IN THE MATTER OF AN ARBITRATION
UNDER THE *LABOUR RELATIONS CODE*, RSBC 1996 c. 244

Between

BC FERRY SERVICES INC.

(the "Employer")

-and-

BC FERRY AND MARINE WORKERS UNION

(the "Union")

(Workforce Adjustment Grievance)

ARBITRATOR:	John B. Hall
APPEARANCES:	Peter A. Csiszar, for the Employer Steven Rogers, for the Union
HEARING DATES:	August 5-7, 2020
SUPPLEMENTAL SUBMISSIONS:	August 21 & 31, and September 8, 2020
AWARD:	September 28, 2020

AWARD

I. INTRODUCTION

The Employer advised in a general email communication on April 3, 2020 that it would be temporarily laying off hundreds of its employees due to a profound decline in ferry traffic caused by the COVID-19 pandemic. It began issuing layoff notices to both regular and casual employees on April 4. Between that date and April 10, about 425 regular employees and about 690 casual employees were notified of their temporary layoffs. The Employer did not know at the time when past service levels would resume, although it stated it would make every effort to recall employees "as soon as we can".

Article 12 of the parties' Collective Agreement is headed Workforce Adjustment and contains a number of provisions related to that subject. Many of the provisions address how layoffs will be implemented. The Union filed a grievance on April 5 alleging that the Employer had unilaterally initiated layoffs in violation of Article 12. It filed an application with the Labour Relations Board on April 9 alleging that the Employer had breached its obligations under Section 54 of the *Labour Relations Code*. Pursuant to a Consent Order issued by the Board on April 12, it was agreed that the Article 12 grievance and the alleged breach of Section 54 would be heard together by a single arbitrator. The proceeding was later expanded to include an allegation by the Union that certain "furlough" and pay arrangements implemented unilaterally by the Employer contravened Article 15 of the Collective Agreement which provides that employees shall be paid in accordance with the Salary Rate Schedules in Appendix C.

In brief terms, the Union submits the plain and ordinary language of Article 12 applied in the circumstances, and the Employer was required to layoff employees in accordance with those provisions. It maintains further that the layoffs and other arrangements cumulatively constituted "a measure, policy, practice or change that affects the terms, conditions or security of employment of a significant number of employees to whom a collective agreement applies", such that the Employer had an independent obligation to give 60 days' notice under Section 54 of the Code.

Finally, and in any event, Article 15.01 was violated because the Employer is required to pay regular employees a specific monthly amount in accordance with the negotiated wage schedule.

The Employer disputes the applicability of Article 12 to the present circumstances. It points to the interest arbitration proceeding which led to the current language and says the provision was never intended to cover temporary layoffs. Further, given the multiple steps in the layoff process -- including a "pre-adjustment canvas", cascading bumping rights and severance pay -- the Employer submits it would be "absurd" to apply Article 12 to a temporary layoff. Instead, it is entitled to invoke its management rights as acknowledged by the Union in Article 1.05 of the Collective Agreement to lay off employees. The Employer similarly argues it would be absurd to interpret Section 54 as requiring 60 days' notice before adjusting operations due to the "completely unpredictable" COVID-19 pandemic.

The foregoing summary of the parties' positions vastly oversimplifies their extensive arguments in what both describe as an important case. Their respective submissions will be recounted more fully and examined in the analysis below. It was agreed that remedy would be bi-furcated should the Union establish a breach of the Code and/or the Collective Agreement.

II. AGREED FACTS

The parties tendered an Agreed Statement of Facts and Joint Book of Documents. The agreed facts are now reproduced with certain headings added for clarity:

(a) The Parties

1. The Employer operates a large ferry transportation system under a service contract with the Province for vehicles and passenger transportation services to communities along the coastal waters of British Columbia.

2. The Employer was incorporated in 2003 under the *Company Act*. Ownership of the single-issued voting share in the Employer is held by the B.C. Ferry Authority established under the *Coastal Ferry Act*.

3. The Employer has approximately 4,200 union employees. Of the 4,200 employees:

   a. approximately 3,100 are regular employees in the bargaining unit;
   b. approximately 1,100 are casual employees who are in the bargaining unit.

   In addition to the 4,200 union employees, approximately 450 seasonal employees are hired to deal with increased workload during the summer and peak-demand periods.

4. The Union is certified to represent BC Ferries' non-management employees working in the coastal ferry service.

5. The Parties' current Collective Agreement is scheduled to expire on October 31, 2020.

(b) Interest Arbitration 2003-2007

6. Following expiry of a prior Collective Agreement on October 31, 2003, Vince Ready was appointed on December 1, 2003 as a special independent mediator.

7. On October 15, 2004, acting as interest arbitrator, Vince Ready issued an Interim Award. That award rendered a decision on "Workforce Restructuring". Vince Ready ordered a Memorandum of Understanding Re: Workforce Planning Committee (see pages 36-38).

   Decision on Workforce Restructuring

   In my Interim Award dated June 7, 2004, I said at page 9, under the heading Workforce Restructuring:

   > As I said earlier, this issue is linked to both contracting out and hours of work and naturally flows from both, but in different ways. In the case of contracting out, it may result in a pre-layoff canvass of employees, bumping, placement of workers including a short timeframe for the selection of options. These are normal concepts which many industries, both public and private, have to deal with in varying economic and political times. In the case of hours of work, workforce restructuring may take the form of changing employee status, the creation of seasonal and part-time positions with their resultant definitions. All of these are natural components of workplace change and will have to be dealt with by the parties.

   When the parties met in the final exploratory talks regarding this issue, they adopted a more collaborative approach to Workforce Restructuring which calls for the creation of a Workforce Planning Committee. They also agreed with the principles of grandfathering of current casuals (who already have the benefits) and proper utilization of casuals when it comes to certain benefits in the Collective Agreement.

I therefore award the following Memorandum of Understanding regards Workforce Planning based on the parties' settlement framework:

MEMORANDUM OF UNDERSTANDING

RE: WORKFORCE PLANNING COMMITTEE

The parties are committed to the ongoing determination of an efficient, productive and skilled workforce.

The parties recognize that a fair and reasonable workforce structure and balance of Regular Employees, Casual Employees and Seasonal employees are necessary to the efficiencies of the business.

On or before November 15th each year, the parties shall meet in one or more Workforce Planning Committees for the purpose of discussing and identifying workforce staffing requirements, trends and needs by operational area and/ or route.

The Committees are to give appropriate consideration to past requirements relative to anticipated future plans so as to identify:

- skill shortages and training needs
- regular full time postings
- regular part- time postings
- term certain positions
- conversion of casual employees, who worked fulltime equivalent shifts during the preceding twelvemonths, to regular status and/ or to the Staffing Pool
- termination of casual employees working less than 240 hours during the preceding twelve months.

Differences may be submitted for adjudication to Arbitrator Vince Ready or Arbitrator Irene Holden.

In resolving any differences the Arbitrator(s) shall take into consideration customer requirements, operational efficiencies, costs and benefits relative to the appropriateness of the workforce structure and proposed changes.

8. In his Interim Award, Arbitrator Ready also stated the following with respect to Article 12:

WORKFORCE ADJUSTMENT

The second aspect of this issue is linked to both contracting out and hours of work. As the workforce is restructured, there should be enhanced provisions provided to employees. The current Article 12 provides for layoff and recall provisions, but

does not adequately address the major changes to the Collective Agreement and the manner in which the workforce will be structured in the future.

The Employer wants increased flexibility and control as to how it will conduct business in the future. It should therefore be prepared to afford the current employee base with added protection should it choose to utilize such flexibility in the future.

The Employer attempted to address this in its final submission by creating a new Article 12 called "Workforce Adjustment" which would provide written notice to the Union of workforce adjustment; consult with the Union via a Workforce Adjustment Committee; allow the Employer to canvass the employees to see if they would be interested in retirement, placement in alternate positions, etc.; and provide displaced employees with a variety of options, including increased severance pay. In order to create a more timely process, the Employer also proposed a shorter notice period than what currently exists in the Collective Agreement (one month instead of five months), and restrictive bumping and recall rights to minimize the impact on other employees.

The Union responded by maintaining the five month notice period; consultation via a Workforce Adjustment Committee which would allow the Union to attempt to reverse the Employer's decision; employment security for twelve months following the expiration of the five month notice period; the layoff of seasonal employees prior to casuals and casuals prior to regular employees; maintenance of the current system-wide bumping ability; training and familiarization in order to qualify employees to bump; and enhanced severance for both casual and regular employees. The Union also proposed that voluntary severance and early retirement be offered to all employees immediately following the issuance of this award.

Decision Re Workforce Adjustment

As a consequence of my award with respect to Contracting Out and with respect to the new workforce structure, it is necessary to consider what appropriate measures should be taken in the event that employees are laid off.

In the past, the issue of layoffs has been somewhat dampened by the restrictive contracting out language and the presence of so many casuals. It is therefore necessary to address the question of whether the Workforce Adjustment provisions of the Collective Agreement should be changed. On this subject, my award is as follows:

a. Article 12 relating to layoff and recall should be deleted and replaced with new workforce adjustment language.

b. The Employer will be obliged to provide notice to the Union of its intention to reduce the amount of work required to be done by the Employer, the reorganization of work, contracting out, the relocation of positions, and

changes in or elimination of programs and/ or services. In providing notice to the Union, the Employer shall provide full particulars. The process which flows from this notice shall be in accordance with the specific provisions of the workforce adjustment language set out below.

ARTICLE 12 - WORKFORCE ADJUSTMENT

12.01 Workforce Adjustment Committee

(a) The parties recognize that workforce adjustments may be necessary due to a reduction in the amount of work required to be done by the Employer, the reorganization of work, contracting out, the relocation of positions, and changes in or the elimination of programs and services.

(b) The Employer shall provide the Union in writing with 4 months notice of the workforce adjustment. The notice shall identify the reason for the workforce adjustment, the classification and location of employees directly affected, whether the Employer intends to implement a pre-adjustment canvass, and the nature of such canvass. This notice may run concurrent with any notice of layoff to regular employees in accordance with Clause 12.04.

(c) The Employer will consult with the Union through a Workforce Adjustment Committee established pursuant to Clause 2.11 that shall meet within seven (7) calendar days of receipt of the notice referred to in Clause 12.01(b). Members of the Workforce Adjustment Committee shall work cooperatively to facilitate the workforce adjustment in the best manner possible for the employees affected.

12.02 Workforce Adjustment Processes

(a) The following processes are available to facilitate workforce adjustments:

Pre-Adjustment Canvass

1. At the discretion of the Employer, a pre-adjustment canvass may be implemented. The pre-adjustment canvass may be general or targeted to specific employee classifications, work groups, or work locations.

2. The pre-adjustment canvass shall call for eligible employees to decide within fourteen (14) calendar days whether they want to retire, to take early retirement, or to sever their employment. A copy of the notice to employees shall be provided to the Union.

3. A decision made by an employee to retire, take early retirement or to sever his or her employment that is confirmed by the Employer shall be final and binding.

(b) Workforce Adjustment – Regular Employees

1. Where the Employer decides not to implement a pre-adjustment canvass, or where such canvass does not result in the degree of flexibility required to meet the objectives of the workforce adjustment, the Employer will provide regular employees with notice of layoff in reverse order of service seniority, except where such notice is specifically related to a decision under Article 14 in which case those regular employees who are directly affected will be given notice of layoff. A copy of the notice to regular employees shall be provided to the Union.

2. The notice of layoff shall be effective one (1) month from the date of issuance, unless the following occurs:

(i) the regular employee is placed in a vacant position, for which he or she is qualified, at the employees' current point of assembly,

(ii) the regular employee is offered and accepts placement into a vacant position through lateral transfer at another point of assembly,

(iii) the regular employee is offered the opportunity for training and familiarization so that he or she is eligible to work in an alternate position which is vacant at his/her current point of assembly,

(iv) the regular employee bumps a junior regular employee in a position for which s/he is qualified at the employees current point of assembly,

(v) the regular employee bumps a junior regular employee in a position for which s/he is qualified at another point of assembly, or

(vi) the regular employee elects to sever.

3. A regular employee who bumps may not receive a promotion. However, in the event that this prevents the employee from bumping pursuant to 2 (iii) or (iv) above, the regular employee may:

(i) bump a junior regular employee in a position that is in one salary grade level above his or her current salary grade level, subject to his/her ability to meet the requirements of the job, or

(ii) be severed.

4. A decision made by a regular employee to accept a lateral transfer that is confirmed by the Employer shall be final and binding,

5. A regular employee who is placed into a vacant position or who bumps shall not be salary protected.

6. Relocation expenses shall not be paid when a regular employee accepts a placement into a vacant position through lateral transfer or who bumps. A regular employee who is placed into a vacant position, including one obtained through lateral transfer, or who bumps shall be required to serve a 120 working day trial period to determine his/her ability to meet the requirements of the job. An employee who fails to meet the requirements of the job at any time during his/her trial period shall be severed.

7. Should a regular employee be bumped as a result of a senior employee exercising his or her seniority rights in accordance with this Article, then that employee shall have bumping rights in accordance with Clause 2 (iv) and (v) above.

(c) Workforce Adjustment Casual Employees

1. Casual employees shall be given notice of layoff in reverse order of seniority, except where such notice is specifically related to a decision under Article 14 in which case those casual employees who are directly affected will be given notice of layoff. A copy of the notice to casual employees shall be provided to the Union.

2. The notice of layoff shall be effective one (1) month from the date of issuance, unless the following occurs:

(i) the casual employee is offered the opportunity for training and familiarization for recall in another classification at his her current point of assembly,

(ii) the casual employee is offered and accepts the opportunity to be recalled at another point of assembly in their current classification, or

(iii) the casual employee elects to sever their employment.

3. Relocation expenses shall not be paid when a casual employee accepts the opportunity to be recalled at another point of assembly.

12.03 Layoff

In the event of a layoff, employees shall be laid off at the point of assembly in the following order:

a. Seasonal employees shall be severed prior to casual or regular employees being laid off.

b Casual employees shall be laid off in reverse order of service seniority prior to regular employees.

c. Regular employees shall be laid off in reverse order of service seniority.

12.04 Notice to Regular Employees on Leave

Notice to regular employees on STTIP, WCB, LTD or serving an apprenticeship shall be effective the date of receipt. The employee shall provide the Employer with seven (7) calendar days' notice of the date upon which s/he can return to work. The Employer will confirm the placement of the employee into a vacant position for which he/she is qualified at the employee's current point of assembly, or facilitate the ability to exercise the remaining options under Clause 12.02 (b) 2 above.

12.05 Severance Pay

(a) A regular employee whose employment is severed shall be entitled to severance pay of four (4) weeks' basic pay for each year of completed service and a pro-rated amount for any partial year of service to a maximum of fifty-two (52) weeks' basic pay.

(b) A casual employee whose employment is severed shall be entitled to severance pay of one (1) week's basic pay for each completed year of service and a pro-rated amount for any partial year of service to a maximum of twelve (12) weeks' basic pay.

12.06 Recall

(a) The Employer shall create a recall list that shall indicate the name, service seniority, former classification and point of assembly and current classification and point of assembly of regular employees who are laid off. A copy of the list shall be provided to the Union.

(b) Regular employees on the recall list shall return to their former classification, employment status, and point of assembly in order of service seniority when a vacancy arises. An employee on the recall list who does

not accept a vacancy when offered shall be deemed to have resigned and shall not be entitled to severance pay.

(c) A regular employee shall have his/her name remain on the recall list until:

1. s/he receives an appointment through Clause 10.07 or 10.08,

2. s/he returns to her/his former classification, employment status, and point of assembly, or

3. two (2) years have passed from the last day worked by the employee; whichever occurs first.

(d) Should a regular employee on the recall list accept a casual assignment, such casual assignment shall not affect his or her recall rights under this Clause.

9. In 2007, as interest arbitrator, Arbitrator Ready established the terms of the collective agreement between the Parties for a term from November 1, 2003 to October 31, 2012. Those terms of the Collective Agreement established by Vince Ready included the Article 12 amendment. This is captured in Vince Ready's 2007 award at pages 4-5:

> Following on the October 15, 2004 Award, the parties undertook several implementation meetings and made significant progress in reaching agreement on a number of issues. On April 26, 2005, I issued an award with respect to another five of the contentious unresolved matters.
>
> The parties have continued their discussions culminating in direct negotiations spanning the period September 6 to 8, 2006. These negotiations were productive in that they shed light on a number of issues but at the conclusion still failed to produce an agreement. I should, however observe that since the issuance of the October 15th Award, the parties have worked diligently to establish a labour relations framework which, in large part, recognizes the need for long-term stability and fundamental changes to the Collective Agreement. These changes and improvements are reflected in the attached Collective Agreement.

Article 12 has remained substantially intact from March 8, 2007 to date.

(c) Prior Legislation and COVID-19 Changes

10. The Province of British Columbia passed the *Coastal Ferry Act* which was assented to and effective March 27, 2003 (Bill 18). The *Coastal Ferry Act* is current to date.

11. The *Coastal Ferry Act* became law on March 27, 2003. The effect of this *Act* is described by Vince Ready in his October 15, 2004 interest award at pages 4-5 as follows:

> Employees were transferred from the crown corporation to the new companies and the companies were deemed separate employers under the *Act*. The *Act* declared the new ferry company an essential service under the *Labour Relations Code* and further provided that any provision of the parties' Collective Agreement would be null and void if it conflicted with the Act. Such measures struck at the very core of a free collective bargaining regime.
>
> The *Act* further addressed the very basis of how the new Company, as well as any other ferry operators, were to operate. Section 38(1) of the *Act* speaks to the following:
>
> (a) priority is to be placed on the financial sustainability of the ferry operators;
> (b) ferry operators are to be encouraged to adopt a commercial approach to ferry service delivery;
> (c) ferry operators are to be encouraged to seek additional or alternative service providers on designated ferry routes through fair and open competitive processes;
> (d) ferry operators are to be encouraged to minimize expenses without adversely affecting their safe compliance with core ferry services.
>
> The *Coastal Ferry Act* included Section 27:
>
> > 27 The minister may, with the approval of the Lieutenant Governor in Council, enter into one or more contracts with one or more persons under which the minister agrees, on behalf of the government, to authorize the other contracting party to operate one or more ferries on one or more specified ferry routes.

12. A Master Agreement effective March 31, 2003 was entered into between British Columbia Ferry Corporation and the Province of British Columbia.

13. On March 26, 2020 the Province of British Columbia made a Ministerial Order No. M084 under the *Emergency Program Act* which included Section 10 “British Columbia Ferry Services”:

> British Columbia Ferry Services Inc. and all other ferry operators within the Province which carry both vehicles and passengers must implement all procedures necessary to ensure priority loading on ferries for the following:
>
> (a) vehicles carrying essential goods and supplies;

(b) residents of ferry sailing destinations

14. On April 1, 2020 BC Ferries and the Government of British Columbia signed a Temporary Service Level Adjustment agreement. This Agreement contemplated BC Ferries would reduce service levels due to the COVID-19 pandemic.

(d) The Parties' Communications Regarding COVID-19

15. On January 28, 2020, the first case of COVID-19 was announced in B.C.

16. On February 24, 2020, Graeme Johnston, President of the Union, sent correspondence to the Employer asking the Employer to prepare for the impending COVID-19 pandemic and to provide the Union with a detailed response plan.

17. On March 6, 2020, Mr. Johnston spoke with both John D'Agnolo, Vice President of People for the Employer, and the Employer's acting COO Frank Camaraire to identify issues that may need to be addressed by the Employer in light of the COVID-19 pandemic.

18. On March 18, 2020, the Province declared a provincial state of emergency. On the same day, the federal government announced that the Canada-U.S. border would be shut-down to non-essential travel.

19. On March 20, 2020, the Employer identified to the Union an intention to reduce service levels for coastal ferries in the Province. Colin Harris, Executive Director, Employee Relations for the Employer, spoke by telephone with Kevin Hall, Director of Labour Relations for the Union, and Mr. Johnston.

20. On March 24, 2020, Aggie Peel, Director of Strategic Human Resources for the Employer, and Mr. Hall for the Union spoke by telephone. On March 23, 2020 Kevin Hall wrote to Aggie Peel an email with an agenda for this discussion. Both Mr. Hall and Ms. Peel took notes of that meeting.

21. Between March 24 and April 1, 2020, the Union and the Employer discussed various options with respect to implementation of the expected service reductions. The Employer and the Union discussed and emailed various options with respect to the implementation of expected service reductions.

22. On Sunday, March 29, 2020, at 10:00 a.m., there was a discussion by conference call between Employer representatives (Mr. D'Agnolo, Ms. Peel, and Mr. Harris) and Union Representatives (Mr. Hall, Lori Horvat, Labour Relations Officer, Mr. Johnston and Dan Kimmerly, President of the Ships Officer Component).

23. On that call, Mr. D'Agnolo identified the Employer's discussions with the Province about a reduction in service levels. The Company also advised the Union that some routes may not be running and some Points of Assembly ("POAs") may be closed.

24. On April 1, 2020, the Employer first gave the Union details of the actual service level reductions it planned to implement.

25. John D'Agnolo spoke to Graeme Johnston on April 2, 2020. John D'Agnolo wrote Graeme Johnson a follow up email on April 2, 2020.

26. On April 3, 2020, by way of email communication to all employees, the Employer announced that it intended to temporarily layoff "hundreds" of Union members working on vessels and terminals based out of Tsawwassen, Swartz Bay, Horseshoe Bay, Duke Point and Departure Bay.

27. On April 3, 2020 Colin Harris and Kevin Hall had a discussion arising from the BC Ferries' President's April 3rd update on Service changes.

28. On April 3, 2020 Kevin Hall emailed Colin Harris and John D'Agnolo following up on that discussion asking a number of questions.

29. On April 3, 2020 John D'Agnolo emailed Kevin Hall setting out the Employer's position in response to Kevin Hall's email.

(e) <u>The Layoffs</u>

30. Beginning on April 4, 2020, the Employer began to communicate temporary layoffs to both regular and casual employees.

31. Between April 4 and April 10, the Employer notified approximately 1,115 Union employees of what it described as a temporary layoff, including approximately 425 regular employees and approximately 690 casual members.

32. Some senior casual employees were temporarily laid off while more junior casual employees in the same work unit continued to work.

33. Some senior regular employees were temporarily laid off while more junior regular employees in the same work unit continued to work.

34. On April 5, 2020, the Union filed a grievance, alleging that the Employer had breached Articles 1 and 12 of the Collective Agreement when it issued the layoffs (the "Layoff Grievance").

35. On April 6, 2020, the Employer posted a communication to its employees titled "Service Changes Frequently Asked Questions and Guide for Employees". This included an estimate of a 60 day reduction in service levels.

36. With respect to the duration of layoffs, the FAQ provided as follows:

Will I be able to come back to work?

These are temporary layoffs and we want to keep the temporary layoff period as short as possible. As the COVID-19 situation subsides, we will make every effort to recall our valued employees as soon as we can. We will need our skilled colleagues back as soon as possible to help restore ferry services when traffic returns. We look forward to having you rejoin the team, and resuming the level of service our customers have come to expect as soon as possible.

Our aim is to recall you back as soon as we can to help restore ferry services when traffic returns, however it will take time for us to ramp our service back up to previous levels as we bring ships back into service, and our crews back on board.

I am a Regular employee. Will I get any notice of temporary layoff?

We will provide you with one week notice, or pay in lieu of notice.

37. On April 9, 2020, the Union filed an application with the Labour Relations Board alleging that the Employer was in breach of its obligations under s. 54 of the *Code*.

38. On April 10, 2020, the President and CEO Mark Collins issued an update indicating that the Company hoped it would qualify for the Canada Emergency Wage Subsidy program and stating that the temporary layoff notices for regular employees will be rescinded with the possible confirmation of BC Ferries being eligible for that subsidy program.

39. On April 11, 2020, the Employer announced that, effective that date, it would rescind the temporary layoff notices issued to regular employees and pay them 75% of their base salary for days without work and 100% pay on any days they are called into work.

40. The Employer further communicated on April 23, 2020 that while on "off duty" status:

    a. All employees would continue to be on payroll and maintain benefits;

    b. Employees could use their existing vacation and sick leave credits to supplement their pay, but the supplemented credits would not count towards pensionable service;

    c. Employees would not be eligible to collect additional premiums, allowances or differentials.

41. The Employer did not rescind the temporary layoff notices issued to casual employees.

42. In May 2020 the Employer started to recall regular and casual employees due to an incremental adjustment of service as a result of increased demand. The reopening of the Departure Bay Ferry Terminal restarting service between Departure Bay and Horseshoe Bay resulted in a further recall of employees.

43. By June 28, 2020 all casual employees were recalled to active status.

44. By July 2, 2020 all regular employees were returned to active duty with full pay.

(f) The Present Proceeding

45. On April 12, 2020, following a mediation with the Labour Relations Board, the parties reached a Consent Order, without prejudice to the matters before this Arbitration Board.

46. By way of the Consent Order, the Parties agreed to establish a Joint Labour Management COVID-19 Committee (the "Committee") to meet and discuss pandemic-related labour relations issues.

47. As part of the Consent Order the parties agreed to expedite the grievance process with respect to the Layoff Grievance and to have that grievance heard together with the Union's s. 54 application and decided by this Arbitration Board by no later than August 31, 2020.

48. The Parties have also agreed to include before this Arbitration Board the Parties' dispute as to whether the off duty status constituted a breach of Article 12 and 15.01 of the Collective Agreement and/or s. 54 of the *Code*.

49. The Union has filed a number of grievances alleging a number of different Collective Agreement breaches flowing from the same actions that form the subject matter before this Arbitration Board. The Parties have agreed that those matters do not fall within the scope of the matter before this Arbitration Board and will be resolved by way of separate grievance processes and arbitration, if necessary.

50. The Parties have agreed that if the Union is successful, the quantum of remedy can be determined between the Parties and, if necessary, decided by a hearing before this Arbitration Board.

51. The key issues in dispute in this matter are as follows:

    a. Does Article 12 apply to the circumstances of this case? If Article 12 applies to the circumstances of this case, did the Employer breach Article 12 by way of the temporary layoffs or Off Duty Status?

    b. Did the Employer breach Article 15.01 by way of the Off Duty Status?

    c. Did the Employer breach s. 54 of the *Code* in the circumstances of this case?

52. The Employer's position is that Article 12 and Section 54 of the *Code* do not apply in the circumstances of this case nor has the Employer breached Article 15.01 of the Collective Agreement.

53. The Union's position is that Article 12 applies in the circumstances of this case and that the Employer breached Section 54 of the *Code* and Article 15.01 of the Collective Agreement.

III. OTHER EVIDENCE

The parties led additional evidence through Will Say statements of witnesses who were subject to cross-examination and re-examination. The Union's sole witness (Kevin Hall) and two of the Employer's witnesses (Aggie Peel and Colin Harris) testified primarily in relation to the discussions which preceded the layoffs. The Employer's third witness (Glen Schwartz) gave uncontradicted testimony about the Ready interest arbitration process and how Article 12 came to take its current form.

It is convenient to begin with the "negotiation" evidence. Although Arbitrator Ready determined that the old Article 12 relating to layoff and recall should be deleted and replaced with new workforce adjustment language, the wording was in fact resolved by the parties themselves during what was referred to as the "Pan Pacific Summit" during September of 2006. Mr. Schwartz represented the Employer and he confirmed his recollection of the events with one of the Union's representatives, Lynda Ruhl. She was not called to testify in this proceeding.

Article 12 was one of several items resolved during the Summit session. Mr. Schwartz testified that he "did not pay attention" to the old Article 12 language; rather, the new provision was responsive to Mr. Ready's Interim Award which contained narrative and language on workforce adjustment. Further, all of the discussions he participated in regarding Article 12 were in the context of permanent workforce adjustments and temporary layoffs were never discussed. As part of the discussions, the Employer proposed that a regular employee subject to Article 12 could access up to 52 weeks of severance pay at any stage of the layoff process. Mr. Schwartz stated in cross-examination that the Employer would never have made the proposal if it thought Article 12 "applied to a two day layoff".

Mr. Schwartz stated earlier in cross-examination that the Employer never anticipated that Article 12 would be applicable to temporary layoffs, adding "the only focus and discussion with the Union [was] permanent situations". When pressed, he acknowledged that temporary layoffs were not discussed one way or the other, and that "we did not have direct discussions on the application [of Article 12] to temporary layoffs -- it was all in the context of permanency".

The Will Say statement of Mr. Harris sets out his recollection of events leading up to the March 2020 discussions between the parties recounted in the Agreed Facts:

> During the first half of March 2020, due to the COVID-19 situation there were daily issues, mostly around health concerns and absences due to concerns around COVID-19. A State of Emergency was declared on March 17, 2020 and the Province of British Columbia issued a subsequent Ministerial Order M084. I was aware that the Company was engaging in discussions with the Province regarding temporary service level adjustments due to the dramatic drop in ridership. It was clear that the Company needed a reduction in the number of daily sailings.
>
> On March 20, 2020 I was on a conference call with Graeme Johnston, President BCFMWU where I updated him on the fact that operationally we were already cancelling some sailings and the Company was reviewing traffic projections and trends. During our discussion we talked about reduced staff requirements and we discussed looking at something similar to the Deas Pacific Marine (DPM) Temporary layoff provision in the Collective agreement and perhaps look for volunteers, etc. It was clear in my mind that our discussions were centered on the then current Pandemic and were temporary in nature.
>
> On March 23, 2020 I was on a phone call with Kevin Hall, Director Labour Relations BCFMWU regarding Minimum Safe Manning requirements for less employees on the ships. In this discussion we talked about voluntary and temporary layoffs. On the same day in a follow up call with Mr. Hall we talked further about voluntary temporary layoffs as we were looking at what employees were needed on a route by route basis. (paras. 4-6)

The concept of "voluntary" layoffs arose, in part, because many employees were not wanting to work due to family obligations, concerns over their vulnerability to the virus and other reasons. The Deas Pacific Marine Component is covered by Article 33 of the Collective Agreement and Article 33.14 has provisions for both permanent and temporary layoffs. The latter are defined as "layoffs that are twelve (12) weeks or less in duration". Mr. Hall participated in the

March 20 conference call and recalls Mr. Harris wanting to have a preliminary discussion about what to do in the event of layoffs.

The dates of the ensuing discussions can be found in the Agreed Facts. It is not necessary to recount the substance of what the parties canvassed beyond noting their discussions were "solutions based" and looked at "broad conceptual" options outside of Article 12. The evidence from all witnesses was largely uniform regarding both the tenor and content of the exchanges, with one exception. Ms. Peel has a "very clear" recollection of Mr. Hall agreeing on March 24 that the Collective Agreement does not contemplate temporary layoffs and the parties were engaged in the discussions due to the unique nature of the COVID-19 crisis. Mr. Hall admitted to not having a clear recollection on this point. His "frame of mind" was that the concepts the parties were discussing were not applicable to Article 12. While the provision could be used, it was preferable for both parties to come up with something that better served their interests. He testified that the Union empathized with the Employer and was looking "to manage [the layoffs] in an equitable way".

This discrepancy has no bearing on the eventual outcome. It cannot be given contractual significance, and there is no suggestion the Employer relied on Mr. Hall's statement for purposes of creating an estoppel.

According to Ms. Peel, when the discussions continued on March 26, the details of any temporary service level agreement with the Government, including scope and timing, were still uncertain. Service and adjustments were canvassed during the March 29 conference call when the parties acknowledged the conceptual discussions that were underway regarding temporary layoffs. It was agreed at that point that the parties would meet again the next day and start to formalize the concepts in writing.

During a conference call on March 30, the Union inquired about the Canada Wage Subsidy which had just been announced by the Federal Government. Ms. Peel committed to review the program and sent an email to the Union later in the day capturing the parties' conceptual

discussions. Mr. Hall replied early on March 31 and said the Union would "take away and review". The Union also wanted additional detail from the Employer on available wage subsidy measures.

The parties had another conference call on April 1 at 0900 hours. The Employer advised that there would be an Executive Management Committee ("EMC") meeting later that day. Ms. Peel and Mr. Harris anticipated that a decision would be made at that meeting regarding the implementation of temporary service levels. The Employer suggested having another discussion later in the day to update the Union on decisions taken at the EMC meeting.

Mr. Hall responded in writing during the early afternoon on April 1 to the concepts proposal which had been sent by Mr. Peel. On the same day, the Employer signed a Temporary Service Level Adjustment Agreement with the Provincial Government. It provided in part:

> A. The COVID-19 pandemic has impacted BC Ferries in two key areas. It has impacted the ability to reliably crew its operations and general travel has reduced significantly on all Designated Ferry Routes. As of March 28, 2020, overall travel demand and fare revenues are 70% below previous-year's levels.
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> * * *
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> F. The parties acknowledge that temporary service levels will be established to balance the goal of matching capacity with anticipated traffic demand while ensuring the delivery of essential goods and services, access for residents, and transportation of emergency personnel and health care workers; and …

The Agreement took effect on April 4 for a 60 day period which "may be extended on a month to month basis by mutual agreement". An Appendix set out the Daily Minimum Round Trips and Daily Minimum Hours of Operation for each of the routes serviced by the Employer. Two routes were suspended and two other routes were effectively combined.

The second conference call on April 1 between the parties' representatives discussing conceptual options had been scheduled for 1900 hours. Ms. Peel and Mr. Harris dialed in five minutes early. Ms. Peel had just learned of the EMC's decision and updated Mr. Harris; namely,

"that the [Employer] would go to temporary layoffs period and not the concepts that had been discussed with the Union" (cross-examination of Mr. Harris).

When Mr. Hall and Ms. Horvat joined the call, Mr. Harris provided details of the service level reductions and the timing of their implementation. Ms. Peel then advised that the Employer would not be providing any of the conceptual options discussed previously. Mr. Hall was understandably shocked and asked if this rejection of concepts included the 75% wage subsidy. His Will Say statement records Ms. Peel saying she wanted to maintain relationships and wished more could be done but "… they were restrained by government decisions and the [Employer's] finances" (para. 35). Mr. Hall said he would not be able to sell what the Employer was proposing to the Union's members and stated "we still have the Collective Agreement layoff provisions" (para. 34). Ms. Peel understood he was referring to Article 12 in particular.

Mr. Harris telephoned Mr. Hall early on April 2 to provide an update. This included some explanation of why the Employer might not be eligible for the wage subsidy. Mr. Hall again raised Article 12 and Mr. Harris said there might be a dispute over its application. Mr. Hall made it clear that the Union would push back on the idea of temporary layoffs outside of Article 12 if there was no benefit to its members.

As recorded in the Agreed Facts, the "temporary layoffs for hundreds of [employees]" was announced on April 3 by email. The evidence before me establishes that the Employer did not know at the time how long the temporary layoffs would continue. The announcement was not specific:

> As the COVID-19 situation subsides, it will take time to ramp our service back up to previous levels as we bring our people back on board. We will make every effort to recall our co-workers as soon as we can.

On the same day, Mr. D'Agnolo sent an email to Mr. Hall which read in part:

> Article 12 was not created to address unforeseen emergency situations that may require the temporary layoff of employees that do not fall within the concept of workforce adjustments that led to the new Article 12.

> Article 12 deals with permanent workforce adjustments that may arise from time to time as contemplated in Mr. Ready's award. Article 12 does not apply to situations such as the one facing the Company today as a result of the COVID-19 pandemic. The workforce is not being adjusted in the ways contemplated by Article 12.
>
> In Article 1.05 of the Collective Agreement, the Company retained the right to manage and direct its employees except as the Collective Agreement specified otherwise. Therefore, the right to manage the impact of an act of god event such as the current COVID-19 pandemic has been retained by the Company subject always to the Company's actions being done in good faith and in a non-discriminatory or arbitrarily [sic] way. The impact of the COVID-19 pandemic has resulted in the need to take significant temporary measures which includes temporary layoffs. Temporary layoffs are not permanent workforce adjustments that are addressed in Article 12.
>
> Therefore, Article 12 cannot be applied to the current emergency need to temporarily reduce service levels until the COVID-19 pandemic subsides.

As recorded above, the Temporary Service Level Adjustment Assignment took effect on April 4. This was the same day that Transport Canada issued a Ship Safety Bulletin outlining measures to reduce the spread of COVID-19 on board passenger vessels and ferries. The measures included reducing by 50% the maximum number of passengers that may be carried on board.

Reference has been made to the parties' discussions regarding the 75% Federal wage subsidy. The Employer announced on April 11 that it would rescind the temporary layoff notices issued to regular employees and pay them 75% of their base salary for days without work. The Employer was ultimately not eligible for the subsidy. However, it paid the 75% and bore the cost for the duration of the layoff period.

It was Mr. Hall's evidence that the Employer has not in the past laid off regular employees without following Article 12 except at the Deas Dock operation (Will Say at para. 43.b). According to Mr. Harris, there have been "multiple occasions" where the Employer has discussed with the Union ways to avoid giving layoff notice. He said there are issues under Article 12 that both parties want to avoid such as bumping, relocation and other negative impacts on employees. One specific example he gave was a permanent restructuring following introduction of a cable ferry between Denman Island and Buckley Bay on Vancouver Island. The record also establishes

that the Employer has historically employed a large number of casual employees. There is typically no need to layoff regular employees because the scheduling process of casuals "acts like a temporary layoff and recall of employees" (Will Say of Mr. Schwartz at para. 22).

There has not been a layoff of casual employees in the past because the Employer has simply not called them for work. Casuals are entitled to request a Record of Employment form after seven days without work. This allows them to apply for Employment Insurance benefits or request unavailability in order to work elsewhere during slow periods. Once the Federal relief benefit was announced, casual employees began contacting the Employer for ROEs. Mr. Harris explained the Employer decided to notify all casuals of their temporary layoff and point them to the Federal Government program. He stated the Employer believed that was "the right thing to do" because it knew there would be no work available for the casual employees. This scenario had never arisen in the past. Mr. Harris later clarified that there were some casuals who were not laid off at some terminals.

IV. SUMMARY OF ARTICLE 12 SUBMISSIONS

The Employer quotes at length from Arbitrator Ready's Interim Award, and submits the Workforce Restructuring Provisions were related to the discussion on Contracting Out (pp. 26-34). Further, both "Workforce Restructuring" and "Workforce Adjustment" were driven by the Employer's ability for enhanced contracting out. Among other things, Mr. Ready wrote that current employees should not bear the full impact of contracting out and "[t]here should be protection for these employees in a variety of forms: bumping rights, recall rights, enhanced severance etc." (p. 31). The Employer says these and other comments show that the context of the new Article 12 was major or permanent changes. It relies on the comments as extrinsic evidence of mutual intent, especially as Article 12 evolved with the input of the parties to Mr. Ready. This aspect of Employer's arguments are captured by these passages:

> His eventual Award on workforce adjustment is clearly directed to major organizational changes which may arise from the employer taking advantage of the provisions of the Act in order to make extensive changes to its workforce. A simple

review of the language of this Award on workplace adjustment should suffice. It is directed to changes to the workforce of a permanent or major nature. On the face of the language awarded it clearly was not intended to deal with temporary layoffs responding to the normal exigencies which effect every collective bargaining relationship. Circumstances that the new Article 12 – Workforce Adjustment were intended to address or made clear is reflected in the language itself.

In interpreting the current Article 12, it is important to harken back to circumstances in existence under the [*Coastal Ferry Act*] at the time of Arbitrator Ready's Interim Award. In particular, regard must be had to the implications of Section 38 (1) of the Act which required, and therefore gave latitude to the employer to adjust its operation, on the following basis:

> a. Ferry operators are to be encouraged to adopt a commercial approach to Ferry service delivery;
>
> b. Ferry operators are to be encouraged to seek additional or alternative service providers on designated Ferry routes through fair and open competitive processes;
>
> c. Ferry operators are to be encouraged to minimize expenses without adversely affecting their safe compliance with core Ferry services.

Further, Arbitrator Ready's award of collective agreement provisions was subject to the provision of the Act that said that any provision of the parties' collective agreement would be null and void if it conflicted with the Act.

Thus, the language awarded had to walk a fine line between, to use Arbitrator Ready's words, dealing appropriately with employees who would be affected by major changes without creating collective agreement language which might be inconsistent with the requirements of Section 38 of the Act and therefore, not enforceable because of the overarching requirement that any provision which was inconsistent with Section 38 would be null and void.

Notwithstanding, this backdrop, the Union would have you interpret Section 12 as directed by Mr. Ready, as providing the full panoply of protective measures provided to employees to assist them in adapting to major changes which might arise from the Employer's reliance upon Section 38 of the Act and make all of those protections applicable in circumstances of a "temporary lay-off" brought about by matters beyond the employer's control and which are not based in any right granted to the employer under the *Coastal Ferry Act*. Particularly not as it is existed in 2004 when the language was drafted. Respectfully, Article 12 cannot be made applicable to temporary layoffs where the extrinsic evidence in the form of negotiation history could never reveal such a "mutual intention" because the issue of temporary layoffs was never addressed by Mr. Ready nor the parties themselves. To apply Article 12

> to temporary layoffs would have put his Award offside of, and in breach of the *Coastal Ferry Act* as it existed at the time of the Interim and Final Awards. Those Awards cannot be interpreted to countenance breaches of the Act.
>
> Further, to presume that the application of Article 12 as drafted by Mr. Ready could apply to temporary lay-offs in the current context would mean the Employer would be faced with an enormous and unanticipated financial burden. Under Transport Canada Ship Safety Bulletin No. 10/2020, issued April 4, 2020, all ferry operators were obliged to reduce by 50% the maximum number of passengers that may be carried onboard. … (Legal Argument at pp. 13-14)

The Employer relies as well on a number of familiar interpretative principles, quoting passages contained in awards such as *West Fraser Mills Ltd., 100 Mile House Lumber Division*, [2016] BCCAAA No. 91 (McPhillips), at paras. 37-39; and *British Columbia Hydro (Wage Adjustment Grievance)*, [2018] BCCAAA No. 83 (McPhillips), at paras. 57-64. The Employer maintains the *West Fraser Mills* award is particularly important with regard to the emphasis placed on "context" and again points to Mr. Ready's Interim award. The same award also affirms the principle that the interpretation of a collective agreement provision should not lead to an "absurd", "unreasonable" or "anomalous" result (see para. 40 and cases cited in support).

The Employer turns next to its management rights found in Article 1.05 of the Collective Agreement:

> 1.05 The Union acknowledges that the management and direction of employees in the bargaining unit is retained by the company accepted as this agreement otherwise specifies.

It submits accepting the position advanced by the Union would be akin to eliminating this provision from the Collective Agreement, and that arbitrators have long accepted that fundamental management rights should not be abridged except in clear circumstances: *British Columbia Railway Co. -and- Canadian Union of Transportation Employees, Local #6 (Kampe Grievance)*, [1984] BCCAAA No. 407 (Hope), at para. 31; *Intertek Testing Services -and- ILWU, Local 514* (2002), 11 LAC (4th) 97 (Blasina); *Nigel Services for Adults with Disabilities Society -and- Construction and Specialized Workers' Union, Local 1611 (Severance Allowance Grievance)* (2013), 230 LAC (4th) 400 (McPhillips) at paras. 29 and 35; and *New Westminster School District*

No. 40 -and-. Canadian Union of Public Employees, Local 409 (Custodian Team Cleaning Grievance) (2010), 200 LAC (4th) 385 (Burke), at paras. 36-44.

In searching for mutual intention, the Employer notes the role of a grievance arbitrator is to give effect to the parties' true contractual intent, not simply to declare and enforce a presumed contractual intent: *British Columbia v. British Columbia Government and Service Employees' Union*, [1994] BCCAAA No. 371 (Munroe), at paras. 33-35. It points in this regard to the uncontradicted evidence of Mr. Schwartz that the Article 12 discussions took place in the context of permanent workforce adjustments and that the parties never discussed temporary layoffs.

I can do no better in summarizing the Union's submissions than to quote without amendment the opening paragraphs of its written argument:

> 1. The scope of Article 12 is clear and unambiguous. It requires the Employer to provide notice and to follow a number of steps to protect seniority rights of employees in the event of a workforce adjustment. Workforce adjustment is broadly defined as including, among other things, "a reduction in the amount of work required to be done by the Company".
>
> 2. Article 12 broadly and explicitly protects the seniority rights of employees in the event of layoffs by the Company. In Canadian labour law, as confirmed by the Supreme Court of Canada, "layoff" is commonly understood to be a reduction in the amount of work required to be done by an employee, resulting in "an interruption of the employee's work short of termination".
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> 3. In this case, there is no dispute that the Employer laid off hundreds of regular and casual employees without providing notice under 12.01, without following the process under Article 12.02 and without even respecting the seniority rights of its employees set out in Article 12.03.
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> 4. The Employer's decision was unquestionably disruptive to the lives of its employees, denying them pay and their work identity during a time of crisis. The Employer's only justification for taking these extreme measures was to save money.
>
> 5. In our submission, both the initial layoffs of casual and regular employees, as well as the subsequent decision to place regular employees on "off duty status" at 75% of their base pay constituted a "workforce adjustment" and/or "layoff" that required the Employer to follow the provisions of Article 12.

6. In addition to being consistent with the governing interpretative principles, the Union's interpretation is consistent with the relevant extrinsic evidence entered in this case. First, it is clear that the Employer first agreed to significant restrictions on its ability to lay off employees as early as 1981.

7. In the 1998-2003 Collective Agreement, immediately preceding the agreement imposed by Vince Ready, the parties had agreed to extensive layoff and recall provisions in Article 12, including an obligation that the Employer provide five months' notice to employees, providing for bumping and severance election options, and protecting seniority in both layoff and recall.

8. The Employer appears to rely heavily upon the undisputed fact that between 2004 and 2007, the parties discussed amendments to the Collective Agreement in the context of potential permanent changes to the workforce. The Employer relies on this fact for the assertion that none of the provisions of Article 12 apply in the event of a pandemic, or indeed, in the event of any decision of the Employer to temporarily layoff its unionized employees.

9. In order for the Employer to succeed in that interpretation, this arbitration would have to conclude that Vince Ready decided to eliminate the pre-existing, collectively bargained restrictions on layoffs gained by the Union, including the protection of seniority rights of the Union's regular members.

10. Such a finding would be very unlikely, in our submission, and would be completely contrary to the stated purpose for amending the language as set out by Mr. Ready in his final award.

I will set aside for now the parties' submissions regarding the alleged breaches of Article 15.01 and Section 54 of the *Labour Relations Code*.

V. SUPPLEMENTAL SUBMISSIONS

At the conclusion of oral argument, I raised with counsel the source of an employer's right to lay off employees and, more specifically, whether it is an inherent management right. The issue obviously arises from the Employer's reliance on Article 1.05 in this Collective Agreement. I brought to their attention an older award in *Re British Columbia Hydro and Power Authority -and-*

British Columbia Nurses Union (1983), 10 LAC (3d) 76 (Hope), where the question had been raised but not answered, and invited supplemental written submissions.

Those submissions have now been received and considered. In brief terms, the Employer says Article 1.05 codifies the "residual rights" theory of management rights. That is, it has all of its traditional management rights unless they have been specifically abridged by another provision of the Collective Agreement. Numerous awards are cited on the subject of managerial authority to direct the workplace. Only one of them concerned layoffs and there was layoff language governing the situation: *British Columbia Hydro and Power Authority -and- IBEW, Local 258,* [1983] BCCAAA No. 92 (Hope).

The Union relies on various authorities, including common law decisions which hold that employers do not have an inherent right to lay off employees. Article 1.05 acknowledges that the management and direction of employees is "retained" by the Employer unless the Collective Agreement provides otherwise. The word implies that the Employer only has those rights it had under common law and statute which are not restricted by the Collective Agreement. It cannot be used to create rights that do not otherwise exist at law. The Union submits this reinforces the interpretation that Article 12 governs all layoffs of employees, regardless of duration.

In reply, the Employer describes the parties' supplemental submissions as "two ships that pass in the night". It relies on the "foundational principle" that statutes such as the *Labour Relations Code* and their inherent principles have displaced the common law of master and servant: *Eurocan Pulp & Paper Co.*, BCLRB No. B203/2010, quoting the familiar judgment in *Ainscough v. McGavin Toastmasters Ltd.,* [1976] 1 SCR 718. The Employer submits it is a violation of principles expressed or implied in the Code for an arbitrator to resolve an issue by resorting to the common law.

VI. ANALYSIS – ARTICLE 12

The submissions respecting Article 12 raise a number of points for examination. I will begin with the issue addressed in the supplemental submissions.

(a) The *Locus* of the Ability to Lay Off Employees

The collective agreement before the Hope panel in the *BC Hydro* award involving the Nurses' Union ("*BC Hydro & BCNU*") was somewhat odd, in that it contained no seniority provision, no layoff procedure, no retention of rights following layoff and no contemplation of the employment relationship being maintained during a period of layoff. It did, however, contain a clause allowing the employer to terminate without cause by giving a minimum of one month's notice. Three registered nurses had been affected by reductions caused by falling revenues. In the course of his analysis, Arbitrator Hope turned to the subject of layoffs:

> *We have some difficulty identifying the source of the right of an employer to impose lay-offs*. A lay-off is a temporary or permanent severance of the active employment relationship. It is common in collective agreements to retain some aspect of the relationship during a lay-off, including retention of seniority, maintenance of certain benefits and a continuing right of recall to active employment for a prescribed period. *In addition, the right of an employer to lay off is customarily defined expressly or implicitly in the recognition of seniority rights. But what is the status of the right of an employer to lay off where the collective agreement is silent on the subject*? Conversely, what are the rights of an employee, if any, in a lay-off where the collective agreement is silent on seniority rights?
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> The answer of the union on the question of the right to lay off where the agreement is silent is that it is tantamount to a dismissal. In short, the union submission, in effect, was that the right to lay off is not a residual management right, it is a contractual right and where it is not addressed in the collective agreement, it is subject to the legislative standard imposed in s. 93(1) with the employer bearing the legal onus of proving on a balance of probabilities that the "dismissal" was in response to just and reasonable cause. …
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> It is an issue with profound implications in modern industrial relations. The least result of the union interpretation would be the discarding of a long line of arbitral jurisprudence which recognizes the right of an employer to lay off in response to shortages of work and which imposes an onus on a grieving employee to establish that he was placed on lay-off in breach of some provision of the

> agreement. If the union is correct, the least consequence would be a reversal of onus and an approach to the arbitral review of lay-offs similar to the approach now taken with respect to arbitral review of discipline or dismissal.
>
> *If the right to lay off is not residual to management as part of its traditional right to manage the enterprise, from where does the right derive? In the common law there was no right to "lay off" employees except in the sense of an implied right to dismiss on notice*. …
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> * * *
>
> If an employer under the common law cannot terminate a contract for a term certain in response to a shortage of work, can an employer in a collective agreement terminate employment permanently or temporarily in the absence of a contractual right to lay off? Does s. 93(1), in that scenario, give to an employer the right to dismiss in the form of a lay-off but only for just and reasonable cause? Does dismissal include a temporary severance of active employment?
>
> *All of the questions raised arise in our view in the absence of a clear understanding of the source in law of the right of an employer to lay off. It is not a statutory concept, unless it has been included in s. 93(1). It seems to have emerged in collective bargaining as the* quid pro quo *of a surrender of the right to dismiss on notice implicit in the recognition of seniority*. (QL paras. 26-32; italics added)

The Hope award was ultimately "not compelled to answer those questions in this dispute" (para. 34).

More recent authorities support Arbitrator Hope's view that there is no right to layoff and recall employees at common law. Any break in employment is tantamount to a fundamental breach of the employment relationship in the absence of express or implied terms contemplating a layoff. See *Archibald v. Doman-Marpole Transport Ltd.*, at paras. 4 and 6; *Davies v. Fraser Collection Services Ltd.*, at paras 31-32; and *Hooge v. Gillwood Remanufacturing Inc.*, at paras. 33-35. The Union additionally relies on decisions which hold that the *Employment Standards Act* does not confer a right on employers to temporarily lay off employees: *Collins v. Jim Pattison Industries Ltd.*, at para. 23; *Besse v. Dr. A.S. Machner Inc.*, at paras. 80-81; and *Hooge*, at paras 36-38. The Employment Standards Branch has issued a Factsheet which makes it clear employers do not have an inherent right to temporarily lay off employees (bold in original):

Temporary layoff

A fundamental term of an employment contract is that an employee works and is paid for his or her services. Therefore, **any** layoff, including a temporary layoff constitutes termination of employment **unless** the possibility of temporary layoff:

- is expressly provided for in the contract of employment;
- is implied by well-known industry-wide practice (e.g. logging, where work cannot be performed during "break-up"); or
- is agreed to by the employee.

In the absence of an express or implied provision in an employment agreement that allows temporary layoff, the Act alone does **not** give employers a general right to temporarily lay off employees.

The Employer maintains that labour relations issues should not be resolved through resort to common law principles. The approach directed by the Board in the *Eurocan Pulp & Paper* decision (leave for appeal dismissed at [2012] SCCA No. 444) is somewhat more nuanced:

> *That does not mean that common law decisions and principles cannot be brought to bear on collective agreement issues and the development of the arbitral law. They can, but they do not "govern" the arbitral law* or provide a basis for critiquing prior jurisprudence because it did not note and deal with the common law. Common law decisions and principles can be used to develop the arbitral jurisprudence where an arbitrator feels that is an appropriate development of the arbitral approach. (para. 12; italics added)

The problem in *Eurocan* was that the arbitrator had felt bound by a Court of Appeal decision and discounted the prevailing arbitral approach to the matter before him (para. 8). Here, of course, the common law is being examined for an entirely different reason; namely, to consider what right, if any, the Employer had to lay off employees prior to the Union being certified and negotiating a Collective Agreement.

In any event, there is another Hope award which revisited the subject: *British Columbia Hydro Power Authority -and- IBEW, Local 258*, [1983] BCCAAA No. 92 ("*BC Hydro & IBEW*"). The dispute was one of general application relating to the interpretation of the seniority and layoff provisions in the collective agreement when, for the first time, regular employees were subject to

layoff. Drawing on several past awards, including the seminal *Tung-Sol* case, Arbitrator Hope adopted this approach:

> The important conclusion we draw from that summary of arbitral consensus is that the express language of a seniority provision will govern its application to lay-offs but that interpretations made necessary by general or ambiguous language will be made within a presumptive framework. The presumptions we see are that the very recognition of seniority in lay-offs will imply an intention in the parties to maintain senior employees in employment while there are jobs available which they are capable of performing. The second presumption is that the exercise of seniority rights in a lay-off will be seen as restricted, in the absence of express language, where the unrestricted exercise of those rights will result in the retention of unqualified employees for whom there is no work or where the application of strict seniority will otherwise compromise the ability of the employer to respond to shortages of work and yet carry on its business productively. It is open to the parties to deal expressly with job security and productivity, but, in the absence of express language, an arbitrator will look to a common sense interpretation which maintains a balance between those two potentially competing interests. (para. 64)

Arbitrator Chertkow agreed with the principles espoused in *BC Hydro & IBEW* in another proceeding involving the same employer: *British Columbia Hydro and Power Authority -and- OTEU, Local 378*, [1983] BCCAAA No. 227 ("*BC Hydro & OTEU*"). He described his task as finding "… a common sense interpretation of the [layoff and recall language] which will maintain a balance between the competing interests of the Union and Hydro" (para. 28).

The Employer submits the following implications should be drawn from this series of Hydro awards:

1. When the evidence is clear that the existing layoff and recall language was developed in an entirely different context than the context which an employer now confronts, the difference in that factual backdrop must be taken into account in interpreting the language. In our main argument, we have outlined the expansive differences between the circumstances before Arbitrator Ready when the language was developed and the present circumstances. However, it is imperative to again emphasize that the language was not developed by Arbitrator Ready as language intended to be responsive to temporary layoffs related to the usual exigencies of a shortage of work, let alone exigencies present in a COVID-19 case.

> 2. In imparting an interpretation to the language of the collective agreement, the practical ramifications, business efficacy and effect on an employer's productivity must be taken into account. More succinctly, in our case, the existing management rights clause must be interpreted as embracing the employer's right to lay off because the language developed by Arbitrator Ready is clearly not applicable to temporary layoff and was never intended to be so. In such circumstances, the right to temporarily lay off arises from the management's right clause. (pp. 9-10)

It is vital to recognize that the collective agreements before Arbitrator Hope in *BC Hydro & IBEW* and before Arbitrator Chertkow in *BC Hydro & OTEU* both contained provisions governing layoffs. The various questions posed to the learned arbitrators concerned how the language should be interpreted. The question posed here concerns the source of an employer's ability to layoff employees. Arbitrator Hope nonetheless commented rather emphatically on the subject in *BC Hydro & IBEW*:

> *An employer has an obligation to lay-off within its rights under the Agreement. There is no residual right in management to lay-off employees. It is a right founded in contract*.
>
> Retention of employment is a right afforded employees in a contemporary collective agreement. That right was described in the *Wm. Scott & Co. Ltd. & Canadian Food and Allied Workers Union, Local P-162* (1977) 1 CAN. LRBR 1 at page 5:
>
> > *On that foundation, the collective agreement erects a number of significant benefits; seniority claim to jobs in case of lay-off or promotion ... The point is that the right to continued employment is normally a much firmer and more valuable legal claim under a collective agreement than under the common law individual contract of employment.*
>
> Undoubtedly different criteria applies to a review of a disputed lay-off but the least obligation of an employer is to establish good faith. When the issue is raised the employer must defend the factual base upon which it exercised its right to reduce the work force. In considering the question it is necessary to remember that a lay-off deprives a blameless employee of his employment, perhaps permanently, in order to accommodate the financial needs of the employer.
>
> We now turn to what we consider to be the proper interpretation of the disputed provision. It does not deal in any express sense with multiple lay-offs. In fact, the language deals, of necessity with seniority rights on an individual

> employee basis. Nor does it deal expressly with the circumstances the Authority must establish in order to justify a lay-off, whether of an individual employee or a group of employees. *The right of an employer to lay-off and the legal burden it will bear depends in large measure, if not exclusively, on the language of the agreement*. See: *Bridge and Tank Co. Ltd*. (1975) 9 LAC 2d 47 (Weatherill). Where that right is expressed in imprecise language the nature of the onus will emerge in an interpretation of the language. In this collective agreement the right to lay-off is presumed in the term "Lay-offs will be conducted on a system-wide seniority basis." That right is then qualified, at least implicitly, in the term "... reduction of regular staff through slackness of work ...". (paras. 81-83 and 86; italics added[1])

These statements were admittedly *obiter dicta* given the existence of layoff language in the collective agreement under consideration. However, they were authored by one of the Province's most respected labour arbitrators. I have not been directed to any authority which contradicts the statements or even calls them into question. *Nor have I been directed to any authority where an employer laid off employees based on the theory of "residual management rights" and not pursuant to a negotiated term of a collective agreement.*

Arbitrator Hope stated in *BC Hydro & BCNU* that the right of an employer to lay off employees is not a statutory concept (nor does the Employer ground its position in the Code). He remarked that "[i]t seems to have emerged as the *quid pro quo* of a surrender of the right to dismiss on notice implicit in the recognition of seniority" (para.32). Assuming that is correct, then it would additionally seem that any ability to lay off employees would need to take into account the seniority rights of employees. But on precisely what basis? The question does not arise here because the Employer asserts it can temporarily lay off employees subject only to the usual constraints implied on the exercise of management rights. And, it will be recalled, some senior regular employees were temporarily laid off while more junior regular employees in the same work unit remained actively employed, and the same situation occurred with some senior casual employees (paras. 32 and 33 of the Agreed Facts).

I repeat the wording of Article 1.05 for proximate reference:

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[1] The phrase "in large measure" must be regarded as shorthand for the presumptions and conclusions drawn from the arbitral consensus described earlier in *BC Hydro & IBEW* (see para. 64 quoted above). The reference does not detract from the fundamental premise that the right to layoff is derived from "the language of the agreement"; i.e., it is "founded in contract".

> The Union acknowledges that the management and direction of employees in the bargaining unit *is retained* by the Company except as this Agreement otherwise specifies. (italics added)

It is axiomatic that one cannot "retain" something which is not held already. While the common law as it applies to individual employment contracts is no longer relevant to employer-employee relationships governed by a collective agreement, the Employer's position is tantamount to turning the effect of union representation on its head. The Employer in essence asserts that it now has greater rights than it held before the Union was certified. It argues in its final reply submission:

> 10. The foregoing principles are a reproach to the argument of the Union, which focusses on limitations on employers' rights at common law and then says that because those limitations existed, and continue to exist, prior to the advent of collective bargaining, they cannot be a "residual right". The high water point of this argument is the Union's assertion at para. 30 because the collective agreement uses the word "retained", the implication is that the employer maintains only those rights it had under the common law and statute which are not otherwise restricted by the collective agreement. It cannot be interpreted to create rights that do not otherwise exist at law.
>
> 11. As set out above, this is a complete misapprehension of the residual rights theory of management rights. The residual rights theory does not "create rights". The parties to a collective agreement start off on an equal footing and management rights are those which are not constrained by the language of the collective agreement. It is fundamentally at odds with the foundational principles of labour law to start any analysis from the notion that the residual rights of management are those which existed at common law and which are not derogated from in the collective agreement. (p. 4)

No authority is provided for the assertion that the parties to a collective agreement "… start off on an equal footing and management rights are those which are not constrained by the language of the collective agreement". The implicit contention is that an employer somehow acquires greater rights when a collective agreement is negotiated unless the union can secure an express restriction. This is counter-intuitive and contrary to the Board's statement in *Wm Scott* (reproduced above) that "… the right to continued employment is normally *a much firmer and more valuable*

claim under a collective agreement than under he common law individual contract of employment" (italics added).

None of the supplemental authorities put forward by the Employer give pause to reach a different conclusion. It quotes, for instance, paragraph 17 from *Ritchie Cut Stone Co. Ltd.* (1966), 17 LAC 202 (Lane), which reads in part:

> … Failing a management's rights clause which limits both labour and management to some degree as may be set out in such a clause, *the residual right to operate the business* and to take such steps as may be desired by management is only limited by agreement which may have been arrived at in the collective agreement which has taken away certain of management's rights, *and those rights not dealt with in the collective agreement remain vested in management*. … (italics added)

This merely begs the question of what rights were "vested in management" in the first place and does not advance the issue at hand. Other awards discuss the well accepted principle that unions must negotiate limitations on management's ability to "organize the workplace", to "reorganize the workforce" and to structure work to achieve the highest degree of productivity, but do not shed light on an employer's ability to lay off employees in the absence of a contractual provision: see, for instance, paragraphs 82-84 of *School District No. 40, (New Westminster)*, cited above; and paragraphs 16 to 23 of *Canada Tungsten Mining Corp*., [1985] CLAD No. 17 (Hope). The award in *Intertek Testing Services* is likewise of no assistance because the management rights clause expressly vested in the company "the right to … layoff" subject to provisions of the agreement. And to repeat, I have not been directed to any arbitration award where the employer's ability to lay off employees was regarded as an inherent management right.

Based on the above analysis, I agree with the Union that the Employer did not somehow "retain" a residual management right to temporarily lay off employees. I prefer and adopt Arbitrator Hope's view in *BC Hydro & BCNU* that the right must be founded in contract and the ability to layoff depends in large measure on the language of the collective agreement. In this case, Article 12 is the only provision governing layoffs.

(b) Interpreting Article 12

Despite the foregoing conclusion, I will address the parties' submissions regarding the interpretation of Article 12 separate and apart from the issue of management rights.

There can be no doubt that the various elements of Article 12 represent potentially onerous obligations for the Employer – particularly in the situation of a temporary layoff of any duration. Moreover, it can be fairly stated that the entire construct would be incongruous in the situation of a relatively short layoff. I accept as well that the current version of Article 12 was negotiated in the context of permanent changes in the workplace. All of these considerations lend strong support to the Employer's position that the language should not be applied to temporary layoffs.

Nonetheless, there are a number of considerations flowing from the Union's submissions which cannot be overlooked. First, there was no express recognition that the revised Article 12 would not apply to temporary layoffs. The subject was simply not discussed. The uncontradicted evidence of Mr. Schwartz recounted the Employer's understanding but does not establish mutual intent which can be relied on as aid to interpretation.

Second, the Employer's position overlooks the fact that the parties' Collective Agreement had for many years contained highly restrictive language governing layoffs. Article 10 of the 1981-1983 Collective Agreement was far more concise but it was "… understood that regular employees with more than two years' service seniority *will not be subject to layoffs*" (italics added). The 1998-2003 Collective Agreement covered the period immediately prior to the contract settled by Mr. Ready. Article 12 as it then existed contained many provisions similar to the current version and was also onerous when examined from the Employer's perspective. For instance, regular employees were entitled to five months' written notice of layoff. It was not argued before me that the language applied only to permanent layoffs. Indeed, as the Union observes, the term "layoff" in both the 1981-1983 and 1998-2003 Collective Agreements was used without any qualification or distinction between "temporary" and "permanent".

Therefore, when Mr. Ready issued his Interim Award, he had before him existing language with detailed restrictions on the Employer's management rights, and a rather complex system to protect the seniority rights of employees including layoff notice, bumping, severance election and recall. He decided to provide the Employer with increased flexibility to run its operations in light of the *Coastal Ferries Act* but simultaneously provided the Union's members with expanded protection in the event of "workforce adjustment" as broadly defined in Article 12.01(a). Some of the passages in his Interim Award warrant repetition:

> 10. WORKFORCE ADJUSTMENT
>
> The second aspect of this issue is linked to both contracting out and hours of work. As the workforce is restructured, there should be enhanced provisions provided to employees. *The current Article 12 provides for layoff and recall provisions*, but does not adequately address the major changes to the Collective Agreement and the manner in which the workforce will be structured in the future.
>
> The Employer wants increased flexibility and control as to how it will conduct business in the future. *It should therefore be prepared to afford the current employee base with added protection should it choose to utilize such flexibility in the future*.
>
> * * *
>
> Decision Re Workforce Adjustment
>
> As a consequence of my award with respect to Contracting Out and with respect to the new workforce structure, it is necessary to consider what appropriate measures should be taken in the event that employees are laid off. *In the past the issue of layoffs has been somewhat dampened by the restrictive contracting out language and the presence of so many casuals*.
>
> It is therefore necessary to address the question of whether the Workforce Adjustment provisions of the Collective Agreement should be changed. On this subject, my award is as follows:
>
> a. Article 12 relating to layoff and recall should be deleted and replaced with new workforce adjustment language. (pp. 39-42; italics added)

Several points should be noted in the foregoing passages. Mr. Ready recognized that the "current Article 12 provides for layoff and recall provisions" but was not adequate to address major

changes and the future structure of the workforce. There is no indication that he viewed Article 12 as applying only to certain types of layoffs. Nor is there any indication that he somehow intended to restrict the application of Article 12 when he "added protection" for employees in light of the increased flexibility afforded to the Employer.

Mr. Ready's statement that "[i]n the past, the issue of layoffs has been somewhat dampened by … the presence of so many casuals" illuminates another point. The inescapable conclusion from the record before me is that the temporary layoff of regular employees was never an issue in the past because the large number of casuals provided a "buffer". There was no requirement to lay off regular employees because casual employees were simply not called to work. Put somewhat differently, the parties appear to have shared a common expectation that regular employees would not be subject to temporary layoffs.

There is then the testimony of Mr. Harris that there have been "multiple occasions" where the parties have reached an agreement to avoid giving layoff notice to employees. No details were provided aside from one instance, and there was no indication of the time period being referenced. The parties have seemingly developed "work arounds" in the past based on mutual recognition that applying Article 12 to certain layoffs would have had undesirable consequences for both the Employer and the employees potentially affected. The representatives involved should obviously be commended for fashioning more acceptable solutions than the Collective Agreement might allow. For present purposes, I note the absence of any suggestion that Article 12 would not have applied to these "multiple" layoffs had the parties not reached an agreement.

The foregoing observation must be given little, if any, weight. Nonetheless, the evidence is consistent with the plain wording of Article 12 which refers simply to "layoff". There is no definition in the Collective Agreement. The term has a recognized meaning in the arbitral case law which was adopted in *Canada Safeway Limited v. RWDSU, Local 454*, [1998] 1 SCR 1079:

> The labour agreement in the case at bar does not define "layoff". We must therefore look at the cases to see how courts and labour arbitrators have defined it. They suggest that "layoff" is used in the law of labour relations to describe an interruption of the employee's work short of termination. A "layoff", as the term is

> used in the cases, does not terminate the employer-employee relationship. Rather, it temporarily discharges the employee. The hope or expectation of future work remains. But for the time being, there is no work for the employee. Such an employee, it is said, is laid off.
>
> The suspension of the employer-employee relationship contemplated by the term "layoff" arises as a result of the employer's removing work from the employee. As stated in *Re Benson & Hedges (Canada) Ltd. and Bakery, Confectionery and Tobacco Workers International Union, Local 325* (1979), 22 L.A.C. (2d) 361, at p. 366:
>
> > Arbitrators have generally understood the term "lay-off" as describing the situation where the services of an employee have been temporarily or indefinitely suspended owing to a lack of available work in the plant. . . . (paras. 71 and 74)

The term "layoff" is used consistently and without delineation throughout Article 12. One of the frequently cited *Pacific Press* rules of interpretation is that parties are presumed to know the relevant jurisprudence.

There is one Article in the Collective Agreement which refers to both "Permanent Layoff" and "Temporary Layoff". It has been alluded to already and applies to the Deas Pacific Marine Component. Article 33.14 provides in part:

> 33.14 – Notice of Layoff for Regular Employees
>
> (a) Permanent Layoff
>
> 1. Regular employees who are given notice of permanent lay off (i.e. exceeds twelve (12) consecutive weeks) shall be laid off in accordance with Article 12 of this agreement.
>
> * * *
>
> (b) Temporary Layoff
>
> 1. The Company shall give as much advance notice as possible to regular employees of temporary layoffs [i.e. layoffs that are of twelve (12) weeks or less in duration], provided that such notice shall not be less than 5 working days, or pay in lieu, thereof.

The Employer relies on this provision to support its position that Article 12 applies only to permanent layoffs. It faces a number of insurmountable obstacles on this front. First, the Deas Dock operation was in a separate bargaining unit and covered by a different collective agreement when Mr. Ready resolved the current Article 12 (an earlier version of the provision can be found in Appendix B to Mr. Ready's Final Award). Later events are found in the Will Say statement of Mr. Schwartz:

> Deas Pacific Marine was repatriated back into the same bargaining unit as BC Ferry Services and BCFMWU following the March 8, 2007 Final Ready Award. Article 33.14 contains specific language relative to temporary layoffs given the seasonal cycle of that maintenance facility. *The parties subsequently agreed that a permanent lay-off is a lay-off exceeding twelve (12) consecutive weeks and specifically referenced that Article 12 would then apply*. This language currently exists in the Collective Agreement applicable to Deas. (para. 24; italics added)

The subsequent agreement applicable to the Deas Dock cannot be used to alter the meaning of what Mr. Ready had previously awarded without clear evidence of mutual intent. It is also instructive to reflect on where the parties would have stood had the present issue arisen immediately after Mr. Ready's award and before the Deas Dock operation was repatriated. Article 13.14 would not have been included in the Collective Agreement. How then would one have differentiated between a permanent layoff and a temporary layoff (assuming, for purposes of the question, that the Employer is correct regarding the scope of Article 12)? There would have been no "bright line" of 12 weeks and no reference at all in the Collective Agreement to the notion of a "temporary layoff". By analogy to the reasons articulated at paragraph 36 of Mr. Munroe's *BCGEU* award cited above, a subsequent amendment to one part of a collective agreement should not be used to alter the scope of a pre-existing provision found elsewhere unless that result can be said to have been mutually intended.

Next, Article 33.14(a) merely adopts "Article 12 of this agreement" for purposes of permanent layoffs at the Deas Dock. It does not limit the scope of Article 12 for other purposes. Finally, and most critically, Article 33.14 demonstrates the drafter(s) knew how to delineate between permanent and temporary layoffs when they are to be treated differently. They have not

done so in Article 12 which applies to the rest of the bargaining unit without differentiation as to the nature of the layoff.

There is yet another reason why Article 12 should not be given the restrictive interpretation urged by the Employer. The following passage from *Tung-Sol of Canada Ltd. and Loc. 512* (1964), 15 LAC 161 (Reville), has been frequently cited by Canadian arbitrators and the Courts:

> Seniority is one of the most important and far-reaching benefits which the trade union movement has been able to secure for its members by virtue of the collective bargaining process. An employee's seniority, under the terms of a collective agreement gives rise to such important rights as relief from lay-off, right of recall to employment, vacations and vacation pay, and pension rights, to mention only a few. It follows, therefore, that an employee's seniority should only be effected by very clear language in the collective agreement concerned and that arbitrators should construe the collective agreement with the utmost strictness wherever it is contended that an employee's seniority has been forfeited, truncated or abridged under the relevant sections of the collective agreement. (p. 162)

The Supreme Court of Canada cited *Tung-Sol* in *Health Services & Support – Facilities Subsector Bargaining Unit v. Province of British Columbia*, [2007] 2 SCR 391, where it stated that collective agreement restrictions limiting the layoff of employees "… affect [their] capacity to retain secure employment, one of the most essential protections provided to workers by a union" (para. 130). It is for this reason that arbitrators have held "clear and unequivocal language is expected" before seniority rights will be infringed (*British Columbia Hydro (Wage Adjustment Grievance*), at para. 64). There is no language in Article 12 limiting its application to permanent layoffs.

Finally, and even assuming the ability to lay off employees is a residual management right, the Employer encounters another obstacle. It arises by analogy from how arbitrators have construed an employer's ability to contract out (which is now uniformly recognized as an inherent management right) where there is a negotiated restriction. The approach was articulated some time ago in *Alcan Smelters & Chemicals Ltd. -and- CASAW, Local 1* (1987), 28 LAC (3d) 353 (Hope):

> In the contemporary context, one can say that unions must continue to accept the reality that they must negotiate any limitation on contracting out in collective bargaining and have the limitation set out in specific terms in the collective agreement. But the backlash of union response to the contracting out of work is a factor to consider in interpreting any language in which an employer has in fact agreed to limit its right to contract out. *The result is that neither side can expect to have their intentions arise by implication as opposed to expressing those intentions in clear language*.
>
> *Where an employer agrees to restrict its right to contract out, it will be accountable for the full scope of limitation consistent with the language to which it has agreed*. That is, while unions must bargain to achieve limitations on contracting out, employers must ensure that where they have agreed to limitations in clear language, any exceptions upon which the employer intends to rely must be expressed in language that accurately defines the exception. *Where the parties have expressed a general restriction on contracting out in clear language, an employer cannot expect that an arbitrator will invoke a strict approach to the interpretation of the language to favour any exceptions relied on by the employer*. (p. 364; italics added)

The immediate parties have negotiated general language which on its face applies to "layoffs" as the term is commonly understood in labour law. There is no exception for "temporary layoffs" and the Employer cannot expect to have the scope of Article 12 limited by implication.

It is difficult to address the Employer's reliance on Section 38 of the *Coastal Ferry Act* as the submission was not developed beyond the bare assertion that applying Article 12 to temporary layoffs would have put Mr. Ready's Interim and Final Awards "offside of, and in breach of " the statute. I note the Act required ferry operators to adopt, among other steps, "a commercial approach" to ferry service delivery. Private sector collective agreements are replete with clauses applicable to temporary layoffs. While they are typically less onerous than the language before me, a provision governing temporary layoffs is not inherently incompatible with a commercial operation.

For all of the above reasons, I prefer the interpretation of Article 12 advanced by the Union notwithstanding the potential challenges arising from its application to "temporary" layoffs. The unilateral implementation of temporary layoffs by the Employer contravened the provision.

VII. ANALYSIS – ARTICLE 15.01

The outcome of this issue effectively stands or falls on whether the Employer had the right to temporarily lay off regular employees. As that issue has been answered in the Union's favour, it follows that the Employer did not have the right to unilaterally place regular employees on "off duty status" and the employees so affected should have continued to be paid in accordance with the negotiated salary schedules.

VIII. ANALYSIS – SECTION 54

The Union relies on Section 54 of the *Labour Relation Code* to submit that the Employer was required to give 60 days' notice of any change affecting the terms, conditions or security of employment of a significant number of employees covered by the Collective Agreement. It maintains this requirement was a separate and independent obligation from the Article 12 Workforce Adjustment language. The Union argues the Employer breached Section 54 by laying off regular and casual employees without notice, and then again by converting laid off regular employees to "off-duty status" and significantly reducing their regular pay. While acknowledging that the Board has recognized limited exceptions to the Section 54, the Union argues temporary layoffs are not exempt; further, regardless of duration, a layoff that is not a predetermined or predictable feature of the employment relationship will not be exempt. The Union additionally asserts it was possible in all of the circumstances for the Employer to give timely notice; its unwillingness to pay employees for a further period of work while ferry traffic was reduced is not a situation for which relief against Section 54 has been contemplated.

The Employer's response starts from the observation that the Legislature could not have intended for employers to be "clairvoyant". It submits further that a requirement to predict the advent of a world-wide pandemic in order to satisfy the 60 day notice period before adjusting operations would be "absurd" and it would be "folly" to find a breach of Section 54 in the circumstances. The Employer relies on *University of British Columbia*, [1995] BCLRBD No. 44,

for examples of situations where the statutory requirement "would not be applicable" (legal argument at p. 22).

Shortly after Sections 53 and 54 were brought into force, a panel headed by then Chair Lanyon "[made] it clear that the Board will give a broad and liberal interpretation to [the provisions] as is consistent with the purposes of the Code": *Pacific Press Limited*, BCLRB No. 294/93, at p. 4. The most recent pronouncement from the Board respecting Section 54 comes from a panel headed by current Chair de Aguayo: *Tolko Industries Ltd*., 2020 BCLRB 57. The following elements of the analysis bear on the present discussion (citations omitted):

- Whether Section 54 applies to measure, policy, practice or change introduced by an employer (for simplicity, "a change") will be determined using a contextual and purposive approach (para. 28).

- The Board may relieve against some or all of the 60 days' notice requirement where the change arises from circumstances outside the employer's control; however, this will be the exception and not the rule (para. 31).

- The primary objective of Section 54 is for the parties to meet, in good faith, and endeavour to develop an adjustment plan to mitigate the effects of the change (para. 32).

- Section 54 may apply to a temporary layoff; however, a decision to implement a temporary layoff is not alone sufficient to trigger the notice and consultation requirements (paras. 34 and 35).

- Evidence establishing that temporary layoffs are a predictable feature of the employment relationship will assist in determining whether a particular layoff constitutes a change contemplated by Section 54 (para. 36).

The panel in *Tolko* summarized its view of Section 54 as it applies to temporary layoffs in this manner:

> … Section 54 does not apply to all temporary layoffs merely because they are indefinite (i.e. do not have a specific recall date). In addition, workplace or industry practice is relevant to the question of whether a decision to implement a particular layoff is a Change contemplated by Section 54. Finally, under Section 54, an employer's subjective intention is not determinative but will be assessed in light of the particular facts and the practices in a workplace or industry. (para. 38)

The Employer relies on *UBC* for the proposition that Section 54 does not apply to changes introduced due to circumstances beyond an employer's control. In fact, a closer reading of the relevant passage reveals that the exemption applies only to the notice requirement:

> In circumstances where a change is contemplated which will affect the employment of a significant number of employees, an obligation presumptively arises to discuss the proposed change with the union before it occurs. Changes which potentially affect the security of employment of a substantial number of employees *may result from actions completely outside the control of the employer*. A creditor may call a loan and an employer forced into immediate bankruptcy. A purchaser may cancel a critical contract with no notice and force closure of all or part of the business. *When these changes occur an employer is unable to provide sixty days notice of the change. Although in some circumstances an employer may be relieved of this obligation where the decision is outside its control, this will be the exception*. (para. 108; italics added)

The Board's authority to relieve against the notice obligation has been recognized in subsequent decisions. After quoting the above passage from *UBC,* the panel in *Pacific Pool Water Products Ltd.*, BCLRB No. B43/2000, stated that "where notice is possible, it must be provided" (para. 41). Both *UBC* and *Pacific Pool* were cited in *Wolverine Coal Partnership* (2015), 262 CLRBC (2d) 1, where then Vice-Chair de Aguayo stated that Section 54 must factored into an employer's decision-making process. The 60 days' notice requirement must be taken into account, for example, when negotiating the closing date for the sale of a business (para. 135). In *Mount Polley Mining Corporation* (2018), 22 CLRBR (3d) 216, the panel noted the Board takes a case-by-case approach to determine whether an employer was unable to give notice for reasons beyond its control (para. 22). The panel refused to exercise its discretion to relieve the employer of the notice obligation because the underlying circumstances were not "new or unforeseen" (para. 23).

The parties agree that I have the same authority as the Board to determine whether relief should be granted from the Section 54 notice requirement. The Union submits the Employer could have complied, and points to the February 24 letter from its President to the Employer's Executive Director of Safety, Health & Environment asking whether the Employer was "… creating a response plan *in the event* COVID-19 becomes a global or local epidemic?" (italics added). The letter concluded by advising that the Union was monitoring the spread of COVID-19 closely "… to ensure the health and safety of the workforce". The Union next notes that a Provincial state of emergency was declared on March 18. It acknowledges the parties held discussions between March 24 and April 1, but says the Employer did not provide appropriate notice of its intention to make workforce changes during those discussions. After the Temporary Service Level Adjustment Agreement was signed with the Province, the Employer communicated its intention to lay off a significant number of employees on April 3.

The COVID-19 pandemic can be understatedly characterized as a "new [and] unforeseen" event. It has caused unprecedented ramifications around the globe. The speed and breadth of its impact on British Columbia was not forecast with precision and events evolved almost daily in the early stages as those impacted attempted to respond and adapt to ongoing developments. While the Union wrote to the Employer on February 24, this letter was directed to health and safety concerns at a time when the scope of the subsequent pandemic had yet to crystalize. Even by the time of the March 26 discussion between the parties, the details of any temporary service level agreement with the Government, including scope and timing, were still uncertain. On the record before me, the Employer did not have certainty regarding if and when it could reduce operations until the Temporary Service Level Adjustment Agreement was signed on April 1. It was only then in a position to respond to an event which was completely outside its control. The Employer had by that point experienced overall travel demand and fare revenues that were 70% below the previous year's levels. If there was ever a case where an exception should be made to the Section 54 notice requirement, it is exemplified by the present facts.

This conclusion does not provide a complete answer to the Union's Section 54 application. Indeed, the analysis to this point has bypassed the threshold question of whether the Employer introduced "a measure, policy, practice or change that affects the terms, conditions or security of

employment of a significant number of employees to whom a collective agreement applies" so as to trigger the provision. This engages the contextual and purposive approach espoused by the Board.

The global pandemic was obviously neither "a predetermined nor [a] predictable feature of the employment relationship" (*Wolverine* at para. 125). It unquestionably affected "a significant number of employees" covered by the Union's Collective Agreement with the Employer. Thus, the issue quickly reduces to the question of whether the temporary layoffs were the type of "measure, policy, practice or change" for which Section 54 was intended under the "broad and liberal interpretation" charted in the early *Pacific Press* decision.

At first blush, a temporary layoff of only 12 weeks would appear to fall outside the scope of the statutory language and the circumstances can be readily contrasted with the "long-term and indefinite" layoff in *Wolverine* (see especially the description in *Tolko* at para. 35). However, this characterizes the layoffs with the enormous benefit of hindsight. At the time of the announcement, no one was predicting with any degree of accuracy how long the effects of the pandemic would continue. The layoffs of the regular and casual employees were indefinite. There was no return to work date and only a statement by the Employer that it would "make every effort to recall our co-workers as soon as we can". The Temporary Service Level Adjustment Agreement had an initial term of 60 days but was subject to extension "on a month to month basis by mutual agreement". The Employer hoped the layoffs would be of relatively short duration but Mr. Harris candidly conceded in cross-examination that "we did not know how long it might be".

Focusing on the duration of the temporary layoffs here additionally serves to overlook entirely the underlying rationale for the statutory provision. To reiterate what was written in *Tolko*, the "primary objective" of Section 54 is for the parties to "… meet, in good faith, and endeavour to develop an adjustment plan to mitigate the effects of the change" (para. 32). As stated earlier in the same decision, Sections 53 and 54 contemplate a cooperative model of labour relations and constitute longstanding recognition of the valuable contributions unions and employees can make to the decision-making processes that affect their working lives. The scope of good faith meetings includes "… discussions which might change an employer's [decision] or *cause it to alter its*

plans": *0910196 B.C. Ltd.*, BCLRB No. B52/2012, at para. 34. This is why Section 54 (1)(b)(i) contemplates "*alternatives* to the proposed measure, policy, practice or change, including amendment of provisions in the collective agreement" (*ibid*, at para. 34). Likewise, while an employer is entitled to conduct its business, the provision mandates it "… to discuss the impact of its decisions and to discuss with the union alternatives that ease the negative impact of its decisions": *Pacific Press* (1995), 26 CLRBR (2d) 127, quoted with approval in *Wolverine* at paragraph 88.

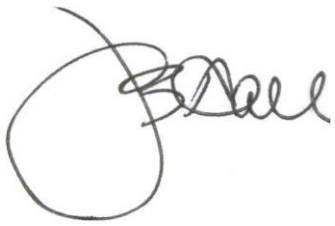
The COVID-19 pandemic is a (hopefully) "once in a lifetime" event which has profoundly changed all or our lives; its impact will continue to reverberate for the immediate future and beyond. I have found that this new and unforeseeable event was entirely beyond the Employer's control, such that providing the 60 days' notice stipulated by Section 54 was not possible. The circumstances represent the epitome of an "exception" and relief is granted accordingly. But the unprecedented nature of the situation reinforced the need to recognize the primary purpose of the provision and to ensure the Union had an opportunity for input through good faith discussions. It would not be appropriate at this juncture to comment on the extent to which the Employer's dialogue with the Union both before and after the temporary layoffs may have satisfied its statutory obligation.

VIII. CONCLUSION

I have determined that the Employer did not have an inherent or residual management right to temporarily lay off ferry services employees due to the COVID-19 pandemic. The layoffs it imposed were contrary to Article 12 of the Collective Agreement. Article 15.01 was also breached as a consequence of the "off duty status" implemented unilaterally for some regular employees. The attendant circumstances were obviously beyond the Employer's control such that it was relieved of the requirement to provide 60 days' notice under Section 54 of the *Labour Relations Code*; however, given the primary objective of the statutory language, the provision otherwise applied to the changes introduced by the Employer.

By agreement, remedial consequences flowing from these determinations are referred back to the parties for resolution. I reserve jurisdiction in the event there are any remaining differences following their discussions.

DATED and effective at Vancouver, British Columbia on September 28, 2020.



JOHN B. HALL
Arbitrator