ARBITRATION

BETWEEN:

UNIFOR LOCAL 52-A

- and -

THE BOARD OF TRUSTEES OF THE EDMONTON CATHOLIC SEPARATE SCHOOL DIVISION NO. 7

WITH RESPECT TO A SEPTEMBER PAY GRIEVANCE

A W A R D

BEFORE A BOARD OF ARBITRATION COMPOSED OF:

Andrew C.L. Sims, Q.C. ..... Chair

REPRESENTATIVES FOR EDMONTON CATHOLIC SEPARATE SCHOOL DIVISION NO. 7

Vicki Giles ..... Counsel
Carole Karbonik ..... General Counsel ECS
Laurie Pelkie ..... Asst. Superintendent HR
Tina Monaco ..... Employee Relations Manager
Denise Michelutti..... Manager Pay & Benefits
Jessica Krulak..... Articling Student

REPRESENTATIVES FOR UNIFOR LOCAL 52-A

Kristan McLeod ..... Counsel
Wilma Ellenburgh..... Unifor 52-A President
Elaine Lyttle..... Unifor 52-A Vice-President
Sue Pearce ..... Unifor National Rep.

HEARD in Edmonton, Alberta on May 15 & 16, 2017

AWARD ISSUED on June 5, 2017

Our file: 7846

AWARD

This decision involves the calculation of pay for the month of September for certain "10 month" employees of the Edmonton Catholic School Board. The employees are represented by Unifor Local 52-A which is the bargaining agent for:

> All support in schools and all secretarial and clerical staff in central offices, maintenance and warehouse buildings.

In short, this issue arises because, in 2015 the first school "operational day" and thus the first day back to work for these employees was September 3, 2015. The Union's position is that despite not working on September 1 and 2 the employees in question were entitled to a full "monthly salary" for September. The Employer's view is that it was entitled to withhold pay for those two days since the employees were not required to work, and were essentially laid off for these two days.

The parties were able to agree on most of the pertinent facts through the following agreement.

1. The Employer is the Board of Trustees of the Edmonton Catholic Separate School Division No. 7.

2. The Union is UNIFOR Local 52-A.

3. The bargaining unit comprises all support staff in Schools and all secretarial and clerical staff in central offices, maintenance and warehouse buildings.

4. As of June 30, 2015, there were 736 bargaining unit members who worked for 10 months of each school year (September – June) (the "**Employees**"). The Employees are laid off at the end of each school year and are recalled at the beginning of the following school year.

5. The current collective agreement between the Union and the Employer is effective September 1, 2013 to August 31, 2016 (the "**Collective Agreement**"). The Collective Agreement is attached and marked as Exhibit 1.

6. On October 7, 2015 Wilma Ellenburgh, Union Representative, filed a group grievance alleging that the Employer had violated that Collective Agreement, and in particular Article 6.3(a) of the Collective Agreement. The Grievance is attached and marked as Exhibit 2.

7. Appendix A of the Collective Agreement sets out the Salary Schedules for employees in the bargaining unit. The relevant Salary Schedules (10 month employees) are found at pages 29 -32 of the Collective Agreement.

8. Article 6.3(a) of the Collective Agreement states:

   6.3 (a) All ten month continuous and probationary employees shall be paid the monthly salary to which they normally are entitled, for all the months of the school year, commencing the month of September and concluding the month of June. Notwithstanding the foregoing, all ten month employees required to work during the months of July or August shall be paid for that time at the same rate of pay to which they are normally entitled.

9. Article 2 of the Collective Agreement states:

> Management and the direction of the working force are vested solely and exclusively with the Employer, and shall not in any way be abridged except by specific restrictions as set forth in this Agreement.
>
> The Employer hereby retains the sole and exclusive control over any and all matters concerning the operation, management and administration of its business; the determination of the location, relocation, or termination of any or all of its facilities, including, without limitation, the determination of whether services or work will be carried out, subcontracted or otherwise acquired; the direction and control of employees including, but not limited to the determination of the number and qualifications, both technical and medical, of employees to perform work, the determination of quality and quantity standards and the required employee performance to meet such standards; the assignment of work or overtime; the right to select, hire, lay off, promote, discipline, suspend, discharge and retire; the right to determine job content; the right to determine the starting and closing time of work; the right to determine processes, methods and procedures to be employed, including technological change; the right to make and enforce rules, including safety matters, and to perform all other functions inherent in the administration and control and/or direction of business, except as expressly and specifically limited by the terms of this Agreement.
>
> The foregoing enumeration of Management's Rights shall not be deemed to exclude other rights of management not specifically set forth. The Employer therefore retains all rights not otherwise specifically covered by this Agreement, irrespective of whether the same have been hereto exercised.

The Grievance

10. On May 11, 2015, the Employer sent an email to the Union and to all Employees outlining the layoff dates for the 2014/2015 school year, and the 2015/2016 school year. A copy of the email is attached and marked as Exhibit 3. The email stated, in part:

> Please review the Information below very closely as it indicates your last day of work for the 2014/15 school year and your first day back to work for the 2015/16 school year.
>
> **Seasonal Layoff Date, 2014/2015:**
>
> • Your last day of work for the 2014/2015 school year is June 26, 2015.
>
> • However, your last day of pay is June 30, 2015 (June 29 and 30 are non-operational days).
>
> • For unemployment purposes your last day of work is June 30, 2015. You cannot apply for unemployment prior to June 30, 2015. More details about unemployment applications and ROEs will follow in June, 2015.
>
> **Return Date, 2015/2016:**
>
> • Your return date for the 2015/2016 school year is September 3, 2015 at which time your pay will commence.
>
> • For unemployment purposes your first day back to work is September 3, 2015.
>
> • Please note that this does constitute a full month of employment for pension purposes.
>
> • If you are receiving extended health benefits throughout the summer, your benefit coverage will not be interrupted.
>
> **Seasonal Layoff Date, 2015/2016**
>
> • Your last day of work for the 2015/2016 school year is June 29, 2016.
>
> • However, your last day of pay is June 30, 2016 (June 30 is a non-operational day).

- For unemployment purposes your last day of work is June 30, 2016.
- Further information will be forthcoming in May, 2016.

11. The Employer laid off the Employees on June 30, 2015. All of the Employees were paid up to and including June 30, 2015.

12. September 3, 2015 was the first operational day of the 2015/2016 school year. An operational day is any day within the school year when school based employees are required to be at school. Operational days may or may not be instructional days (days upon which students are present). Within the school year, operational days outnumber instructional days.

13. On September 3, 2015, 679 Employees (occupying 733 positions) were recalled (the "**September 3rd Recalled Employees**"). Attached and marked as Exhibit 4 is the list of September 3rd Recalled Employees.

14. The Employer did not pay the September 3rd Recalled Employees for September 1-2, 2015.

15. The September 3rd Recalled Employees who received EI continued to receive EI up to and including September 2, 2015.

Other Information with Respect to 2015/2016 School Year Recalls

16. A number of Employees were recalled prior to September 1, 2015. These Employees were paid (or banked time in lieu) for all hours worked prior to September 3, 2015. Attached and marked as Exhibit 5 is the list of Employees who were recalled prior to September 1, 2015.

17. A number of Employees worked on either September 1 or 2, 2015 (or both) prior to being formally recalled. They were paid (or banked time in lieu) for the actual hours worked on those days plus vacation pay. Attached and marked as Exhibit 6 is the list of Employees who worked on either September 1 or 2 or both.

18. 23 Employees were recalled between September 8-October 18, 2015.

19. 21 Employees were recalled on November 9, 2015.

20. 4 Employees were recalled on February 1, 2016. Attached and marked as Exhibit 7 is the list of the Employees who were recalled after September 3.

21. The Employees who were recalled September 8 or later were paid a prorated monthly salary based on their recall date (i.e. Employees who were recalled on September 8 were not paid a full monthly salary).

Prior Years

22. The recall and pay practices with respect to the majority of 10 month employees (excluding those with particular individual circumstances) in previous years is as follows:

- 2005-2006 – Recalled Tuesday August 30. Worked until Friday June 30
- 2006-2007 – Recalled Wednesday August 30 with Friday September 1 being unpaid. Friday September 1 was a nonoperational day and all school based staff were not required to report to work. Worked until Friday June 29 (June 30 was Saturday)
- 2007-2008 – Recalled Wednesday August 29 with Friday August 31 being unpaid. Friday August 31 was a nonoperational day and all school based staff were not required to report to work. Worked until Friday June 27 (Monday June 30 was paid)

- 2008-2009 – Recalled Wednesday August 27 with August 29 being unpaid. Friday August 29 was a nonoperational day and all school based staff were not required to report to work. Worked until Friday June 30
- 2009-2010 – Recalled Monday August 31. Worked until Wednesday June 30
- 2010-2011 – Recalled Monday August 30. Worked until Thursday June 30
- 2011-2012 – Recalled Tuesday August 30. Worked until Friday June 29 (June 30 was Saturday)
- 2012-2013 – Recalled Thursday August 30. Worked until Friday June 28 (June 30 was Sunday)
- 2013-2014 – Recalled Thursday August 29. Worked until Friday June 27 (paid Monday June 30)
- 2014-2015 – Recalled Thursday August 28. Worked until Friday June 26 (paid Monday June 29 & and Tuesday June 30)
- 2015-2016 – Recalled Thursday September 3. Worked until Wednesday June 29 (paid Thursday June 30)

23. Copies of the school calendars from 2005/2006 – 2015/2016 are attached and marked as Exhibit 8.

24. The number of operational days and instructional days varies from year to year, as follows:

School Year	Instructional	Operational
2005/2006	192	197
2006/2007	192	197
2007/2008	191	196
2008/2009	192	197
2009/2010	191	197
2010/2011	191	197
2011/2012	190	197
2012/2013	191	196
2013/2014	190	195
2014/2015	190	195
2015/2016	188	194

Other Information

25. The Employees accrue vacation in accordance with Article 10.2.3 of the Collective Agreement.

26. During natural breaks in the school year (Christmas Vacation, Spring Break, Teachers' Convention) Employees are paid their full monthly salary as these breaks are mandated vacation periods for the Employees (Article 10.6).

27. Employees who have not accrued sufficient vacation to cover the mandated vacation periods will have the difference deducted from their final pay in June of the relevant school year (Article 10.7(b)).

28. If the mandated vacation periods do not use up all of the accrued vacation for an Employee, any outstanding vacation will be paid out on the Employee's final pay in June (Article 10.7(a)).

29. If an Employee is absent from work and does not qualify for a day of leave with pay under one of the paid leaves set out in the Collective Agreement, the Employee's monthly pay is reduced accordingly.

30. Employees whose FTE is less than 1.0 are paid a pro-rated monthly salary based on their FTE. The FTE's of Employees range from 0.12 to 1.0.

These facts were augmented by the evidence of Local Union President, Wilma Ellenburgh. Ms. Ellenburgh testified that she has worked for the School District for about 29 years. She is currently the Rental and Lease Coordinator and in that role deals with third party use of school premises. She has also, for the last 7 years, been the President of Local 52-A which has involved her in the last three rounds of negotiations.

Ms. Ellenburgh's experience in negotiations is that the parties have negotiated increases on an annual pay basis. The monthly salary figure is set without reference to the number of operational or calendar days in any given month. So, for example, February which has the lowest number of operational days is not paid at any different rate than the other nine months. Ms. Ellenburgh is a 12 month employee not directly affected by this dispute. She first became aware of the issue when, in September 2015, she began receiving what amounted to 50-60 telephone calls and emails from members of her local who were 10 month employees and who felt monies had inappropriately been deducted from their pay cheques. In her experience this had never happened before.

Ms. Ellenburgh acknowledged there are regularly minor differences in monthly cheques due to variations in deductions but basically, as far as she is aware, each month's base rate has always been the same. Employees in December are required to take such holidays as they have banked and to take any remaining days off without pay, although the pay adjustment (extra banked days or days for which their bank is short, are only adjusted on June's cheque, not December's cheque, as set out in Article 10.7.

Union Argument

The Union canvassed three principles of interpretation in relation to its arguments; the plain meaning approach, the need for a contextual interpretation and, in the event of an ambiguity, the ability to draw on clear past practice.

The Union's view is that its interpretation comports with the rule that collective agreements are to be given their plain and ordinary meaning. It summarizes the proper approach as follows:

> … the objective is to determine the parties' intention. In accordance with the modern approach to interpretation, words are read in their entire context and in their ordinary and grammatical sense, harmoniously with the scheme and purpose of the collective agreement.
>
> Where the words are clear and unambiguous on their face, the parties are presumed to have intended their legal consequences. That is, the parties are presumed to have intended what they have actually said. When there is no ambiguity in the meaning, effect must be given to the words the parties chose, as interpreted in their "normal or ordinary sense".
>
> Brown and Beatty, *Canadian Labour Arbitration*, 4th ed. (Thomson Reuters, loose leaf, 2017-) at paras. 4:2000, 4:2100 and 4:2110

See also:

> *Leading Cases on Labour Arbitration*, 2nd edition, Mitchnick and Etherington (Lancaster House) at 17.6

The Union also argues that these provisions, when read in the context of the agreement as a whole, still support its interpretation. Contextual interpretation is an important principle.

> The context in which words are located is critical to their meaning. Thus, it is said that the words under consideration should be read in the context of the sentence, section and agreement as a whole.
>
> Brown and Beatty, *Canadian Labour Arbitration*, 4:2150

See also:

> *United Food and Commercial Workers' Union Local 401 v. Real Canadian Superstore*, [2008] ABCA 210

and a case cited by the Employer:

> *Parkland (County) v. County of Parkland Employees Association* (Wakeling) at para. 14

While maintaining that the plain meaning of the section in question, read in the context of the agreement, is sufficient to decide the matter, the Union asserts too that the preponderance of past practice supports its interpretation. The Union summarizes the appropriate role of past practice as follows:

> Past practice can be relevant, when the language of a collective agreement is ambiguous, given that the aim of collective agreement arbitration is to derive the parties' intent in agreeing to a particular provision. When that provision is ambiguous, the parties' past practice applying it reflects their mutual understanding of the provision's meaning and thus can be used as an aid to the interpretation of the provision.

Arbitrator Brown commented on the uses of past practice as an aid to interpretation:

> As Professor Weiler suggested in John Bertram, past practice is the best evidence of the parties' shared understanding of an unclear term in their agreement. The meaning of vague language is better resolved by an employer and bargaining agent, in the course of administering a collective agreement, than by arbitrators who typically know less about any particular workplace than do the parties to the collective agreement in force there.
>
> *Catholic District School Board of Eastern Ontario v. Ontario English Catholic Teachers Assn (Surplus Teachers Grievance),* (2015) 250 L.A.C. (4th) 293 at para. 23

Within these principles, the Union argues that Article 6.3(a), combined with the similar reference in the salary schedules on pages 29-32 provide a full answer to this grievance. That is; 10 month employees receive a salary (not an hourly or daily rate) to be paid in each of the ten months they work in the amounts set out in the schedules.

This basic proposition is subject to well delineated exceptions in Article 10. The first is the formula for part-time employees in s. 10.2.2.

> 10.2.2 Part Time Employees
>
> (a) The above entitlements will be pro-rated for part time Employees based on their F.T.E.

The Union notes that this is based solely on the "full time equivalency" and once again not on days or hours worked.

The second is the provision for earning and taking vacation entitlement. It addresses two technical issues. The first is that employees of different years of service are entitled to different levels of vacation leave as provide for in s. 10.2.3. The second is that, under s. 10.6, vacation for 10 month employees must be taken at set times:

> 10.6 Notwithstanding Article 10.2, vacation for ten month employees must be taken during the year in which it is earned, specifically at Christmas break, spring break, and the annual Teachers' Convention. Any difference in entitlement and vacation taken shall be adjusted according to Article 10.7.

These defined exceptions (with surplus vacation pay paid out in June and any shortfall in vacation entitlement deducted in June, because the employee in on leave without pay during those days) do not, in the Union's submission, take away from the basic proposition that 10 month employees essentially get 10 pay cheques, of equal amount, for each of the months of the school year, and nothing for the summer months unless they are required to work on days during those months.

The Union also relies on what Article 6.3 does not say:

> 6.3 (a) All ten month continuous and probationary employees shall be paid the monthly salary to which they normally are entitled, for all the months of the school year, commencing the month of September and concluding the month of June. Notwithstanding the foregoing, all ten month employees required to work during the months of July or August shall be paid for that time at the same rate of pay to
>
> (b) For ten month employees, all work during July and August prior to school opening must be authorized in writing by the supervisor prior to being worked.
>
> (i) Upon written request by the employee, the supervisor may allow the employee the option of taking time off in lieu of pay. The time taken shall be equivalent to one time the number of hours worked, and shall be taken at the time mutually agreed on by the supervisor and the employee within the next school year.
>
> (ii) For ten month employees, time worked during July and August does not accrue additional service.
>
> (iii) Employees who "work prior", from August 15 to school opening, shall be paid according to the salary placement as of September 1 of that school year. Such payment to be made at September month end. However, employees may request and receive an advance for work prior. The advance will equal sixty five (65) percent (%) and will be paid by mid-September with residual pay at the end of September.

What this does not say, despite it being the obvious place to say it if it were intended, is that days in September not worked, and logically at least days not worked at the end of June, are not to be paid. It might have been said, if that were the intention, in 6.3(b)(i), that days worked in July or August would be offset against days not worked in June or September, or only paid if the one exceeded the other.

The Union argues that the equal pay per month arrangement has advantages to both parties in that they do not have to count and adjust for the varying days in the school year, or the differences in the number of days in each month. This yields less work for the Employer and predictability of income for the employees.

Employer Argument

The Employer's principle assertion is that Article 6.3 is not, and should not be interpreted to be, a wage guarantee. The common presumption is that employees are to be paid when and only when they work. That presumption, the Employer argues, can only be countered by clear and express language, particularly in the case of a publicly funded employer. The language here, in the Employer's submission, is insufficient to counter that presumption.

In support of this approach the Employer relies on the following summary of authorities:

> **9** Counsel for the company referred to several authorities which indicated that the kind of wage guarantee for which the union was arguing could only be found on express language and is unusual Brown & Beatty, for example, at pg 8-6 says:
>
> > To support a claim for a guaranteed level of wages requires clear and unequivocal language in the agreement.
>
> Further along those lines, counsel referred to two previous unreported awards between the two parties before me. In the first award dated September 21, 1993, Arbitrator Pauls at page 23 said:
>
> > Thus, although attracted from the perspective of sympathy to the Union's position, I am unable to uphold the grievance. It would be an egregious error on the part of any Board of Arbitration to take language in a Collective Agreement and to increase significantly an employer's cost by reading into that language what was neither contained therein nor intended by the parties at the time that the language was drafted.
>
> **10** In the second award dated September 15, 1995, Arbitrator Chapman at page 16 quoted from Brown & Beatty as follows:
>
> > "Where faced with a choice between two linguistically permissible interpretations, however, arbitrators have been guided by the reasonableness of each possible interpretation, administrative feasibility, in which interpretation would give rise to anomalies." (Emphasis his)
>
> *Westfair Foods Ltd. and UFCW Local 832* [1996] MGAD 12 (Grey) at paras. 9-10

The Employer also relies upon the following basic principles of collective agreement interpretation:

> The modern rules of interpretation are now well established and there is little significant difference between the parties on the point. The Employer distilled the discussion in Brown and Beatty, *Canadian Labour Arbitration* (4th edition) to the following essential elements:
>
> - The fundamental object in construing the terms of a collective agreement is to discover the intention of the parties – Para. 4:2100;

- The cardinal presumption is that the parties are assumed to have intended what they have said and that the meaning of the collective agreement is to be sought in its express provisions – Para. 4:2100;

- In searching for the parties' intention with respect to a particular provision in the agreement, arbitrators have generally assumed that the language before them should be viewed in its normal or ordinary sense unless to do so would lead to some absurdity or inconsistency with the rest of the collective agreement, or unless the context reveals that the words were used in some other sense – Para. 4:2110;

- It should be presumed that all of the words used were intended to have some meaning, and that they were not intended to be in conflict – Para. 4:2120;

- Where the same word is used twice it is presumed to have the same meaning; and where two different words are used, they are intended to have different meanings – Para. 4:2120.

The Association refers to the useful adaptation of the modern rules of interpretation, for use in the collective agreement context, by Arbitrator Elliott contained in:

> *Re Imperial Oil Strathcona Refinery and CEP* (2004) 130 L.A.C. (4th) 439 at paragraphs 39-48

Language is to be interpreted after considering the entire context of the collective agreement, with the words read harmoniously with the scheme of the agreement. This includes the legislative framework within which the agreement exists. An interpretation should be tested by asking (from *Imperial Oil* at para. 47):

- Is the interpretation plausible – is it reasonable?

- Is the interpretation effective – does it answer the question within the bounds of the collective agreement?

- Is the interpretation acceptable in the sense that it is within the bounds of acceptability for the parties and legal values of fairness and reasonableness?

Arbitrators will apply words in an agreement in accordance with their plain meaning, even if the result may seem obnoxious to one side or the other. However, they will avoid an absurd result or obvious inconsistency with the rest of the collective agreement.

> *United Food and Commercial Workers Local 1400 v. Westfair Foods Ltd. (Wage Rates Grievance)* (2010) 196 L.A.C. (4th) 129 (Stevenson)

Lakeland College v. Lakeland College Faculty Association [2016] CanLii 60668 (Sims)

The Employer suggests that, had the parties intended a wage guarantee they would have said, in Article 6.3 "their <u>full</u> monthly salary" or "will be paid <u>as a minimum</u> their monthly salary". The Employer recognizes that the agreement speaks of monthly salaries, and that monthly figures are also reflected in the 10-month salary scales. However, it urges, that alone does not mean it applies without regard to the time actually worked. It argues that, at other points in the collective agreement, this salary is simply used as the basis for a rate of pay. It points to Article 6.1(a) and (b) where the terms salary and rate of pay are used in parallel but without obvious distinction.

Article 7, the Employer notes, gives little detail to how part-time employees are paid except to say in 7.1(b) "hours of part-time employees shall be pro-rated according to their FTE." It would be unnecessary, the Employer argues, to provide for days off with pay if the monthly salary was a pay guarantee.

The Employer submits that the arrangements for time off at Christmas supports the view that the monthly salary is not a wage guarantee. If the employee has accrued vacation entitlements they get paid for the Christmas vacation period. If they do not, those days are unpaid. This supports its view that one is only paid if one works. It acknowledges Article 10.7 addresses this issue but argues that, if Article 6.3's reference to a monthly salary were truly a wage guarantee, the parties would have added "notwithstanding Article 6.3 to 10.7." The Article 6.3 reference to monthly salary, in the Employer's view, is simply a reference to the timing of wage payments and not a guarantee of a certain sum each month without regard to the underlying obligation to work. It characterizes what can happen in early September, when operational days do not start right on September 1st, as a short-term layoff of employees until they are needed when the school year actually starts. This, it argues, is more probable than an intention to pay the employees for not working on those days.

The Employer draws on the arguments in a case where the employer, by reducing the hours of work, was found to have breached a collective agreement commitment to pay employees "the minimum rates set forth in Schedule A". It notes the use of the word "minimum", something absent in the clause at hand.

> *Parkland (County) No. 31 and the County of Parkland Employees Association* (*supra*)

That Board said, at para. 7:

> 7 Claims for guaranteed compensation are difficult to sustain. Brown & Beatty note that such a claim "requires clear and unequivocal language in the agreement". *Canadian Labour Arbitration* 533-34 (2d ed. 1984). See also E. Palmer, *Collective Agreement Arbitration in Canada* 627 (2d ed. 1983).

The Board had to decide just what "minimum" rates the Employer had agreed upon, a matter made more difficult because the wage schedule included both hourly and monthly rates. The passage the Employer particularly relies upon reads as follows:

> 29 The case law which we have reviewed does not suggest that we were in error in our initial assessment of article 21.1 and Schedule A.

> 30 We hold that article 21.1 constitutes a guaranteed monthly rate. This guarantee, however is subject to other limits necessary because of other provisions in the collective agreement. The employee must be ready, willing and able to work his regular hours, as set out in article 19.3, and not be on layoff. The second part of the limitation is consistent with other provisions in the collective agreement. Article 13 contemplates layoffs and obviously this qualifies an employee's right to a minimum monthly rate. The first qualification also makes sense. Absent such a limitation, a provision like article 15.1 which grants bereavement leave with pay would be unnecessary. An employee away from work because of a death in the family would lose the pay he lost while away. An employee on bereavement leave is not ready, willing and able to work. The same analysis applies with respect to article 22 (medical and sick leave) and article 16 (leave for special circumstances).

The Employer distinguishes the result based on the use of the word "minimum". It also relies on the exception that the employee must "not be on layoff". Here, it argues, the employees are indeed on layoff, the summer two month layoff not ending until September 3rd, as stated in Exhibit 3 reproduced at paragraph 10 of the agreed facts.

The Employer also draws on a decision involving a temporary mid-week layoff in the face of a minimum 40 hours work week clause in support of its reliance on the layoff exception described in *Parkland* (*supra*):

> *IATSE Local 357 v. Centre in the Square Inc.* [2012] 109 CLAS 52 (Stenberg)

The relevant part of the employer's argument in that case, in summary, is reproduced at para. 26:

> First, the Union is seeking a monetary benefit and therefore the language must be clear and unambiguous in order for such a claim to be successful. Second, the type of benefit sought here is in the nature of a wage guarantee and the parties did not use the word "guarantee" or even words close to it. Third, if Article 19.01 was given the meaning asserted by the Union it would nullify or modify other provisions of the collective agreement.

The arbitrator begins by holding that, in a general sense, the clause in issue was a guarantee of work subject to exceptions. He said at para. 36-37:

> I am of the opinion that the real question is the limit of the application of Article 19.01. For ease of reference that provision provides that "Full time employees shall be paid a minimum forty (40) hours per week." In my view, this language unequivocally guarantees full time employees forty hours of pay per week in *some* circumstances.
>
> 37 I therefore reject the position of counsel for Employer that the language of Article 19.01 is not sufficiently clear and explicit that it is a guarantee of wages because it does say that the pay is "guaranteed". I do not think that the absence of the word "guarantee" in Article 19.01 in any way undermines the clear meaning of the words that are used. In my view, the addition of that word to Article 19.01 would be superfluous to the language which was used and which clearly indicates that full time employees "shall" receive a minimum of 40 hours pay in a week.

At paragraph 43-45 the arbitrator framed the more specific question as follows:

> 43 In determining the limits of the application of Article 19.03, my starting point must be Article 3, the Management Rights provision. Although this particular provision in this collective agreement is quite sparse, there is no doubt (and the Union did not argue to the contrary) that the Employer has the right to decide all matters pertaining to layoffs including the timing of such layoffs and the number of employees to be laid off subject only to specific restrictions in the collective agreement.
>
> 44 The Union's argument at its core is that Article 19.01 amounts to a restriction on management's right to layoff when it sees fit. In my view, that is giving to Article 19.01 a more robust application than is warranted.
>
> 45 As I noted earlier in this award, there is no doubt that Article 19.01 does amount to a guarantee of 40 hours pay for full time employees in a work week in some circumstances Such a guarantee, while not unheard of, is somewhat unusual.

The arbitrator's decision is set out at paragraphs 49-50:

> 49 In my view, however, in situations where the Employer knows that for an extended period of time there will be no work at all to be done in the theatre and exercises its right to layoff its entire full time workforce, the same rationale does not apply. In these circumstances it does not seem reasonable that full time employees should reap the benefit of Article 19.01 where it would significantly interfere with the Employer's right to exercise its broad management right to decide the timing of the layoffs. At the point at which the available work is simply not sufficient for the Employer to maintain its workforce of full time employees, the rationale of smoothing out the peaks and valleys of available work (and pay) while the theatre stays open simply does not apply. In addition, employees will have recourse to other sources of income such as the use of vacation days, as occurred here, or access to EI where appropriate.
>
> 50 For these reasons, I agree with the Employer's position that the limit of the application of Article 19.01 as a guarantee of 40 hours wages is reached when the Employer exercises its right to layoff its employees due to lack of work. If, in the exercise of that right, the Employer determines for *bona* fide reasons, that the layoff will occur mid-week, Article 19.01 does not apply and must yield to the right of the Employer to decide the timing of the layoffs. The layoff grievances are therefore dismissed.

Union Reply

The Union points to significant distinctions in the contractual wording in *Lakeland College* (*supra*). It views the fact that this is a public employer, with an obligation to be prudent, as irrelevant to what is simply a question of contractual interpretation. It suggests the concept of these employees being paid only when they work, with the term monthly salary serving only as the

basis for calculations contradicts the frequent use, within the agreement of the term “10 month employee”.

The Employer’s argument that the 10 month employees were laid off for September 1 and 2 is contrary to the layoff practice in the agreement. There is clearly the summer layoff inherent in the term 10-month employee. However, nothing in what happened this year reflects the layoff arrangements agreed to in Article 21. In the Union’s view the Employer, having agreed clearly that 10 month employees will receive a set salary for each of the 10 months from September-June is simply reducing the negotiated pay rate by deducting amounts for September 1 and 2.

Decision

The words used in this collective agreement, read in the context of the *School Act* and the collective agreement, reveal a clear meaning. It is therefore unnecessary to draw on past practice. Should I have felt the need to do so, my conclusion would have been that it has been too mixed to be of assistance. It simply does not point clearly or consistently enough to one or other interpretation. Not only are the circumstances and dates in each year different, but there are isolated examples that could support either party’s position.

The employees here are school support staff. Schools, in a broad sense, under the *School Act* and in practice, shutdown for the summer months of July and August. The end dates and start dates fluctuate with the way the days of the week fall in each year’s calendar, but the basic proposition remain true from year to year. The definition of year in Article 4.7 reflects this:

> (a) for 10 month employees, a full school year generally from September of one year to June of the following year.

Article 10.1 uses the full months of September to June for calculating the vacation year.

My conclusion is that what the parties have negotiated, and negotiate each year, is for a salary payable in each of the months of September to June, in equal monthly amounts. There may well be exceptions to this where, for example, an employee is temporarily laid off under Article 21, or perhaps obtains approval for leave without pay. When such things occur however, they involve *ad hoc* adjustments to the monthly salary, they do not undermine the basic salary level itself. Had the parties intended it to be otherwise, they would have negotiated some exceptions for the possibility that the start of the school year might be after September 1st. They have not done so.

The Employer is correct in saying arbitrators should be cautious in interpreting a provision as a "wage guarantee", but that is not what is happening here. The parties have chosen to negotiate pay on the basis of a fixed salary payable monthly. The very term 10 month employee explains why they may have chosen to do so. The contract makes no adjustments for the calendar fact that different months contain a different number of calendar days, as well as varying operational or instructional days.

Had the parties intended that there be daily or hourly rates, as many do (see for example in salary schedule in the *Parkland* (*supra*) case) they would have been expected to provide for such rates in the salary schedules. They have not.

The situation in this case is analogous to that in the *Eastern Provincial Airlines* (1977) 14 L.A.C. (2d) 316 decision referred to at paragraphs 24-25 of the *Parkland* (*supra*) decision.

The method of accruing, vacation on mandatory dates and the June reconciliation of vacation entitlements addresses the issue of different levels of accrual within a system of mandatory dates. Nothing in that arrangement suggests anything contrary to the annual salary approach, in fact in my view it supports it by dealing with it as an exception to be adjusted under specific arrangements.

Parkland (*supra*) supports the Union's case that this monthly pay arrangement is basically guaranteed, subject to individual *ad hoc* alterations based on a particular employee's circumstance. While the cases generally speak of wage guarantees, in this case it is less a guarantee than a basic agreement as to the unit of exchange, with 10 months work for a fixed monthly salary.

For these reasons, I find that the grievance succeeds. As requested, I reserve authority to quantify any losses or provide any other remedial orders in the event the parties are unable to resolve these matters themselves.

I thank counsel for their clear and concise presentation of the facts and argument.

DATED at Edmonton, Alberta this 5th day of June, 2017.

ANDREW C.L. SIMS, Q.C.