to report the overpayments. We also feel that there was an obligation on you not to spend money that was not rightfully yours. We regard your actions as theft. Due to the seriousness of this incident we feel that we have no other choice but to

terminate your employment effective immediately.

You will be obligated to repay the overpayment. Following consultation with the Workers' Compensation Commission you will be notified as to whom this payment is to be made.

Yours truly,

John Gillis
Human Resources Officer

It is common ground that:

1. the grievor received cheques for her claim solely from the Employer from January 1999 to April 1, 1999;
2. after April 1, 1999 and for a period of ten (10) months thereafter until January 4, 2000. The grievor received cheques for the same claim from the WCC as well as from the Employer;
3. the grievor did not attempt to enquire of either the WCC or the Employer whether she was entitled to double payment.

The Employer regarded Ms. Denine's actions as theft. The Union challenged this allegation on the grounds that, while the termination letter alleges theft, Ms. Hanrahan claimed the grievor's actions constituted fraud, a term the Union distinguished from theft, which it insisted must follow the Criminal Code definition. The Union also argued that, since the termination letter did not specify that the theft was against the WCC, a third party, such an allegation could not now be relied on. Furthermore, since the Employer lost nothing in these circumstances, no theft was possible against the Employer. The Union also insisted that the grievor believed that she had the colour of right to both payments and she cited her reasons for that belief when first confronted with the issue.

The Colour of Right Issue

Ms. Denine essentially offered three (3) reasons at this hearing for believing that she was entitled to the extra payments from the WCC: 1) she had received information slips with three of her cheques concerning an increase to her benefits; 2) she felt that the change from 75% of net to 85% of net had something to do with the situation and 3) the additional cheques were an adjustment for the many “fool-ups” concerning her benefits over the years.

The evidence is that the slip described by Ms. Denine was a routine information slip issued with claimants’ cheques by the WCC in January and July to advise them of the effect that tax table changes will have on their payments. However, it appears that, at the very most, tax table changes would mean at most a dollar or two difference in the amount of a person’s cheque. This raises the question whether it was reasonable for Ms. Denine to believe that this slip, which she could not produce at the hearing, entitled her to a 100% increase in benefit payments. The evidence is clear that Ms. Denine is no stranger to receiving WCC benefits and she has done so on many previous occasions. It would be unlikely, therefore, that she had not previously encountered tax table slips. Ms. Denine also has Grade XII education; she is far from illiterate. Therefore, it is simply not believable that she could assume that an information slip on three (3) occasions explaining tax table changes would account for additional cheques that were virtual duplicates of the amount she was receiving from the Employer. In other words, it is not credible that Ms. Denine would believe that tax table changes could account for a 100% increase in benefit payments. It should also be noted that Ms. Denine already had been receiving the extra payments for three (3) months before the tax table information slips for changes commencing in July were included with claimants’ cheques.

As for the grievor’s assertion that she thought the increase from 75% to 85% of net had something to do with her additional cheques, that too is not believable. The evidence is that this

increase had occurred 15 months earlier, but even if it had occurred currently, a 5% increase in net would in no way translate into a 100% increase in benefit. It should also be noted that Ms. Denine's benefit was the minimum possible benefit of \$200 weekly or \$400 every two weeks. It is simply not plausible that tax table changes of \$1 or \$2, or WCC changes of 5% to benefit levels, separately or in combination, would be regarded by any reasonable person, including the grievor, as being sufficient to double her benefit payment.

With respect to the assertion that previous "fool-ups" by the WCC had something to do with adjustments that resulted in these new WCC cheques in April 1999, that too is not believable. It is simply not plausible that Ms. Denine would believe that such a factor would result in cheques from the WCC that were virtual duplicates of the cheques she was already receiving from the Employer. The longer such payments continued, the more apparent that would become.

On the one hand, Ms. Denine has made much of the errors that the WCC has made in the past, yet on the other hand, she has testified that she did not seek clarification concerning the extra cheques because she assumed that the Commission knew what it was doing. That comment is entirely inconsistent with the evidence that the grievor has been shown to be quick to complain about every decrease or delay to her cheques in the past. In my view, every other aspect of her evidence strongly suggests that she did not at any time believe that the Commission knew what it was doing and that is why she was always prepared to bring matters that adversely affected her to the attention of the Commission as quickly as possible. The evidence is that another employee also received double payments, but made the effort to enquire whether she was actually entitled. There was absolutely no excuse for Ms. Denine not to do likewise in these circumstances.

For the foregoing reasons, I do not accept the reasons offered by Ms. Denine for claiming

that she believed that she was entitled to the extra cheques in dispute. In my opinion, she knew from the very beginning that an error had been made by somebody within the Commission and she deliberately allowed the situation to continue without any intention of contacting anybody about it. In essence, she found herself with a windfall to which she knew she was not entitled and she decided to keep it for as long as the windfall continued or until the mistake was noticed. While there is no evidence on whether she considered the consequences of her actions at the time, I am convinced that she was willing to take her chances no matter what the consequences might be. As the 10 month period wore on, each time Ms. Denine accepted and cashed another additional cheque, she did so deliberately with the full knowledge that her actions were premeditated and they were wrong.

Ms. Denine had no colour of right to the extra payments. She also knew that she had no colour of right to them. And she did nothing to contact either the WCC or the Employer so as to clarify why she was receiving this extra money.

Was There Theft Against the Employer or the WCC?

The termination letter does not specify that the alleged theft was against the Employer or the Commission. On balance, I do not see it as being fatal to the Employer's case who the alleged theft was against as long as the Employer is able to make a sufficient link with the Employer's operation and the employment relationship. The letter does indicate that there was some doubt in the Employer's mind at the time whether recovery of the overpayment would be paid to the Employer or to the Commission. However, that does not necessarily indicate ambivalence as to whether the Employer considered the theft to be from the Employer or theft from the WCC. Once it imposed

discipline for theft, the Employer was obliged to make a case that the grievor's actions affected the Employer's interests and, therefore, the employment relationship.

On balance, I accept that the WCC caused the error that resulted in the extra payments being made to the grievor. In essence, the money that was paid to the grievor by the WCC should have been reimbursed to the Employer for its own payments to Ms. Denine. There was quite a delay before that reimbursement was made, a delay the Employer and the Commission blame on each other. That apparently is reflective of the problems that can exist in the reimbursement system between the two entities. There is also some indication that identification of individual claim reimbursements are probably lumped together with other reimbursements and that it would take some attention to detail to examine accompanying documents so as to identify when reimbursement for a particular individual's claim had been paid. It is extremely unlikely that employees on claim would have any knowledge of such matters. Therefore, while the grievor's actions did result in the Employer being without \$7,800 for three (3) years, Ms. Denine cannot be accused of causing that consequence deliberately. Indeed, she was discharged for receiving and cashing ten (10) months of extra payments. What transpired between the Commission and the Employer during the subsequent twenty-six (26) months had no bearing on the matter.

While it is true that Ms. Denine did not devise a plan to have the extra money paid to her in the first place, she nonetheless quickly took advantage of the WCC's error and deliberately allowed it continue until she was caught, if indeed that was a real possibility in her mind. Reimbursement procedures between the WCC and the Employer were probably not in her mind at any time. Rather, it is more probable that she viewed the WCC and the Employer as large entities to whom the amount of money involved in her circumstances would be relatively insignificant and of little import

such that nobody would notice. In other words, her actions suggest that she did not care who she might affect and that she was relatively unconcerned about being found out someday. To her, it is likely that the implications of getting caught would mean simply paying back the overpayment to the WCC as she had done on previous occasions.

Meanwhile, the best that can be said for the reimbursement system between the Commission and the Employer is that it could do with better controls and better attention to timely reimbursement.

It is not sufficient for the Employer to merely find fault with the grievor's actions. To ground just cause to discipline, the Employer must show that there is a sufficient link with the employment relationship. In this case, it has been proven that the money the grievor received from the WCC was actually money which should have been reimbursed to the Employer. In other words, the money in question belonged to the Employer even though the grievor received it from the WCC.

It was the Employer, therefore, who was deprived of the money in question and, arguably, the one against whom theft was committed. Had the grievor properly advised the WCC or the Employer when she first began to receive the extra cheques, this situation probably would not have progressed as it did. However, the situation was exacerbated each time Ms. Denine received and cashed another cheque until her actions were accidentally discovered.

The link between the WCC and the Employer in these circumstances has been established. In *Re Canada Safeway, supra*, the issue was an employee who obtained WI benefits under false pretenses and reference was made in that case at p.125 to *Re Simon Fraser University and C.U.P.E, Loc. 3338* (May 28, 1992) unreported (Munroe, Q.C.) [summarized 27 C.L.A.S. 474], viz:

. . . [the grievor] falsely claimed to be disabled from working, and she sought and received LTD benefits to which she knew she was not entitled.

The ongoing ability of employers and unions to negotiate and administer sick leave and long term disability plans depends in large measure on the willingness of the beneficiaries of such plans to be honest in relation thereto. In that sense, employees as well as employers have a stake in the veracity and general bona fides of claims for sick leave or LTD indemnities. An employee who deliberately makes a false claim is guilty of a serious breach of trust – not only as against the employer but also as against her working colleagues.

It is impractical to suggest that employers ought to be tightly policing and second-guessing the applications of their employees for sick leave or LTD benefits. Moreover, an such suggestion would be inconsistent with the underpinnings of the modern employment relationship. What is required by everyone concerned is a reasonable and appropriate level of mutual trust; and an attitude of voluntary compliance.

. . . . “Because cases of this kind are hard to detect there is a special need for deterrence which outweighs considerations of rehabilitation . . .”

It is not too strong to say that the grievor’s misconduct amounted to a form of theft against her employer. . . .

. . . .

While the instant case does not involve sick leave or LTD benefits negotiated by the parties, the fact of the matter is that the parties have taken pains to negotiate some thirteen (13) provisions in Article 26.02 dealing specifically with their and employees’ obligations in respect of the administration of WCC benefits, benefit programs and the relationship between such matters and other benefits included in the collective agreement. These are, in my view, substantive expressions of the parties’ mutual interests in respect of Workers’ Compensation matters, a situation not entirely unlike the parties’ attempts to negotiate other benefit provisions in their collective agreement. To that extent, I echo the theme expressed in the passages above *mutatis mutandis*. Therefore, employees as well as the Employer (and I would add the Union to this list) all have a stake in the veracity and general *bona fides* of claims for Workers’ Compensation. The need for trust and honesty in this area is not

restricted to those employees who hold special positions of trust with the Employer. Indeed “what is required by everyone concerned is a reasonable and appropriate level of mutual trust. . .” (Emphasis mine.) Everyone concerned in my view includes any employee, no matter what her position, who might seek Workers’ Compensation benefits. And I would definitely consider the deliberate receipt of benefits to which an employee is not entitled to be at least as serious as obtaining benefit payments by other dishonest means. In *Canada Safeway, supra*, despite 17 years seniority, the grievor (a Deli Clerk) was found not to have accepted responsibility for his actions and, therefore, since his actions were considered a serious breach of trust, discharge was upheld.

In the instant case, Ms. Denine received and cashed extra WCC payments for her own use for ten (10) months knowing that she was not entitled to them. That money belonged to the Employer. The parties’ collective agreement establishes a strong relationship between the Commission and the Employer. Ms. Denine’s actions were just as wrong in respect of her use of those WCC benefits as they would have been for wrongly using any other negotiated collective agreement benefit. For that breach of trust, the Employer was justified in disciplining her.

Was Discharge Just and Equitable in These Circumstances?

The Issue of Theft

The question has been asked whether Ms. Denine’s actions constitute theft. In particular, the Union ‘s position appears to be that, unless her actions meet the definition in the Criminal Code, then the Employer is precluded from discharging her. This argument would essentially require the Employer to prove in a civil proceeding by clear, cogent and convincing evidence that theft, as it is

defined in section 322.(1) of the Criminal Code, has actually occurred. The relevant section states:

322.(1) **Theft** – Every one commits theft who fraudulently and without colour of right converts to his use or to the use of another person, anything, whether animate or inanimate, with intent,

- (1) to deprive, temporarily or absolutely, the owner of it, or a person who has a special property interest in it, of the thing or of his property or interest in it;
- (2) to pledge it or deposit it as security;
- (3) to part with it under a condition with respect to its return that the person parts with it may be unable to perform; or
- (4) to deal with it in such a manner that it cannot be restored in the condition in which it was at the time it was taken or converted.

The Employer's position is that the jurisprudence relied on by the Union dealt with a case where the collective agreement contained a specific penalty for theft (and certain other offenses), which the arbitration board considered necessary to invoke the Criminal Code definition. However, since no such wording, indeed not even the word "theft" is mentioned in the instant collective agreement, the Employer argues that application of the Criminal Code definition is not relevant.

In my view, the wrong question is being posed here. In a civil proceeding such as an arbitration hearing, the critical question is whether the conduct of the grievor offends the employment relationship to such an extent that discharge is a reasonable disciplinary response in all the circumstances. Society has a reasonable sense that theft, by any definition, is a serious matter which entails a deliberate act of taking something of value from someone and putting it to one's own use or somebody else's use instead. Therefore, whether or not theft, as it is defined in the Criminal Code, is proven, the essential question will always be whether the particular conduct complained of was so dishonest that its effect on the employment relationship and the Employer's legitimate interests would justify discharge as a reasonable disciplinary response.

It has already been decided that the grievor took the money in dispute without the colour of right even though she did not cause the issuance of the extra cheques in the first place. Her conduct became culpable when she continued to receive and put the extra cheques to her own use for a ten (10) month period. In my view, Ms. Denine knew that her actions were morally wrong, but she simply did not care. On balance, I am satisfied that such conduct was therefore fraudulent. Indeed, that was the essence of Ms. Hanrahan's evidence. In the result, despite the Union's insistence that fraud and theft are distinguishable, I do not accept that they are always mutually exclusive. It should be noted that the Criminal Code definition clearly contemplates that theft is, in part, a fraudulent act. Without necessarily finding that Ms. Denine's actions constituted theft as defined by the Criminal Code, I do find that her conduct was fraudulent and without colour of right and at least offended any reasonable societal notion of theft.

I make this finding despite the Union's insistence that the absence of charges of theft to the Police renders the allegation of theft unsustainable. While recourse to the Courts via a charge of theft was open to pursue in this case, I make no judgements on the decision not to do so. Not every allegation of employee theft is deemed necessary to pursue in Court if an institution is willing to resort to another alternative. For the Commission, recovery of the overpayment appears to have been sufficient for its own purposes. For the Employer, the focus on the trust issue as the most important part of the theft allegation was sufficient to accomplish its purpose of dealing with the grievor's conduct within the employment relationship. By making this choice, the Employer is not by any stretch conceding that its allegation of theft is groundless.

The Issue of Breach of Trust

It has been suggested here that the grievor's actions were not serious because the Employer was eventually reimbursed for all the money in question and, therefore, lost nothing. I disagree. The fact of the matter is that the grievor used the Employer's money for ten (10) months, during which time the Employer was deprived of that amount. While Ms. Denine might consider the amount involved as being insignificant to such large institutions such as the WCC or the Employer, that money should have been available to the Employer to put to some other use directly or indirectly for the benefit of health care.

Whether one characterizes it as theft or some other offense, the fact of the matter is that the grievor's actions of deliberately cashing ten (10) months of benefit cheques to which she knew she was not entitled constituted a serious breach of trust. Nothing could be clearer than the fact that the WCC error and, therefore, the grievor's conduct, could have continued undetected and might never have been noticed. Since the adverse financial considerations are potentially huge should this type of thing happen again, action by the Employer is entirely justified to make it perfectly clear to the entire workforce that such conduct is serious and will not be tolerated. As suggested in *Canada Safeway, supra*, (quoting *Simon Fraser University*) it is precisely "Because cases like this are hard to detect there is a need for deterrence which outweighs considerations of rehabilitation." I concur with that statement. Just because Ms. Denine does not hold a particular "position of trust," she is an employee who, like any other employee, must be trusted not to acquire WCC benefits to which she knows she is not entitled. Everybody loses in that situation. The seriousness of the breach of trust in the grievor's case and the need for deterrence has been established in this case. Despite the Union's assertion that certain of the Employer's employees were not disciplined for receiving significantly more than their sick leave entitlement, I note that no supporting evidence for that

assertion was offered. The details or the context of that alleged situation are unknown and, therefore, in the absence of supporting evidence, we cannot simply presume that discipline would have been justified but was not imposed in that event.

Although Ms. Denine did not deny receiving and cashing the cheques in dispute, I am satisfied that the reasons she offered for believing that she was entitled to the extra payments were not believable. In my opinion, they were feeble attempts to excuse what she realized from the beginning was culpable conduct on her part. Had she not been found out, her actions would have continued until her claim expired. On the whole, I am satisfied that there has been no indication on the grievor's part that she has acknowledged responsibility for her wrongdoing. I also do not accept that the grievor's nine (9) years of employment with the Employer is sufficient to mitigate. While she might have been employed for that length of time, she has actually spent much less in actual working service due to injury lost time and, therefore, has not managed to build up an equivalent bank account of good conduct from which to draw upon to offset disciplinary action for a serious offense such as this.

In the result, I am satisfied that discharge was within the range of reasonable disciplinary responses that the Employer was justified in imposing in these particular circumstances.

DECISION

On the basis of the evidence and by the foregoing considerations, I find that the Employer had just cause to discipline the grievor in these circumstances.

I further find that the allegation of theft has been established by any reasonable societal

standard.

I further find that there is an inexorable link between the WCC and the Employer expressed in the parties' collective agreement.

I further find that the critical issue in this dispute, whether it has been characterized as theft or some other offense, was the seriousness of the offence in terms of the trust relationship that must prevail where employees are free to avail of WCC benefits. In that regard, I find that the grievor's actions constituted a serious breach of trust.

I further find that the need for deterrence is warranted in these circumstances.

I further find that there are insufficient mitigating factors to warrant reducing the penalty of discharge, which penalty I accept as being within the reasonable range of disciplinary responses to which the Employer was entitled to impose in these particular circumstances.

Therefore, the grievance is denied.

Respectfully submitted as the decision of the Chairperson.

Dated at Mount Pearl, Newfoundland and Labrador, this 13th day of April, 2004.

David L. Alcock – Chairperson

(Concurring)
Gerry Curnew – Employer Nominee

(Dissenting)

Peter Ivany – Union Nominee

**DISSENT
OF
PETER IVANY**

BETWEEN: Newfoundland Association of Public Employees
(hereinafter referred to as “the Union”)

AND: St. John’s Health Care Corporation represented by the
Newfoundland and Labrador Health Boards Association
(hereinafter referred to as “the Employer” or the “HCC”)

RE: THE GRIEVANCE OF MARGARET DENINE
(hereinafter referred to as “the Grievor”)

I have read the draft award of the Majority and I respectfully disagree with their decision to deny the grievance. I believe the basic facts for all intents and purposes are set out in the Majority award and I see no reason to repeat them. However, there are certain aspects of the proceedings contained in the considerations and decision of the award that I differ with the Majority in their reasonings and/or conclusions.

In the letter of dismissal there are three main points, namely the Employer regarded the actions of the Grievor as theft; an amount was shown and it was stated the Grievor will be obligated to repay the overpayment. This, in my view, should be the crux for the dismissal. Testimony and evidence have shown that the amount stated was incorrect. Testimony and evidence have shown that the Grievor has made arrangements to repay the overpayment to the Workers’ Compensation

Commission and the Employer has received the full balance due them. This leaves the final point, i.e. theft and was it against the Employer as stated or against the Workers' Compensation Commission if you consider the repayment issue.

The Majority have concluded that the Grievor had no colour of right to the extra payments and that she had no colour of right to them of which I don't fully agree. The Grievor offered three reasons as listed in the Majority's deliberations and perhaps the first two would hardly cover the extra payment but the third could be substantial in her mind and if all were considered together could be a genuine belief. Consider the 2004 annotated "Tremear's Criminal Code" (the Honourable Mr. Justice David Watt of the Superior Court of Justice (Ontario) and the Honourable Madam Justice Michelle Fuerst of the Superior Court of Justice (Ontario) per 5.322;

Colour of Right - "R V Skykavich (1954), 19 CR 401 (S.C.C.)
- See also R V Howson (1966), 47 C.R. 322
(1966) 3 c.c.c. 348 (Ont. C.A.) - The claim of right must be
an honest one, even if unfounded in law or in fact. (Emphasis
mine)

It might be in the Majority's view that the reasons are not believable. But they did occur and was substantiated by testimony. Granted, they did not happen all at once, but a series of events. It is easy to understand a person receiving the minimum allowance would be greatly concerned if it was late in arriving or lesser than the usual amount. I believe it is natural for a person to enquire as this

is the only means of financial support as far as we understand the situation. To a person who has been on Workers' Compensation as well as Ease Back over a period of years and has been denied benefits and have them reinstated on several occasions, it could be construed as a genuine belief that the additional cheque was somehow connected with the past decisions. It should be borne in mind each cheque was for the minimum amount of \$200.00 weekly. It is true the payments continued for a period of over nine months but I am not convinced that her actions were premeditated and that she considered it wrong.

Further to the above, testimony was heard that the Grievor did not do anything to cause the Employer to issue her any cheques. It was established that the Grievor didn't make any false documents nor initiate any improper action to receive the extra payments. The Grievor was entitled to benefits. There is no argument to that statement. These have to be considerations in the final decision and must bear weight. Also, the Grievor never denied receiving two cheques each pay period and never denied cashing them.

Consider what transpired and was it theft. An Employer's witness felt that theft and fraud are one and the same. Also, was it against the Employer or the Workers' Compensation Commission. Testimony was heard that the Workers' Compensation Commission set up the repayment schedule and that the Employer was reimbursed fully in time by the Commission. My belief would be that the action was against the Commission and not the Employer. The Commission was deprived of the funds. It is true that theft and fraud are different in law. Theft is not defined in meaning in the Collective Agreement. We see there are different meanings for theft and fraud in the following

jurisdictions, namely:

- Canadian Law Dictionary by John A. Yogis, Q.C.
- Osborn's Concise Law Dictionary, Seventh Edition by Roger Bird, LL.B.
- Black's Law Dictionary by Henry Campbell Black, M.A.
- Tremear's Criminal Code
- The Living Webster Encyclopedic Dictionary of the English Language.

After reviewing what I heard and understand in testimony, I believe this is a case of grave misconduct rather than theft.

Perhaps it is a belief by the Majority that the actions of the Grievor were morally wrong and she simply did not care but, in my view, that actions of this nature could be considered wrong. However, to say the Grievor simply did not care is not supported from what I heard and viewed.

The issue of breach of trust was raised by the Majority in their deliberations to which I disagree in some of the statements and/or conclusions. Is it not a fact the Employer was reimbursed for all the money in question and therefore lost nothing. True, the Employer was deprived of that amount of money for a period of time but to state the following, in my view, is not supported, namely;

“While Ms. Denine might consider the amount involved as being insignificant, to such large institutions such as the WHSCC or the Employer, that money should have been available to the Employer to put to some other use directly or indirectly for the benefit of health care”.

The above might be a true gesture but it flies in the face of what transpired later in that it took about two years for the Employer to supply the Workers' Compensation Commission the required information in order to complete the true reimbursement total. It has been stated that cases of this nature are hard to detect and deterrence is necessary. I'm not convinced from what I heard how hard it is to detect but it is apparent that better checks and balances are required by both the Employer and the Workers' Compensation Commission to assist in detection. Therefore it is my belief that while deterrence is always a consideration, but in this case, I feel it doesn't outweigh considerations of rehabilitation.

Granted, trust is always a factor in any employment, but degrees are held. Consideration of the position held and the chances of this occurring again. Consideration should be given to the Grievor whether her actions have impaired the trust as opposed to destroying that trust. It is my belief that her actions have impaired the trust but not necessarily destroyed the trust. My considerations and reasons have been supplied earlier in this report. Also, one must consider the rehabilitative potential. In my view it is not right as the Majority have stated to dismiss her nine years of employment because she actually spent less in actual working service. The Grievor was injured on the job; was considered for other types of work of the Employer and was put on Ease Back work as well. Up to the time of her termination, she was still in pain and incapable of doing certain types of work. No doubt this was medically supported. Greater consideration should be given under these circumstances. Also, there was an instance of an extra cheque given to the Grievor which she returned. Does this not suggest rehabilitative potential.

Finally, one should consider an alternative penalty. It was stated no prior criminal activity by the Grievor. This must count for something. Is discharge the only remedy that should be considered. I am not convinced that discharge in this case is the appropriate penalty. I have difficulty in accepting the letter of discharge as presented. One must consider that discharge in arbitrations is considered the ultimate. Did the actions of the Grievor warrant such a penalty. I don't think so, but rather a period of suspension should be considered bearing in mind the date of termination and the period of time it took, no fault implied, to reach this stage of the various proceedings.

DECISION

Having considered all the evidence and testimony as well as the deliberations and decision of the Majority plus my own comments and beliefs as contained in this report, the decision to discharge the Grievor should be changed to a period of suspension to end on the receipt of the Arbitration Board's report. There would be no loss of seniority, as to do so, would impose an additional penalty on the Grievor and certainly lessen her change of employment as she is a casual/temporary employee. The determination of seniority be left in the hands of the Union and the Employer, and if not satisfactorily resolved, it be returned to this Board for final determination.

Peter Ivany

April 13, 2004