IN THE MATTER OF AN ARBITRATION BETWEEN:

THE REGINA PUBLIC LIBRARY

Employer
Respondent

- and –

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 1594

Union
Grievor

AWARD

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before

Daniel Ish, Q.C. **Arbitrator**

Heard in Regina, Saskatchewan on Wednesday, June 18, 2014.

For the Employer: **Brian Kenny**
Jeff Grant

For the Union: **Guy Marsden**
Dale Mitchell

INTRODUCTION AND BACKGROUND

[1] This arbitration arises as a result of a grievance filed by the Union on July 26, 2013. The grievance alleged that the Regina Public Library (the "RPL" or the "Employer") breached Article 21.05 (d) and other provisions of the governing collective agreement when it posted two competitions for part-time (term) Public Service Clerks.

[2] The issue that gave rise to the grievance, concerned an italicized and bolded addendum in the posting that included the following sentence:

> Application to this competition will be considered as consent to be scheduled in excess of three (3) Saturdays and/or Sundays in four (4) as described in Article 21. 05 (d) of the Collective Agreement.

[3] A hearing was held on June 18, 2014 with only one witness called to testify on behalf of the Union. The witness, Mr. Dale Mitchell, the Acting President of the Local, testified that the competitions in question were posted on July 19, 2013, that they contained the above-quoted sentence and that three people were hired into the positions. He testified that the sentence in the postings was unique and that he did not recall ever seeing it, or similar words, used in previous postings. He also testified that the Employer added the challenged sentence to the postings without consultation with the Union and without the Union's agreement. Subsequent to July 2013 there have been several similar postings (and hiring pursuant to the postings) that the Union has grieved but the grievances are being held in abeyance pending the outcome of this case.

[4] There are no significant disagreements with respect to the facts. Also, at the outset of the hearing the parties agreed that I was properly appointed as an arbitrator and that there were no outstanding jurisdictional or preliminary issues to be determined. It was also agreed that the parties submit written arguments, which they subsequently did.

ISSUE AND ARGUMENTS

[5] In its written argument the Union outlined the issue as follows:

> Did the Regina Public Library violate the Collective Agreement when it included the addendum in the job postings stating that the employee's application to these positions would be considered as consent to be scheduled in excess of three Saturdays and/or three Sundays in for as described in Article 21.05 (d)?

I agree that this statement of the issue is an accurate and fair one.

[6] In their respective arguments the parties relied on numerous provisions of the collective agreement. For ease of reference, they are:

ARTICLE 1 – PREAMBLE

1.01 Whereas it is the responsibility of the Regina Public Library Board and its employees to endeavor to provide the taxpaying public and the citizens of the City of Regina with an efficient library service.

1.02 AND WHEREAS IT IS THE DESIRE OF THE PARTIES HERETO:

(a) To promote and maintain harmonious relations between the Employer and the Union.

(b) To recognize the mutual value of joint discussions and negotiations in all matters pertaining to working conditions, employment, hours of work and wages.

(c) To promote the morale, well being and security of all the employees in the bargaining unit.

ARTICLE 4 - FAIR EMPLOYMENT PRACTICES

4.01 The Employer recognizes and acknowledges the Union as the sole collective bargaining agent of the employees who are within the scope of this Collective Agreement, and the Employer hereby agrees to negotiate with the Union and with representatives elected or appointed by the said Union with respect to all the terms and conditions of employment and rates of pay and hours of work of all such employees.

…

4.03 No employee(s) shall be required or permitted to make a written or verbal agreement with the Employer which conflicts with the terms of this Collective Agreement or with any compensation plan or system arising from it.

ARTICLE 9 – ARBITRATION

9.03 Subject to Article 12.07, the Arbitrator shall not have the power to alter any of the terms of this Collective Agreement or substitute any provision for existing provisions, nor to give any decision inconsistent with this Collective Agreement. The Arbitrator shall have the power to determine whether a difference or dispute is a grievance under Article 8. In the event of the discharge of any employee becoming the subject of arbitration, the Arbitrator may, in his discretion, dismiss the grievance, impose a penalty less severe than dismissal or order the discharged person reinstated without loss of pay, benefits and/or seniority.

ARTICLE 12 – PROMOTIONS, TRANSFERS, STAFF CHANGES AND NEW JOB CLASSIFICATIONS

12.01 (a)(i) All new positions or vacancies which the Employer wishes to have filled shall be posted on a bulletin board for at least ten (10)

calendar days. Such posting shall include the job classification or title, a summary of the job description, budgeted hours allocated to the position, the applicable wage rate or salary range, and the initial location of the position.

(a) (ii) Each posting shall contain the educational qualifications or equivalencies, skill, and ability required for the position. The posted requirements with respect to skill, ability, and qualifications shall reasonably relate to the job to be performed.

12.02 Permanent employees shall be entitled to bid to fill any posted vacancy by means of written application within ten (10) days of the date the vacancy is posted. New positions or vacancies shall be filled on the basis of where the overall qualifications, skill, and ability as between two or more permanent employee applicants is equal, then seniority shall prevail. Nothing shall prevent the Employer from temporarily filling a new position or vacancy pending the selection of a successful applicant. Provided, if the Employer decides that no permanent employee applicant has the overall qualifications, skill, and ability, the Employer may hire any other applicant; the Employer's decision shall be subject to the grievance procedure.

ARTICLE 21 – HOURS OF WORK

21.05 (a) All full time employees (except Maintenance staff) may be required to work not more than one (1) Sunday in four (4) except where required to work due to absence of other employees or for special programs. Such employees (except as aforesaid) working on Sunday will be given two (2) consecutive days off that week; they will work a four and one half (4 ½) day, thirty-two and one-half (32 ½) hour work week instead of the regular five (5) day, thirty-six and one-quarter (36(1/4) hour week, with no reduction in pay. The benefit of a four and one half (4 ½) day week will only be granted to such employees, except as aforesaid, who are scheduled to work and actually work on a Sunday.

Effective January 1, 2013 the above provision will be replaced by the following:

All full time employees (except Maintenance staff) may be required to work not more than one (1) Sunday in four (4), except where required to work due to absence of other employees or for special programs. Such employees (except as aforesaid) working on Sunday will be given two (2) consecutive days off that week.

(b) All full time employees shall be entitled to at least one (1) Saturday off in four (4), and shall not work more than two (2) evenings per week except due to the absence of other employees or for special programs. This clause shall not apply to Maintenance employees.

(c) Part time employees (except Maintenance staff) shall be paid at the rate of one and one-half (1 ½) times their regular rate of pay for all hours worked on Sundays.

Effective January 1, 2013 the above provision will be replaced by the following:

All employees shall be paid at the rate of one and one-half (1 ½) times their regular rate of pay for all hours worked on Sundays.

(d) A part time employee may be required to work not more than three (3) Saturdays in four (4) and three (3) Sundays in four (4) without her consent.

THE UNION'S SUBMISSIONS

[7] The core argument of the Union was that Article 21.05 (d), read in conjunction with the collective agreement as a whole, is not consistent with the Employer's interpretation that it can secure an employee's consent contemplated by the Article through the process of applying for vacant positions. It was argued that in doing so the Employer has not only violated Article 21.05 (d) of the collective agreement, but it also undermined the Union's role as the sole bargaining agent and as such has also violated Article 4.01 (the Union recognition clause) and Article 4.03, which prohibits individual agreements with the Employer that conflict with the collective agreement.

[8] In support of its submission that the collective agreement was violated the Union relied upon numerous arbitration decisions that addressed the proper approach to the interpretation of specific provisions of the collective agreement. Reference was made to *PCL Construction Ltd. and Construction and General Workers, Local 1111* (1982), 8 L.A.C. 3rd (Sychuk); *Re Coca Cola Ltd.* (1983) 11 L.A.C. 3rd 207 (Springate); *Puretex Knitting Company and C.T.C.U. Local 560* (1975), 8 L.A.C. 2nd 371 (Dunn); *Weyerhauser Chapleau* (2001), 98 L.A.C. (4th) 150 (Tacon); *U.A.W., Local 112 and Dehaviland Aircraft of Canada* (1961), 11 L.A.C. 350 (Laskin); *Securitas Canada and U.F.C.W.*, [2012] S.L.A.A. No. 12 (Pulmac); *Pacific Press and Graphic Communications International Union, Local 25-C*, [1995] BCCAAA No. 67 (Bird); *Toronto Transit Commission and A.T.U., Local 113*, [2009] O.L.A.A. No. 408 (Brunner); and *Imperial Oil Strathcona Refinery* (2004), 130 L.A.C. 4th 239 (Elliott).

[9] In its argument the Employer also relied on some of these same cases and many of the same principles as setting out the proper approach by an arbitrator in interpreting provisions of the collective agreement. Most notably, the Employer relied upon the now often quoted decision of Arbitrator Elliott in *Imperial Oil, supra*. In the Analysis and Decision part of this award I will attempt to summarize the principles that have been elucidated by several arbitrators.

[10] The Union argument focused on two grounds. The first was that the Employer violated the Union security clause of the collective agreement and the provision prohibiting individual negotiations with Union members when it required the consent of applicants to be scheduled for four Saturdays and Sundays in four as a condition of applying for and obtaining one of the positions in question. It was argued that this amounted to negotiating or bargaining with individual employees that affected employees' terms and conditions of employment and thus breached Articles 4.01 and 4.03 of the collective agreement. In support of this argument the Union relied upon statements in Brown & Beatty, *Canadian Labour Arbitration* and numerous arbitration decisions including *Hawksbury General Hospital and U.S.W.A., District 6* (1992) 24 L.A.C. 4th 329 (Roach) and *Re Westar Timber Ltd. and I.W.A., Local 1-405* (1986), (unreported, Moore, referred to in the *Hawksbury* case).

[11] The second primary ground argued by the Union was that to seek consent contemplated in Article 21.05 (d) as part of the application process is in effect no consent at all. It was argued that consent requires a voluntary agreement unclouded by duress or pressure associated with the desire to obtain a certain position. In furtherance of this argument, it was argued that the Employer's approach and interpretation of the collective agreement, specifically Article 21.05 (d), negatively impacts the ability of permanent employees to bid on any vacancies. It was submitted that it will have the effect of dissuading some employees from applying for positions because of the requirement to possibly work every weekend should they be successful in obtaining a position. This, it was submitted, is contrary to the purpose and intent of the seniority provisions of the collective agreement. Reference was made to the longstanding and universally accepted decision of Arbitrator Reville in *Tung-Sol of Canada Ltd. and United Electrical, Radio and Machine Workers of America, Local 512* (1964) 15 L.A.C. 161.

[12] The remedies requested by the Union included a declaration that the Employer violated the collective agreement, a cease and desist order that would prevent the Employer from including the addendum regarding Article 21.05 (d) on future postings and an order vitiating the "alleged consent" the Employer has received from the three successful applicants to the two postings in issue.

THE EMPLOYER'S SUBMISSIONS

[13] The Employer began its argument by pointing out that the onus rests with the Union to prove, on a balance of probabilities, that the Employer breached its obligations under the collective agreement by posting the competitions with the addendums. It was emphasized that there is no onus on the Employer to prove the contrary and that the Union failed to meet the onus of proof.

[14] The Employer also addressed in some detail the principles of interpretation that should be utilized in considering Article 21.05 (d) and the other provisions of the collective agreement relied upon by the parties. Reference was made to statements in Brown and Beatty, *Canadian Labour Arbitration* and several arbitration decisions including *Northern Ontario School of Medicine and O.P.S.E.U., Local 677* (210) 193 L.A.C. 4th 124 (Surdykowski); *Stanley Works Ltd. and International Association of Machinists, Local 1226*, [1979] O.L.A.A. No. 115 (Hinnegan); and *Saskatoon Regional Health Authority and SEIU – West* [2010] S.L.A.A. No. 9 (Pelton). In the latter decision Arbitrator Pelton cited with approval the decision of Arbitrator Elliott in the *Imperial Oil Case, supra*. I will later attempt to summarize the commonly accepted principles from the cases cited by the Employer and the Union.

[15] It was submitted that while the preamble of a collective agreement cannot be used as a basis for enforceable rights, it was recognized by the Employer that the preamble can serve as a useful guide in discerning the intent of the parties to a collective agreement. Thus while Article 1.02 can shed some light as to the intention of the parties, it was submitted that it cannot be examined in isolation of Article 1.01. While Article 1.02 speaks to harmonious relations, Article

1.01 recognizes that the Regina Public Library Board and its employees are committed to providing an efficient library service.

[16] The primary submission of the Employer is that Article 21.05 (d) is completely silent with respect to how the consent contemplated can be obtained by the Employer. The clause sets out no process and to accede to the Union argument an arbitrator would have to impute qualifications and restrictions into the provision that are not there. It was submitted that there is no basis whatever for the Union position that the consent under Article 21.05 (d) is meant to be secured on a case-by-case basis. It was argued that the provision says nothing about *ad hoc* or case-by-case consent, nor does it restrict or stipulate the time when consent is to be obtained. Thus, for an arbitrator to interpret the Article as containing qualifications or limitations, it would be a violation of Article 9.03 of the collective agreement which says that an arbitrator shall not have the power to alter any terms of the agreement.

[17] The Employer argued that it is important that Article 21.05 (d) refers to the consent of the employee and not the consent of the Union. Relying on *Kingston General Hospital and CUPE, Local 1974* [1995] O.L.A.A. No. 658 (Charney) it was argued that obtaining the consent of an employee through the application process was not inconsistent with Article 21.05 (d). It was submitted that where the provision applies the consent means that of the employee without any input from the Union. In short, it was the Employer's submission that Article 21.05 (d) does not impose any limits and does not set out any procedure for obtaining an individual employee's consent. Thus, the Employer was not in breach of the collective agreement by asking for the consent of employees as condition of applying for the three posted positions.

[18] The Employer took issue with one of the Union's arguments with respect to past practice. It was submitted by the Employer that it had been agreed that the matter would be resolved in arbitration without any reference to extrinsic evidence. Thus, the Employer submitted that I should make no assumptions about previous practice with respect to postings. I agree with the Employer's argument on this issue and in this decision I make no assumptions or conclusions based on past practice.

[19] The Employer also made submissions with respect to management's rights. It took the position that even in the absence of a management's rights clause, which is absent in this collective agreement, there is a residual right of management to make operational and workforce decisions, except to the extent that its rights are limited by the terms of the collective agreement. In support of this position reference was made to *Voice Construction Ltd. and Construction and General Workers' Union, Local 92*, [2004] 1 S.C.R. 609 and *Coastal Community Credit Union and Office and Technical Employees' Union, Local 15*, [2001] B.C.C.A.A.A. No. 356 (Blasina). It was submitted that because there is no management right's clause in the collective agreement, it does not follow that the management has no rights.

[20] The last substantive point made by the Employer in its submissions was that it took issue with the Union's characterization of the Employer seeking consent through the application to the competitions as a "waiver" by employees of their Article 21.05 (d) rights. It was submitted that this is an erroneous characterization because it is the Employer's right under the Article to grant or withhold consent. Stated differently, it was submitted that there are no limits as to how the employee can exercise his or her Article 21.05 (d) right to grant or withhold consent. Thus, when an employee applies for posted competitions he or she has not waived any rights. Rather, it was submitted that the employee is exercising their Article 21.05 (d) right by consenting through the application process.

[21] The Employer concluded its argument by submitting that the Union has failed to prove on a balance of probabilities that the Employer is in violation of the collective agreement and asked that the Union grievance be dismissed.

ANALYSIS AND DECISION

[22] Initially I will address two issues before analyzing and focusing on the core matters to be determined in this arbitration. The first concerns the Reply submissions made by the Union and an Employer's objection with respect to the extent of them. I briefly perused the Reply and the objections, as well as the Union reply to the objections. It is my conclusion that much of the Reply did technically go beyond what is contemplated in reply submissions. As a result, I set aside the reply submissions and limited my consideration of the respective arguments to the

Union's and Employer's initial written submissions. Both were very thorough and, in my opinion, little more is required to set out clearly the issue to be determined and the arguments in favor of the respective positions.

[23] The second issue that I will deal with briefly at the outset is that of the Employer's residual management rights. I agree with the Employer that the arbitral jurisprudence recognizes the right of an employer, for legitimate business reasons, to reorganize its workplace in the absence of express language to the contrary in the collective agreement. Thus, so long as an employer exercises its management's rights without impinging on negotiated provisions of the agreement, generally it is acting within its recognized authority. Paragraph 5:0000 of Brown and Beatty, *Canadian Labour Arbitration*, correctly outlines the accepted arbitral approach on this issue. It says:

> It is an almost perpetual condition of the industrial environment that work requirements are in a state of flux. Variations in demands, changes in production requirements, and pressures to improve the efficiency of performance are commonplace in virtually all industrial establishments. It is axiomatic that the presence of such competitive pressures and technological advances will have a direct and immediate impact on the existing organization and makeup of the workforce. And when confronted by the intrusion of such external forces, management will commonly perceive the need to reorganize its methods of production. This it may do, depending upon the nature of the exigency, in several ways. For example, management might determine to assign certain aspects of its work to persons or firms outside of the bargaining unit; to reorganize the work processes within the bargaining unit; to reallocate personnel by way of transfers, promotions, demotions, layoffs; or to establish new, or alter existing, working hours, shifts and overtime schedules. From management's perspective, depending upon the prevailing circumstances, any of these responses would be within their competence. Indeed, prior to the establishment of a collective bargaining relationship, it could be said that management's initiative to respond to changing needs of this nature was limited only by its resources and other pragmatic considerations….
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> Indeed, it is now generally conceded that whether or not an express provision giving management the power to initiate such changes is included in the agreement, management nevertheless possesses this power or ability to initiate such changes. Very simply, arbitrators have recognized that such authority flows from management's responsibility to manage the enterprise.

The Brown and Beatty summary is based on numerous and now well accepted arbitral cases. I now turn to the core issue concerning Article 21.05(d).

[24] The parties both made reference to the appropriate principles of contractual and statutory interpretation that should be honoured by arbitrators. Numerous quotations were set out in the parties' arguments from arbitration and court cases which together support the following principles of interpretation:

- The appropriate response is to interpret language used by the parties so as to give it its most reasonable interpretation.
- To preserve integrity to a contract that parties have taken care to reduce to writing, the words of the contract must be looked to to establish intent rather than what the parties later may wish to say was their intent. The meaning of the collective agreement is to be sought in its express provisions.
- In determining the proper interpretation of a particular provision in a collective agreement the consideration of the purpose of the provision must be taken into account (the so called "purposive" principle of interpretation).
- Where one reading of a provision leads toward a more reasonable outcome in the labour relations context, in view of the purpose of the provision in question, and one to a less expected result, the former should be preferred.
- A collective agreement should be interpreted as a whole, in a manner that gives meaning to all of its terms and avoids an interpretation that would render one or more of its terms ineffective.
- Any interpretation should accord with sound labour relations principles in good labour-management sense that avoid a labour relations absurdity.
- The words of a collective agreement should be interpreted harmoniously within the overall scheme of the collective agreement, the object of the agreement and the intention of the parties.
- The interpretation must be acceptable in the sense that it is within the bounds of acceptability for the parties and legal values of fairness and reasonableness.
- The language in an agreement should be viewed in its normal and ordinary sense.
- It should be presumed that all words used in an agreement were intended to have some meaning.
- Where there is no ambiguity or lack of clarity and meaning, effect must be given to the words of the agreement.

[25] Arbitral jurisprudence and the courts have for many years adopted a purposive principle of interpretation of statutes and contracts, including collective agreements. The interpretation of any text is context-dependent in the expectation that it will lead to a rational understanding of the

purpose and the factual context behind the statutory or contractual language. A very recent decision of the Supreme Court of Canada underscores the importance of this approach. In *Sattva Capital Corp.* v. *Creston Molloy Corp*., 2014 SCC 53 the Court was dealing with an issue arising out of a commercial arbitration. The observations of the Court with respect to the interpretation of contracts nevertheless are relevant to courts and other arbitrators, including labour arbitrators.

[26] In the *Sattva* case the Court said that a decision-maker should adopt "an approach to contractual interpretation which directs [the decision-maker] to have regard for the surrounding circumstances of the contract – often referred to as the factual matrix – when interpreting a written contract". (para 46) The Court continued:

> [47] … the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding" (*Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21 (CanLII), 2006 SCC 21, [2006] 1 S.C.R. 744, at para. 27 *per* LeBel J.; see also *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4 (CanLII), 2010 SCC 4, [2010] 1 S.C.R. 69, at paras. 64-65 *per* Cromwell J.). To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:
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> > No contracts are made in a vacuum: there is always a setting in which they have to be placed. . . . In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating. (*Reardon Smith Line*, at p. 574, *per* Lord Wilberforce)
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> [48] The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement (see *Moore Realty Inc. v. Manitoba Motor League*, 2003 MBCA 71 (CanLII), 2003 MBCA 71, 173 Man. R. (2d) 300, at para. 15, *per* Hamilton J.A.; see also Hall, at p. 22; and McCamus, at pp. 749-50). As stated by Lord Hoffmann in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*, [1998] 1 All E.R. 98 (H.L.):
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> > The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. [p. 115]

It is these principles that I will attempt to apply in the present case.

[27] The purpose of Article 21.05(d) is clearly to give part-time employees the benefit of having one weekend per month when they do not have to be scheduled to work. It is generally recognized that most employees, perhaps not all, would prefer not to work weekends or at least prefer not to work all weekends. Article 21.05(d) was negotiated by the parties to place a fetter

on the management's right and ability to schedule part-time employees. The clause is not absolute but allows individual employees to consent to work four weekends in four. The addendum placed in the job postings, which are the subject of the current grievance, in effect overrides the clear and unambiguous right given to individual employees in Article 21.05(d). The addendum deems that an application for a posted position is consent under Article 21.05(d). The effect of the addendum is to only hire employees into these part-time positions that agree to consent. In my view this pre-condition (to even being considered for the job in question) directly circumvents the purpose and intent of Article 21.05(d). If one applies the so-called modern principles of interpretation, which I have attempted to summarize in paragraph 24 above, a fair and reasonable interpretation of Article 21.05(d) is that it gives individual employees rights that cannot be rendered ineffective through the job posting process.

[28] The numerous arbitration and court decisions cited by the parties in my view clearly lead to this conclusion. In the words of Arbitrator Elliott in the *Imperial Oil* case, *supra*, the interpretation I ascribe to Article 21.05(d) addresses the provision within "the entire context of the collective agreement", reads the words of the Article harmoniously within the scheme and object of the agreement, is reasonable and is "within the bounds of acceptability for the parties and legal values of fairness and reasonableness". I agree with the Employer that the Article in question contains no apparent limitations on how and why consent can be obtained but the lack of those limitations does not, in my view, lead to the conclusion that the purpose and intent of the Article can be circumvented through the job application process.

[29] In addition I agree with the Union argument that consent obtained through the application process is not really a voluntary consent or agreement. There is no doubt that Article 21.05(d) contemplates an individual employee's consent without the involvement of the Union but to require consent as a condition of making a job application removes the ability to consent free and clear of any consequences. The consequence of not providing "consent" in this manner (ie. as part of the application for the job) is not to be considered for the position which obviously removes an employee's ability to obtain the position. There is nothing in Article 21.05(d) that suggests the Employer can impose conditions on an employee's right not to work four weekends in four and the attempt to link the ability to obtain the position with the consent is in my view an

unwarranted condition attached to Article 21.05(d), as well as a removal of the voluntariness or freedom for an employee to give consent.

[30] It is my conclusion that the grievance of the Union succeeds on either of the two grounds that I have outlined above. A third ground that does have merit is the one argued by the Union as its primary argument, that the imposition of the addendum in the job posting undermines the Union's role as sole bargaining agent and is in violation of Articles 4.01 and 4.03. The Employer is correct that the consent contemplated by Article 21.05(d) is not that of the Union but that of the individual employee. Nevertheless, to place on a job posting consent as a necessary pre-condition to obtaining the job is in effect negotiating with the individual employee. The imposition of the pre-condition to obtaining employment goes well beyond the consent contemplated by Article 21.05(d) to in effect add a term and condition of employment for part-time employees. While there is no doubt that the Employer has the ability to manage its workplace and to seek efficiencies for "the tax paying public and the citizens of the City of Regina" (Article 1.01), these efficiencies cannot be obtained in the face of clear and unambiguous collective agreement provisions.

[31] If my conclusion was otherwise, there may be significant implications for numerous other provisions of the collective agreement that make reference to employee consent or agreement. The Union made reference to no fewer than six other clauses of the collective agreement that allow for a variation in the norm by mutual agreement or consent of the employee. For instance, Article 21.04 says that: "Every employee shall have two scheduled days off each week, unless otherwise agreed between the Employer and the employee". If the Employer is able to obtain agreement or consent for the purposes of Article 21.05(d) as part of the job application process, it is difficult to understand as a matter of principle why such agreement or consent could not be similarly obtained for the purposes of Article 21.04, or Articles 14.06(a), 21.07(a), 21.09, 21.11 or 21.17. This result would be quite unreasonable and undermine the purpose and intent of these provisions.

[32] For the foregoing reasons, it is my conclusion that the grievance of the Union succeeds in part. The addendum to the job postings for the part-time positions is contrary to the collective

agreement. The addendum contained on the three job postings in question is invalid and the Employer must cease from using it again in future similar postings. The result is that the three successful applicants who obtained the positions which are the subject of this grievance are able to exercise their collective agreement rights under Article 21.05(d), although I recognize that their term positions are about to expire in the very near future.

[33] In the last paragraph I indicate that the grievance succeeds in part. The reason is that the Union argued that the consent envisaged in Article 21.05(d) is to "be secured on a limited, case-by-case basis depending on the circumstances just as it would when employees may be asked to work a split shift, forego two days off per week or to agree to a sudden change in schedule". This decision should not be interpreted as agreeing with the Union position on this point. The Employer is correct that Article 21.05(d) does not address the process of obtaining consent and it may be possible that a "blanket" consent could be obtained from an incumbent employee provided that it is always subject to withdrawal. And there may be other processes that could be utilized that are consistent with the Article. The crux of the decision in this case is limited to the Employer requiring or deeming consent as part of the application process.

Dated at Saskatoon, Saskatchewan this 19th day of August, 2014.

Daniel Ish, Q.C., Arbitrator