

**FINDINGS AND DECISION
IN A DISPUTE**

between

CHARLES S. CURTIS MEMORIAL HOSPITAL
Represented by the Newfoundland & Labrador Health Boards Association
(hereinafter called the Employer)

and

NEWFOUNDLAND ASSOCIATION OF PUBLIC EMPLOYEES
(hereinafter called the Union)

THE GRIEVANCE

On November 21, 2002, Mrs. Rita Pilgrim submitted a written grievance alleging that the Employer violated Article 28 - Promotion and all other related articles.

By way of opening statement, the Union also claimed violation of Article 1.05 - Discrimination.

The dispute arose when the Employer posted for an 18 week maternity leave Laboratory Technologist 1 position for which the grievor claimed she applied, but a new employee was hired instead.

Full redress was requested.

Arbitration hearings were held on February 10th & 11th and June 7th, 2004 at St. Anthony, Newfoundland and Labrador

For the Union: Mr. Gerard Ward, *et al.*

For the Employer: Ms. Elizabeth Aylward, *et al.*

Sole Arbitrator: Mr. David Alcock

The parties confirmed that the arbitration was to proceed by way of Ministerial appointment and they agreed to exclude witnesses and extend the collective agreement and statutory time limits for filing the final award.

At the onset of hearings, the parties found themselves embroiled in a dispute over the subject of the grievance. Considerable argument ensued whereby the Employer questioned whether it was the job competition itself that was being grieved or that the period posted actually turned out to be less than 18 weeks. Counsel for the Employer initially thought that only the latter issue was in dispute and that, after telephone discussions and correspondence on the matter between Ms. Aylward and Mr. Ward, particulars of clarification were sought from the Union concerning differences between what Mr. Ward said and what he wrote. Ms. Aylward claimed that what she was led to understand was the subject for the grievance differed from that stated by the Union at the commencement of hearings. Therefore, she sought an adjournment of proceedings with costs so that she could prepare for the case it had to meet.

Mr. Ward argued that his reply to Ms. Aylward's request for particulars made it clear that a violation of Article 28 – Promotions and Article 30 – Layoffs and Recall were in dispute.

Ms. Aylward argued that the job competition issue in Article 28 was not raised in their discussion. She further argued that she tried to prevent this problem from arising at arbitration, but the Union was not forthcoming.

Mr. Ward insisted that grievances are intentionally vaguely worded all the time. Indeed, he said that the Union's Shop Stewards are trained not to be specific in wording grievances because the Union does not have to specify all the possible clauses that might have been violated, or what the Union's argument will be.

The arbitrator explained that a request for particulars on the subject of the grievance is not a request for the Union to disclose its argument at arbitration. Rather it is simply a request for clarification as to what is actually being grieved so that the Employer can prepare for the case it has to meet. In this case, the Union claims that the mention of Article 28 in the grievance form and other correspondence citing Article 30 was sufficient to explain the issues in dispute. The arbitrator further explained that Article 28 contains 14 different clauses, each dealing with specific topics, which, if "violation of Article 28" were the claim, might effectively require the Employer to prepare for a possible violation of each and every one of the 14 clauses. Similarly, Article 30 contains 5 clauses, each one different from the other and dealing with separate topics. Therefore, unless the Employer was advised in a timely fashion which of the 19 clauses captured by the Union's general reference to Article 28 and Article 30 that were alleged to have been violated, it would be placed in an unreasonable position with respect to preparing for arbitration. Effectively, the Union would be asking the Employer to guess which clauses were the subject of the grievance, or prepare for the entire lot.

After hearing evidence from Angela Johnson, Shop Steward and Barbara Blake, Manager Diagnostic Services, the parties agreed to proceed with two (2) issues, i.e., 1) the failure of the Employer to award the posted position to the grievor and 2) the failure to recall the grievor when the period involved in the posted position changed from 18 weeks to less than 16 weeks.

The parties agreed that the arbitrator had jurisdiction to deal with the dispute and he would remain seized of the matter to deal with questions of interpretation that may arise out of the award, including the *quantum* of compensation, if any, should the parties not be able to agree.

The following items were received by consent:

- C#1 collective agreement expiring March 31, 2004;
- C#2 grievance form – November 21, 2002 and responses.

Appearances for the Union

Angela Johnson, Local President and Shop Steward
Rita Pilgrim, grievor
Sharon Brushett-Saunders, Lab Tech II

Appearances for the Employer

Barbara Blake, Manager Diagnostic Services
Scott Smith, Regional Manager - Human Resources

The following items were introduced by witnesses:

- GP#1 Position Description – Laboratory Assistant;
- GP#2 Lab/X-Ray Seniority List to December 31, 2002;
- GP#3(a) one year posting for Lab Tech 1 effective March 1, 2002 (closing date 2002/01/17);
- GP#3(b) 6 month posting (2 positions) for Lab Tech 1, February 2002;
- GP#3(c) 5 month posting (2 positions) for Lab Tech 1, March 2002;
- GP#3(d) 3 month summer relief posting for Lab Tech 1, June - August, 2002;
- GP#3(e) 7 month posting for Lab Tech 1, mid Nov. 2002 – mid June 2003;
- GP#3(f) posting for temporary Lab Tech 1, effective until March 2003;
- GP#3(g) posting for permanent Lab Tech II, August 14, 2002;
- GP#3(h) posting for permanent Lab Tech 1, (closing date 2002 08 23);
- GP#3(i) 10 month posting for Lab Tech 1, September 10, 2002;
- GP#3(j) internal 4 month posting for Lab Tech 1, Nov. 11, 2002 - mid March 2003;
- GP#3(jj) abbreviated 4 month posting for Lab Tech I, Nov. 11, 2002 - mid March 2003;
- GP#3(k) 14 month posting (2 positions) for Lab Tech 1, June 15, 2003 - August 31, 2004;
- GP#3(l) summer relief + some maternity leave relief posting for Lab Tech 1, June 2003 - August 2004;
- GP#3(m) posting for Lab Tech 1, August 30, 1003 - September 4, 2004.
- GP#4 Laboratory Policy and Procedure Manual;

- GP#5 letter to grievor dated January 24, 2002, advising that she did not meet the minimum qualifications for Lab Tech 1 position, Competition No. 02.04.
- AJ#1 Notes of grievance meeting Monday Nov. 18, 2002;
 AJ#2 Form requesting Government Mediation Services, Nov, 3, 2003;
- SB#1 Schedule of employee hours worked Nov, 2002 - March 2003;
 SB#2 Call schedule, December 30 2002 - February 23, 2003;
- SS#1 letter dated Nov. 15, 2002 from Scott Smith to Robert Hussey confirming his appointment to the temporary, full-time position of Lab Tech 1;
 SS#2 Nov. 6, 2003 memo from Scott Smith to Gerard Ward, advising that mediation had been discussed with senior management, but the decision was to proceed to arbitration.

The following is the relevant collective agreement language:

1.05 No Discrimination

The Employer agrees that there will be no discrimination with respect to any employee in the matter of hiring, wage rates, training, upgrading, promotion, transfer, layoff, recall, discipline, classification, discharge, assignment of work, or otherwise by reason of age, race, creed, color, national origin, political or religious affiliation, sex or marital status, nor by reason of his/her membership or activity in the Union.

....

28.03 Job Postings

- (1) Subject to 28.03(b), when a vacancy or new position is to be filled, either inside or outside the bargaining unit, the Employer shall post notice of the position in accessible places in the hospital for a period of not less than seven (7) calendar days. Copies of all postings are to be supplied concurrently to the Local Secretary of the Union.
- (2) Clause 28.03(a) does not apply to a temporary vacancy except where, in the Employer's opinion, a temporary position is expected to exceed a period of sixteen (16) continuous weeks, or where a position exceeds sixteen (16) weeks, such position shall be posted in accordance with clause 28.03(a).

....

30.01 – Layoff and Recall Procedure

(a) Subject to Clause 30.01(b), both parties recognize that job security should increase in proportion to the length of service. Therefore, in the event of layoff, permanent employees shall be laid off in the reverse order of their seniority. Permanent employees shall be recalled in order of their seniority providing that they are qualified to do the work.

(b) Temporary employees shall be laid off in the reverse order of seniority in their recognized Departments or their recognized section of the Department provided that those temporary employees being retained are immediately qualified to do the work required. Temporary employees shall be recalled in order of seniority in their respective recognized Departments or in their recognized section of the Department provided that they are immediately qualified to do the work required.

(c) Temporary employees shall be deemed to be junior to permanent employees.

(d) It is the responsibility of the employee to give the Employer notice of his/her current address and telephone number.

30.02 - No New Permanent Employee

Subject to clause 30.01, no new permanent employee shall be hired until those permanent employees on layoff have been given an opportunity of recall provided that those being recalled have sufficient qualifications to perform the work required.

....

Cases and Authorities Referred to by The Union

1. Canadian Labour Arbitration, 3rd edition, para 5:2300 - The Requirement of *Bona Fides*; para 6:0000 - Introduction (Seniority), 6:2352 Status of Persons on Lay-off; para. 6:3100 - The Scope of Arbitral Review.
2. *Re College of The North Atlantic and Newfoundland Association of Public Employees* (April 26, 2002) unreported (Oakley).
3. *Re Her Majesty The Queen in Right of Newfoundland (Department of Career Development and Advanced Studies) and Newfoundland Association of Public Employees* (March 8, 1988) unreported (Thistle).
4. *Re The Town of Paradise and Newfoundland Association of Public Employees* (September 5, 1984) unreported (Thistle).

5. *Re Charles S. Curtis Memorial Hospital and Newfoundland Association of Public Employees* (June 26, 1991) unreported (Alcock).
6. *Re Chinook's Edge Regional Division #5 and Alberta Teachers' Association* (August 29, 1996), 59 L.A.C. (4th) 262 (Moreau).
7. *Re Charles S. Curtis Memorial Hospital and Newfoundland Association of Public Employees* (December 10, 1999) unreported (Alcock).

Cases and Authorities Referred to by The Employer

1. *Re Inglis Ltd. and Communications & Electrical Workers of Canada, Local 595* (1992), 27 L.A.C. (4th) 146 Brandt.
2. *Re Corner Brook Pulp & Paper Ltd. and Communications Energy and Paper Workers Union, Loc. 60N* (1998), 73 L.A.C. (4th) 1 (Oakley).

BACKGROUND

Rita Pilgrim was originally hired in November 1974 in the permanent position of Lab Aide. She continued in that capacity until 1983 when she left her employment after the Employer denied her request for Maternity Leave. In 1984 she was hired to do 14 weeks of summer relief as a Lab Aide and has been recalled each year since to provide summer relief or some maternity leave. In 2002 she worked 36 weeks, and in 2003 she worked for the full year. Back in 1974 she worked in Haematology and Bacteriology and also did some Chemistry. Since that time, her work has been primarily in Bacteriology.

At no time since 1984 has Ms. Pilgrim been considered qualified for temporary or permanent job postings for the position of Lab Tech 1. Each time she applied, she was advised that she did not

possess the necessary qualifications, namely she had not trained as a General Laboratory Technologist and she did not hold a certificate of registration with the Canadian Society of Laboratory Technologists. Also, the Employer argued that she did not have experience in all departments of the Laboratory, a qualification required of a General Duty Technologist (Float) which is intended to ensure that the successful applicant could do call throughout the Lab when required (see GP#4). At some point, the classification of Lab Aide was changed to Laboratory Assistant (See GP#1). Ms. Pilgrim testified that both she and the Lab Technologists perform all the Illustrative Examples of Work listed in GP#1, including blood collection, but she does not do blood banking or microscopic reading, functions which are performed by the Registered Technologists. She also indicated that, when she is recalled as a Lab Assistant, she is placed in Bacteriology and does not move through the various section of the Lab as determined by staffing on a daily basis, as the Lab Tech 1s do (see GP#4). Also, she does not assume the responsibilities of a Charge Technologist on occasion.

For many years, the grievor has protested the position the Employer has taken with respect to her qualifications, pointing out that she has always answered every recall, has always performed her assigned duties well, and has always provided the Employer with dependable, reliable relief whenever it was requested of her, including lengthy periods of maternity and other leave relief lasting as long as a full year. In her view, the Employer has used her in a consistently unreasonable and discriminatory manner to suit its own needs and has never recognized the contribution she has made. As she sees it, the Employer will not permit her to be promoted to a Lab Tech 1 position because it would give her more seniority, security and entitlement to bid on other jobs in the regular workforce and, therefore, the Employer fears it would lose the advantage of being able to call on her

to provide the kind of short term relief for which she has always been available.

This particular arbitration is not the first to deal with the issue of the grievor's abilities *vis a vis* the Employer's right to require the aforementioned paper qualifications for Lab Tech I. Ms. Pilgrim has waged this battle previously in two (2) other arbitration disputes over which I presided and, I suspect, she will challenge the Employer again in future over the same issue unless she feels that some equitable arrangement can be worked out to deal with her particular circumstances. Since the parties have dealt with the qualifications issue at length before and it has been ruled on in previous arbitration awards, I consider it unnecessary to reproduce the same material again for this dispute. In my view, the only significant new evidence introduced on the subject of paper qualifications is Ms. Brushett-Saunders' testimony that the Employer's requirement for a Certificate with the Canadian Society of Laboratory Technologists at the RT level means nothing. Although she originally applied for registration when she was hired in June 1986, she dropped her Certificate years ago without any consequences. Secondly, with respect to the requirement that applicants must have experience in all departments of the laboratory, both Ms. Brushett-Saunders, a Lab Tech II, and Angela Johnson, a Lab Tech 1, argue with some familiarity on the subject that the Employer's insistence on such experience for short term vacancies for the purpose of performing call is flawed as far as efficiency and practicality are concerned. Pointing to actual situations in the lab where temporary positions have been filled by fully qualified Lab Tech 1s, those witnesses insisted that, while an exceptional new temporary Lab Tech 1 might be able to do call after a minimum of 1 month orientation, most are initially incapable of performing call before 4 - 6 months. Therefore, the time and effort expended by other laboratory staff in training them sufficiently for that function

while also taking turns doing call during that time, makes job postings entirely impractical where vacancies as short as even 6 months are concerned. Both women strongly suggested that, although the collective agreement permits the Employer to post vacancies that are expected to exceed 16 weeks, it would make more sense to hire Ms. Pilgrim in such situations because the staff find that arrangement far less onerous to deal with. In their view, since Ms. Pilgrim is immediately able to perform the full function of a Lab Tech 1 in the Bacteriology Lab, except reading some test results, the remaining staff can tend to their own duties, including sharing call (as they have done on numerous other occasions when Ms. Pilgrim has been recalled), without the additional work involved in supervising a new employee during an extensive orientation period.

It was revealed that the successful candidate, Mr. Hussey, only did one call and was dismissed for incompetency on February 7, 2003. It was further revealed that Ms. Pilgrim worked in 2003 on January 13th, 14th 15th and 16th; January 30th and 31st; February 3rd and 4th; February 10th - 16th and thereafter full time in Bacteriology.

The Issue of the Job Competition

The Employer posted GP#3(jj) for a Lab Tech I position (Competition No. 02.94) on October 24, 2002 when an employee already relieving in that maternity leave position was required to take a "Meditech" course. At the time of posting, the duration of the position was to be from November 11, 2002 until mid-March 2003, a period which was generally referred to during the arbitration as 18 weeks. Angela Johnston spoke to Barbara Blake on Monday, November 18, 2002, to enquire why Ms. Pilgrim had not been awarded the posted position. During that conversation, she learned that the successful applicant would not be arriving until November 25th. The grievor

testified that she applied for the position but was told in mid-November 2002 that someone outside the bargaining unit had been given the position. Therefore, by the time Ms. Pilgrim grieved on November 21, 2002, she was aware that there would be 16 weeks in the vacancy if Mr. Hussey started on November 25th.

After a great deal of evidence on the issue of qualifications during arbitration proceedings, it was revealed that the Employer had not received any application from Ms. Pilgrim for the position in dispute. Obviously, if there had been no application from the grievor for the Employer to consider, there would be no point in dealing further with the issue of her qualifications for the posted position. Therefore, this became an essential issue. The Union's evidence was that, while Ms. Pilgrim was in New Brunswick, she received word from Angela Johnson that the position had been posted and that, in Ms. Johnson's opinion, she should apply for it. Ms. Pilgrim insisted that she applied by e-mail. Subsequently she said that she made application by contacting her sister in St. Anthony and asking her to apply on her behalf by e-mail (e-mail being a previously accepted method of applying). The Employer's records did not show that such an e-mail had been received and the grievor was unable to provide any copy or other proof of her application. Further evidence (see GP #3(a) to (m)) was led on a series of previous postings which revealed that Ms. Pilgrim did not apply for all previous posted vacancies (especially when she was to be otherwise employed during the periods involved). Therefore, the Employer saw no reason to contact her to see if she had applied for the position in dispute on this occasion. It simply assumed that she had not done so. As arbitration proceedings wore on, it became apparent that Ms. Pilgrim could not produce any corroborating evidence to support her claim that her application had actually been sent to the Employer. Since the burden of proof lies with the Union to establish on the balance of probabilities that the grievor did make an

application for the Employer to consider in this case, the fact that it had been unable to do so led the Union to withdraw its grievance that the Employer violated the collective agreement by failing to award her the position as it was posted.

The Employer's failure to recall the grievor when the period involved in the posted position changed from 18 weeks to less than 16 weeks.

Ms. Pilgrim agreed that, since she did not qualify for the posted position, she would not have grieved if its duration had remained at 18 weeks as it was initially intended. However, the successful applicant did not start work in the position until there were less than 16 weeks remaining. At that point, Ms. Pilgrim felt that the temporary vacancy no longer fell under Article 28.03(b). Rather she felt that the Employer should have recalled her as it has always done for vacancies of less than 16 weeks.

Mr. Scott Smith established that the Employer's decision to post the position in the first place was based on the expectation that the position would exceed 16 weeks. The posting occurred one week prior to its closing date of Friday, November 1st, 2003. The start date for the position was Monday, November 11th and the term was intended to continue until mid-March. The sole applicant, Mr. Hussey, did not apply until November 1st and it took a week for the Employer to contact his references and arrange a flight for him to come to St. Anthony for an interview. That interview was scheduled for and did take place on Thursday, November 14th. During the interview, the subject of a start date was discussed. Mr. Smith said that he needed Mr. Hussey right away. Mr. Hussey indicated that he would be able to start sometime during the following week.. On the basis of their discussions, the Employer delivered a formal written offer to Mr. Hussey at his hotel in St. Anthony on Friday, November 15th, viz:

Dear Mr. Hussey:

As a follow up to our recent conversation, I am pleased to confirm your appointment to the temporary, full-time position of laboratory Technologist I, at the Charles S. Curtis Memorial Hospital, effective as soon as possible until Dana Patey returns from maternity leave of absence. Please arrive in the Human Resource Department at 0830 hours on the first day of your appointment to complete the necessary documentation.

You will be directly responsible to Ms. Barbara Molgaard Blake. Your first three months of employment are considered probationary.

Salary is at the LX-26 Level, Step 4 at \$39, 343.00 yearly.

As a condition of employment you are required to participate in the Public Service Purchase Pension Plan and the Group Life Health Insurance Plan. We also offer a Dental Insurance and Long Term Disability Insurance which are optional.

As a member of the NAPE LX Bargaining Unit, you will work in accordance with that Collective Agreement. As well, you will work in accordance with our Human Resource Policies, copy enclosed.

Hours of work will be 70 hours bi-weekly. You will be required to work in all areas of the laboratory and will work days, evenings, weekends, and standby duty on a rotational basis with other staff.

Furnished accommodations will be available to you at a reasonable cost. You will need your own television, VCR and microwave, as these are not provided. Please note the GRHS Pet Policy, article 7.9 of the Human Resources Policies.

All staff joining this organization are required to have a health assessment. This will be completed when you visit Staff Health during your orientation.

Grenfell Regional Health Services will pay your transportation expenses from St. John's to St. Anthony. You will be responsible for your return travel.

To signify your acceptance of this position, please sign one copy of this letter and return to me.

We will be looking forward to having you back on staff.

Sincerely,

Scott Smith

Manager, Human Resources

The words “as soon as possible” were used because Mr. Hussey had not been able to give Mr. Smith a firm date when he would be able to report for work. The offer was verbally accepted by Mr. Hussey on November 15th and confirmed by facsimile to Mr. Smith on November 18th or 19th, at which time Mr. Hussey advised him that he had been unable to book a flight to St. Anthony until Monday, November 25th.

On November 18th or 19th, when he heard from Mr. Hussey that he would not be able to report until November 25th, Mr. Smith was aware that this meant that less than 16 weeks would remain in the position. Although he had the authority to tell Mr. Hussey on November 18th or 19th that the position was no longer his because the 26th was too late for him to report, and although he knew that Ms. Pilgrim was on layoff at that time, he did not recall her because he believed that Mr. Hussey had already been appointed as of November 18th or 19th. He also did not consider this situation to be a violation of the collective agreement because he had properly posted the position in accordance with Article 28.03. In other words, once he followed the collective agreement by posting in accordance with Article 28.03(b), he felt that he had no need to consider the greivor for recall.

Mr. Smith testified that Mr. Hussey had worked for the Employer previously in X-Ray in Flowers Cove. He also indicated that, although Mr. Hussey had not been working in the laboratory area for quite some time, he did not have to do a refresher course in order to obtain registration. When he was offered the job, Mr. Hussey successfully applied for registration. Mr. Smith indicated that he expected Mr. Hussey to do standby and call in the new position even though he realized some new laboratory employees might take from 2 to 6 months to be able to do so. Mr. Smith said that he had been told by Ms. Barbara Blake that standby has been performed by other new employees in 2 to

3 weeks. In his opinion Mr. Hussey would be able to perform those tasks. However, as matters turned out, Mr. Hussey did not measure up to the standards expected of him. Therefore, he was let go.

In an attempt to demonstrate that Mr. Smith and the Employer had no interest in resolving this dispute, counsel for the Union raised the issue of grievance mediation. While I appreciate that this topic struck a nerve that is rooted in the parties' poor labour relationship, I do not believe it would serve any useful purpose to deal with it at length here. Suffice it to say that, although the collective agreement requires grievance meetings at his level, Mr. Smith did not participate in such a meeting in this dispute because he determined that there was no violation and, therefore, there was no purpose in holding a grievance procedure meeting. Also, Mr. Smith confirmed that he had been aware of the Union's request for a government mediator to assist with the grievance, but it was the Employer's decision to proceed to arbitration instead.

Ms. Barbara Blake explained that Ms. Pilgrim would be recalled when Ms. Blake felt that the laboratory workload needed to be augmented. That situation might occur with one, two or three Lab Techs off. However, recall is not automatic. Because Ms. Blake is not experienced in the technology of the laboratory or X-Ray, the decision to recall is made after she takes advice from the laboratory employees and reports her findings to the Human Resources Department. Ms. Blake said that there frequently had been times in 2001, 2002 and 2003 when Technologists had been off but Ms. Pilgrim had not been recalled. No grievances were received by Ms. Pilgrim in those circumstances.

Ms. Blake explained that at no time has the grievor been recalled to work in the position of Lab Tech 1. She is not qualified for a Lab Tech 1 position. In other words, she is not qualified for any posting longer than 16 weeks. Her recall position has always been Laboratory Aide, now Laboratory

Assistant, and she has always been assigned to the Bacteriology Department. Usually, she has been required for periods of 12 -14 weeks of summer relief, but she has also been employed for significantly longer periods of time in the past few years.

Ms. Blake testified that there was a second meeting of the grievance procedure at Step 3 which was attended by the appropriate doctor, herself and Angela Johnson. She agreed however that there was no correspondence involved in setting up this meeting and it was never specifically described to Ms. Johnson as a Step 3 meeting.

ARGUMENT

The Union

The Union agreed that the position in dispute had to be posted initially because it was for more than 16 weeks, i.e., actually 18 weeks. However, when the position developed into one of less than 16 weeks, actually 15 weeks and 4 days, the Employer's failure to recall Ms. Pilgrim was arbitrary and discriminatory, though not deliberate.

There is no question of the grievor's qualifications and ability to work in the lab. Indeed she had worked there for 34 weeks in 2002 and 47 weeks in 2003 (since Mr. Hussey's departure in February 2003, she has worked constantly).

The position in dispute had been posted previously when the incumbent went on maternity leave. It was posted again for the second time when the person temporarily filling the position was asked to attend a training program. In the Union's view, there was no collective agreement requirement to post that position for the second time. Therefore, Ms. Pilgrim should have been

recalled simply because the work in the laboratory needed augmenting. In other words, it was her right to be recalled in those circumstances.

The Employer's evidence is that it expected Mr. Hussey to commence work on November 18th. When it was learned on the 18th that Mr. Hussey could not report for work until November 25th, it was poor logic and a great error for the Employer to assume that its obligations under the collective agreement had been met. Once Mr. Hussey could not meet the expected start date, the Employer should have advised him that the offer was no longer valid, and it should have recalled Ms. Pilgrim from layoff to cover the remaining period of the vacancy. The evidence clearly establishes that the grievor previously has been recalled in situations where work has been needed for less than 16 weeks. Indeed, Angela Johnson made that very suggestion to Barbara Blake when she became aware that Mr. Hussey would not be reporting until November 25th. Therefore, Ms. Pilgrim's rights under Article 30.01(a) were affected in this case because her job security did not increase in proportion to the length of her service. Her rights under Article 30.01(b) were also affected because she was a temporary employee on layoff who was entitled to be recalled for work she was qualified to perform. That she was qualified to perform the work required is not an issue. She has clearly demonstrated that on many occasions over the years.

In the Union's view, Article 1.01 - Purpose of Agreement has also been violated. A brief discussion between Ms. Johnson and Ms. Blake in the corridor of the hospital and a second meeting in a doctor's office without any notification to Mr. Ward of the Union or to the grievor, hardly constitutes an attempt at maintaining a "harmonious and mutually beneficial relationship between the Employer, the employees and the Union."

Article 1.05 - No Discrimination has also been violated because the grievor was discriminated

against on the basis of the fact that she was not recalled as an employee into her position as a Laboratory Assistant, a classification contained in Article 3 - Recognition.

The grievance procedure, Article 8.01, was also violated because there were no meaningful discussions on the issue in dispute. In this case, the Union even went the extra mile to establish a good relationship by suggesting government mediation of the grievance, but the Employer rejected the idea.

In support of its various positions, the Union submitted Brown & Beatty Para. 5:2300 The Requirement of *Bona Fides*, arguing that the Employer's right to fill vacancies is subject to the requirement that it not be exercised in bad faith, arbitrarily or discriminatory. Also, it argued that an employee's seniority should only be affected by very clear language in the collective agreement. Moreover, the decision of the Employer to deny the grievor her recall rights is subject to the standard of reasonableness (see Para. 6:3100).

In *Re Department of Career Development and Advanced Studies, supra*, a sufficient ability clause was in effect. The employer there posted the position and claimed that the grievor did not meet its qualifications. The arbitrator disagreed, saying that the grievor did have sufficient ability and, therefore, should have been recalled for the work involved. In the instant case, the Employer partly relied on its claim that the grievor did not have the laboratory experience to do standby and call, but at the same time accepted Mr. Hussey for the position knowing that he had no such laboratory experience either. Previous recalls have established Ms. Pilgrim's ability to do the work required in her position. Since Mr. Hussey could not report for work until the remaining term of the vacancy had been reduced below 16 weeks, the Employer should have recalled Ms. Pilgrim to her Laboratory Assistant position as it had done so on previous occasions and as it eventually did in

February 2003 when Mr. Hussey was dismissed for incompetence. (See also *Re Town of Paradise, supra*).

In *Re Charles S. Curtis Memorial Hospital, supra*, the Employer argued that the successful applicant was hired because he could do call, but the arbitrator challenged that point on the Employer's own evidence that new laboratory employees require from 2 to 6 months orientation and training in all departments before they can perform call. Since the successful candidate did not have that kind of experience and since this requirement had not been relied on in previous situations, the arbitrator found it unfair that Ms. Pilgrim should now be subject to job requirements that she had not encountered in the past. Finding little difference in work duties between that maternity leave vacancy and a summer relief situation, which the grievor had always managed to perform while other lab employees shared call duties, the arbitrator decided that the requirement for call was unreasonable and discriminatory. Therefore, had the position been posted without that requirement, the grievor would have been qualified and, because she was the most senior applicant, she would have been entitled to the job. In the instant case, the evidence indicates that the Employer could have posted for an 18 week Laboratory Assistant position rather than an 18 week Laboratory Technologist 1 position, in which case, the grievor would have been the successful applicant.

Every time the grievor sees a requirement for standby and call back in a 16 week plus job posting, she knows that she will not be successful if she applies. However, on the evidence presented, the vacancy in dispute turned out to be for less than 16 weeks. Therefore, Ms. Pilgrim should have been recalled as a Laboratory Assistant as she has always been.

Lamenting the parties' poor labour relationship and placing the blame for it squarely on the Employer's shoulders, counsel for the Union again suggested that a win-win result in this dispute had

been scuttled by an unwilling Employer. Since the Employer sees no reason to discuss issues with the Union in formal grievance meetings or in grievance mediation, the Union argued that future differences would automatically be put to win-lose arbitration. In the instant dispute, by insisting on an entirely unreasonable individual standard for Mr. Hussey's orientation period, the Employer once again abused its authority by causing Ms. Pilgrim's job opportunity to decrease in proportion to length of service, thereby violating Article 28.05(a) and (b).

Finally, the Union argued that it was a mistake of interpretation for the Employer to claim that it was already committed to Mr. Hussey even after the remaining term of the unfilled position was reduced below 16 weeks. The fact of the matter is that the Employer did not make the connection that the grievor had recall rights that should have been processed in this situation. The fallacy of the Employer's position can be seen in the scenario where Mr. Hussey might not have reported for work for 6 weeks. Would the Employer remain obligated to Mr. Harris then?

The Union acknowledged that the arbitrator will have to rely on existing collective agreement language in dealing with this grievance. However, whatever the disposition may be on this particular dispute, the Union's overriding worry is that the Employer has not yet accepted that reasonableness is the only thing that will ensure a mutually beneficial future for all concerned.

The Employer

This case is not about the posting of the job, or Mr. Hussey's or Ms. Pilgrim's qualifications. The issue is whether the Employer violated the collective agreement by not recalling Ms. Pilgrim after the job was posted and the successful applicant's reporting date was delayed until November 25th.

The Employer posted for the remainder of a maternity leave vacancy, a period from November 11th, 2002 to mid-March 2003. Mr. Hussey was interviewed on November 14th, was offered the job on the 15th and accepted it that same day. At that time, the Employer's clear understanding was that Mr. Hussey would start sometime in the week of November 18th. However, it was advised by Mr. Hussey on November 18th or 19th that he could not get a flight to St. Anthony until November 24th. Since a contract already had been effected on November 15th, it is irrelevant when Mr. Hussey reported for work.

The collective agreement requires only that the Employer shall post vacancies if they are expected to be more than 16 weeks. This vacancy was expected to be for 18 weeks. Therefore, the Employer posted it as it was required to do by Article 28.03. That does not constitute bad faith. There was no violation of any language of the collective agreement. Indeed, if the Employer had not posted that vacancy, it would have expected a grievance from the Union.

In its argument, the Union questioned whether the Employer had the right to post the position for the second time when the temporary incumbent left. Yet the Union offered no rationale why the Employer should not post the position again. In the Employer's view, if it had not posted the position the second time, the Union would have grieved.

There is no evidence of a violation of Article 28.03(a). Indeed, (b) says that (a) does not apply where a temporary position is expected to exceed a period of 16 continuous weeks. This position for a Lab Tech 1 was posted seven days prior to the closing date of November 1st. The expected duration of the position at that time was 18 weeks, a reasonable determination in those circumstances.. Therefore, 28.03(b) was not violated. What is expected might not actually occur if circumstances change. The Employer is not expected to foresee every eventuality. For example, a

posting might be made for a maternity leave for more than 16 weeks, but the employee concerned might return after only 14 weeks. It would be an absurdity if somebody were to grieve that the period of that vacancy was actually only 14 weeks and, therefore, that person should have been recalled. Clearly, Article 28.03(b) contains no remedy for such situations. Therefore, in the Employer's view, it has the right to determine the expected duration of the vacancy without penalty without incurring a penalty if the duration should subsequently change. When a vacancy exists, or when leave is taken, the Employer has the discretion whether or not to recall. The decision to recall is based on the need for an additional person to perform extra duties in the lab.

Article 4.01 establishes management's rights except where those rights are specifically abridged by express language in the agreement. In other words, the collective agreement would have to explicitly provide otherwise in order to fetter the Employer's right to post and fill the position and have the chosen Lab Tech 1 perform the duties of the position. There is no such fetter on the Employer's right to post the position in dispute. Hallsbury's Laws of England on interpretation as quoted in Brown & Beatty Para. 4:2000 hold that the intention must be gathered by the instrument itself as it is written, not by what was intended to have been written. In other words, the meaning must be sought in the express provisions of the collective agreement. In this collective agreement, Article 28.03(b) is clear. If a position exists for 16 weeks or less and there is a need for recall, the Employer would recall the grievor as it has done in the past. However, if the Employer's reasonable expectations are that the position will exceed 16 weeks, the position must be posted. There is no language requiring the Employer to recall if, for some unanticipated reason, the expected term of the position subsequently decreases below 16 weeks.

If the Union were to prevail in this case, the arbitrator's decision would mean that the

Employer should have cancelled the contract it made with Mr. Hussey and told him that he was no longer entitled to the job. There appears to be jurisprudence in *Brown & Beatty* at Para. 5:2526 on cancelling a posting prior to the position being filled, but nothing dealing with a situation where a posting has been cancelled after an applicant has been confirmed in a position. On balance, the Employer feels that the collective agreement did not require it to recall Ms. Pilgrim in these circumstances. Indeed, *Re Inglis Ltd., supra*, appears to suggest that such an action would be wrong. In that award, the Employer cancelled a posting after a person had been confirmed. At p. 152 the arbitrator wrote:

In my respectful opinion the situation that obtains once the decision on a job posting has been effectively made and communicated to the employee is one that is significantly different from that where the posting process is not yet been completed. The successful candidate is entitled to enjoy the benefits of the collective agreement that attach once he/she has been confirmed in the position. It, in my opinion, too late for the company at that stage to attempt to reverse the process.

In the instant case, the Employer was prevented from cancelling the job posting once it had confirmed Mr. Hussy in it. (See also *Re Corner Brook Pulp & Paper, supra*, where the arbitrator discusses at pp. 8-9 the concern for abuse of process associated with withdrawing a job posting).

In the result, the Union has not shown that there was a violation of the collective agreement in this case. In fact it agrees that the position in dispute was expected to be for 18 weeks. No grievance was filed on that point. Due to circumstances beyond the Employer's control, the Employer became aware that Mr. Hussey could not report for work at the appointed time. However, nothing in the collective agreement deals with that situation. Although the Employer agrees that it would recall the grievor if a position is expected to be 16 weeks or less, it wonders what the Union's position would be if the position happened to continue unexpectedly for another 18 weeks. Would the Union then grieve that the Employer should have posted it instead of recalling an employee?

Counsel for the Employer wondered what the Employer's liability would be if it had breached its contract with Mr. Hussey in this case and proceeded to recall Ms. Pilgrim. In her view, the grievor's recall would have exposed the Employer to liability.

In summary, there was no fetter on management's rights in this case. There is also no proof of malice or bad faith on the Employer's part. And there is certainly no proof that the grievor was discriminated against on any of the prohibited grounds contained in Article 1.05. All the Employer did was follow the collective agreement. It would be improper to read into the agreement the kind of fetter proposed by the Union. Therefore, the grievance should be denied.

Union Rebuttal

The collective agreement language in dispute was not negotiated in a vacuum. Article 28.03(b) does not exist all by itself. When the Employer takes an action, that action must be judged on all relevant and applicable clauses in the agreement.

The Employer incorrectly read Article 1.01 - Discrimination. The discrimination that occurred here was a matter of recall, which is mentioned in that Article.

The Employer had complete control over this situation. It is a fact that the Employer offered Mr. Hussey the job and gave him a confirmatory letter. However, the Employer did not ask him to sign the letter and did not compel him to report for work before the vacancy actually became one of less than 16 weeks, which would have then compelled the Employer to honour its collective agreement obligation to recall an employee. Ms. Pilgrim would have been that employee in this case. The fact of the matter is that Mr. Hussey accepted an understood reporting time and then reneged on it. In such circumstances the Employer was free to repudiate its offer without repercussions and to

recall the grievor, and it could have done so any time between November 15th and November 25th.

The Employer is quite wrong about there being nothing in the collective agreement requiring it to recall Ms. Pilgrim in this situation. That requirement is established by Article 30.01(b). There was work required to be done in these circumstances. Otherwise the Employer would not have posted the position. This posted position actually developed into a vacancy of less than 16 weeks. When that happened, the Employer's obligation was to recall. To ensure that the work would actually be done, the Employer should have assigned the duties of the vacant position to other staff in the laboratory and recalled Ms. Pilgrim as a Laboratory Assistant in accordance with past practice. On balance, the evidence demonstrates that the Employer completely failed to recognize the grievor's recall rights in these circumstances.

Management's rights do not come into play here. The collective agreement establishes what should have been done. This whole situation was entirely within the Employer's control. It had the reason and it had the time to repudiate its offer to Mr. Hussey and to honour Ms. Pilgrim's recall rights.

As for something unknown causing a position to be extended beyond 16 weeks, Article 28.03(b) clearly requires that the position must be posted. That is all there is to that situation.

Had the Union been consulted in these circumstances, a responsible decision might have occurred. As the matter stands, the Union takes the view that the Employer did not have to post this vacancy a second time as a Lab Tech 1 position. Rather it could have posted it as a Laboratory Assistant position.

Counsel for the Employer admitted that the Employer had a clear understanding from Mr. Hussey that he was to start work in the week of November 18th. In the Union's view, that is

doubtful. Obviously, Mr. Hussey waited until that start date to say that he could not honour it. Therefore, it is apparent that the Employer was totally unconcerned what happened in future once it made the job offer to him. By this method, the Employer can say in each case that it expects a vacancy to last more than 16 weeks and then, when only 10 weeks is actually the case, it can post again for a Lab Tech 1.

For all the foregoing reasons, the grievance should be upheld.

CONSIDERATIONS

The Alleged Violation of Article 1.01 - Purpose of Agreement

This allegation was not mentioned in the grievance form. In fact it was raised for the first time by counsel for the Union only in argument. In other words, it was an add-on by the Union at the last minute. I do not accept this allegation as properly captured by the expression “all other related articles.” In my view, where an allegation of a violation is capable of being associated with a specific Article of the collective agreement, the Union has the obligation to cite that Article in the grievance. By placing it unexplained and without description under the umbrella of “all other related articles” the Union is essentially claiming the right to conveniently ambush the Employer in arbitration.

Under the circumstances, I make no finding on this allegation. I only make note that each party here appears to have the very definite belief that it is the other side who is contributing negatively to its labour relationship.

The Alleged Violation of Article 1.05 - No Discrimination

This allegation was also not specified in the grievance itself. I see no reason why the Article

could not have been cited at that time – the issue was straightforward enough to associate with the Article. However, to his credit, counsel for the Union did specify this allegation in his opening statement. To her credit, counsel for the Employer recognized the straightforward nature of this allegation and did not object to it.

In my view, to prove discrimination for any of the listed activities, including recall, the Union would have to establish the reason as being for one of the prohibited grounds, namely, “age, race, creed, color, national origin, political or religious affiliation, sex or marital status, nor by reason of his/her membership or activity in the Union.” Whatever the Employer’s reason may have been for not recalling Ms. Pilgrim in these circumstances, I am satisfied that it had nothing whatsoever to do with any one of those prohibited grounds. Therefore, I find no violation of Article 1.05 in these circumstances.

The Alleged Violation of Article 8.01 - Settling of Grievances

This is another example of an allegation conveniently hiding under the umbrella of “all other related articles.” In contrast to the Article 1.05 issue, this particular matter was not raised by counsel for the Union in his opening statement. Rather it was formally raised as an alleged violation only in final argument. Essentially, after hearing Mr. Smith admit during the hearing that he saw no reason to attend a particular grievance meeting, the Union added this allegation at the last moment to see if it would stick. Under the circumstances, I would not normally consider the issue properly before me. However, since both sides debated the merits of the issue, I will answer the allegation.

As I understand it, the Union’s claim is that the Employer did not follow the grievance procedure as it is prescribed by the collective agreement because the Step 2 meeting with Barbara

Blake occurred in an *ad hoc* fashion and there was no Step 3 meeting because Mr. Smith did not attend. Ms. Blake's evidence is that the Step 3 meeting was attended by the appropriate program doctor, herself and Ms. Johnson. Counsel for the Union objected that neither the grievor nor Mr. Ward was notified of this meeting. Also, Ms. Johnson was an inexperienced shop steward at the time.

Step 3 requires that the employee and shop steward or the shop steward alone (if the employee wishes) may submit the grievance to the permanent head and, thereafter, the permanent head shall meet with the shop steward in an effort to settle the grievance. There is no requirement for either the grievor or the Union's Employee Relations Officer to be present at that meeting and, therefore, no requirement that they be notified of such a meeting. In this case, no evidence was led on whether the doctor involved was the permanent head, but the suggestion in argument was that Mr. Smith should have attended that meeting. Therefore, the suggestion appears to be that the Union considered Mr. Smith to be the permanent head.

Assuming for a moment that Mr. Smith was indeed the permanent head and that he did not attend the Step 3 meeting as required, his failure to do so would have constituted a violation of Article 8.01 Step 3. Under the circumstances, that issue would have been a grievable matter at the time that it occurred. Yet the Union did not grieve it then. The appropriate remedy, if it had been grieved in a timely manner and brought to arbitration, would have been an order for the Employer to comply with Step 3, thereby ensuring that the full value of the grievance procedure had been realized. However, since the Union chose to proceed to arbitration on Ms. Pilgrim's particular complaint, and since the Union waited until the end of this arbitration proceeding to raise the Article 8.01 issue for the first time, an order for the Employer to comply with that Article would no longer be appropriate.

No meaningful remedy would be available at this point. Therefore, I award none.

The Alleged Violation of Article 28.03 - Job Postings

By her own testimony, Ms. Pilgrim agreed that, since she knew that she did not qualify for the posted position, she would not have grieved if its duration had remained at more than 16 weeks as it was originally intended. The evidence also indicated that Ms. Pilgrim was unable to substantiate that she applied for the posted position. In my view, this means that the grievor did not intend to challenge the job posting itself, including the qualifications that were sought for Lab Tech 1, as long as the vacancy exceeded 16 weeks. In other words, Ms. Pilgrim's sole grievance issue is that she should have been recalled to the position of Laboratory Assistant once the period of the vacancy appeared to be 16 weeks. Despite this frank admission by the grievor, the Union unilaterally expanded the grievance issues to include 1) the posting itself, i.e., a second posting should not have been made for a position previously posted; 2) the posting should have sought a Laboratory Assistant rather than a Laboratory Technologist 1 and 3) the qualifications themselves, i.e., there should have been no requirement for standby.

While I understand the Union's longstanding view that Ms. Pilgrim has not been treated fairly by the Employer for many years, and I understand that the Union takes every opportunity to argue that issue, I am satisfied that its expansion of this particular grievance beyond that intended by the grievor herself is unjustified. The fact that an arbitration proceeding is scheduled to hear one issue involving the grievor, i.e., a recall issue, does not mean that the Union can use that forum to introduce additional issues that the grievor herself did not grieve.

It should be noted also that no timely grievance was filed by the Union on the posting itself.

If the Union believed that this second posting was not permitted by the collective agreement, or the wrong classification was sought on the posting, or the posting's requirements were improper, the time for the Union to challenge that was when the posting was made in late October 2002. That did not happen. Instead, the Union chose to wait until an arbitration board was convened to deal with Ms. Pilgrim's grievance on her recall rights before it decided to dispute the posting itself.

For all the foregoing reasons, I decline to consider whether there was a violation on the issue of a second posting, or that the posting sought a Lab Tech 1 instead of a Lab Assistant, or on the issue of the qualifications required in the posting.

The Allegation of Violation of Article 30.01 - Layoff and Recall Procedures.

On the one hand, the Union agrees that temporary vacancies of more than 16 weeks are required to be posted by Article 28.03(b). However, the Union's essential position is that, when a posted position cannot be filled before it develops into a vacancy of 16 weeks or less, then a laid off employee should be recalled. On the other hand, the Employer's essential position is that, once a position is properly posted and a successful applicant is confirmed in the position but subsequently cannot report for work until there are 16 weeks or less remaining in the vacancy, it has no obligation to fill the remaining period by way of recall.

As a matter of interpretation of Article 28.03(b), it is clear that the Employer must post temporary vacancies which are "expected to exceed" a period of 16 continuous weeks as well as positions "exceeding" 16 weeks. The Employer identified a temporary vacancy of more than 16 weeks and posted it as it believed it was required to do by Article 28.03(b). There is no dispute that the expected duration of the vacancy was to be more than 16 weeks. Indeed, a period of 18 weeks

was generally referred to by all concerned. Therefore, I take no issue with the propriety of the job posting when it was made..

The evidence is that no interview could be arranged with the sole applicant for the advertised position until November 14th, which was three (3) days after the date the Employer originally intended to have the job commence. Although Mr. Hussey did not apply until the last day of the advertisement, November 1st, a Friday, it seems passing strange that it should take another 13 days to check one person's references and conduct an interview. Obviously, it was open to any applicant to apply on November 1st. Yet it seemed to be the Employer's expectation that a successful applicant could have been identified, processed through an interview and possibly able to give sufficient notice to his/her current employer that he/she was leaving employment to take another position by November 11th. That hardly seems like ample time to allow a prospective employee to report for work in time to fill the entire period expected. Nevertheless, since I do not know the reasons for it I will not interfere in the Employer's choice of time constraints in this case.

It appears that the understanding reached between Mr. Hussey and Mr. Smith on November 15th was for Mr. Hussey to start work during the next week, by all accounts that meant Monday, November 18th or Tuesday the 19th. However, it was on one of those days that Mr. Hussey contacted the Employer to say that he could not get a flight until November 25th. By my reckoning (counting the first day and the last day of the vacancy) if Mr. Hussey had started on Monday, November 18th, the remaining period of the temporary vacancy would have been 17 weeks and 1 day *assuming that the vacancy would end on Monday, March 17th*. Therefore, with the same assumption of Monday, March 17th being the ending date, if Mr. Hussey were to start one week later on November 25th, the remaining period in the vacancy would have been exactly 16 weeks and 1 day. The following table

describes the foregoing scenarios:

Position Start Date	“Assumed” Finish Date for the Position	Exact Time Remaining in the Vacancy
November 11, 2002	March 17, 2003	18 weeks and 1 day
November 18, 2002	March 17, 2003	17 weeks and 1 day
November 25, 2002	March 17, 2003	16 weeks and 1 day

According to Article 28.03(b) a position is subject to posting if it is expected to exceed 16 weeks. Each of the foregoing scenarios exceeds 16 weeks, including the start date of November 25th, which according to Ms. Pilgrim’s evidence, was the date she was told that Mr. Hussey would be starting. It is arguable that this date was in fact his effective start date because he arrived that day and took up residence at accommodation arranged by the Employer. Only if one considers Mr. Hussey’s first day at work, i.e., November 26th, to be the effective start date can the remaining period be said to be exactly 16 weeks, again *on the assumption that March 17th was the end date*.

Obviously, the foregoing table would change if the assumption was that the last day of the vacancy was March 16th or March 15th. For March 16th, it would read:

Position Start Date	“Assumed” Finish Date for the Position	Exact Time Remaining in the Vacancy
November 11, 2002	March 16, 2003	18 weeks
November 18, 2002	March 16, 2003	17 weeks
November 25, 2002	March 16, 2003	16 weeks

For March 15th, it would read:

Position Start Date	“Assumed” Finish Date for	Exact Time Remaining
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	the Position	in the Vacancy
November 11, 2002	March 15, 2003	17 weeks and 6 days
November 18, 2002	March 15, 2003	16 weeks and 6 days
November 25, 2002	March 15, 2003	15 weeks and 6 days

The question of course is whether the exact end date was sufficiently specified by the job posting to establish either March 15th, 16th, or 17th or any other exact date for that matter. The answer is no. On balance, I am also satisfied that such precision cannot be presumed by witnesses' general references to an 18 week or a 16 week position. In my view, those references were simply a convenient way of describing the approximate length of the vacancy.

Nowhere in the detailed job posting (GP#3(j)) or the abbreviated advertisement (GP#3(jj)) is there any reference to the temporary vacancy having an expected term of precisely 18 weeks. The expression used is "until mid-March 2003." Not even in the Employer's November 15th written offer of employment to Mr. Hussey, is 18 weeks mentioned. In that letter, the duration is expressed as "effective as soon as possible until Dana Patey returns from maternity leave absence." A quick look at Article 19 - Maternity, Adoption and Paternity Leave, especially Articles 19.01(c) and (e), indicates that the parties recognize that maternity leave expectations do not lend themselves to precision. Clearly, the parties contemplate requests for leave extensions even beyond 52 weeks, which may not be unreasonably denied. Although somewhat different than the period expressed in the posting, Mr. Hussey's written offer of employment appears to be a practical indication of the length of employment he should have been prepared for. Clearly, whether Ms. Patey should return from maternity leave earlier or later than initially intended, Mr. Hussey was put on notice that his term of employment would cease. Obviously, that could result in a term of less than or more than 16

weeks.

In my view, it would be folly for the Employer to post or advertise a maternity leave position for an exact number of weeks, because there is no way for the Employer to know exactly how long the actual period of leave will turn out to be. In the posting at issue, the Employer expressed “mid-March” as the end of the expected vacancy. In my view, “mid-March” places a greater restriction on the Employer than Mr. Hussey’s letter does in the event that the incumbent’s leave is subsequently reduced or extended. Nevertheless, what is contained in the job posting is a reasonable approximation based upon the Employer’s understanding of when the incumbent intended to return to work. It was not, however, a commitment to the exact date of March 17th. The only significance of that date is that it is a Monday, and it matches the same day of the week as the start date of November 11th.

If “mid-March” should be narrowly construed to be Saturday, March 15th, then there never was a full 18 week vacancy in the first place. The Union has described the remaining portion of the position as 15 weeks and 4 days, which can only be calculated by choosing a start date of November 26th and an end date of March 14th (yet another suggestion for “mid-March”). Yet the Union did not refer to the original vacancy as being 17 weeks and 4 days. Rather it consistently referred to 18 weeks as the relevant period. Clearly, the only way the Union can adopt two different lengths for the same period of this vacancy is to vary the end date from exactly March 14th to exactly March 16th. As I see it, the Union’s speculation on a range of end dates lends credence to the view that there was no exact end date to rely on when the grievance was filed. In my view, the various references used throughout the hearing to a vacancy of an exact number of weeks are simply approximations. They are not precise because no precise ending date is contained in the posting itself. And the reason there

is no precise ending date in the posting is to assure a reasonable degree of flexibility so as to accommodate the return of an employee within a range of a few days prior to or after her maternity leave is expected to expire.

On balance, I am satisfied in these circumstances that the remaining length of the vacancy based on a start date of November 25th or even November 26th did not unequivocally establish a period of 16 weeks or less. The words “mid-March” made allowance for flexibility in that regard such that the end date was not specified. Depending on the incumbent’s actual return from maternity leave, the relevant period might have been more, or it might have been less. Therefore, at the time of the grievance, a precise claim that the remaining period of the vacancy was 16 weeks could not be supported. For that reason, I would find no violation of Article 30.01(b).

The whole notion of what rights and entitlements prevail if a posted temporary vacancy is not filled before its remaining term becomes 16 weeks or less appears to be new territory for the parties. As a matter of interpretation, it is my view that a vacancy must exceed 16 weeks to be posted. If a vacancy period of 16 weeks or less is identified and the Employer wishes a particular vacancy to be filled, it must activate the recall provisions of the collective agreement if any one is on layoff and is qualified to perform the work required. The function of identifying the length of a particular vacancy has been fairly straightforward in the past. The decision to post or not to post simply depended on whether an initial vacancy exceeded 16 weeks duration. However, the identification of a 16 week or less vacancy has never been made as a function of watching a posted position continue to be unfilled until the remaining period is reduced to 16 weeks or less.

When a temporary vacancy is appropriately posted, the Employer’s responsibility is to ensure that a qualified candidate fills the position while the period of the vacancy still exceeds 16

weeks. If that does not happen, the vacancy then becomes one of 16 weeks or less. This is not a matter to be lightly dismissed because it seems to split hairs over a day or two. Rather, it is a matter of collective agreement obligation. The agreement makes no allowances when it distinguishes between temporary vacancies in excess of 16 weeks and those of 16 weeks or less. No matter how little time separates them, those two types of vacancies are mutually exclusive and a separate set of rights apply to each of them. When a temporary vacancy in excess of 16 weeks is not filled during the period it still exceeds 16 weeks, it becomes by default, a temporary vacancy of 16 weeks or less, which is then subject to the recall provisions of the collective agreement. This does not mean that the original posting is cancelled; it simply means that the vacancy ceases to be one that is subject to further posting. It also means that no applicant for the posting who was offered the position earlier can begin to fill the vacancy at that late date. The Employer simply does not have the luxury to wait for the successful candidate to report for work in those circumstances. If the Employer wants the relevant work performed, it is required by Article 30.01(b) to proceed by way of recall. And if it does not do so, a laid off employee will have every right to grieve violation of that Article.

I am aware that, if the Union had been able to establish the exact ending date for the vacancy in dispute and that such date actually created a temporary vacancy of 16 weeks or less, the Employer might have had to face liability issues because of its offer to Mr. Hussey. However, it must be realized that no arrangement with a job applicant, be it a contract in law or something less, can serve to nullify or supersede a collective agreement provision requiring the application of Article 30.01(b).

If the Employer, by formal offer or other assurances to an applicant, opens itself to liability because it has created a conflict with the application of Article 30.01(b), then so be it. Article 30.01(b) prevails. It is the Employer's responsibility to avoid creating liability situations for itself in the first place. For example, the Employer might consider limiting its potential liability in such matters by

advising applicants in their written offers that their contracts may be repudiated if they fail to report for work by a certain date. Obviously, such a date should be chosen to ensure that the remaining term of the vacancy does not become 16 weeks or less. There may be other means of limiting liability as well, but I think that a legal consult would be a good idea at this point.

If this was a situation, as the Union has expressed concern might happen, where it could be established that the Employer fabricated a false vacancy period of more than 16 weeks so that it could unreasonably avoid the recall procedure for the grievor, I would have no hesitation in declaring a violation of Article 30.01(b). However, I am satisfied that there was no ulterior motive or surreptitious conduct on the part of the Employer in these circumstances. Everybody concerned knew the individual who was on maternity leave and they had a reasonable idea when she was due back to work. In my view, there was general acceptance that the expected term of the original posting was legitimately estimated to be in excess of 16 weeks. No fictitious time period was fabricated and there was never an intent to deny Ms. Pilgrim laboratory work materializing from a true vacancy of 16 weeks or less. Essentially what happened was that the situation almost, but not quite, developed into one where the Employer would have been required to give effect to the grievor's recall rights. In that case, the evidence suggests that, if the Employer wanted the relevant laboratory work done, the most likely scenario would have been to recall the grievor to a Laboratory Assistant position in the Bacteriology department and reassign the various duties of the vacant position to other laboratory employees.

Bluntly put, this was a narrow escape for the Employer.

DECISION

On the basis of the evidence and by the foregoing considerations, I find:

- 1) that Article 1.01 - Purpose of Agreement was not reasonably captured under the umbrella expression “all other related articles.” Therefore, I decline to make a finding on its alleged violation.
- 2) that there was no violation of Article 1.05 - No Discrimination.
- 3) that, on the assumption that Mr. Smith was the permanent head mentioned in Step 3, Article 8.01 - Settling of Grievances, his failure to attend the Step 3 meeting would have constituted a violation of this clause. However, no remedy is awarded.
- 4) that since the grievor’s evidence is that she would not have grieved unless the position became a 16 week position, the issues of a second posting, that the posting sought a Lab Tech 1 instead of a Lab Assistant, and that the qualifications listed in the posting were improper, all were added to the dispute by the Union, none of which were related to the issue of recall and, therefore, are not captured by “all other relevant articles.” Therefore, I decline to consider them for possible violation.
- 5) that “mid-March” is an approximation for the end of the vacancy in dispute and it does not necessarily mean exactly March 15th or March 17th or any other specific date for that matter. The Union has not established that the remaining period of the vacancy in dispute became 16 weeks or less when the successful applicant failed to report for work until November 25th or 26th, 2002. Therefore, I find no violation of Article 30.01(b) in these circumstances.
- 6) that the situation almost, but not quite, developed into a 16 week or less vacancy where the Employer would have been required to give effect to the grievor’s recall rights.

For all the foregoing reasons, the grievance is denied.

Respectfully submitted as the decision of the arbitrator.

Dated at Mount Pearl, Newfoundland, this 27thday of September 2004.

David L. Alcock
Sole Arbitrator