

IN THE MATTER OF AN ARBITRATION

BETWEEN

PUBLIC SERVICE ALLIANCE OF CANADA

(the "Union")

AND

HAMLET OF FORT RESOLUTION

(the "Employer")

Re: Lay-Off, Severance Pay and Job Security grievances

ARBITRATOR: John M. Moreau QC

Appearing for The Union:

Leslie Robertson - Counsel
Kim Tybring - Service Officer
Tyler Delorme - Witness
Vanessa Sanderson - Witness
Teresa Simon - Witness
Linda Carpenter - Witness
Loraine Villeneuve - Witness

Appearing for The Company:

Gerhard Seifner - Counsel
Todd Francis - Senior Administrative Officer
Calvin Lizotte - Witness
Lloyd Norm - Witness

A virtual hearing was held on September 7, 8 & 9, 2021. Written submissions were completed by counsel on October 7, 2021.

AWARD

INTRODUCTION

Fort Resolution, NWT, is situated at the mouth of the Slave River, on the shores of Great Slave Lake, and has a population of just over 500, according to 2019 statistics. It is the headquarters of the Deninu Kų́ę́ First Nation, whose Chief is Louis Balsillie.

The Union, as noted in the Agreed Statement of Facts, filed three separate policy grievances on behalf of eight employees of the Hamlet of Fort Resolution (the “Hamlet”) who were notified by letter on March 11, 2019 that they were being temporarily laid off.

The letter reads:

Monday, March 11, 2019

To Whom It May Concern:

Please be advised that due to monitoring circumstances beyond our control we will be giving (**named employee**) temporary lay-off notice on March 11, 2019. If our circumstances change we will be reviewing on May 1, 2019 all positions.

Sincerely,

Scott Edgerton
Senior Administration Officer
Hamlet of Fort Resolution

The three policy grievances which comprise the matters heard in the hearing include: (1) dealing with inadequate notice or payment in lieu of notice of layoff of specific listed employees (19-P-02424); (2) failure to recall laid off employees (19-P-02446); (3) severance payable pursuant to the collective agreement for failure to recall laid off employees (19-P-02425).

The Union called five of the eight individuals mentioned in the three policy grievances. They include: Vanessa Sanderson, Tyler Delorme, Loraine Villeneuve, Teresa Simon and Linda Carpenter. The Employer called two employees named in the grievances, Calvin Lizotte and Lloyd Norm, who both confirmed they did not receive layoff notices and were never laid off from their positions in March 2019. Ms. Wanda Balsillie did not testify in these proceedings.

A Production Order was issued on July 26, 2021 directing that the Hamlet produce the following for the bargaining unit members: relevant union membership documents; payroll records starting in 2008; leave audits; and, copies of any audited financial statements for the Hamlet as they relate to all salaries and remittances. The Employer did not produce any documents in response to the Order. The Employer noted in its submissions that this is not a case of a refusal to produce records but rather an inability to produce the requested financial information because of their unavailability.

Counsel for the Union and counsel for the Employer provided written submissions at the conclusion of the evidence.

AGREED STATEMENT OF FACTS

1. The parties are bound by the Collective Agreement between the Hamlet of Fort Resolution (the "Employer") and the Public Service Alliance of Canada ("PSAC") as represented by its component the Union of Northern Workers (UNW). (see attached Collective Agreement).

2. The present disputes arise from three grievances filed by the UNW including the following:

- 19-P-02424 dated March 20, 2019 (layoff pay/notice)
- 19-P-02425 dated April 15, 2019 (severance pay)
- 19-P-02446 dated May 24, 2019 (job security)

3. On March 11, 2019, the following eight members, employees of the Hamlet of Fort Resolution were told by the employer that they were being temporarily laid-off:

- Tyler Delorme
- Wanda Balsillie
- Vanessa Sanderson
- Teresa Simon
- CJ Lizotte
- Lloyd Norm
- Linda Carpenter.
- Loraine Villeneuve

4. The Collective Agreement provides the following:

- Contracting out is not permitted if it results in lay off or reduction of hours of bargaining unit members (article 41.01 and 41.02)
- there shall be no layoffs other than layoffs resulting from lack of work (article 42.01)
- employees are to be laid in reverse order of their bargaining-unit wide seniority within their job classification (articles 42.02 and 42.03)
- laid off employees are entitled to one month notice or pay in lieu thereof (article 42.04)
- employees are to be recalled in order of seniority providing they have the ability to perform such jobs following a trial or training period (article 42.05)
- no new employees are to be hired until laid off employees have been given the opportunity of recall (42.06)
- employees who are permanently laid off are entitled to Severance Pay in the amount of two weeks of pay for each year of continuous employment for the first three years, and one week for each year of continuous employment after three years, to a maximum of 12 weeks (article 43.01)

5. None of the laid-off employees referenced in clause 3 received severance pay

6. Since the layoffs in March of 2019 the Hamlet of Fort Resolution has hired additional employees apart from those referenced in clause 3.

RELEVANT COLLECTIVE AGREEMENT PROVISIONS

Article 41

CONTRACTING OUT AND WORK OF THE BARGAINING UNIT

41.01 Contracting out of Bargaining Unit work shall not occur if it would result in the lay off, continuance of a layoff, reduction in the hours of work of Bargaining Unit members, or elimination of Bargaining Unit positions.

41.02 No person from outside of the Bargaining Unit shall perform work normally performed by members of the Bargaining Unit.

Article 42
LAYOFF AND JOB SECURITY

42.01 There shall be no layoff of any employee during the life of this Collective Agreement except layoff resulting from lack of work.

42.02 The Employer and the Union recognize the principle of seniority in determining layoff. It is agreed that where employees face layoff, length of service will be the deciding factor.

42.03 In the event of layoff, employees shall be laid off in reverse order of their Bargaining Unit-wide seniority within their job classification.

42.04 The Employer shall give employees who are to be laid-off one (1) month prior notice in writing of the effective date of layoff, or award pay in lieu thereof, unless a greater period is required by legislation, in which case such greater period of notice, or pay in lieu thereof, shall be given.

42.05 Employees shall be recalled in the order of their seniority, where jobs become available, provided they have the ability to perform such jobs following a trial or training period. The Employer shall give notice of recall by registered mail to the last recorded address of the employee. The employee shall keep the Employer advised at all times of his current address. The employee shall return to work within ten (10) working days from the time that he receives notice of recall unless, on reasonable grounds, he is unable to do so. A casual employee who has been given notice of recall may refuse to exercise such right without prejudicing his right to recall in the future.

42.06 No new employees shall be hired until those laid off have been given the opportunity of recall. Laid off employees who wish to be notified of job vacancies, other than those to which they have recall rights, may signify their desire in writing prior to lay off and shall be entitled to apply for such jobs.

Article 43
SEVERANCE PAY

LAYOFF

43.01 (a) An employee who has five years or more of continuous employment and who is permanently laid off is entitled to be paid Severance Pay at the time of layoff in the amount of two (2) weeks of pay for each year of continuous employment for the first three years and one (1) week of pay for each year of continuous employment after three years. The maximum entitlement shall be twelve (12) weeks of pay.

(b) Payment shall be prorated in respect of any period of continuous employment which is less than a complete year.

(c) For part-time employees their weekly pay for severance purposes shall be calculated by taking their total earnings for the last full calendar year of continuous employment divided by 52.176.

THE THREE GRIEVANCES

In order to provide some context to this dispute, it is worth referring to the grievance correspondence which was entered into evidence:

- 1) The layoff grievance (19-P-02424) alleges the Employer breached articles 42.01 and 42.04.

The Union, as required under the collective agreement, submitted the grievance at Step 1 to the acting Senior Administrative Officer Acting (“SAO”), Scotty Edgerton, along with a covering email dated March 20, 2019 written by Kim Tybring, the Union’s assigned Service Officer, which reads in part as follows:

...The laid off Employees were notified Monday March 11, 2019 by letter and it was effective immediately. The notice was described as temporary but had no return to work date or any reference to a commitment to call back the affected employees. The Union alleges this is a permanent layoff. The notice of layoff was not due to lack of work as is required under article 42.01 and there was no notice of pay in lieu of said notice, as required under article 42.04.

Mr. Edgerton replied as follows on March 22, 2019:

Submitting Step 1
22 March 2019

RE: Grievance 19-Hamlet of Fort Resolution-02424-Pay/Layoff

Hamlet has no funds we are out of work

The Hamlet has been in disarray for a number of months and was able to carry its workers, however the funding ran out and there was no funds left in the account. To write cheques on an empty balance is illegal. So we had to lay people off till such time we can regroup. We could not offer checks to sustain our payroll hence the layoff was necessary and was issued, we were out of work. As for return dates, we will need our workers to run our various programs, however, we must establish funding to run the projects. When these are in order will review our needs at that time, and start asking employees to return to work. We are working hard to correct our situation.

The Hamlet of Fort Resolution will be starting our New Year on April 1, 2019 with MACA funding review. Funding changes will start revitalizing our workplace. We hope to have

most our employees back in place by May 1, 2019. However, all funding is under review at this time.

Regards,

Edgerton
Interim SAO

2) The severance pay grievance (19-P-02425) alleges the Employer breached article 43.01. Mr. Tybring's covering email, also dated March 20, 2019, reads in part as follows:

The laid off Employees were notified Monday March 11, 2019 by letter and it was effective immediately. The notice was described as temporary but had no return to work date or any reference to a commitment to call back the affected employees. The Union alleges this is a permanent layoff. As a permanent layoff the Employees should receive consideration under article 43.01 of the collective agreement and severance pay should be determined and paid accordingly.

3) The job security grievance (19-P-20446) alleges the Employer breached articles 42.05 and 42.06 of the collective agreement. Mr. Tybring's covering email dated May 9, 2019 reads in part as follows:

The Union of Northern Workers has become aware of the Hamlet of Fort Resolution, (the Employer) has been hiring "casual employees" to operate Equipment at various locations under the Hamlet's control. This is a violation of several articles of the Collective Agreement. The Union is aware of who has been hired or is factually performing this bargaining unit work and is aware their names do not appear as members of this bargaining unit and as such must be regarded as new hires. Article 42.06 and 41.01 clearly prohibits the hire of new employees until those laid off are given the opportunity of recall. In fact Article 41.02 directs no person outside the bargaining unit shall perform work normally performed by members of the bargaining unit. Article 42.05 is clear that as work becomes available the employer must recall in order of seniority, its laid off workers. The Union alleges this has not been done, and represents a violation of the collective agreement.

OTHER GRIEVANCE CORRESPONDENCE

Mr. Tybring testified and reviewed all the grievance documents entered in these proceedings, as well as other correspondence between himself and the Employer. Included in the correspondence is the following email from Carol Collins, the Lands Officer for the Hamlet at the time, and Mr. Tybring on March 13, 2019:

From: Carol Collins [mailto:carolc.lands@gmail.com]
Sent: Wednesday, March 13, 2019 10:06 AM
To: Kim Tybring
Subject: Short Term Lay Off

Good Morning Kim:

Here is the list of short term lay offs for the Hamlet of Fort Resolution.

- 1. Tyler Delorme, Forman
- 2. Wanda Balsillie, Recreation Staff
- 3. Vanessa Sanderson, Recreation Staff
- 4. Teresa Simon, Recreation Staff
- 6. CJ Lizotte, Water Treatment Plant Operator
- 7. Lloyd Norm, Water Treatment Plant Operator
- 8. Linda Carpenter, Water Treatment Plant Operator, is laid off

Carol Collins
Lands Officer
Hamlet of Fort Resolution, NT
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On Wed, Mar 13, 2019 at 10:09 AM Kim Tybring <tvbrink@unw.ca> wrote

Thanks Carol,
What's the deal with Linda Carpenter? Is she laid off different than the rest?
.....

From: Carol Collins <carolc.lands@gmail.com>
Sent: Wednesday, March 13, 2019 11:18 AM
To: Kim Tybring <tybrink@unw.ca>
Subject: Re: Short Term Lay Off

She asked to be laid off.
.....

Further email correspondence was entered into evidence between Mr. Scotty Edgerton and Mr. Tybring:

From: Scotty Edgerton [mailto:scottysaores@gmail.com]
Sent: Thursday, April 04, 2019 5:00 PM
To: Kim Tybring; Mary Blake-Moore; louisbalsillie@gmail.com; Carol Collins; Gladys MacPherson
Subject:

Good afternoon Kim:

I have been trying to write you a memo stating that we are not in agreement with what has been sent on behalf of the employees. Most have understood what has happened to our community and are wanting to be employed again. However that is not available at this time.

Hope this memo gets to you Kim.

Regards,
Scotty Edgerton,
Interim SAO
Fort Resolution, NT.

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From: Scotty Edgerton <scottysaores@gmail.com >
Sent: Friday, April 05, 2019 9:38 AM
To: Kim Tybring; louisbalsillie@gmail.com; Mary Blake-Moore; Carol Collins

Good morning Kim:

I am responding to the Case #: 19-P-Hamlet of Fort Resolution 02424.
Kim we have to disagree with the case presented, We had no funding and jobs disappeared because the funding was spend. The capacity of a number of workers is low with substance abuse a real problem. We will have to review what is needed to succeed in the near future.

I do respond to your grievances.

It seems my words have little interest in this mess. Seems all I hear is pay, how disappointing.

Regards,
Scotty Edgerton, SAO
Hamlet. of Fort Resolution

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From: Kim Tybring
Sent: Friday, April 5, 2019 9:57 AM
To: Scotty Edgerton <scottysaores@gmail.com>; Mary Blake-Moore <Mary_Blake-Moore@gov.nt.ca>; louisbalsillie@gmail.com; Carol Collins <CarolC.lands@gmail.com>; Gladys MacPherson
Cc: Anne Marie Thistle <thistla@unw.ca>

Subject: RE:

Good Morning Scotty,

Thank you for this response. We have spoken, and I will restate the Unions representations made on behalf of our members is in no way connected to what has "happened" in the community. We are sympathetic to the challenges you have in your role as SAO. The Union does not believe our members should be held accountable for these issues. As such we insist Employees are entitled to benefits and protections afforded to them through application of the terms of the Collective Agreement.

I am unclear as to your position with regards to the grievances filed by the Union on behalf of our members. Is it your contention that these issues do not violate the collective agreement? The Union is not in a position that we would accept that all these matters are in the past and the "fix" would be to ignore them and move forward as if they never happened or were somehow an acceptable consequence of failures of administration.

The union is also concerned with your comment about people understanding and "wanting to be employed again". I hope this is not a veiled threat referring to members that we have made representations on behalf of.

In Solidarity,
Kim Tybring

Sent: Monday, April 8, 2019 10:24 AM
To: Scotty Edgerton <scottysaores@gmail.com>; louisbalsillie@gmail.com; Mary Blake-Moore <Mary-Blake-Moore@gov.nt.ca>; Carol Collins <CarolC.lands@gmail.com>
Cc: Anne Marie Thistle <thistla@unw.ca>
Subject: RE: Good morning Kim:

Good morning Scotty,

I am receiving inquiries surrounding the layoff situation there in Fort Resolution. It has been alleged to me that Mr. Lizotte was never laid off as indicated in your list of laid off employees. If he were not the Union alleges you have violated article 42.2 of the collective agreement. If he was laid off as you indicated to me by e-mail, the most senior water treatment operators should have been recalled first as described in article 42.05. Can you confirm for me what is the actual situation here so the Union can proceed accordingly.

I have also been informed a Mr. Brad King, has been observed operating the town equipment inclusive but not limited to the grader. As Mr. King is not a bargaining unit member and appears to be doing bargaining unit work this would represent a violation of articles 41.01 and .02. Would you be able to confirm this is actually happening?

Scotty you are aware our members are very concerned for their livelihood. Inquiries like these two are taken very seriously by the Union, but I do believe in going right to the source and finding out if this is happening before the Union reacts. Your response would be very much appreciated.

In Solidarity,

Kim Tybring

TESTIMONY OF THE AFFECTED EMPLOYEES CALLED BY THE UNION

1) Vanessa Sanderson

Ms. Sanderson testified that she began working for the Hamlet in the recreation program in July 1999 at the age of 14. Her duties, as a Recreation Programmer I, included supervising after-school programs and coordinating sports groups at the Youth Centre. She recalled only one disciplinary event dating back to 2015 when she was suspended for failing to call in her absence from work. Ms. Sanderson further recalled receiving the layoff notice letter on March 11, 2019 indicating that she would be laid off until May 1, 2019. She understood from the letter that the reason for the layoff was that the Hamlet had no available funds to pay salaries. She was never called back to work and never received pay in lieu of notice. She testified that another person was now doing her old job at the recreation centre. She was earning \$26.98 per hour + 5.24 for northern pay allowance. She has held several jobs since March 11, 2019 including working as a highway flag person; working as a caretaker at a local bed and breakfast; and, working in a mine. She has taken off 4 months (from her job at the mine) since 2019 to look after her ailing mother. She has one daughter. She testified that her parents provided her with financial support when she was laid off on March 11, 2019.

2) Tyler Delorme

Mr. Delorme testified that he has been an equipment operator with the Hamlet since 2014. He held the position of Public Works Foreman starting in July 2017. He was working on his supervisor's certificate as a heavy equipment operator when he was laid off on March 11, 2019. Mr. Delorme testified that the Mayor of the Hamlet at the time, Louis Balsillie, hired family members to perform his duties after he was laid off with the other employees on March 11, 2019. Mr. Delorme also produced pictures taken on March 21, 2021 showing an employee driving a truck which he testified that he was accustomed to operating as part of his normal duties as a heavy equipment operator. His email to his union representative, Mr. Tybring, of March 21, 2019 reads as follows:

Hey Kim as we where talking I got some photos of the garbage truck driver and also my public works truck being used for the band to build a boardwalk, Kevin Boucher the garbage truck drivers helper and the driver gabriel Lafferty and my works truck being used by DKFN BAND

Mr. Delorme also alerted Mr. Tybring that Mr. Lizotte, a part-time water treatment employee, was working at the water treatment plant. His email to Mr. Tybring of April 4, 2019 reads as follows:

From: tyler delorme [mailto:tydelorme33@gmail.com]
Sent: Thursday, April 04, 2019 2:40 PM
To: Kim Tybring
Subject: Hey Kim

Hey Kim yeah I notice they have back working one of the water plant operators CJ lizotte is back on at work I still didn't get a call back or anything

Mr. Delorme further testified that he was willing to do other jobs being performed after his layoff on March 11, 2019 by the newly-hired individuals, such as performing garbage collection duties. Mr. Delorme was earning \$31.75 per hour + \$5.42 for northern allowance at the time of his layoff. Mr. Delorme picked up various short-term jobs since

his layoff on March 11, 2019, including cutting wood for re-sale. He also hunted moose and sold the meat as a means to support himself and his family of 4 children after March 11, 2019. Mr. Delorme began working once again for the Hamlet on August 18, 2021 as a grader operator.

3) Lorraine Villeneuve

Ms. Villeneuve was hired for part-time employment by the Hamlet in 2018 performing administration duties including processing water and delivery tickets for the water trucks. She also performed other duties in the Hamlet office including janitorial services and working on special events. She was earning \$15.91 per hour + \$5.42 northern allowance. She was working full-time hours when she left the Hamlet in 2019, about a month before the March 11, 2019 layoff notices were issued. Ms. Villeneuve testified that she volunteered to be laid off prior to March 11, 2019 as she understood that the Hamlet was without funds to pay its employees. Ms. Villeneuve further understood that all positions would be reviewed on May 1, 2019. She did not receive any severance pay or payment in lieu of notice. Ms. Villeneuve testified that she experienced bullying while working in the Hamlet office. Ms. Villeneuve identified Tina McKay and Ramona Mrymer as two individuals who were hired to work in her former position. Ms. Villeneuve has 4 children and has worked sporadically since leaving the Hamlet, including for a 'search and rescue' firm.

4) Teresa Simon

Ms. Simon worked for the Hamlet beginning in 2001 as a casual employee. By 2019, she was working full-time hours and held the position of Recreation Director. She

was earning \$24.46 per hour + \$5.42 northern allowance at the time she received her layoff notice on March 11, 2019. She did not receive any severance or notice otherwise when she was laid off. She maintains that the Employer threatened to lay her off as far back as 2002 when she raised issues about her compensation. She further maintains that her working conditions continued to worsen over the years, and particularly after Mr. Balsillie became mayor in late 2018. Ms. Simon testified that she observed Mr. Balsillie's daughter performing her previous duties at the recreation centre since her layoff on March 11, 2019. She enrolled in a course as a personal support worker and has held a full-time position as of September 2021. Ms. Simon has five children.

5) Linda Carpenter

Ms. Carpenter worked full-time for the Hamlet for 19 years as the main Water Treatment Plant Operator in Fort Resolution. She was paid \$33.64 per hour and worked 25 hours per week. She holds professional certificates related to her employment including: small systems 1 and 2, water treatment level 1 and 2, small system water certification and level 2 plant certification. She did not receive severance nor a recall to her position after she was laid off on March 11, 2019. Ms. Carpenter stated that she took some time off for health reasons, using her earned sick days, before she was laid off. Ms. Carpenter claims that her duties are now being performed by three individuals (Calvin Lizotte, Lloyd Norm and Denis King) none of whom have her Level 2 qualifications, the minimum qualifications required for a type 2 water plant. Ms. Carpenter maintains that Mr. Balsillie, when he was mayor, made disparaging comments about her on social media, including that she was being overpaid. On another occasion she heard through Mr. Edgerton, that Mr. Balsillie suggested she take disability leave when she in fact was

not disabled. Ms. Carpenter testified that being laid off from her position caused a major disruption in her life and that she has always been willing and able to her return to her former position.

The Union noted that although Wanda Balsillie did not provide *viva voce* evidence, the email from Ms. Collins of March 13, 2019 to Mr. Tybring includes her name on the list of employees who were the subject of “Short Term Lay Off”.

TESTIMONY OF THE AFFECTED EMPLOYEES CALLED BY THE EMPLOYER

1) Calvin Lizotte

Mr. Lizotte testified that he has been employed with the Hamlet for 10 years. He did not receive a layoff letter on March 11, 2019 and continues to work as a plant operator in the water treatment plant.

2) Lloyd Norm

Mr. Norm testified that he has been employed with the Hamlet since 1998. Similar to Mr. Lizotte, he stated that he did not receive a layoff letter on March 11, 2019 and continued to work at the water treatment plant. He testified that he was designated in a supervisory position as lead hand in October 2019 at which time his hours of work increased.

SUBMISSIONS OF THE UNION

The Union, in addition to summarizing the testimony of its witnesses, submitted that an adverse inference should be drawn from the absence of any evidence adduced from the Employer. The Union noted in that regard that no documentation was entered in

response to the Production Order nor was any evidence called by a representative of the Employer to challenge the direct evidence of the Union's witnesses. The Union notes that although the author of the March 11, 2019 letter (Acting SAP Scotty Edgerton) has since passed away, it was incumbent on the Employer to address the absence of any financial information for the period 2008-2021, including the names of current employees of the Hamlet. (See: *Brown and Beatty Canadian Labour Arbitration* (5th) 3:5120).

The Union takes the position that the job losses that resulted from the March 11, 2019 layoffs, and 3 subsequent policy grievances, were in fact disguised terminations and not temporary layoffs. Subsequent events after March 11, 2019 indicate there was in fact no lack of work as at March 11, 2019 when the individual layoffs occurred. Although article 42.01 permits layoffs "resulting from lack of work", which can include financial circumstances, the layoff letters of March 11, 2019 did not specifically indicate that the layoffs were taking place as a result of the Hamlet's financial circumstances. The letter, however, did indicate that a review of the positions would take place on May 1, 2019 if circumstances changed.

Mr. Edgerton indicated in his Step 1 reply to the layoff grievance on March 22, 2019 that the Hamlet intended to recall employees once the Municipal and Community Affairs ("MACA") funding was in place. The employees were never recalled and the Employer was unable to provide any evidence as to which employees were called in to perform the work of the laid off employees. The Union's witnesses, for their part, were able to identify the individuals who were hired to perform their former duties.

The Union points to the unchallenged evidence of the Union's witnesses that individuals with family connections to the Mayor at the time, Louis Balsillie, were hired to perform the same work that was formerly performed by the laid off employees prior to March 11, 2019. The Union also argues that numerous witnesses cited Mr. Balsillie as the cause of an increased negative work environment. Ms. Villeneuve, in that regard, came forward with personal allegations of bullying in the office while Ms. Carpenter stated that Mr. Balsillie criticized her on social media by suggesting she was overpaid.

Although the evidence from Ms. Collins email to Mr. Tybring of March 13, 2019 indicates Mr. Lizotte and Mr. Norm also received layoff notices, they were in fact never laid off at all.

In the end, the Union submits that it has met its initial onus of proving on the balance of probabilities that the employees were not terminated from their employment because of a shortage of Hamlet funds but rather because the Employer targeted them for dismissal in what clearly amounts to a disguised termination. It falls on the Employer to refute this evidence and they have been unable to do so. The Union cites in support *Vancouver Shipyards Co. v. IBEW, Local 213* (File No. X-013/19), a decision of Arbitrator Glass where he states:

63 It is noteworthy that in all of the cases where the union successfully established a disguised termination it was obvious that there was a clearly identified employee or specific group of employees who had issues with or were at loggerheads with the employer.

In the alternative, the Union seeks to exercise its negotiated layoff rights but only in the event that the arbitrator determines that *bona fide* layoffs took place on March 11,

2019. In the event that the layoffs are determined to be legitimate, the Union maintains in the alternative that all the employees who testified for the Union are entitled to one month's salary pursuant to article 42.02 of the collective agreement.

With respect to the issue of employee recall, the Union points to article 42.05 which states that employees shall be recalled in order of seniority. The Union notes that the layoff letters to the employees of March 11, 2019 indicate that they were being temporarily laid off. Mr. Edgerton indicated in his Step 1 reply of March 22, 2019 that he anticipated having the employees recalled by May 1, 2019 once the MACA funding review was in place for the new fiscal year beginning April 1, 2019. Yet none of the employees were recalled to their former positions. Other members of the community were in fact performing their duties since the layoff on March 11, 2019. The inference to be drawn is that the positions that were subject to the layoff notices were never in fact unoccupied. In the event the layoff is determined to be legitimate, the affected employees should be retroactively recalled into their positions as of March 11, 2019.

The Union requests severance pay under article 43.01 but again only in the event the layoffs are deemed to be legitimate and a finding that there has been no breach of the affected employees recall rights. The Union notes in that regard that every person who was laid off was replaced by another individual. Accordingly, there is no evidence to support the layoffs as permanent layoffs which would trigger severance pay under article 43.01.

The Union also requests aggravated damages for mental distress, given the Employer's high handed, arbitrary and capricious actions. The Union cites the emotional

trauma and hardship of the employees when they were told of the layoff and the subsequent personal distress when they learned that other individuals in the community were doing their jobs.

The Union, in summary, submits that the Employer has breached all of the collective agreement provisions associated with layoffs and the prohibition against contracting out. Further, the Union notes that the Employer displayed a lack of goodwill by misleading the employees into thinking they would be recalled on May 1, 2019 and then never followed up with any other communications afterwards, as promised. The fact that the affected employees were prejudiced for being out of work so long is a further reason to award damages, as is the Employer's lack of response to the production order. See in support: *Edmonton (City) v. CUPE, Local 3197* 2007CarswellAlta3197 (Casey). The Union seeks damages in the amount of \$10,000 for each of the laid off employees who testified on behalf of the Union as well as Ms. Balsillie.

SUBMISSIONS OF THE EMPLOYER

With respect to the layoff grievance, the Employer notes at the outset that neither Mr. Lizotte or Mr. Norm were ever subject to a layoff and for this reason no relief should be granted to them under the lay off provision of the collective agreement. The testimony of Ms. Villeneuve confirms that she asked to be laid off more than one month prior to March 11, 2019 and for this reason is disqualified from receiving any payment in lieu of notice. In addition, the Employer submits that the only evidence concerning Ms. Balsillie is the layoff letter of March 11, 2019. Her relief should be limited to the one-month payment in lieu of notice in accordance with article 42.04 as should the remaining five

employees named in the layoff grievance. Further, although several of the witnesses for the Union testified that they did not receive severance pay (either under the collective agreement or the NWT *Employment Standards Act*) as a result of not being recalled, it is clear that no severance pay relief is warranted for either Mr. Lizotte or Mr. Norm given they remained actively employed after March 11, 2019.

The Employer maintains that a number of the affected employees had moved on to other employment or educational opportunities and would not have accepted a recall in any event.

The Employer further maintains that the proper principles of interpretation are applicable to the provisions of the collective agreement in the present case including the often-cited rule that the words of a collective agreement should be read contextually and harmoniously in order to ascertain the true intentions of the parties (See: *Brown and Beatty at 4:2100*). Arbitrators have also followed the guiding principle that all clauses in a collective agreement should be given meaning; and, that where an agreement uses different words one must presume that the parties intended different meanings. (See: *Nigel Services for Adults with Disabilities Society and CSWU, Local 1611, 2013 CarswellBC471 at para 22*).

The Employer notes that the collective agreement does not define the concepts of either a temporary or permanent layoff. In the absence of such definitions, the Employer submits that the parties intended that Article 42 (Layoff and Job Security) and Article 43 (Severance Pay) are to be read in compliance with the relevant employment legislation, the NWT *Employment Standards Act*, which mandates the payment of severance pay

after 45 days on layoff have elapsed. This approach to relying on the relevant employment legislation is supported by *Brown and Beatty* 6:2352 where the authors state:

[...][there comes a point at which a layoff of a prolonged and/or indefinite duration may sever the employment relationship. Extended, open-ended layoffs of this kind will often be treated as termination of employment under general employment legislation and will entitle the employee to severance pay.

There is no dispute that the affected employees were laid off for a period in excess of 45 days. Accordingly, they were deemed to be “permanently laid off” by operation of the NWT *Employment Standards Act* and became eligible for severance pay under article 43.01 of the collective agreement.

The Employer further submits, as noted in the decision of Arbitrator Sims in *Red Deer Advocate (Black Press Group Ltd). v. Media & Communications Workers of America (“Red Deer Advocate”)* 2021 CanLii 43154, that the right to recall for laid off employees does not exist separately from the concepts of temporary or permanent layoff. The right to recall is one of the rights an employee retains during the 45-day period of temporary layoff. However, the severance pay provision, article 43, does not contain a reference to recall rights. Accordingly, the Employer submits that the right to recall is lost to an employee, along with other attributes of employment status, when the employment relationship is permanently severed by the payment of severance pay or the obligation to pay it.

In this case, the affected employees were permanently laid off and thus lost any entitlement to their rights under the layoff provision, article 42, including the right to be recalled under article 42.05. The Employer submits that the severance pay entitlement

was triggered when the affected employees were not recalled within 45 days of being laid off, beginning on March 11, 2019.

In terms of the request for aggravated damages, the Employer submits that the Hamlet has undergone many changes in personnel, including the SAO position. It operates in a very small and isolated community with limited funds and means to meet its ongoing operational needs. Indeed, the Employer submits that it was the financial constraints that led to the layoffs (other than Mr. Lizotte and Mr. Norm) in the first place. This is not a case where the Employer's behaviour has been so high-handed, arbitrary or capricious to warrant an award of aggravated damages.

REPLY OF THE UNION

The Union maintains in reply that the identical letters of March 11, 2019 to the laid off employees clearly states that the Employer's intention was for the layoffs to be temporary and at no time was it ever communicated to the affected employees that their layoffs were considered to be permanent. Nor was any testimony presented to that effect in the arbitration hearing. The evidence clearly leads to the conclusion that the Employer had no intention to recall the affected employees. The affected employees were continually treated like terminated employees and not like employees who became permanently laid off 45 days after March 11, 2019. The Union further submits that the absence of testimony from Ms. Balsillie should not preclude her claim given the grievances in question are policy grievances affecting a group of employees who the

Employer purported to lay off but who were in fact terminated effective March 11, 2019. The Union also maintains its position regarding the entitlement to aggravated damages for the affected employees given their unchallenged evidence that they were discharged from their positions for nefarious reasons.

ANALYSIS

The parties bargained a collective agreement which contains a prohibition on contracting out work normally performed by bargaining unit members (article 41); a layoff and recall clause (article 42) and a provision for severance pay (article 43).

The case law states that the circumstances must be closely examined in each case to determine whether there is a reasonable expectation that work will resume and that the layoff is temporary; or, whether the layoff will be permanent at which point, depending on the wording of the collective agreement, the employee is entitled to severance. The following citation from *Brown and Beatty at 8:3800 - Severance Pay*, as cited in the *Red Deer* award at p.5 provides a helpful explanation of the difference between the two concepts:

Whether it is grounded in legislation or a collective agreement, severance pay is typically payable when a person's employment is terminated because he or she has become redundant or because of a permanent cessation of operations by the employer.

....

On the premise that severance pay is to compensate for the loss of employment status and seniority rights in particular, it has been held that employees on layoff or on strike who remain employees of the company cannot make a claim for severance benefits.

.....

On the other hand, depending on the language of the agreement, individuals who are not actively employed may be able to claim severance pay. For example, if an employee is laid off for an indefinite period owing to a lack of work, and there is no reasonable expectation he or she will be recalled within the foreseeable future, employment standards

legislation typically requires, and arbitrators have frequently ruled, that such a layoff is tantamount to a termination of employment warranting the payment of a severance allowance.

Also helpful is the following passage cited in the *Red Deer* award:

A distinction must necessarily be drawn between temporary and permanent severance of employment. Naturally, there are shades within these categories, but the basic element of permanence must reasonably prevail in the company's mind at the time of termination. This is not the case in event of a strike of unknown duration in a supplier company. To the contrary, both the company and the workers could only regard the halt as temporary. The reasonable anticipation at that point is that the strike will end and the company will be back in production. The underlying purpose of severance pay does not come into play. The same applies to any layoff where the reasonable anticipation is resumption of work. On the other hand, if all the facts and circumstances at the time of layoff necessarily lead the parties to reasonably conclude that the severance will be permanent then severance pay should be allowed. That recall might later occur does not destroy the fact of permanence prevailing upon severance. (emphasis added)

Maywood Military Products Plant. Norris Industries of International Union United Automobile, Aerospace and Agricultural Implement Workers of America, Local 509 (1972) 72-1 ARB para. 8364

I accept that eight employees received immediate layoff notices on March 11, 2021

which reads:

Please be advised that due to monitoring circumstances beyond our control we will be giving (*employee name*) temporary layoff notice as of March 11, 2019. If our circumstances change we will be reviewing on May 1, 2019 all positions.

The notice was issued to the eight employees under the signature of the Hamlet's Acting SAO at the time, Mr. Scott Edgerton. Unfortunately, Mr. Edgerton has since passed away. Despite his passing, there is evidence which provides an explanation for the layoffs at that time. Mr. Edgerton's Step 1 reply of March 22, 2019, just 11 days after the layoff announcement states: "*The Hamlet has been in disarray for a number of months and was able to carry its workers, however the funding ran out and there were no funds left in the account*". Mr. Edgerton goes on to explain that the Hamlet was hopeful funding

could be re-established once the new fiscal year began on April 1, 2019, after the MACA review.

The facts in this case point to circumstances where the “reasonable anticipation” was that a recall would take place once the finances were in place. In his words, “*We hope to have most of our employees back in place by May 1, 2019. However, all funding is under review at this time*”.

The evidence from the Union’s witnesses was that they never received any recall notice to report to work on May 1, 2019 or a further update after March 11, 2019 on their potential recall date. What many of those employees discovered was that other individuals who were not part of the bargaining unit were performing their previously assigned duties. For example:

-Vanessa Sanderson had worked in the recreation program beginning in 1999 when she was 14 years old. She testified that she was never recalled to her former position and that someone else was doing her old job at the recreation centre.

-Tyler Delorme took pictures of individuals on March 21, 2019, just 10 days after receiving his layoff notice, driving a public works truck that he used to drive as part of his regular duties. He also observed Mr. Lizotte back at work at the water treatment plant on April 4, 2019.

-Ms. Carpenter testified that she was the only person who held the necessary qualifications (Level 2) as the water plant operator and yet was not recalled, notwithstanding her previous 19 years of service. Ms. Carpenter stated that in

addition to Mr. Lizotte, the plant assignments were being performed by Mr. Norm and a Mr. King. Those three individuals, according to Ms. Carpenter, did not hold the minimum qualifications for the water treatment plan operator's position.

-Mr. Delorme testified that he was never recalled to his position as Public Works Foreman and that the mayor, Mr. Balsillie, hired other employees after March 11, 2019 to perform his duties.

There were other examples, as noted above, where individuals other than the affected employees were hired to do the work previously performed by the affected employees prior to receiving their layoff notice on March 11, 2019. The Union maintains that the layoff was not a result of lack of work and therefore the Employer was in breach of article 42.01 which prohibits a layoff “...*except layoff resulting from lack of work*” and article 42.06 which prohibits the hiring of new employees “...*until those laid off have been given the opportunity of recall*”.

I note that the jurisprudence in this area does indicate that financial pressures can be an underlying cause of lack of work. The rationale for this approach is set out in *Insurance Corporation of British Columbia v. Canadian Office and Professional Employees Union, Local 378*, [2015] B.C.C.A.A.A. No. 127 (Moore), as cited in *Vancouver Shipyards Co.* at para 49:

First, in my view, a shortage of work is not only defined by the external demand for an employer's product or service. It is also a function of the amount of work the employer can offer to the employees based on other business considerations. For example, where an employer is facing economic pressures and, as a result, has to reduce staff, there may be a shortage of work by virtue of the fact that the employer does not have the need or ability to continue to employ the same complement of employees. To ignore this notion would be equivalent to guaranteeing employment as long as there was ongoing demand by the

employer's customers for product, regardless of the internal need for or ability to maintain the work of the bargaining unit. There would be no means by which an employer could make any adjustments to its employee complement, unless there was an external decrease in demand for products/services.

Second, I do not accept that the parties intended such a literal interpretation of the terms "shortage of work". If that was the intended interpretation, the Employer would not be able to affect any layoffs in any area of the organization unless there was a reduction in demand for ICBC products and services on a macro level. Had that been the parties' interpretation, I would expect express language to that effect.

The evidence in this case supports a finding on balance that a layoff was justified on the basis of the financial circumstances of the Hamlet at the time. The grievance and related correspondence between the Union and the Acting SAO, Mr. Edgerton, clearly indicates that the Hamlet could not meet its payroll obligations and had no choice but to institute a layoff. Although there were no supporting financial documents introduced into evidence to provide a profile of the Hamlet's budget at the time of the layoff, I nevertheless accept the comments of Mr. Edgerton set out in the grievance correspondence, particularly his Step 1 reply of March 22, 2019, that financial pressures were the root cause of the layoffs. The documentary evidence before me also supports the conclusion that the layoff was anticipated to be only temporary with the review by MACA at the financial year end on March 31, 2019 hopefully leading to new financing and a recall of employees by May 1, 2019. Accordingly, I find the economic pressures on the Hamlet were the direct cause of the "lack of work" and that the layoffs were a proper exercise of the Employer's layoff rights under the collective agreement, and in particular article 42.01. However, that does not end the matter.

Article 42.05 states that laid off employees be *"...recalled in the order of their seniority, where jobs become available, provided they have the ability to perform such*

jobs following a trial or training period.” The evidence before me from the witness testimony is that none of the affected employees were ever recalled after receiving their layoff notices on March 11, 2019 with the exception of Mr. Lizotte and Mr. Norm. Mr. Lizotte and Mr. Norm both testified that they were never out of work and continued with their employment after March 11, 2019.

The Employer submits that the severance pay formula was triggered under article 43 when the affected employees were not recalled within 45 days of layoff and were therefore “permanently laid off” and eligible for severance pay pursuant to *Employment Standards Act* [ss. 43 (2)] in an amount set out under article 43 of the collective agreement. The Employer submits that there is no reference to recall rights in article 43. Accordingly, it is the Employer’s position that the right to be recalled is lost to each of the affected employees. The Employer submits the employment of the affected employees has by law been permanently terminated and that they are only entitled to receive severance pay in an amount to be determined by the parties or the arbitration board.

With respect, I disagree with the Employer’s analysis.

All of the affected employees, as noted in their respective layoff letters, anticipated being recalled sometime around May 1, 2019 once the Hamlet’s finances were reviewed by MACA. The Employer took no steps at any time to recall the affected employees, many of whom had lengthy service, after March 11, 2019. The uncontradicted evidence before me is that other individuals were called in to perform the duties of the affected employees,

including relatives of Mr. Balsillie, who was Mayor at the time. These actions of the Employer were clearly in breach of article 41.02 of the collective agreement which prohibits outside persons from performing bargaining unit work and article 42.06 which prohibits the hiring of new employees until laid off employees have been given the opportunity of recall.

There was no evidence presented by the Employer that spoke to the reasons the affected employees weren't recalled. In the absence of such evidence, and accepting the documentary evidence and the testimony of the affected employees, I find that the affected employees were not recalled because the Employer, under the leadership of Mayor Balsillie, elected to simply ignore their bargained rights under the collective agreement and substitute other individuals of the Employer's choosing into their positions. By doing so, the Employer was in clear breach of the recall rights of the affected employees, as set out in article 42 of the collective agreement. The employment relationship of the affected employees has not been severed, as argued by the Employer, and they retain their rights to this day of recall pursuant to article 42.05.

The next issue is what is the proper remedy resulting from the breach of articles 41 and 42 of the collective agreement. The union seeks a declaration that the affected employees, excluding Mr. Lizotte and Mr. Norm who were never laid off, were discharged without cause and order their reinstatement given the Union's view that the facts support a finding of a disguised termination. As indicated, I do not find that the initial layoff was motivated by any reasons other than the state of finances were such that there was no

money to pay the employees who were laid off. In order to support such a finding of a disguised termination, I would need supporting evidence that the affected employees were set up for termination at the time of the layoff on March 11, 2019. I am not prepared to make such a finding on the evidence before me. The core reason for the layoff on March 11, 2019, as noted, was the lack of operational funds to pay the affected employees.

The breach of articles 41 and the recall rights set out in article 42, however, requires a compensatory order. In my view, the order should include both Ms. Villeneuve and Ms. Balsillie. All of the affected employees, as noted in paragraph 3 of the Agreed Statement of Facts received layoff notices on March 11, 2019. The fact that Ms. Villeneuve heard of the layoffs a month before they occurred because the Hamlet was broke or that Ms. Balsillie was not available to testify in these proceedings should not preclude their eligibility for relief, particularly given the context of the policy grievances.

Finally, without diminishing the hardship experienced by the affected employees as a result of the Employer's actions, I am not disposed under the circumstances to award aggravated damages as claimed by the Union. As indicated, I do not see that the circumstances leading up to the layoffs were motivated by any nefarious reasons other than a lack of money to pay the affected employees. I agree with the Employer that this small and remote northern Hamlet is not managed with the same level of expertise as more populated centres. The unfortunate circumstance here was that the protected recall rights set out in the collective agreement were ignored. There is simply insufficient

evidence before me, however, to say that the layoffs were motivated by any calculated malice towards one or more of the employees. Under the circumstances, I am not prepared to direct a payment of aggravated damages for each of the affected employees, as requested by the Union.

CONCLUSION

I find that the Employer breached article 41.02 for hiring individuals to perform bargaining unit work, as well as articles 42.05 and 42.06 for failing to recall the affected employees. The Employer also breached article 42.04 for failing to provide one months' notice, or pay in lieu of notice, after the layoff notices were issued to the affected employees on March 11, 2019. The Layoff grievance and the Job Security grievances are therefore upheld. The affected employees are not entitled, nor is the Union seeking under the circumstances, any severance pay pursuant to article 43. The Severance Pay grievance is therefore dismissed.

Under the circumstances, and given the passage of more than two and half years since the layoff notices were issued, during which time several of the affected employees have sought out and accepted other employment, I shall reserve on making any further remedial orders of reinstatement or other compensation (as a result of the breach of articles 41.02, 42.05 and 42.06); or, pay in lieu of notice (as a result of the breach of article 42.04), in order to allow the parties an opportunity to resolve the claims of each of the affected employees, with the exception of Mr. Lizotte and Mr. Norm, who continued

to work after March 11, 2019, and are therefore not entitled to compensation. I shall retain jurisdiction should the parties be unable to resolve any outstanding matters resulting from this award.

I wish to thank counsel for their efforts and particularly taking the time to prepare their thorough written submissions.



JOHN M. MOREAU QC

November 8, 2021