6-18-1993

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

Innis Christie

John Staple

Charles S. Rennie

IN THE MATTER OF AN ARBITRATION:

BETWEEN:

MEMORIAL UNIVERSITY OF NEWFOUNDLAND FACULTY ASSOCIATION

(The Union)

and

MEMORIAL UNIVERSITY OF NEWFOUNDLAND

(The Employer)



RE: Grievance Nos. I-91-19 and 22, Hartman, Karagianis, Klas, Nesbit and Treslan; Denial of Leave Without Pay and Transfer of Pensionable Service, Faculty of Education

BEFORE: John Staple, Union Nominee
Charles S. Rennie, Employer Nominee
Innis Christie, Chair

HEARING DATES: January 18 and 19, 1993

AT: St. John's, Newfoundland.

FOR THE UNION: Howard Snow, Counsel
Noel Roy, Chair, Academic Freedom and Grievance Committee, MUNFA
Marian Atkinson, Executive Officer, MUNFA

FOR THE EMPLOYER: Augustus G. Lilly, Counsel
J.E. Strawbridge, Director of Faculty Relations

DATE OF AWARD: June 18, 1993

Individual grievances alleging breach of the Collective Agreement between the parties for the period April 1, 1988 - March 31, 1991 in that the Employer violated Article 1.5.1 and other relevant articles in denying the Grievors leave without pay for the purpose of working in the school system to become eligible to get pensionable service credit, and in denying them the right to transfer pensionable service purchased by them into the Teachers' Pension Plan when they were employed by the Employer.

The Union, on behalf of the Grievors, requested that the Employer be directed to allow the transfer to the Employers' pension plan of the pensionable service credit purchased

by the Grievors, or at least to grant the retroactive leave without pay which was requested to achieve that end.

At the outset of the hearing in this matter counsel for the parties agreed that this Board of Arbitration is properly seized of it, that we should remain seized after the issue of this award to deal with any matters arising from its application, and that all time limits, either pre- or post-hearing, are waived.

AWARD

The complex issues before this Board of Arbitration are stated as succinctly as they can be in the reply at step one of the grievance procedure by Dr. J.E. Strawbridge, Director of Faculty Relations for the Employer:

> I refer to grievance Nos. 1-91-19 and 1-91-22 wherein Dr. B. Hartman, Dr. L. Karagianis, Dr. L. Klas, Dr. W. Nesbit, and Dr. D. Treslan, Faculty of Education, allege that the University has violated the Collective Agreement between the University and the Faculty Association by denying them leave without pay for the purpose of working in the school system to become eligible to get pensionable service credit for University education and denying them the right to transfer pensionable service in the provincial Teachers' Pension Plan while they were still employed at the University. ...
>
> While it may be true that some people in the past have taken advantage of an unusual provision allowing teachers to credit their undergraduate years as pensionable service (a practice instituted many years ago to increase the supply of teachers), the University stopped this practice approximately two years ago when we learned that it was illegal to belong to two pension plans at the same time. As far as I can tell, the grievors accepted this view by applying for retroactive leave without pay in order to retroactively step out of the University's pension plan while participating in the Teachers' Pension Plan.
>
> The Board has never granted retroactive leave without pay to anyone and is therefore not acting in a discriminatory fashion with respect to the grievors. ...

The basis of the grievances is that in denying the Grievors the right to transfer pensionable service in the teachers' pension plan and in denying them the leave without pay that would have enabled them to take advantage of these special provisions in the Newfoundland legislation the Employer acted unfairly, inequitably or unreasonably, in breach of Article 1.5.1 of the Collective Agreement, which provides:

> 1.5 MANAGEMENT RIGHTS
>
> 1.5.1 The Association recognizes that all rights, powers and authority which are not specifically abridged, delegated or modified by this agreement are

vested in the University. The University shall exercise such rights, powers and authority in a fair equitable and reasonable manner.

With respect to the leave application Article 9.10.2 is also relevant, although it does not appear to add to the grounds upon which the Grievors can base their grievances:

> 9.10 SPECIAL LEAVE WITHOUT PAY
>
> An Academic Staff Member may receive leave for appropriate purposes without pay on terms negotiated between the Academic Staff Member and the University. The Association shall be informed of such cases.
>
> 9.10.2 The Dean, or equivalent administrative officer, shall respond to an application for such leave within a reasonable period. Applications shall not be unreasonably denied.

According to the Union, the question for this Board of Arbitration is whether, in our judgement, the Employer did act unfairly, inequitably or unreasonably either in denying the Grievors the right to transfer their pension credits or in denying them the retroactive leave without pay in question. In the Union's submission the Employer was obligated by the Portability of Pensions Act of Newfoundland, R.S.N. 1990, C. P-17 to transfer to its pension plan the Grievors' credits for pensionable service under the teachers' pension plan and had no discretion in that.

Mr. Snow, Counsel for the Union, also emphasized that the Employer treated the Grievors differently than it had treated other members of the Faculty of Education, refused to go along with a compromise arrangement which had been accepted by the Grievors after it was proposed by the Employer's Director of Human Resources, acting on legal advice, and did not treat their case fairly in procedural terms.

Mr. Lilly, Counsel for the Employer, stressed that s. 7 of An Act Respecting a Pension Fund for the Memorial University of Newfoundland, R.S.N. 1990, C. M-8, provides that the Board of Regents of the Employer holds the pension fund in trust. It is, therefore, he submitted, "a statutory trustee" and in that capacity has overriding duties to all those persons covered by the pension plan. There are some three thousand employees covered by the Employer's pension plan, about nine hundred of whom are members of the Union.

Mr Lilly submitted that the decisions of the Board of Regents in its capacity as trustee are not subject to review by this Board of Arbitration, that the Portability of Pensions Act does not require the transfer of the pension plan credits for pensionable service under the teachers' pension plan here in question, that the Board of Regents made the decisions challenged here on the recommendation of a broadly based University Pension Committee, and that in accepting that recommendation it did not act in a manner that was other than fair, equitable and reasonable.

There are factual differences among the five Grievors, but the parties agreed that all five should be treated the same.

We received thirty-three documents in evidence and heard the testimony of four witnesses; the Grievors Dr. L. Karagianis and Dr. D. Treslan, Ms. Glenda Willis, the Employer's Manager of Benefits, and Mr. Wayne Thistle, Vice-President Finance and Administration and Legal Counsel for the Employer.

The Facts: The Portability of Pensions Act provides that the pensionable service under the Teachers' Pensions Act is transferable to the Memorial University of Newfoundland pension plan. The Teachers' Pensions Act has, since 1962, had a special provision apparently intended to encourage more people to go to university to become teachers. It allows anyone who worked in any public school system in Newfoundland to count his or her years of university education as pensionable service, by "buying" those years at what would have been the rate of contribution had that person been making a nominal minimal teaching salary at the time he or she was in university. Until the Act was amended, effective May 31, 1991, this purchase of four years of pensionable service was interest free. It was allowed to be done retroactively, and many people took advantage of it because, obviously, pension rights could be considerably enhanced at low cost.

In some cases this first proved possible or convenient after the "buyer" had ceased to work in the school system and had moved to employment with a pension plan to which such years of "service" were portable by virtue of the Portability of Pensions Act. It was perfectly legal for such a person to "buy" his or her university time under the Teachers' Pensions Act and then move it to his or her current pension plan.

This is underlined by a notice, which is in evidence, circulated by the Employer's Director of Personnel in October of 1984 explicitly drawing the attention of "all Faculty and Staff" to the following Memorandum from the Deputy Minister of Education, and inviting them to contact the Manager of Benefits, should they have any questions:

> MEMORANDUM TO
> DEPUTY MINISTERS, AUDITOR GENERAL.
> GOVERNMENT AGENCY/CROWN CORPORATION HEADS
> AND SCHOOL BOARD SUPERINTENDENTS
>
> FORMER TEACHING SERVICE
> UNDER TEACHER' PENSIONS ACT
>
> Reference: Amendment to Teachers' Pensions-Chapter 16 of 1984 - 18 May 1984
>
> The amendment at Reference will now permit members of Government sponsored pension plans who were former teachers in the regular school system to repay any withdrawn teachers' pension premium and/or if necessary, to

> purchase their years of teacher training at university. This option has, however, a time limit imposed....
>
> Those Department/Agency. etc. employees wishing to apply for this benefit should write:...

Mr. Wayne Thistle, the Employer's Vice-President Finance and Administration and Legal Counsel, testified that through the 1980's, before under-funding of pension funds became apparent, the general approach had been to encourage people to "buy" as much unworked service as they legally could because it enhanced their pensions and opportunities for early retirement. He himself had taught school before taking employment with the University and freely acknowledged in the course of his testimony that he had taken advantage of this opportunity, as had, apparently, many former teachers at the University and in government positions. The time limit referred to in the memorandum quoted was subsequently removed.

Obviously, this low cost enhancement of pension rights by some four years of university study time exacerbated under-funding, of which the teachers' and other pension fund trustees, including the Board of Regents of the Employer, were becoming painfully aware by the end of the 1980's. A consultant's report from the Wyatt Company was put in evidence, suggesting that on November 27, 1990 the Employer had very explicit information on how badly under-funded its pension fund had become. Vice-President Thistle testified that the Employer had a very good idea in the preceding weeks, if not months, of just how bad this news was going to be.

One of the Grievors, Dr. Karagianis, testified that the cost of "buying" his university study time was $640. When it was suggested to him in cross-examination that the actuarial value of what he had attempted to purchase would have been in the range of $50,000 he said he had no idea about that; but acknowledged that he would have had a very good bargain. Dr. Treslan also acknowledged this undeniable fact. Actuarial calculations subsequently introduced into evidence confirmed that the value of what was sought to be "bought' by the grievors ranges from a value of $36,000 in Dr. Hartman's case to $52, 159 in Dr. Karagianis'.

In the 1980's several members of the Employer's Education Faculty added a new wrinkle to the purchase of pensionable service credits under the teachers' pension plan. People who had worked in the Newfoundland school system but had had a break in the continuity of their employment in jobs covered by the Portability of Pensions Act were not, on the face of it, eligible to "buy" their teaching time back into the teachers' pension plan and transfer it to the Employer's plan. However anyone who worked in the Newfoundland school system for as little as ten days could become a member of the teachers' pension plan, and would then be eligible to do so. They, therefore, arranged to work in the school system when the University was not in full session or during sabbaticals, on assignments undoubtedly appropriate to their expertise, for at least the required period. They then "bought" their previous teaching time and their university study time into the Teachers' pension plan and transferred it all to the Employer's

pension plan. There was, apparently, nothing secretive about this, and it was regarded by all who knew of it as quite legitimate.

Clearly, in these cases the time worked in the school system while employed by the Employer was double counted for pension purposes. That is, the ten days counted for both the teachers' pension plan and the Employer's pension plan.

This was the state of things when, in the period from 1987 to 1989, each of the Grievors sought to take advantage of these possibilities. None of them had ever worked in the Newfoundland school system, but all had university teacher education which could be "bought" into the teachers' pension plan if they worked for the required ten days in the Newfoundland school system. Each of them arranged to do that.

It is to be noted that Dr. Karagianis was the first of the Grievors to try to take advantage of this arrangement, and that he was the Dean who approved the leaves of the other four for this purpose. He testified that he saw this as an arrangement that was to everybody's advantage; the faculty member enhanced his pension while gaining experience and making contacts that made him more valuable to the Faculty and at the same time benefiting the school board for whom he worked temporarily, perhaps doing a project that required a high level of expertise.

As members of the Faculty of Education the Grievors would have had normal professional contact, and probably personal friendships, with school system administrators in St. John's and elsewhere in Newfoundland. Opportunities to work in the school system were, apparently, not hard to find, especially since the level of remuneration was of little consequence. They did have to get certification to teach in Newfoundland.

Dr. Karagianis' obviously frank and truthful narrative with respect to how he got involved, while at an educators' conference, in this attempt to "buy" his university study time was an excellent example. He was told by a government official that if he did not do so he was passing up a good opportunity, and people who were interested in hiring him for a short period were close at hand.

Dr. Treslan testified that he first got involved because he was trying to find a way to get pensionable service credits for teaching in other parts of the country. Credit for his university study years was an add-on. That, however, and not credit for teaching time elsewhere, is the subject of these grievances.

We are not suggesting that the work done in the school system was, in respect of any of the Grievors, not valuable or otherwise illegitimate; but it is clear that the motivation for doing it was to qualify to "buy" their university education time. Dr. Karagianis testified that before spending time in the school system he had talked to "someone" in Human Resources without identifying himself, and that his inquiry had been treated as routine.

Acting with this sort of general advice from the Employer's Department of Human Resources, each of the Grievors "bought" his university education years into the teachers' pension plan. We note here that this much was accomplished with no objection from anyone.

Each of the Grievors then attempted to transfer those years of pensionable service into the Employer's plan. They were first formally informed that their requests could not be processed by letter of May 18, 1990 from Glenda Willis, Manager of Benefits. They were told that, although they had worked the required ten days to qualify for membership in the teachers' pension plan, there was a problem. They were told that the matter was under review.

The Grievors' situation differed from that of colleagues who had previously "bought" their university study time after taking short term employment in the school system because they had never previously taught in the Newfoundland school system. Ms. Willis had become Manager of Benefits in August of 1987. She realized, and brought to the attention of Tony Dearness, who was then the Employer's Director of Human Resources, the fact that there might be a legal problem in crediting employees with pensionable service for two different employers for the same period. That was what had been happening when people on the Employer's payroll went on some special assignment in the education system to get the ten days employment that would allow them to "buy" their university study time. At her suggestion legal advice was taken on the issue and it was discussed with relevant government authorities. Eventually it was concluded by the Employer's legal advisors that by reason of Revenue Canada regulations, if for no other reason, the effective double counting involved was illegal.

According to Ms. Willis, it has since been also put into a Provincial regulation pertaining to the University that there can be no such double counting. At the relevant time Provincial law made it clear that such was the case for the public service but there was nothing explicitly applicable to the University.

The Grievors knew of this on-going consideration of their situation and asked Tony Dearness about it. Informally he continued to be reassuring to the Grievors, saying he was sure they could come up with a solution favourable to them, although he made no precise promises.

On September 21, 1990, the five Grievors brought their cases together when they jointly wrote the following letter to Mr. Dearness:

> We, the undersigned, have previously requested your office to have four (4) years of purchased University Degree Service covering four years (4) of university training transferred from the Newfoundland Teachers' Pension Fund to the Memorial University Pension Fund and credited to our respective pension time at this institution. We are aware of the favourable resolution of similar requests in this regard. Therefore might this letter serve as our formal request for you to initiate an expeditious resolution to this matter.

Some six months later, under date of November 23, 1990, each of the Grievors received the following letter signed by Tony Dearness:

> Your request to have pensionable service under the Education (Teacher's Pension) Plan transferred to the Memorial University Pension Plan has been under consideration for some time. The situation has required lengthy consultation with the Teacher's Pension Division and the Department of Justice of the Provincial Government.
>
> The University is unable to transfer in pensionable service for a period which already has pensionable service credit under The Memorial University (Pensions) Act; Teachers' Pensions is unable to transfer out a partial period of pensionable service (the undergraduate education training cannot be recognized without the qualifying teaching period.)
>
> In an attempt to favourably resolve the outstanding requests, the University sought a legal ruling on this matter. The conclusion is as follows:
>
> 1) According to University policy, leave without pay which would allow an employee to opt out of the Memorial University Pension Plan must be at least one month.
>
> 2) An employee who was employed by a school board as a replacement or substitute teacher must apply for leave without pay for a minimum of one month and, may then elect to opt out of the Memorial University Pension Plan for this period. The Director of Human Resources must be notified of the dates of employment with a school board.
>
> 3) The University would then be able to accept the transfer of pensionable service from the Education (Teachers' Pension) Plan (actual teaching service and education training pension credits.)
>
> This arrangement would entail approval of leave without pay for a minimum of one month retroactive to the time you were employed by a school board. Repayment to the University of your salary effective at that time would be required for the period of leave. The University would be prepared to accept the amount through a series of payroll deductions over a 12-month period.
>
> If you choose to take up this option, please send a letter to me, indicating the dates of the school board service and the commensurate dates for which leave without pay is requested. Please indicate, as well, whether you wish to make repayment in a lump sum or by payroll deductions, including a 14 percent interest payment, for a period up to 12 months.
>
> If you have any questions in this regard, please contact me or Ms. Glenda Willis, Manager of Benefits.

Although he characterized this "an offer of a contract which we accepted", in cross-examination Dr. Karagianis acknowledged that he understood that the matter would have to go to the Board of Regents for final approval. Dr. Treslan acknowledged that he assumed any such arrangement would have to be approved by "some higher body, which I guess would be the Board of Regents". He said that he assumed, however, that if he accepted the solution offered it would be acted upon. In his mind at the time it was "an offer agreed to, not something he had initiated". He had taken the November letter as "a confirmation".

We note that the evidence is that item 1) in the third paragraph of the November 23 letter was the statement of a long standing policy of the Employer.

Glenda Willis testified that in her contacts with the Grievors, both before and after November 23, 1990, she had always made it clear that any transfer of credits for university study time into the Employer's pension plan required the approval of the Board of Regents.

By separate letters each of the Grievors replied to Mr. Dearness, accepting this "attempt to favourably resolve" their requests. Dr. Treslan's letter was as follows, and each of the others wrote to similar effect:

> I am writing in response to your letter dated November 23, 1990 in which you described the procedure whereby I might have pensionable service under the Education (Teachers' Pension) Plan transferred to the Memorial University Pension Plan.
>
> The purpose of this letter is to inform you of my acceptance of the conditions you have outlined. I wish to begin repayment for my one month period of retroactive leave in January 1991, I also wish to use the payroll deduction option of twenty-six equal instalments amounting to $176.30/pay period as outlined in a letter from Ms. Glenda Willis dated December 17, 1990.
>
> The following information is provided at your request.
>
> 1. Dates of School Boards Service: January 6, 1989-January 20, 1989.
>
> 2. Commensurate dates for which leave without pay is requested: January 1, 1989 - January 31, 1989.
>
> Trusting this is the information you require, I remain...

No reply was received by any of the Grievors, and they learned only informally that the matter had been referred to the Employer's Pension Committee.

In fact, on January 7, 1991 Tony Dearness recommended to the President that he refer the November 23 "solution" to the Board of Regents "for approval". The President,

however, appears to have looked on the "solution" with less favour. Within the next three weeks he wrote a memorandum, which is in evidence, to Vice-President Thistle raising concerns about the overlapping of full-time work activity with employment by the University, the precedents for granting leave without pay retroactively, unfavourable implications for the funding of the pension plan and, primarily, with whether the grant of such leave, whether retroactive or prospective, was appropriate where the purpose was to "exploit what looks like a loophole in the various pension arrangements", which he found it "hard to imagine" were "set up with this purpose in mind". Mr. Thistle then referred the matter back to Mr. Dearness. He in turn referred it to the Pensions Committee on March 12.

On August 1, 1991 the Grievors formally requested through Mr. Dearness, who was the Secretary of the Pension Committee, that they be represented at the meeting of the Committee when it considered their requests. This was never replied to, until under date of September 26, 1991, they received a letter from Mr. Dearness advising them their requests had been denied by the Board of Regents. That letter stated:

> Some time ago you requested the transfer of pensionable service granted under the Education (Teachers' Pensions) Act to the Memorial University Pension Plan. Since the qualifying teaching period was earned while you were also earning pensionable service under the Memorial University (Pensions) Act, and such duplication is not possible under the legislation, the transfer could not occur. Legal counsel advised that leave without pay for the qualifying period may be adequate to enable the transfer and to this end you requested leave retroactively for the qualifying period.
>
> Your request for leave retroactive to the qualifying period was referred to the Pensions Committee for a recommendation to the Board of Regents. In addition, your letter requesting an opportunity to address the Pensions Committee was considered by the committee: the Committee decided that since its role is one of policy development and review, no individual cases would be heard.
>
> On the basis of the Committee's extensive presentation and review of the case, including related factors, precedents and consequences, the Board of Regents has agreed that:
>
> 1) leave without pay not be granted for the purpose of working in the school system to become eligible to get pensionable service credit for University education, and
>
> 2) the leaves requested retroactively not be granted

This is the decision that gave rise to the grievances before us. It appears to have been established earlier, by Mr. Dearness' letter, that the Employer would not simply credit the Grievors with the pensionable service with which they had been credited under the teachers' pension plan, in accordance with the Portability of Pensions Act, but it was

only at this point that it was finally settled that they were not, one way or another, going to get credit for that time.

It is clear from Vice-President Wayne Thistle's testimony that, in his opinion, if the Grievors had been granted retroactive leaves in accordance with the legal opinion quoted in the November 23 letter to them from Tony Dearness, "technically and legally" they would have qualified to "buy" their university study time into the Employer's pension plan, but it was up to the Board of Regents to decide whether they should be allowed to do so.

One of the "related factors, ... and consequences", undoubtedly was the Board of Regents' concern with the increasingly apparent under-funding of the liability of the Employer's pension fund.

With respect to "related ... precedents", the Grievors were concerned not only with the cases that had occurred prior to 1987, which they felt involved quite different treatment of cases not different from theirs in any relevant respect, but also with the case of Professor Dennis Sharpe, which occurred in 1989, while the Grievors' claim was ongoing. This is clear from the fact that under date of "1989 06 09" Dr. Karagianis wrote to Mr. Dearness saying;

> Approximately four years ago I purchased four years of university time for inclusion in the Teachers' Pension Plan and then asked for this to be transferred to the University Pension Plan.
>
> I wonder if you could bring me up to date on what has transpired since then. ...

Then, under date of October 20, 1989, in his then capacity as Dean of the Faculty of Education, Dr. Karagianis received the following from Professor Sharpe:

> From: Dennis B. Sharpe, Director, Division Special Programmes
>
> Subject: Request for leave of absence
>
> I would like to request a leave of absence, without salary, for the period November 6 to December 5, 1989 inclusive. Subject to approval of this request, I have arranged to teach classes and work on professional development activities with the staff at the Peenamin McKenzie school, Sheshatshit, Labrador for a period of two weeks. The remainder of the time, I anticipate being available, on campus, to continue with my current research projects and commitments within the Faculty.
>
> Apart from the experience of working in a Native School situation, this leave will enable me to accumulate sufficient service with the Newfoundland Teachers Plan to buy back my years of university education and to transfer my pensionable service from Alberta into the same fund and eventually into the Memorial

> University pension plan. Information obtained through discussions with personnel in the Department of Human Resources at Memorial (particularly with Ms. G. Willis) has led me to conclude that this is the only viable route to follow in order for me to transfer all of my pensionable service to the Memorial fund.
>
> The length of the leave requested may seem inconsistent with the time I need to work for a Provincial school board, however, regulations at Memorial require that I not be receiving a salary (and/or an administrative allowance) from Memorial for a period of one month in order to temporarily cease making payments into the Memorial pension plan. Yet, for the Newfoundland Teachers Pension Plan contribution purposes, only 10 pensionable working days are required for me to purchase and transfer pensionable service. Since I am not allowed, apparently, to contribute to two plans simultaneously, I would have to be off the Memorial pension plan in order to contribute to the Teachers Plan, Also, my commitments to Memorial are such that, even given the opportunity, I would find it difficult to be away from campus for more than two weeks this semester.
>
> During the period of leave without salary, I would wish to continue to maintain all other benefits, and where necessary, reimburse the University for such things as medicare coverage. Commencing December 7, 1989 my current employment status would resume as normal.
>
> This experience, although initiated primarily so that I might maximise my pensionable service to date, will have considerable professional development benefits, since one of the program areas for which I am responsible is Native Teacher Education, and as yet, I have not had the opportunity to work in such a Native school environment. It will also enable the School Board concerned to bring to fruition some plans developed for the Peenamin McKenzie school.
>
> I would appreciate any help that you can provide that would help facilitate this request. There is also some urgency to proceed the leave at this time due to impending changes to the Teachers Pension Plan by the Provincial Government.

The evidence is that this arrangement was approved by Dr. Karagianis, by the Vice-President (Academic), the President, the Pensions Committee and the Board of Regents. It is also clear that the Pensions Committee knew of this case when it decided not to grant the retroactive leaves here in question. Vice-Presidant Thistle, however, testified that when Dr. Sharpe's leave application was approved probably only Dr., then Dean, Karagianis, and possibly the Vice-President (Academic), would have realized what was the purpose, and effect from a pension point of view, of the application.

The nature of the discussion in the Pension Committee meetings at which the Grievors were denied representation is made clear by the following memorandum of March 12, 1991, from Tony Dearness to the members of the Committee. After introducing the issue in general terms and outlining the legal opinion in the same language he used in his letter to the Grievors of November 23, quoted above, Mr. Dearness continued:

The five faculty members involved have requested approval of leave without pay retroactive to the time of employment with a school board for one month periods during 1987-1989.

The President has asked for input from the Pensions Committee for the advice to the Board of Regents. We have tried to outline the issues in this case, as follows:

The legal ruling prescribes the conditions which must be met to effect a transfer of pensionable service from the Education (Teachers' Pension) Plan to the Memorial University Pension Plan. But, what is the impact of these transfers on the University Pension Plan?

1) The transfer of pensionable service from the Education (Teachers' Pension) Plan to the Memorial University Pension Plan occurs pursuant to the Portability of Pensions Act. According to this Act, the cost to transfer pensionable service to the University is based on the following formula:

2x (six percent of the starting salary with the University less CPP offset for that year) x number of years' pensionable service

As the cost to transfer service is based on the starting salary (which in these cases dates back to the early 1970s), the funds received from Teachers' Pensions will be for less than the actuarial value of the service being transferred.

The purpose of Portability of Pensions Act is to enable the transfer of pensionable service credit in cases where a person ceases to the employed with one provincial government or its agency employer and becomes employed by another government or agency employer. This clearly did not happen in these cases.

2) The intent of the Provincial Government had been to change the policy to minimum teaching requirement (in the Newfoundland school system) of at least one year; this change was not made, however, when the Minister became aware that changes to the Income tax Act would eliminate the option as of 31 December 1991. Officials of the Teachers' Pension Division are uncertain of whether the option to purchase the education training years will be discontinued by the end of 1991.

It should be noted that one employee, in anticipation of the legal advice above, was granted leave without pay in advance for this purpose.

I would see the possible recommendations available to the Committee as follows,

(a) the Board should grant leave without pay in these cases

(b) the Board should not grant leave without pay in these cases

(c) the Board should grant leave without pay in the present cases but no others

(d) the Pensions Committee may wish to establish an ad hoc subcommittee to meet with the individuals concerned and provide a recommendation for consideration by the Committee

(e) [no recommendation]

The Pension Committee's reaction was to strike an ad hoc subcommittee of six people, including Mr. Dearness and with Ms. Willis as a resource person, to consider these issues. The report of that subcommittee's meeting, which apparently determined the Employer's future course of action, is in evidence. It states:

UNIVERSITY PENSIONS COMMITTEE

REPORT OF THE AD HOC SUBCOMMITTEE ON RETROACTIVE GRANT OF LEAVE FOR EMOPLOYEES

Meeting 14 June 1991 ...

At the March 1991 meeting, the Pensions Committee created a committee to present a recommendation in the matter outlined in the attached memorandum from the Director of Human Resources. The Ad Hoc Committee approached the issues as follows;

1. Should this type of transfer be recognized?

The ability to teach in the Newfoundland school system for a period of ten days in order to receive credit for four years of university education is grossly inequitable to members of the University Pension Plan.

It is the provincial government's position that such availability will be prevented, by changes in federal regulations governing pensions, in January 1992. If such changes had not been anticipated, it is believed that the government would have required a minimum of one year to create such eligibility.

It is believed that Teachers' Pensions, with which the credit for the four years of service and the qualifying period of the days is lodged, would not have recognized the ten days of qualifying service if they had known that the applicants were also accumulating service in the University Pension Plan at the same time.

The Committee, therefore, recommends that leave without pay not be granted for the purposes of working in the school system to become eligible to get pensionable service credit for university education. As employees' reasons for requesting leave without pay are not always clear, it should be stated, as a

condition of the leave without pay granted under the various collective agreements and terms and conditions of employment, that the leave shall not be taken to take advantage of eligibility provisions of the Education (Teachers' Pensions) Act.

2. Should the Board of Regents grant leave without pay to the applicants?

The proposed arrangement for leave without pay was seen by legal counsel as the only identifiable path to allow the applicants to gain the credit.

The precedent for recognition of such service and transfer was discussed by the Ad Hoc Committee. While other employees, now retirees, were able to transfer such service, and did so with double counting of the qualifying period through inadvertence, it is understood that they had taught in the Newfoundland school system some years before.

At the time the matter was under review by the Department of Human resources and counsel, one other employee, who indicated his wish to gain such credit, was advised of the difficulty and obtained a grant of leave without pay from the Board in advance of serving the qualifying period.

Since the requested leaves are for the sole purpose of facilitating the transfer of service which the Committee sees as inequitable, and there is no merit to the perpetuation of an inequitable anomaly, the Committee recommends that the Board not grant the leaves requested retroactively.

Further, the Committee recommends that, if the legality of the action can be determined, the Board review, for the purpose of denial, the leave granted to the other employee in 1989.

This recommendation was approved, with one dissenting vote, by a twenty member quorum of the University Pensions Committee on September 12, 1991. The twenty included eight of the nine members of the Union who sit on the Pensions Committee. Vice-President Thistle testified that, in his opinion, the Pensions Committee understood the issues fully. From the discussion, he recalled that they had been concerned about the funding implications of the five applications "and others that might be in the system". They had also been concerned that to allow the requests would be discriminatory in that it would be to allow the Grievors to obtain a large benefit unavailable to most others. The minutes, which are in evidence, bear this out.

Pensions Committee

Summary of Business Transacted at Meeting: 12 September 1991

The Pensions Committee met for its regular meeting on 12 September 1991, Charles White in the chair, and 20 of 32 members attending.

1. Report of the AD Hoc Committee

In the period from 1987 to 1889, five members of the Faculty of Education taught in the Newfoundland school system for a period of ten days while at the same time maintaining permanent full-time employment with the University. The purpose was to obtain a qualifying teaching period to enable the purchase of four years' pensionable service for undergraduate education training time, a provision which is available under the Teachers' Pension Plan.

As the pensionable service to be transferred included ten days' teaching in the school system for which credit was simultaneously accruing under the Memorial University Pension Plan, the University obtained an internal legal ruling on this matter, as follows.

1. The requested transfers of pensionable service could only occur if there were leave without pay from the University for the period in which the qualifying employment occurred.

2. According to University policy, leave without pay which would allow an employee to opt out of the Memorial University Pension Plan must be a least one month.

The transfers would thus require Board of Regents' approval of leave without pay, for the employees in question, for a minimum of one month retroactive to the time of employment with a school board.

The question of the efficacy of granting such leave retroactively was referred to the Committee for advice.

After an ad hoc committee reviewed the matter and presented its report, the Committee approached the issues as follows:

1. Should this type of transfer be recognized?

The ability to teach in the Newfoundland school system for a period of ten days to receive credit for four years of University education is grossly inequitable to the large majority of members of the University Pension Plan. The Committee therefore recommends that leave without pay not be granted for the purpose of working in the school system to become eligible to get pensionable service credit for University education.

As employees' reasons for requesting leave without pay are not always clear, it should be stated, as a condition of the leave without pay granted under the various collective agreements and terms and conditions of employment, that the leave should not be taken to avail of eligibility provisions of the Teachers' Pensions Act.

> 2. Should the Board of Regents grant leave without pay retroactively to the applicants?
>
> The precedent for recognition of such service was discussed. While other employees, now retirees, were able to transfer such service, and did so with double counting of the qualifying period through inadvertence, those employees had taught in the Newfoundland school system some years before.
>
> As the requested leaves are for the sole purpose of facilitating the transfer of pensionable service which the Committee sees as inequitable, the Committee recommends that the Board of regents not grant the leaves requested retroactively.

Neither the Pensions Committee nor the subcommittee would have had before them the Grievors' letters of December 20, 1990 which purported to "accept" what they took to be Mr. Dearness' offer. Vice-President Thistle could not recall that Mr. Dearness said anything to the Pensions Committee or the subcommittee about having held out to the Grievors that the "solution" was in fact approved.

Later that same day the Board of Regents approved the recommendation of the Pensions Committee, which came to the Board in the form "Summary of Business" document just quoted, unsupported by any other documentation, in accordance with the Board's practice.

It is in this context that the Grievors do not accept the ex post facto reason in Mr. Dearness' letter of September 26, 1991, which is quoted above, for denying their request for representation at the meeting of the Pensions Committee:

> In addition, your letter requesting an opportunity to address the Pensions Committee was considered by the Committee: the Committee decided that since its role is one of policy development and review no individual cases would be heard.

Glenda Willis, who was at the meetings of both the subcommittee and the Pensions Committee, testified that the issues involved were considered without any adverting to the individuals involved. The chair of the subcommittee had the "complete file" but the others involved in this decision making process had none of the correspondence to or from the five Grievors. They worked from the legal opinion which had been given and documents from the discussions with government and the officials of the Teachers' Pension Plan. The November 23 letter to the Grievors and their reply was before the Board of Regents, but not the Pensions Committee or its subcommittee. In cross-examination of Ms. Willis it emerged that the subcommittee and the Pensions Committee did, in fact, decide on the five individual applications by the Grievors, but without using, and perhaps without everybody knowing, their names.

Vice-President Thistle testified that it would be "most unusual that a group of employees would appear before a committee of the Board". Neither the Board nor its committees are set up on that basis. He did not recall any discussion in the Pensions Committee of the Grievors' request to be represented at the Committee's meeting, and the minutes of neither the June 14 meeting of the subcommittee nor the September 12 meeting of the Committee itself disclose any such discussion.

The Issues: 1) Whether the Employer's decisions to refuse to transfer the Grievors' pensionable service, in so far as it has been accepted as pensionable service under the teachers' pension plan, and to deny the Grievors retroactive leave and thus, effectively, the right to buy their university study time into the Employer's pension plan, are reviewable by this Board of Arbitration. Counsel for the Employer submitted that these matters are beyond our jurisdiction. He based this on the submission that the latter decision, and we assume, effectively, the former as well, were decisions by the Board of Regents in its capacity as trustee of the pension fund.

2) If these questions are not beyond our jurisdiction, did the Employer breach Article 1.5.1 of the Collective Agreement by failing to exercise its powers in a manner that was (a) "reasonable", (b) "equitable" or (c) "fair", both (i) substantively and (ii) procedurally. This involves dealing, first, with the Union's submission that the Employer had no discretion under the Portability of Pensions Act of Newfoundland, R.S.N. 1990, C. P-17 to deny the Grievors the right to transfer pension credits. Is that correct and, if it is, can the Employer be said to have been reasonable in the exercise of its powers under Article 1.5.1?

(3) If the Employer breached Article 1.5.1, what remedy is appropriate?

Decision: For the reasons that follow, we have concluded that the Employer has not breached Article 1.5.1 of the Collective Agreement. It has not exercised its powers contrary to the Portability of Pensions Act nor did it breach Article 1.5.1. in refusing to grant the Grievors retroactive leave of absence without pay.

(1) In light of these conclusion, we could avoid deciding whether the fact that the Memorial University Pensions Act provides in s. 7 that the Board of Regents shall hold the pension fund in trust puts its decisions with respect to pensions beyond our jurisdiction, as submitted on behalf of the Employer. Nevertheless, we will state that this does not, in our opinion, impliedly release the Board from its other legal duties, including its duties under the Collective Agreement. We do not see how it can be that we have no jurisdiction to review the decisions of the Employer which are the subject of the grievances before us. It is our role to determine whether the Employer has acted in breach of Article 1.5.1 and any other relevant provisions of the Collective Agreement. We do, however, recognize that in exercising its discretionary powers under the Collective Agreement, in accordance with the requirements of Article 1.5.1 and 9.10.2, the Board of Regents is constrained by a range of other duties, including its duties as trustee of the pension fund. These considerations must inform its judgement, and ours,

in determining whether its decisions are, and were, reasonable, equitable and fair, as required by Article 1.5.1.

Sections 3, 4, 5 and 6 of the Memorial University Pensions Act, R.S.N. Ch. M-8, make it clear that the Employer's pension plan covers many more people than those bargained for by the Union and involves the public interest.

(2) Article 1.5.1. requires that the Employer exercise those of its rights, powers and authority that are unabridged by other provisions of the Collective Agreement "in a fair equitable and reasonable manner."

We note also that Article 9.10, which is set out in full above, provides:

> 9.10 SPECIAL LEAVE WITHOUT PAY
>
> 9.10.2 ... Applications shall not be unreasonably denied, [emphasis added]

In our opinion this reinforces but does not really add anything to the requirements of Article 1.5.1.

Counsel for the Union made two quite different submissions with respect to the alleged breach by the Employer of Article 1.5.1. He made submissions with respect to the unreasonable, inequitable and unfair manner in which the Grievors were denied the retroactive leave without pay that they sought. We deal with those submissions below. First, however, he submitted that, under the terms of the Portability of Pensions Act the Employer had no discretion as to whether or hot the service that the Grievors had bought into the teachers' pension plan could be transferred to the Employer's pension plan.

Counsel for the Union relied on Section 5 of the Portability of Pensions Act, which provides:

> 5. Notwithstanding the nature of the previous pension plan of the employee, the period of pensionable service to be credited under the importing pension plan is the period of pensionable service credited under the exporting plan.

That, he submitted, leaves the Employer with no discretion, regardless of the nature of the pensionable service, in respect of either the university study time or the ten day qualifying period.

The answer to this submission lies in Section 3(1) of the Portability of Pensions Act, which provides:

> 3(1) An employee, covered under a pension plan who transfers his or her employment" [emphasis added] to another pension plan covered by the Act may elect to have the pensionable service transferred.

As counsel for the Employer submitted, the words we have emphasized make it clear the Portability of Pensions Act is not intended to apply to a situation such as this, where there was no transfer of employment. Sections 18, 19 and 34 of the Memorial University Pensions Act are consistent with this.

Section 18 provides;

> 18(1) The amount of a pension awarded under section 16 shall be 2% of an employees pensionable earnings.

The relevant parts of Section 19 provide:

> 19(1) Unless this Act otherwise provides, the only periods of service which shall be taken into account in determining whether an employee has qualified for the award of a pension and the amount of that pension are
>
> (a) the period served as an employee of the board: ...
>
> (e) ... the period served as a teacher in the province...
>
> (2) A person who was previously [emphasis added] employed
>
> (a) as a teacher in the province;...
>
> and received upon leaving, a refund of contributions from the respective pension plan may elect to buy pensionable service.

Section 34 provides for the possibility of agreements by the Board of Regents with the Government of Newfoundland to allow for the transfer of pension rights between the Employer and the public service, which by subsection (10) includes "A teacher within the meaning of section 19...".

The apparent purpose and intent of section 3 of the Portability of Pensions Act is that to be able to transfer pensionable service in the teachers' pension plan the Grievors had to have had previous employment as teachers, that is prior to coming to the University, and that employment had to have been in Newfoundland.

Counsel for the Union pointed out that Section 2(2) of the Portability of Pensions Act provides:

> (2) This Act shall be read as one with the Acts listed in the Schedule ...

and they include the Acts establishing both of the pension plans with which we are here concerned. It is evident that the purpose of this statute is, in part, to overtake the need for any agreement of the sort contemplated by Section 34 of the Memorial University Pensions Act. It is also apparent that Section 5, to which we have already referred, is

intended to ensure portability by precluding anyone, in the administration of "the importing pension plan", from second guessing "the exporting pension plan". The critical point, however, is that this is so only where Section 3 applies. That is, it only applies to an employee "who transfers his or her employment".

For these reasons we reject the submission on behalf of the Union that the Portability of Pensions Act precluded the Board of Regents from deciding, or proceeding on the basis, that it would not simply allow the transfer of the Grievors' credits for university study time from the teachers' pension plan to the Employer's plan. Grievance No. I-91-22 is therefore denied.

We turn now to the second submission by counsel for the Union; with respect to what he alleged was the unreasonable, inequitable and unfair manner in which the Grievors were denied the retroactive leave without pay that they sought.

Mr. Tony Dearness, the then Director of Human Resources, came to the view that the problem for the Grievors was that they could not be in pensionable employment with two different employers at the same time, but the rules of the teachers' pension plan required them to have had a minimum of ten days pensionable employment in the Newfoundland school system to be able to bring their university study time into that plan. Because of that the device of retroactive leave without pay became critical. The issue in this context is whether the Employer acted in an unreasonable, inequitable or unfair manner in denying the Grievors' application for retroactive leave without pay.

In Dr. Treslan's case this had the further impact that, if he could not buy those four years, or at least part of that time, he did not have enough pensionable service in the Newfoundland teachers' pension plan to be able to buy in his teaching time in Alberta and Saskatchewan. Nevertheless, counsel for the Union submitted that all five Grievors should be treated the same, and we agree that in principle the question is the same for all of them.

There is no doubt that the granting of leave without pay is discretionary to the Employer. The question therefore is, "In exercising that discretion, did the Employer breach Article 1.5.1 of the Collective Agreement by failing to exercise its powers in a manner that was (a) "reasonable", (b) "equitable" or (c) "fair", both (i) substantively and (ii) procedurally."

(a) In our opinion it was not unreasonable for the Employer to refuse to grant retroactive leave without pay in these situations. This is not a question of whether we, judging the various relevant factors, would have decided the matter differently. It is a question of whether the Employer reached a conclusion that no reasonable person or body of people could have reached. The evidence is that the Pensions Committee, and its subcommittee, and the Board of Regents, understood the bases of the Grievors' claims. They considered that to grant the leave without pay retroactively would be to perpetuate an anomaly inequitable to other members of the Employer's pension plan. There is also evidence that they were concerned to protect the adequacy of the funding of the

pension plan. With respect to the request for retroactive leave their conclusion was not an unreasonable one.

(b) It is apparent that the Board of Regents, the Pensions Committee and its subcommittee were concerned that their decision in this matter be "equitable". They addressed themselves specifically to the unequal treatment involved in allowing the Grievors to enjoy this great benefit, to which most other members of the pension plan would have no access.

The argument for the Grievors is, of course, that several faculty members in the early 80's had had this benefit, and Dr. Sharpe had the benefit of it in 1989. We do not agree that to deny the Grievors retroactive leave without pay was inequitable in light of these cases.

Those who had worked the qualifying period in the early 80's, while apparently improperly double counting what was accepted as pensionable service by the administrators of the teachers' pension plan, were different in that they had all at one time worked in the Newfoundland school system for reasons other than to take advantage of this loophole. Breaks in service had disentitled them, so they had used this device to requalify to buy their university study time. Even if what they did was contrary to the tax law, the "equities" of the situation favoured them more than the Grievors because, as former Newfoundland teachers, they were people to whom the special provision in the teachers' pension legislation was apparently aimed. In contrast, retroactively granting the Grievors leave of absence without pay to enable them to count their university study time toward their pensions, from the fund administered by the Board of Regents, could be construed as not furthering the public policy aims of the legislation.

Moreover, while it does not appear to have been a factor to which the Employer addressed itself, the faculty members who had earlier transferred pensionable service credits from the teachers' plan would probably have fallen within the scope of Section 3 of the Portability of Pensions Act, whereas, as we have held above, the Grievors do not.

Assuming Dr. Sharpe had never previously taught in the Newfoundland school system, his case is more difficult to distinguish. At one level the only difference is that he sought, and was granted, leave without pay in advance, rather than retroactively. Certainly, advance permission to take leave without pay was not unusual whereas retroactive leave without pay had never before been sought. But the fact remains that Dr. Sharpe sought his leave for precisely the same reason that the Grievors sought theirs. Does that impel us to the conclusion that it was "inequitable" for the Employer to deny the grievors' requests for retroactive leave?

We think not. Dr. Sharpe's was only one case, and there is no sensible meaning of "equitable" which dictates that one faulty exercise of a discretionary power locks the decision maker into forever repeating his or her mistake.

Moreover, the evidence is that the Board of Regents did not realize what the purpose of Dr. Sharpe's leave was when they approved it. Vice President (Academic) Strong may or may not have. He did receive a clear explanatory memorandum, which would undoubtedly estop him from claiming against Dr. Sharpe that he did not know the purpose for which the leave was sought. But for purposes of determining whether the Grievors were treated inequitably the more important thing is that Dr. Sharpe's application was simply not scrutinized by the Pensions Committee or considered on its merits at all by the Board of Regents.

The Grievors suggested that in November and December of 1990 they had been led by Mr. Tony Dearness, who was then Director of Human Resources, to believe that they had his assurance that the grant of retroactive leave without pay would be forthcoming as "a solution" to "the problem". That "problem" being, of course, that in the opinion of the Employer's legal counsel they could not legally double count their ten days of pensionable service in the Newfoundland school system. His letter of November 23, 1990 has been set out above in full. Its nature is undoubtedly open to more than one possible interpretation. However, taken in context, it seems to us clear that the first two paragraphs state the problem, the third paragraph outlines the "legal ruling" and the fourth and fifth simply suggest a possible solution. While the fifth paragraph directs the Grievors as to what they are to do "If you choose to take up this option", the fourth very clearly states "This arrangement would entail approval of leave without pay for a minimum of one month retroactive to the time you were employed by the school board." [emphasis added]

Each of the Grievors purported to respond to this letter in writing "accepting" Mr. Dearness' "offer". However, counsel for the Union did not even try to argue that a contract of some sort had been formed, and we do not believe that they thought that Mr. Dearness intended, or had authority to, bind the Employer to the grant of retroactive leave without pay for this purpose. Clearly, he led them to believe that he was seeking the same "solution" that they were, but he did not hold out that he had authority to effectuate it. There is nothing in the evidence which satisfies us that anyone, including Mr. Thistle, led the Grievors to believe that the matter was settled prior to the negative decision by the Board of Regents.

The Grievors claimed to have relied on the prospect of a solution held out by Mr. Dearness to the extent of making the necessary payments into the teachers' pension plan to buy their university study time, and in Dr. Treslan's case to also purchase his out-of-province teaching time. As has been pointed out, he would have become eligible to do that by virtue of counting his university study time. The outcome of this arbitration notwithstanding, this money will not necessarily be lost to the Grievors. The teachers' pension plan may have to repay it or the Grievors may in due course receive some pension based upon it from the teachers' pension plan.

For these reasons we do not think that this claimed reliance made the decision of the Board of Regents to deny retroactive leave without pay "inequitable" in terms of Article 1.5.1 of the Collective Agreement. The same wording in Mr. Dearness' letter of

November 23, and the same lack of lack of authority to bind the Employer that makes it clear that he did not contract with the Grievors, makes it clear that the Employer was not estopped or otherwise committed to them by their purported reliance on his letter.

(c) There is a good deal of arbitral precedent on "fairness", none of which was cited to us here, probably because it is almost entirely concerned with whether, and when, there is an implied requirement for management to exercise its rights "fairly". Here the requirement is express. Relying on this explicit requirement in Article 1.5.1., counsel for the Union made a strong submission that the decision to deny the Grievors the retroactive leave without pay which would have enabled them to transfer their university study time into the pension plan was unfair both substantively and procedurally.

(i) What has been said about whether the decision of the Employer was inequitable could be repeated in connection with whether it was unfair substantively. It suffices, therefore, to say simply that, on balance, we do not find the decision of the Board of Regents to deny retroactive leave of absence without pay to have been unfair in substance.

(ii) The answer to the question of whether this decision was unfair procedurally; whether it was, in the words of counsel for the Union, "procedurally flawed", requires more full elaboration.

The first submission of counsel for the Union in this respect was that the Grievors were denied the opportunity, which they explicitly requested, to explain their claims and concerns to the Pensions Committee, its subcommittee, or the Board of Regents. That we can say, after the fact, that the ultimate decision to refuse retroactive pay without leave did not, in substance, constitute a breach of Article 1.5.1 of the Collective Agreement does not necessarily mean that it was not unfair to deny them the opportunity to put their case.

We note, however, that the Pension Committee and its subcommittee, and the Board of Regents, do appear from the evidence, including their minutes, to have understood the issues, including the precedents and Dr. Sharpe's case. The one aspect of the Grievors' claim to unreasonable, unfair and inequitable treatment that does not appear to have been put before those bodies was the Grievors' alleged reliance on what they claim was Tony Dearness' holding out to them that the "solution" was a fait accompli. We have already explained why we reject that claim. There is, however, the question of whether the subcommittee, the Pensions Committee and the Board of Regents would have been convinced had the Grievors been allowed to put that claim personally or through a representative. Indeed, there remains the general question of whether those bodies might have concluded differently on any of the bases of the Grievors' claims had they been heard.

The position of the Employer is that the Board of Regents and the Pension Committee are not constituted to deal with individual cases and have never functioned that way. They do not and have never afforded "hearings", because they are set up to decide

matters of policy, not individual cases. Neither the Board of Regents nor any of the Committee or subcommittee members had before them the names of the Grievors, or any individualized facts, although the Chair had access to the complete file. In this respect the subcommittee was simply an extension of the Pension Committee, with no power or authority to hold "hearings", unless it was expressly given that power or the power to determine its own procedure by a body with authority to do so.

In our view it is beyond argument that the Employer is bound to be "fair" procedurally. Article 1.5.1 explicitly requires that it exercise its management rights "in a fair manner". Nevertheless, in the context as we understand it from the evidence, this cannot be taken to have been intended to change the established way the Board of Regents functions. In other words it cannot be taken as constituting an agreement that the Board of Regents itself will afford a hearing to individual claimants before it.

What of the Pension Committee? Under date of August 1, 1991, Dr. Treslan wrote to Mr. Dearness on behalf of the Grievors asking to "have representation at the upcoming meeting of the MUN Pension Committee". This was considered necessary, he said in his letter, "so that we might present an accurate chronology of our case and answer any questions the Committee might have". Mr. Dearness did not reply until September 26, when, as part of his letter advising the Grievors that their requests for retroactive leave without pay had been rejected by the Board of Regents he stated "In addition, your letter requesting an opportunity to address the Pensions Committee was considered by the Committee: the Committee decided that since its role is one of policy development and review no individual cases would be heard". Taken literally, it appears from the evidence that this may be an untruth, but it is not misleading in substance.

The minutes of the meeting of the Pensions Committee, which are in evidence, do not indicate any discussion of this sort. Glenda Willis, who attended the meetings of both the Pensions Committee and its subcommittee, could not be sure that the matter had not come up at the meeting of the Pensions Committee. However she did recall that this request was seriously considered by the subcommittee, and they decided, for the reasons given by Mr. Dearness, not to hear the Grievors.

Since the decision of the Supreme court of Canada in Kane v. board of Governors of U.B.C. (1980), 110 D.L.R. (3d) 311, there has been no room for doubt that decision making bodies in Canadian universities are impliedly bound by the rules of natural justice in the broad sense of "fair play in action" (per Dickson J., as he then was, at p.322). However, they "need not assume the trappings of a court" (ibid., at p. 321), and the degree to which they must afford a court-like right to be heard directly will increase with the importance of the interests at stake and the nature of the decison; where it stands between, at one pole, the pure making of policy and, at the other, the application of pre-determined standards to an individual case.

In Kane his employment and professional career were at stake, and the issue was his individual honesty. Here, the Grievors stood to gain the opportunity to retire early with pensions enhanced by 8% of their final salary levels; and in Dr. Treslan's case by

considerably more than that, because he would have been able to bring his out-of-province teaching years from the teachers' pension plan into the Employer's plan as well. These are not minor claims, but neither are they near the top of the scale. And the granting of retroactive leave of absence without pay for these purposes did present a policy issue capable of being divorced from particular instances.

The Pensions Committee has never operated by hearing individual cases, and we do not conclude that those who negotiated Article 1.5.1 of the Collective Agreement intended to alter the basic modus operandi of such established committees in the University structure. Moreover, we do not think that by establishing a subcommittee the Pensions Committee took upon itself any new procedural obligations.

Weighing the evidence, we are satisfied that the subcommittee and the Pensions Committee gave full and fair consideration to all the relevant factors involved in the claim that retroactive leave without pay should be granted in cases such as those involved here. They knew of and considered the precedents, including Dr. Sharpe's case, they had before them Mr. Dearness' letter of November 23, 1990, to the Grievors, and their replies, and they had no lack of understanding of "an accurate chronology of the Grievor's cases.

Our conclusion, therefore is that the Employer did not act in a procedurally unfair manner contrary to Article 1.5.1 of the Collective Agreement in denying the Grievors the leave of absence without pay that would have enabled them to transfer their years of University Study from the teachers' pension plan to the Employer's plan.

Conclusion and Order; For the reasons set out above, this Board of Arbitration finds that the Employer did not breach the Collective Agreement, specifically Article 1.5.1, in refusing to grant the Grievors "leave without pay for the purpose of working in the school system to become eligible to get pensionable service credit for university education" and hereby denies Grievance # I-91-19.

For the reasons set out above this Board of Arbitration also finds that the Employer did not breach the Portability of Pensions Act R.S.N. Ch. P-17, and did not thereby exercise its powers under the Collective Agreement in an "unreasonable manner" contrary to Article 1.5.1. Grievance # I-91-22 is therefore denied.

Charles Rennie
Employer Nominee

Innis Christie
Chair

John Staple
Union Nominee

## DISSENT

IN THE MATTER OF AN ARBITRATION BETWEEN:

MEMORIAL UNIVERSITY OF NEWFOUNDLAND FACULTY ASSOCIATION

AND

MEMORIAL UNIVERSITY OF NEWFOUNDLAND

I find I must disagree with the decision of the majority in this case on two significant points.

1. On the question of procedural fairness, unencumbered by other circumstances, I would agree with the majority that the Employer's decision not to accede to the request for retroactive leave was not an unreasonable one.

However, I have the greatest of sympathy for the circumstances within which the Grievors found themselves. The time taken by the Employer to deal effectively with this issue was excessive and, in my opinion, unnecessary. The confusion which existed at different points throughout the process was engendered by correspondence from the Employer to the Grievors. In my view the Grievors could come to no other conclusion, as a result of the communication from Mr. Dearness, Director of Human Resources, than that which they indicated before the Board. Mr. Deamess did far more than "simply suggest a possible solution", as the majority report holds. Mr. Dearness outlined, in detail, how the proposed resolution would work and even asked the Grievors to indicate their personal choice of options for salary deductions in order to accommodate the resolution on behalf of each of them. Certainly such detail was unnecessary if the Employer did not intend to leave the impression that it would follow through with it's commitment.

To say that the Mr. Dearness "did not hold out that he had the authority to effectuate [the resolution]', is unacceptable. One has to remember that this is the Director of Human Resources, presumably the individual charged with the responsibility to resolve such matters on behalf of the Employer. The Grievors, quite rightly in my opinion, held that view and acted accordingly by purchasing their pensionable time and indicating how they wished the salary deductions to be made, it would appear that the Grievors case was affected adversely by differing views from within the Human Resources Division as to how the matter should be addressed, and I cannot agree that the Employer acted fairly in this matter.

2. On the second point, i cannot agree that the Employer has the authority to deny the transfer of legitimate pensionable service from one pension plan covered by the Portability of Pensions Act to another. The Act was written in such a way as to remove from the Employer any arbitrary decision in that respect. It was designed to allow for a smooth transfer of accumulated pension credits from one plan to another.

It is on the point that the individuals did not "transfer employment that the majority report bases its argument that the Employer is not obliged to accept the pensionable service from the Teachers' Pension Plan.

However, the fact remains that the Grievors have accumulated what appears to be legitimate pensionable service under the Teachers' Plan. The Portability of Pensions Act states in Section 4 that it is the employee who makes the determination as to whether or not the service is to be transferred.

"4.(1) Upon an election being made under section 3, the exporting pension plan shall pay to the importing pension plan the employee and employer contributions to the pension plan with respect to the employee together with interest."

Section 5 states dearly that the Employer is not empowered to make a determination that an employee's pensionable service cannot be accepted from an exporting plan.

"5. Notwithstanding the nature of the previous pension plan of the employee, the period of pensionable service to be credited under the importing pension plan is the period of pensionable service credited under the exporting pension plan."

In my opinion, the only determination here should be whether or not the service accumulated under the Teachers' Pension Plan is legitimate. There was no evidence before the Board which would lead me to conclude that it was not legitimate. That being the case, the time should be credited to the University's Pension Plan.

Respectfully Submitted

John Staple
Union Nominee