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Federal Public Sector Labour Relations and Employment Board Act and *Federal Public Sector Labour Relations Act*

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

MICHAEL HURLEY

Grievor

and

TREASURY BOARD
(Department of National Defence)

Employer

Indexed as
Hurley v. Treasury Board (Department of National Defence)

In the matter of an individual grievance referred to adjudication

Before: David Olsen, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Christopher Perri, counsel

For the Employer: Allison Sephton, counsel

Heard at Kingston, Ontario,
December 13 and 14, 2016, and March 9 and 10, 2017.

I. Application before the Board

[1] Dr. Michael Hurley ("the grievor") has been a university teacher at Royal Military College of Canada (RMC) in Kingston, Ontario, since 1988. Teaching has been a great passion of his. On three occasions, the cadets at RMC have nominated him for teaching excellence awards.

[2] Dr. Hurley had been thinking about retirement for some time. He wanted to coordinate his retirement with his daughter's graduation from the University of Toronto. He had heard of a protocol between the Canadian Military Colleges Faculty Association (CMCFA; "the bargaining agent") and RMC to the effect that if a faculty member provided as much notice as possible of retirement, certain benefits would accrue to him or her. He did not know the exact details.

[3] He consulted with his bargaining agent representative, Dr. Helen Luu. In turn, she referred him to Dr. Jean-Marc Noël, the CMCFA's president.

[4] Drs. Hurley and Noël met on January 26, 2015, and mapped out several iterations of a retirement plan. According to Dr. Hurley, the plan included three key parts, namely, double salary increments based on satisfactory performance for the last three years of his employment, a six-month sabbatical, and six months of course relief on his return and immediately before his retirement, to round off his scholarly duties ("the three-part plan"). During that six-month period of course relief, he would be relieved from his classroom teaching duties.

[5] His plan assumed that his six-month sabbatical would start in January 2017 and that for the six months from the end of June 2017, he would be on course relief until his retirement in January 2018.

[6] He and Dr. Noël decided to meet with Dr. Harry Kowal, the RMC's principal, to alert him to the grievor's retirement plan.

[7] A meeting took place on April 27, 2015 ("the April 2015 meeting"). Present were Dr. Noël, Dr. Hurley, Dr. Kowal, and Dr. Philip Bates, the vice-principal academic at RMC, and Kathleen Hope from human resources.

[8] There is no consensus on what was discussed at the meeting among those present or on how it concluded. It led to the grievance that was referred to

adjudication and assigned to this panel of the Federal Public Sector Labour Relations and Employment Board ("the Board").

[9] Drs. Hurley and Noël claimed that they clearly laid out the elements of the three-part plan, while Drs. Kowal and Bates recalled that the only issue discussed was retirement and a memorandum of agreement (MOA) dated July 1, 2007, dealing with double increments and signed by a former principal and a former president of the bargaining agent. Dr. Kowal was not familiar with the MOA. To the best of their recollection, sabbaticals and course relief were not discussed.

[10] Dr. Hurley and Dr. Noël said that Dr. Kowal stated that he was not going to abide by past practice or the MOA because he did not think the MOA was binding on him as he had not signed it. In contrast, Dr. Kowal and Dr. Bates characterized the meeting as an initial discussion of Dr. Hurley's retirement plans and stated that as of the end of the meeting, no decision had been reached.

[11] On June 15, 2015, Dr. Hurley filed his grievance alleging violations of the MOA, of a past practice under article 8 of the collective agreement between the Treasury Board and the bargaining agent for the University Teaching (UT) group, which expired on June 30, 2014 ("the collective agreement"), section 107 of the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; *PSLRA*), and any other related policy, directive, statute, regulation, or provision.

[12] As corrective action, he requested that the Principal comply with the collective agreement by upholding past practice and by abiding by the terms and conditions of employment as outlined in the MOA.

[13] There is no consensus on the scope of the grievance. The bargaining agent asserted that it pertains to all of the three-part plan, namely, double increments, a sabbatical, and course relief. The Treasury Board ("the employer") contended that the only issue raised in the grievance is the application of the MOA that relates to double increments and not sabbaticals or course relief.

[14] The bargaining agent maintained that all parts of the three-part plan were discussed during the three levels of the grievance process, while the employer maintained that only the MOA, about double increments, was discussed.

[15] After the grievance was referred to adjudication, Dr. Kowal committed to abiding by the undertakings with respect to double increments in the MOA on the basis that it was a term or condition of employment continued in force after notice to bargain was given, by virtue of the bargaining freeze in s. 107 of the *PSLRA*.

[16] On June 19, 2017, *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures* (S.C. 2017, c. 9) received Royal Assent, changing the name of the Public Service Labour Relations and Employment Board and the titles of the *Public Service Labour Relations and Employment Board Act* and the *PSLRA* to, respectively, the Federal Public Sector Labour Relations and Employment Board, the *Federal Public Sector Labour Relations and Employment Board Act*, and the *Federal Public Sector Labour Relations Act* ("the *Act*").

A. Overview of the parties' positions

1. For the grievor

[17] The bargaining agent stated that this case is about a past practice of the parties. According to the bargaining agent, if a UT provides three years of notice of retirement, the parties have agreed to implement the three-part plan, composed of the following:

> 1. a revised performance evaluation scheme tied to pay resulting in double increments for the last three years of employment;
>
> 2. sabbatical leave; and
>
> 3. course relief following the sabbatical.

[18] The provisions on the revised performance evaluation were put in writing in the MOA.

[19] The collective agreement sets out the eligibility for sabbaticals. Every three years, a UT is entitled to a half-term sabbatical. When the UT provides advance notice of retirement, the sabbatical may be taken.

[20] The third component is course relief following a UT's return from sabbatical. UTs teach, conduct research, and provide services in the community. Course relief involves reshuffling these components so that the UT is assigned less teaching

responsibilities so that he or she can focus his or her attention on completing research and service initiatives before retiring.

[21] The course relief component has not been reduced to writing; however, there is evidence of a past practice in which it was part of a three-year plan following a sabbatical. The practice of granting course relief dates to 2007, when the former principal, Dr. Cowan, initiated it. Dr. Joel Sokolsky continued it. He was the principal between 2007 and 2013.

[22] The components of the three-part plan constitute a past practice under article 8 of the collective agreement, and by virtue of the provisions in that article, they were incorporated into the collective agreement.

[23] It is claimed that Dr. Kowal, the present principal, has refused to abide by the three-part plan.

[24] The collective agreement expired in 2014. However, the terms and conditions of employment are subject to a statutory freeze as the parties are still negotiating a new collective agreement.

2. <u>For the employer</u>

[25] The employer stated that there are two problems with this grievance, as follows:

> 1. Dr. Hurley is not yet aggrieved because he has not completed a form establishing a retirement date. Consequently, his grievance is premature.
>
> 2. The grievance is moot insofar as it relates to double increments.

[26] The grievance concerns whether the employer complied with the MOA. On October 30, 2015, after the grievance was referred to adjudication, Dr. Kowal committed to abide by the MOA and to grant the corrective action requested in the grievance on condition that Dr. Hurley sign the retirement forms, as the employer acknowledged that the MOA was caught by the statutory freeze set out in s. 107 of the *Act*.

[27] The MOA is not incorporated into the collective agreement. Its alleged contravention is not properly before the Board.

[28] This is an individual grievance and not a complaint filed under s. 190 of the *Act*. No adjudicator has jurisdiction to consider whether s. 107 has been contravened.

[29] The grievance is about the three-part plan and the MOA. The MOA does not address or state anything about the two parts raised by the bargaining agent, namely, sabbaticals and course relief. It speaks only about increments and performance. There are no written policies on sabbaticals and course relief other than the provisions in the collective agreement.

[30] Course relief and sabbaticals were not raised during the grievance process. The employer objected under *Burchill v. Canada (Attorney General)*, [1981] 1 F.C. 109 (C.A.) ("*Burchill*"), because those issues are not properly before the Board.

[31] No component of the three-part plan has been the subject of a past practice.

3. <u>For the bargaining agent</u>

[32] In response, the bargaining agent stated that it does not matter that the MOA is not in the collective agreement. It has been incorporated into the collective agreement.

[33] In the last round of bargaining, the parties agreed that existing memoranda of agreement would remain in force until the next round.

[34] The MOA puts past practice to writing.

[35] In response to the submission that the grievance is premature because Dr. Hurley did not complete a form establishing a retirement date, the bargaining agent stated that the process operates differently. The parties meet and discuss a proposed retirement plan and agree on terms. Only then does the employee sign a retirement form because once it has been signed, it is irrevocable.

[36] It is an accepted principle that collective agreements should be interpreted liberally to get to the heart of a problem. This principle is balanced with proper notice so that any such issues can be resolved through the grievance process.

[37] The issues of sabbaticals and course relief were raised at each step of the grievance process.

[38] The bargaining agent did not dispute that the grievance could have been drafted more completely.

[39] The employer stated that the matter is moot as it agreed to comply with the provision dealing with revised performance evaluations. All Dr. Hurley has to do is sign the retirement form. However, the employer does not recognize the past practice with respect to double increments, sabbaticals, and course relief.

II. Issues

[40] The following are at issue. Were sabbaticals and course relief raised at the April 2015 meeting? Were they raised on the face of the grievance? Were they raised and discussed during the grievance process?

[41] If not, am I precluded from hearing these issues under the *Burchill* principle? This gives rise to the following issues:

> 1. Is the grievance moot because the employer agreed to grant the corrective action requested in it with respect to the revised performance evaluation scheme tied to pay, as it acknowledged that the MOA was caught by the statutory bargaining freeze period?
>
> 2. If the grievance is not moot, do I have jurisdiction to hear it and grant the corrective relief? This would necessitate determining whether the MOA's terms and conditions were incorporated into the collective agreement on the basis that they constituted a past practice under article 8, which would clothe the Board with jurisdiction to hear the grievance and to award a remedy if it is allowed.
>
> 3. Assuming sabbaticals and course relief were raised during the grievance process, were they incorporated into the collective agreement? This also involves determining whether they constitute a past practice under article 8.
>
> 4. If the MOA concerning double increments, as well as alleged past practices with respect to sabbaticals, and course relief are incorporated into the collective agreement, and I have jurisdiction to hear and determine the grievance, is the grievance premature because Dr. Hurley

did not sign a formal notice of retirement?

[42] For the reasons that follow, I have concluded that I do not have jurisdiction to consider the course relief and sabbaticals issues. I am not persuaded that they were raised at the April 2015 meeting, were contemplated in the grievance, or were raised and discussed at all levels of the grievance process. Thus, I am precluded from hearing them, in accordance with the *Burchill* principle.

[43] With respect to the alleged contravention of the MOA with respect to granting double increments, I conclude that the issue is not moot by virtue of the employer's acknowledgement that it was caught as a term and condition of employment under s. 107 of the *Act*, the bargaining freeze provision.

[44] The bargaining agent is entitled to know whether the granting of double increments is incorporated into the collective agreement and if so, whether Dr. Hurley is entitled to a remedy.

[45] I have concluded that the bargaining agent has met its onus under clause 8.02 of the collective agreement and established that the granting of double increments is a past practice, meeting the conditions in article 8.02. Consequently, the provisions in the MOA are incorporated into the collective agreement.

[46] The MOA now incorporated into the collective agreement expressly states that "faculty members **who have already executed the forms which establish a retirement date** and who are within three years of that date shall be evaluated overall as 'superior', provided that their performance in each of teaching, research and service, assessed separately, is satisfactory or better" [emphasis added].

[47] The clear unambiguous words of the collective agreement contain a condition precedent to the granting of the benefit resulting in double increments. I conclude that since the grievor has not executed the retirement forms establishing a retirement date, he has failed to meet the condition precedent and, as a result, the grievance is dismissed.

III. Summary of the evidence

[48] The bargaining agent called four witnesses: the grievor; Dr. Luu, senior grievance officer; Dr. Sokolsky, the RMC's former principal; and Dr. Noël.

[49] The employer called five witnesses: Dr. Kowal, RMC's current principal; Dr. Bates RMC's Vice Principal academic; Nadia Bing, a senior labour relations officer and a civilian at the Department of National Defence (DND) in Ottawa, Ontario; Guylaine Hau, a labour relations officer in the DND Directorate Workplace Management; and Josée Lefebvre, a senior negotiator at the Treasury Board Secretariat, a position she has held since December 2006.

A. Background facts not in dispute with respect to the MOA

1. Pay administration - annual salary increments

[50] Clause 40.01 of the collective agreement states: "Except as provided in this Agreement, the terms and conditions governing the application of pay to UTs are not affected by this Agreement."

[51] The Treasury Board has a manual concerning the "Salary Administration Plan" for the University Teaching Group. Appendix A to the collective agreement sets out the annual rates of pay for the group. Notes to that appendix deal with pay administration and state that the pay plan does not form part of the collective agreement. Nevertheless, the pay plan governs the application of pay to the UTs in the bargaining unit. The notes also state that to the extent that the plan modifies existing terms and conditions governing the application of pay, the pay plan shall apply.

[52] The pay plan sets out the following definitions, which are relevant to this proceeding:

> 1. "Increment" means the amount of the difference between the steps within a pay level.
>
> 2. "Maximum rate" is the rate of pay determined to be the maximum for a pay level.
>
> 3. A "merit/maturity increase" is a salary increase based on the UT's assessed level of performance and years of experience, which results in an upward positioning in the range to a salary not exceeding the maximum rate.
>
> 4. "Step" means an individual rate of pay within the University Teaching group pay rates.

[53] Under the section on implementation, the pay plan deals with a faculty assessment report.

[54] Dr. Kowal explained that the implementation of the pay plan is based on a process of performance review and employer appraisal of all employees.

[55] Annually, before the academic year begins on July 1, the principal reviews the performance of each UT over the current academic year. The review takes into account such elements as teaching ability, professional standing, and creative activity. Input is provided by the deans and the department heads. The performance assessment process distinguishes between those UTs whose performance is rated "unsatisfactory", "satisfactory", and "superior".

[56] Faculty members whose performance is rated as "unsatisfactory" do not receive an incremental increase.

[57] Faculty members whose performance is rated as "satisfactory" and whose position in the pay scale is below the maximum rate for their levels are advanced one step within the scale for their levels.

[58] Faculty members rated "superior" and being paid at a rate more than two steps below the maximum rate for their level move two steps up the pay scale; i.e., they receive a double increment. If they are at the maximum rate of their level, they receive a gross lump-sum payment equivalent to twice the value of the increment. And if they are at the rate immediately below the maximum, they move to the maximum rate and receive a gross lump-sum payment equivalent to the value of the increment.

[59] Performance awards (i.e., the gross lump-sum payments) are included as part of salary. An award paid in the year of retirement and related to the year before retirement is included in the calculation of the six-year average salary for pension purposes.

[60] The pay plan provides that a maximum 40% of UTs may be rated above "satisfactory".

[61] In Dr. Kowal's opinion, the quality of RMC faculty is high. There is no question that the number of faculty whose performance should be assessed at the superior level is greater than 40%.

2. The MOA

[62] In collective bargaining, Ms. Lefebvre is the chief spokesperson for the Treasury Board.

[63] Under the *Act*, the parties to a collective agreement are the employer and a bargaining agent. The DND and RMC do not have authority to sign a collective agreement on the Treasury Board's behalf. That authority is delegated to the assistant deputy minister at the Treasury Board.

[64] Ms. Lefebvre testified that letters of understanding between a department and a bargaining agent do not form part of a collective agreement unless the department sought and obtained the Treasury Board's authority.

[65] The Treasury Board appointed her as its negotiator for the 2007 round of bargaining between the bargaining agent and the employer. During bargaining, the bargaining agent raised issues that were not within her authority. Dr. Cowan, then the RMC's principal, was a member of the employer's bargaining team. He indicated that he would seek alternative ways to address the bargaining agent's concerns.

[66] Dr. Cowan and Dr. Graham, who was then the bargaining agent's president, drafted the MOA.

[67] A question arose as to who would sign the MOA. Ms. Lefebvre stated that it would not be part of the collective agreement and that it would not be under her authority or the Treasury Board's but would be a local agreement between the principal and the bargaining agent. Drs. Cowan and Graham signed it, and it reads as follows:

> ***Memo to Deans and Heads***
>
> *Subject: UT Annual Evaluation in the Three Years prior to a Scheduled Retirement*
>
> *1. In the broader university world, it is well established that the average performance of faculty members declines somewhat in the three years prior to retirement. While decline to unsatisfactory levels is rare, and while significant numbers of faculty show no decline whatsoever, there exists a common pattern of decline of energy, of easing off in voluntary value added activities, and of a natural reluctance to take on new or unfamiliar tasks.*

2. A case could thus be made that customary criteria for performance assessment should be interpreted in a somewhat generous way when applied to faculty members in the last three years prior to retirement. Indeed, a faculty member whose performance remains strong in that period is to be highly prized.

3. In the federal setting there is no mandatory retirement, so that it is normally difficult to know when a faculty member is within the three years prior to retirement. However, in certain cases, faculty members have planned sufficiently in advance to be able to ascertain a retirement date well in advance. Faculty members who have signed the forms establishing a future retirement date thus constitute a subset to whom the concepts in paragraph 2 above could be applied.

4. Despite the fact that the annual faculty assessment report (FAR) provides for extensive text appraising all aspects of the role of the faculty member, including teaching, research and service, it does ultimately provide for a single consolidated rating which is used (among other things) for compensation purposes, and for which the available bins are "unsatisfactory", "satisfactory"' "superior"' and "distinguished". However, an overall rating of "satisfactory" does not necessarily mean that the member is satisfactory in each of all three aspects (teaching, research, service). Indeed, persons who are satisfactory in two, and less than satisfactory, but not dangerously so, in the third, would usually achieve an overall rating of "satisfactory". Furthermore, the rating "superior" would often include a certain number of members who were judged superior because they were satisfactory in every one of the three roles (teaching, research, service), judged separately.

5. ***Given the realization that maintaining high performance in the three years prior to retirement requires extra effort, faculty members who have already executed the forms which establish a retirement date and who are within three years of that date shall be evaluated overall as "superior", provided that their performance in each of teaching, research and service, assessed separately, is satisfactory or better****.*

6. By way of definition, the informal term fully satisfactory can be used to describe someone who is satisfactory in all three areas. This is not a rating, but merely conveys the additional information that all three areas separately meet the standard, and that there are no trade-offs.

This standing local policy shall be promulgated as of the date of the signing of a collective agreement between TB & CMCFA for the period beginning July 1, 2007.

[signed] *John Cowan* *William Graham*

[*Sic* throughout]

[Emphasis added]

[68] In the 2011 round of bargaining, and at the 11th hour, Dr. Noël raised the issue of whether all letters of understanding between RMC and the bargaining agent would be renewed. Ms. Lefebvre stated that they were not within her responsibility because the Treasury Board was not a party to them.

[69] Dr. Sokolsky, then the principal and a member of the employer's bargaining team, undertook to honour the letters of understanding. Ms. Lefebvre took the position that they did not form part of the collective agreement because the Treasury Board was not a party to them.

[70] Dr. Sokolsky could not recall whether the MOA concerning double increments was discussed. However, he had agreed to honour it, among others. It was not clear what would have happened had he remained principal. He did not believe that he was bound to continue the MOA at the next round of bargaining. In 2011, he agreed to continue it for that round, but not indefinitely.

[71] Section 107 of the *Act* provides that after notice to bargain is given, each term and condition of employment applicable to the employees in the bargaining unit to which the notice relates that may be included in a collective agreement and that is in force on the day on which the notice is given is continued in force until a new collective agreement is entered into or an arbitral award is rendered or a strike could be declared.

[72] The collective agreement expired on June 30, 2014. Notice to bargain was given in February 2014.

[73] Ms. Lefebvre acknowledged that after the grievance had been referred to adjudication, the Treasury Board deemed the MOA a term and condition of employment continued in force pursuant to s. 107 of the *Act*.

[74] Consequently, Dr. Kowal agreed to abide by the terms of the MOA as set out in a letter dated October 30, 2015, to Dr. Noël that reads in part as follows:

…

> *… I am committed to the terms of the UT Collective Agreement, the Salary Administration Plan and to doing what I am legally obligated to do. Hence, I sought the assistance of the Treasury Board of Canada Secretariat (TBS) and the Department of National Deference [sic] (DND). We have consulted on these documents and I would like to inform you of the Employer's position on each one.*
>
> *1. UT Annual Evaluation in the Three Years prior to a Scheduled Retirement, dated July 1, 2007….*
>
> *This memo indicates that a UT will be evaluated as superior if he or she has established a retirement date, if he or she is within three years of that date, and if his or her performance in each of teaching, research and service is satisfactory or better. It is my understanding that this memo is deemed to be a term and condition protected by section 107 of the* Public Service Labour Relations Act *(PSLRA) and must be continued in force until the statutory freeze has ended. The employer is prepared to maintain the terms of this memo until a new collective agreement is signed….*

…

[75] Article 8 of the collective agreement is entitled "Past Practices" and provides as follows:

> ***8.01*** *Where this Agreement is silent on working conditions, the conditions existing immediately before the date of this Agreement shall continue to apply provided that:*
>
> *(a) they are not inconsistent with the Agreement;*
>
> *(b) they are reasonable, certain and known;*
>
> *(c) they may be included in this Agreement in accordance with the* Public Service Labour Relations Act*;*
>
> *and*
>
> *(d) they are carried out in a fair and equitable manner.*
>
> ***8.02*** *The onus of establishing an existing practice within the meaning of 8.01 shall rest on the party who alleges the existence of same.*

B. Undisputed facts

1. Sabbaticals

[76] Article 18 of the collective agreement is a comprehensive provision dealing with sabbatical leave.

[77] UTs are eligible for sabbatical leave in accordance with the conditions outlined in that article. Sabbaticals are for a specific duration of 6 or 12 months. Eligible UTs are relieved of their normal teaching and administrative obligations to give them an opportunity to pursue research or other scholarly activities.

[78] The collective agreement sets out the eligibility criteria for sabbaticals. For example, for a 6-month sabbatical, the UT must have completed 3 years of service, while a UT who applies for a 12-month sabbatical must have completed 6 years of service. The same terms apply for subsequent sabbaticals.

[79] The collective agreement sets out selection criteria that a screening committee considers when approving sabbatical applications. The criteria include the relevance of the proposed professional development activity to department needs; the projected benefits to the applicant's professional development; the merit of the sabbatical proposal in terms of its scope, planning, resource implication, and potential for success within the sabbatical period; the evidence of benefits derived from any earlier sabbatical of the applicant, if applicable; the applicant's performance assessments and evidence of scholarly potential and achievement during the period of qualifying service; and RMC's operational and human resources management priorities.

[80] Article 18 provides that sabbatical leave is granted at the employer's discretion and that it shall not be unreasonably denied.

[81] UTs granted sabbatical leave are required to sign a written commitment to return for a period of employment equal to their period of leave. If a UT fails to, then he or she will be required to repay the allowance received during the sabbatical.

[82] The collective agreement also provides that the employer may defer a requested sabbatical leave in the event that the UT's services are required for the period planned for the leave, i.e., when simultaneous requests are made by two or more eligible faculty members with the same critical teaching competencies within a particular discipline. If an application meets the approval criteria but the leave is denied due to financial

constraints, the application is to be given first priority the following year.

[83] Dr. Kowal explained that sabbatical applications are distinct and are not connected to retirement. Eligibility is governed by the collective agreement. The process for such applications is not aligned with a three-year notice of retirement. Calls for applications go out in the fall for the subsequent academic year; each year runs from July 1 to June 30 of the following year. The fall term runs from September to December and the winter term from January to April. For example, sabbatical applications are submitted in the fall of the year for the summer of the following year one and a half years in advance. It is an independent process that is not linked to retirement.

[84] When a UT goes on sabbatical, the Treasury Board finances the allowance he or she is paid. The UT is required to sign a return-to-work agreement obligating him or her to return to duty for a period equivalent to the time he or she was on sabbatical. If a UT is away on sabbatical for six months, then he or she is required to return to work for six months.

[85] Dr. Bates explained that he was very familiar with the sabbaticals process as he was the Dean of Engineering from 2010 to 2014. When a UT requests a sabbatical, the department has to agree. The department head is the best person to decide if the department can get along without the UT. The dean has to approve the sabbatical request because he or she controls the resources at the faculty level. The decision is made at the Dean's Council. The principal and the commandant have the ultimate authority.

[86] During final argument, the bargaining agent acknowledged that the sabbatical eligibility rules are clearly set out in the collective agreement and that it was not saying that the past practice with respect to sabbaticals differed from the provisions of the collective agreement.

[87] I was also informed that in fact, Dr. Hurley had applied for and was granted a six-month sabbatical commencing in January 2017.

[88] In my view and in these circumstances, it is not necessary to address the issue of whether the sabbatical practice is a past practice within the meaning of article 8 of the collective agreement and is thus incorporated into the agreement, as the

bargaining agent agreed that the terms of article 18 govern the granting of sabbaticals. Nor is it necessary for me to determine whether sabbaticals were raised at the April 2015 meeting, covered by the grievance dated June 2015, or raised at all three levels of the grievance process.

2. Course relief

[89] Article 13 of the collective agreement deals with the distribution of the teaching workload. Clause 13.01 states as follows:

> ***13.01*** *The teaching workload of a UT shall be consistent with the normal average teaching workload of UTs in his or her academic department or equivalent unit. Teaching duties materially in excess of the appropriate teaching workload shall be considered overload.*

[90] Clause 13.07 sets out the factors to be used in determining an appropriate teaching workload. Significantly, clause 13.08 deals with the circumstances under which the normal average teaching workload may be varied. It reads as follows:

> ***13.08*** *Notwithstanding 13.01, the teaching workload of a UT may vary materially from the normal average teaching workload of UTs in his or her academic department or equivalent unit due to the following factors:*
>
> *(a) the number of hours devoted to administrative duties;*
>
> *and*
>
> *(b) the level of productive scholarly activity, it being understood that greater than normal involvement in scholarly activity may not result in a reduction in teaching workload, unless such reduction can be accommodated within the resources accorded to the department.*

[91] Clause 13.09 provides that department heads are not required to teach more than the normal annual teaching workload, less two one-term courses or equivalent, and that serving as a chairperson of an academic program will be given due consideration when assigning teaching workload.

[92] Having recited the facts that are not in dispute, I will now turn to the issues to be determined.

IV. The *Burchill* objection

[93] Was course relief raised during the grievance process? The employer raised its objection asserting that this issue is not properly before the Board. It relied on *Burchill*, a decision of the Federal Court of Appeal that stands for the proposition that a grievor cannot refer a new or different grievance to adjudication or turn a grievance into a different grievance if it has not been dealt with in the grievance process. In the employer's view, this grievance is all about the provisions of the MOA, which does not address course relief but speaks only to increments and performance.

A The parties' evidence with respect to the April 2015 meeting

1. Overview

[94] Drs. Hurley and Noël claimed that they clearly laid out the elements of a three-part plan, including the grievor's eligibility for double increments, a six-month sabbatical, and course relief on his return.

[95] Drs. Kowal and Bates recalled that the only issues discussed were retirement and the MOA and that Dr. Kowal was not familiar with the MOA. To the best of their recollection, sabbaticals and course relief were not discussed.

[96] Dr. Hurley and Dr. Noël stated that Dr. Kowal said that he would not abide by past practice or the MOA because he did not think it was binding on him as he had not signed it.

[97] Dr. Kowal and Dr. Bates characterized the meeting as an initial discussion about Dr. Hurley's retirement plans and that at the end of the meeting, no decision had been reached.

2. Dr. Hurley

[98] Dr. Hurley stated that Dr. Noël referred to the MOA. Neither of them gave it to Dr. Kowal, although Dr. Hurley stated that Dr. Noël verbally communicated its contents to Dr. Kowal.

[99] Dr. Hurley believed that he was giving three years' advance notice of his retirement, although he acknowledged that he had not signed any paperwork.

3. Dr. Noël

[100] Dr. Noël testified that he and Dr. Hurley wanted to discuss a retirement strategy with Dr. Kowal, namely, the MOA about double increments, sabbaticals, and the "victory lap", which was the term faculty used to describe course relief.

[101] He stated that the meeting with Dr. Kowal lasted approximately half an hour. The gist of the discussion was that Dr. Hurley wanted to retire, he had a date in mind, and they were there to discuss the benefits. Dr. Hurley was prepared to give three years' advance notice in return for the MOA on double increments, a sabbatical, and a victory lap.

[102] Dr. Kowal was surprised to learn about the MOA. Dr. Noël could not recall whether he produced it at the meeting.

4. Dr. Kowal

[103] Dr. Kowal recalled saying at the beginning of the meeting that it would be an informal discussion and that no decision would be made that day.

[104] According to Dr. Kowal, Dr. Hurley did not say very much. Dr. Noël did most of the talking and explained that the MOA existed and how it would be applied in Dr. Hurley's case. Dr. Kowal recalled that Dr. Noël explained that the motivation for the MOA was to incent faculty members to take retirement. Dr. Kowal stated that he did not want to incent anyone to retire and that a UT should select his or her own retirement date in accordance with the collective agreement.

[105] Neither Dr. Noël nor Dr. Hurley brought documents to the meeting. Dr. Noël promised to send documentation to Dr. Kowal afterwards.

[106] Dr. Noël described the MOA to Dr. Kowal. A faculty member within three years of retirement would automatically benefit from double increments until he or she retired. The majority of the meeting was spent discussing the MOA, what it meant, and why it had been put in place. It was new information for him. It had not been discussed with him during his orientation.

[107] Dr. Kowal could not remember discussing sabbaticals; nor did he recall course relief being raised. He was certain that course relief was not brought up because later on, he learned of the term "victory lap", the faculty term for course relief. He was

certain that if that term had been used at the meeting, he would have remembered it.

[108] He characterized the discussion as being an initial one about retirement.

[109] At the conclusion of the meeting, Dr. Kowal had not yet decided Dr. Hurley's retirement application. He subsequently learned that Dr. Noël had attempted to send the MOA to him; however, even though it was addressed to him, he did not receive it, as he was not on the distribution list.

5. Dr. Bates

[110] Dr. Bates testified that the meeting was held to explore what might be available to Dr. Hurley should he retire in the next three years. Dr. Kowal's initial response was that he did not want to provide any UT with an incentive to retire.

[111] Double increments were raised and discussed in the context of the MOA. The bargaining agent did not have a copy of it. The Principal was unaware of contents of the MOA.

[112] The bargaining agent agreed to send the MOA to the Principal. At the end of the meeting, no decision was made. It was an information-sharing meeting. Dr. Bates could not recall any discussion about course relief occurring; nor could he recall any discussion concerning a sabbatical.

B Evidence with respect to drafting the grievance

[113] Dr. Luu, the senior grievance officer who is also a UT and an RMC employee, was primarily responsible for the grievance's wording. She approved the presentation and signed it as the local bargaining agent representative.

[114] As noted, on June 15, 2015, the bargaining agent presented Dr. Hurley's grievance, which reads as follows:

…

> *On April 27 2015, my Faculty Association representative, Dr. Jean-Marc Noel and I met with the Principal, Dr. Kowal, to discuss my three-year retirement plan, a plan specifically laid out in a Memo of Agreement signed on 1 July 2007 by the Principal of RMCC and the Chief Negotiator of the CMCFA at the time, Dr. John Cowan and Dr. William Graham, respectively (RefA). This MOA was renewed at the*

> *last round of bargaining and continues to be in force under section 107 of the* Public Service Labour Relations Act.
>
> *In the meeting of 27 April, Dr. Kowal said that he would not abide by past practice and would ignore the three-year retirement plan endorsed by his predecessors at RMCC, thus deviating from established practice and the documented terms and conditions of employment at the College currently in force.*
>
> *After the meeting, Dr. Noel e-mailed the 1 July 2007 MOA to Dr. Kowal, pointing out that it has been past practice since 2007 (RefB). The Principal has not yet responded to the e-mail.*
>
> *I am therefore grieving the Principal's violation of the terms and conditions of employment, including but not limited to the following:*
>
> *(i) the violation of the 1 July 2007 MOA,*
>
> *(ii) past practice under Article 8 of the Collective Agreement,*
>
> *(iii) section 107 of the* Public Service Labour Relations Act*, and*
>
> *(iv) any other related policy, directive, statute, regulation, or provision.*
>
> …

[115] By way of corrective action, Dr. Hurley requested "… that the Principal comply with the CMCFA Collective Agreement and the *PSLRA* by upholding past practice and abiding by the terms and conditions of employment as outlined in the 1 July 2007 MOA and all related policies and documents."

[116] Dr. Luu had to rely on information provided to her by Dr. Hurley and Dr. Noël, as she was not present at the meeting with Dr. Kowal, with respect to the facts outlined in the first two paragraphs of the grievance. In the fourth paragraph, she outlined the different violations of the terms and conditions of employment.

[117] She understood that Dr. Hurley and Dr. Noël had discussed with Dr. Kowal not just the MOA but also sabbatical and course relief under a past practice.

[118] Notice to bargain had been given in February 2014, and the bargaining agent filed a complaint under s. 107 of the *Act*, the statutory bargaining freeze provision, as

well as a standard grievance that referenced any other related policy. The corrective action sought compliance with the collective agreement, the past practice, and the MOA.

[119] She tried to outline the MOA in the first paragraph and the past practice in the second paragraph. By "past practice", she meant the three-part plan endorsed by predecessor principals, which included not just double increments but also sabbaticals and course relief. She was personally aware of the MOA, which was appended as reference A to the grievance.

[120] Dr. Luu acknowledged that there was no express mention of sabbatical or course relief in the grievance. She explained that she had just completed a course on writing grievances, which had advised not to go into too much detail and to just attempt to cite a policy or the collective agreement provision that was being contravened. That is why in the first paragraph, the MOA is referenced, and in the next one, past practice is referenced. The first paragraph references not double increments but just the MOA.

[121] She knew that two bargaining unit members had received a three-part plan. She had seen the two retirement letters that had laid out the plan. Both were identical other than with respect to dates.

[122] Dr. Sokolsky, the former principal, had sent the retirement letters, which had been anonymized, together with a draft document on performance review to her on May 19, 2015, as well as a notice-of-retirement form. The covering email stated as follows: "I am attaching a document I prepared in the Spring of 2011 which may help our discussion." The document is entitled "FACULTY SALARY DETERMINATION RE: PERFORMANCE REVIEW AND AWARDING OF INCREMENTS". At paragraph 10, Dr. Sokolsky states as follows:

> *10. In 2007, the then Principal and the Faculty Association agreed that faculty members who established a fixed retirement date and were within three years of that date "* [*sic*] *shall be evaluated overall as 'superior' provided that their performance in each of teaching, research and service, assessed separately, is satisfactory or better."*

[123] Dr. Luu stated that she called up these documents in preparation for the first-level hearing. She had assumed that the elements in the letters constituted a past

practice. Other than the two cases referred to, she was not aware of any others.

C The grievance process

[124] The bargaining agent maintained that during the three levels of the grievance process, all elements of the three-part plan were discussed, while the employer maintained that only the MOA, relating to double increments, was discussed.

1. The first-level hearing

[125] The first-level hearing was held on June 4, 2015. Dr. Hurley and Dr. Luu attended for the bargaining agent. Dr. Bates and Dawn Kennedy, a labour relations officer, represented the employer.

[126] Dr. Luu stated that during the hearing, she presented the grievor's argument that the employer had violated the MOA and a past practice and that it had contravened s. 107 of the *Act*.

[127] A question arose concerning Dr. Bates's authority to decide the grievance and whether he would have to go back to Dr. Kowal.

[128] Dr. Luu confirmed that she stated at the hearing that Dr. Hurley had asked for the three-part plan.

[129] Most of the time was spent debating the MOA and whether it was equitable for all bargaining unit members, as there was a limit on the distribution of "superior" assessments. If UTs on the eve of retirement who had been rated "satisfactory" were to receive double increments as if they had received a "superior" assessment for the last three years of their teaching, then arguably, other UTs deserving of a "superior" assessment would be adversely impacted.

[130] The bargaining agent stressed that the MOA was renewed in bargaining in 2011 and that it was a term and condition of employment in force until the next collective agreement was entered into.

[131] Dr. Luu stated that she presented the retirement letters of the two UTs who had provided notices of retirement in 2010.

a. Dr. Bates

[132] Dr. Bates heard Dr. Hurley's grievance at the first level and wrote the grievance response.

[133] Before hearing the grievance, he reviewed it. His understanding of it was that Dr. Hurley was looking for a three-year plan that would grant double increments. Dr. Hurley felt that at the April 2015 meeting, Dr. Kowal had indicated that he did not support his proposal. Dr. Hurley had grieved a violation of the MOA and expected a discussion on double increments. His understanding of past practice also related to the awarding of double increments.

[134] The discussion related to the MOA and whether it was valid, whether it had actually been approved at the last round of contract negotiations in 2010, and whether it was fair. He listened to what the bargaining agent had to say. Afterwards, he worked on the reply.

[135] Dr. Bates was asked to what extent anything else came up at the hearing. He stated that nothing else arose. He was asked specifically whether sabbaticals came up. He was certain that they did not. He had reviewed the notes that the Labour Relations Officer took, which contained nothing on sabbaticals. He had no recollection of sabbaticals being raised. Everything had been about double increments, as per the MOA. In addition, had something like course relief come up, it would have merited some level of analysis in his grievance reply.

[136] Subsequently, when management made the decision to uphold the 2007 MOA, Dr. Bates recalled with great clarity talking to the Principal and stating that the grievance was over and that "we have met what they wanted". He stated that quite frankly, he was "gobsmacked" when he learned the grievance was continuing.

[137] Dr. Bates issued the first-level reply on June 16, 2015, stating in part as follows:

…

> *The 1st level hearing was held on 4 June 2015. In attendance were the two of us, Dr. Helen Luu and the Kingston Civilian Human Resources Labour Relations Officer, Dawn Kennedy. During the hearing, you and the member explained the details of your grievance.*
>
> *The grievance is based on a verbal statement allegedly made*

by the Principal during an informal meeting on 27 April 2015. You also allege that Dr. Noël sent a copy of the memo to Dr. Kowal on 27 April 2013 and provide ref B as proof. Please note that Dr. Kowal's email address is not on the distribution list of the email you provided - he therefore did not receive the message. This might explain why he did not respond.

I have examined the memo, which was signed by then Principal John Cowan and then CMCFA President William Graham on 1 July 2007 and involves UT Evaluations in the three years prior to a scheduled retirement. According to schedule A of this grievance, you state that this memo was "renewed at the last round of bargaining and continues to be in force under section 107 of the Public Service Labour Relations Act". I was provided with no written confirmation to this effect in your grievance submission or during our meeting of 4 June. Nevertheless, I have considered the merits of your grievance.

The Treasury Board Secretariat Policy on Terms and Conditions of Employment (ref C) established the sources of terms and conditions of employment. Pursuant to paragraph 3.2 of this policy, "Terms and conditions of employment for persons appointed to the core public administration are as set out in the relevant collective agreements and other legislation and as supplemented by other related policy instruments." The employer therefore did not contravene section 107 of the Public Service Labour Relations Act (ref D) as the provisions that are subject of this grievance are contained in a local memo rather than the aforementioned instruments.

The Salary Administration Plan - University Teaching Group (ref E) is the instrument that describes the pay administration for employees in the University Teaching (UT) Group. It is governed by the Treasury Board Secretariat. Ref E, which was updated on 2011, makes no reference to the memo. The signatories to ref A describing the retirement plan did not have the authority to establish supplemental provisions to the Salary Administration Plan - University Teaching Group (ref E).

In section 40.01, the UT Collective Agreement (ref F) states: "Except as provided in this Agreement, the terms and conditions governing the application of pay to UTs are not affected by this Agreement." Furthermore, Notes on Pay Administration on page 76 of ref E states "Subject to the provisions of the [sic] Article 40 on Pay and Appendix A, the University Teaching Group Pay Plan, which does not form part of this collective agreement, governs the application of pay to UTs in this bargaining unit." That is to say that the

> *pay plan does not form part of the collective agreement. Therefore, the employer did not contravene Article 8 of the UT Collective Agreement as the UT evaluation outlined in the memo is not a working condition that may be included in the collective agreement.*
>
> …

b. Dr. Luu

[138] Dr. Luu took issue with that reply since in addition to the MOA discussion, in her view, past practice had also been discussed.

2. The second-level hearing

[139] The second-level hearing was held on July 3, 2015. Present were Dr. Hurley; Dr. Luu; Dr. Noël; the Commandant, Brigadier General Friday; and Ms. Hau.

a. Dr. Luu

[140] Dr. Luu testified that the same matters that were discussed at the first level were discussed at the second level. The fact was raised that Principal Kowal had not received the MOA from Dr. Noël.

[141] By email dated April 27, 2015, Dr. Noël addressed an email to Dr. Kowal, stating as follows:

> …
>
> *Here is a copy of the document that explains how UT's are to be evaluated 3 year* [*sic*] *prior to their scheduled retirement. You will note that this document was signed by Dr. J Cowan (Principal) and Dr. W Graham (Chief Negotiator for the Union) when we were in bargaining in 2007. This has been the practice since 2007 until your appointment as Principal.*
>
> *I draw your attention to Item 5 in the document.*
>
> …

[142] Dr. Kowal was not on the "TO" list in the email.

[143] In terms of process, the past approach appeared to be an issue, under which the principal would put in writing the components of a retirement plan before the forms were signed.

[144] Dr. Luu stated that at the hearing, she filed the 2010 retirement letters signed by Dr. Sokolsky.

b. Ms. Hau

[145] Ms. Hau's client group is the Chief of Military personnel in Ottawa working for the Directorate of Workplace Management. RMC is a subunit of the Chief of Military Personnel group. Previously, she was a civilian human resources officer in Kingston. Before that, she was employed as the human resources coordinator at RMC.

[146] She attended the second-level grievance hearing as a labour relations officer. She took notes to remember what was said and as a point of reference if RMC needed to provide more information in the event the grievance moved forward.

[147] She produced her handwritten notes, taken over the course of the second-level hearing held on July 3, 2015. In her view, she missed very little in them, and she testified from them.

[148] Ms. Hau was briefed in advance by her colleague Ms. Kennedy, who had assisted at the first-level hearing and who provided her with an oral account. Ms. Hau reviewed the file's contents. She had ascertained from the second page of the grievance that the bargaining agent grieved the Principal's alleged violation of the terms and conditions of employment arising from a violation of the MOA and of a past practice under article 8 of the collective agreement.

[149] Present were Dr. Hurley, Dr. Noël, and Dr. Luu. Present for the employer were herself and Brig.-Gen. Friday.

[150] Dr. Hurley stated his impressions and feelings about the April 2015 meeting with Dr. Kowal.

[151] The two bargaining agent representatives each focused on a specific aspect of the grievance. Dr. Luu explained the MOA's contents. Dr. Noël explained the MOA and what had happened during previous negotiations.

[152] The MOA speaks of retirement and of UTs being rated "superior" if they perform satisfactorily. It speaks of performance ratings. Ms. Hau's takeaway was that the bargaining agent was trying to help Brig.-Gen. Friday understand that the MOA still applied.

[153] In the middle of the hearing, Dr. Luu presented a single letter signed by Dr. Sokolsky. She did not recall why it was produced except that the bargaining agent was trying to support its argument.

[154] In referring to the retirement letter, the bargaining agent said that the Principal was not aware of what had happened in the past. It stated that allocating double increments to retirees would not be a big deal.

[155] Ms. Hau's notes read as follows:

…

Friday -the floor is yours

Hurley - Exec summary-We play by the rules until the CA is re-negotiated
Past 27 years, I was advised that when the time to retire comes, I discuss my retirement plans
We met with the principal.
His argument (Principal) - times have changed
He would not abide by past practice
His sentiment is: adios.
Surprised that anyone would ignore or contravene a TB [Treasury Board] *agreement because you don't like it*
So, I filed a grievance
1st level with Bates - He also chose to ignore the MOA + concentrated on fairness or [illegible]
I don't see this is a good way to build a team.

Friday - I clearly see the concern that you have
need to fully understand the grievance statement

+ your view + understanding.

Friday - are you referring to this agreement?

Hurley - yes

Friday - 3 year retirement process?

Hurley - a retiring prof process - increments helps in term of pension

Noel - gives management the opportunity to replace a retiring professor.
This has been negotiated at TB level + they know it

Friday - 3 year process is mainly in para 5

Luu - it is about the entire memo.

It is useful in linking with the grievance statements.

Friday - 3 years

Hurley - the content 2nd line -3 years prior

Friday - Current CA [collective agreement] *in effect in 2011*

Noel - Bill Graham + McDonough were negotiating then in 2010, we went through an expedited CA negotiation.

Friday, Is there something somewhere?

Noel - yes, our notes + TB

Luu - Phil asked that question
We don't have updated signatures, those are all of the letters we have
I explained the conversation Jean-Marc had with Josée.
Phil did not ask for more info
It is not Union's responsibility to search further
I am disappointed that management did not go to TB - a simple phone call to Josée.
That is what she is telling us

Friday - there have been many conversations -
You are not aware

Noel - I know that legal at DND is talking with legal at TB -
We are about to launch an unfair labour practice
This is an issue as we are currently negotiating.

Friday - I asked what is being grieved.

Luu - not following the process here.
Your question about the renewal of the moa was asked at first. I am concerned with the response at first - I don't think management spoke with Josée

Luu - Level 2 is our opportunity to express our concerns about the first level response

Friday - I didn't hear from Dr. Hurley that you had concerns that management did not contact TB

Hurley - It is my fault.
going to second level because I am not satisfied with the first level response.

Friday - In addition to your concern about the Principal not adhering to the memo + now you are concerned that management did not consult TB. as well

Hurley – Correct

Friday - You believe it is not the union's responsibility to show valid documents

Luu - It is not the association's responsibility to show management's responsibility in knowing the working conditions

Friday - I have no evidence about this memo

Noel - I was the chief negotiator. It was in my notes

Friday - Were there signed Rod or minutes?

Noel - We take our notes separately

Friday - ref these signatures don't mean anything, if TB doesn't sign, it may not be valid.
But it is about the process of evaluating professionals here. Entire evaluation process of evaluating professors occurs over time.
Are you aware about the rules about evaluation processes

Noel - there is another letter of agreement.
It was at the table in 2007.
It specifies how the double increments would be allocated.
Retirements are done first.
These are letters of agreement. Signed in 2011 + renewed in 2011

Friday - signed minutes?

Noel - Josée did not have an analyst at the table.
We kept it to a minimum, because it was expedited.

Friday- I see memo to Deans + Dept Heads.

Noel - Josée was at the table + she confirmed

Luu - Talked about a document where Sokolsky talks about the entire retirement process

Luu- Would be happy to provide this document to you.
Will ask Joel to send this document to you

Friday - Will check if my team has it.

Friday - you mentioned: he's only prepared to say adios
What do you think he should be prepared to do

Hurley - It has been traditional for newcomers to introduce yourself to people.

Harry hasn't done that.
First time I saw him.
I thought I was obeying rules.
If you are going to change horses mid-stream.
I thought his decision was unilateral.
It was not like: Michael, "times are thought, under the circumstances, we can't."

Friday - I find it frustrating that some of the mechanisms that are available to the PS [public service] *are not available to us.*
- We need to adhere to the FAA

Hurley - He didn't have the human touch. He was cold

Friday - Expectations need to be understood on all sides.
I am not aware of any kind of flexibility Federal government doesn't have this

Luu - expectations that management can do

Luu - Provided a copy of a retirement letter
Michael was expecting the Principal to say: I am aware of the memo, this what we will be doing.
this memo does not contravene the 40% salary admin plan.
None of this is inconsistent with the salary admin plan - this memo does - It is not inconsistent
It allows room for manoevring.
It is consistent with FAA.
This costs nothing - We have the 40% increment.

Friday - Looked at the memo that Dr. Luu handed him

Noel - Wen we went through WFA [workforce adjustment], *we had individuals who wished to rescind their retirement, but couldn't*

Friday - I have concerns
Proceeding was sabbaticals

Luu - It is consistent with sabbatical entitlements

Friday - 'Exempt from teaching load" - I am not aware of mechanism would govern this particular aspect..

Noel - the dean is responsible for assigning the teaching load - 3 year increment

Luu - It is not automatic - manoevrability of management

Friday - CMCFA - Concerned about equitable treatment of everybody.
I need to investigate what becomes an agreement

It is the whole body who needs to be looked at
If a portion of those who retire lessen their teaching load, it has to be absorbed somewhere -
You're saying it is the allocation of the 40%
but the way we distribute the 40%, the less of this 40% we can distribute objectively

Luu - Question of equity
This is not an automatic 40%
Expectation + standards have been raised for the retiring UT.
The UT has to be assessed equally in all 3 categories.
Natural decline that occurs - mentally
Compounded effect of declining performance.
Maintain that satisfactory in each of 3 in order to be deemed as satisfactory.
I think it is more equitable.

Friday - I hear you + appreciate the response.
What defines the retirement? What if someone retires at 40?

Luu - I am tying to age - We tend to retire late
It is the reality.

Luu - the time it takes to get an indeterminate position is longer.
In this profession, it is natural that the retirement age is much longer

Noel - Different circumstances when someone retires + goes to another institution

Friday - grievance reads: Principal violated the terms + cond of employment.
Has there been anything he said "no" to?

Luu - the first level response constitutes a denial

Friday - I do my research + discover that TB was right
Has the Principal refused to action this?

Noel - We had a consultation - He said to Michael: "Why if I don't want you to retire?"
I sent him the memo.
Hau - But the Principal did not get the memo?
Luu - But we had the discussion

Friday - But the Principal didn't say no.

Noel - Without the yes, the no is implied

Friday - Maybe he was following up

Luu - you sent him (to Noel) that you had spoken to Josée.

He was on his way to Vancouver. I said: We are happy to have the discussion with Phil
then we get this denial
Cited article 33.01
I doesn't have to be a written. It is the interpretation

Friday - I am not 100% that anyone said no.

Noel - We can remove the word: violation.
He wants to retire.
He wants the letter

Luu - We need to know what TB is saying
Do you know where TB stands?

Friday - This is a hearing.
You saying that this was in the minutes, it is news to me.
The process
I got the grievance on Monday, here we are.
the 10 day thing is not enough time.

Noel - We had the meeting - the increment process is about to start
this is the time where we need the resolution to this

Friday - The Principal + I are concerned about what is going on

Friday - the Principal is a fair person
I would rather we go through this via dialogue
I don't know how quickly I can get responses from Ottawa.
Noel - He needs to speak to Don Graham.
Friday - I can give you a letter according to the timelines.

Noel - time is of the essence.
We don't have the luxury of time
It affects the pension.

Luu - alternatives
It has come up that the Principal has not given a no or yes
is it a viable option to meet - We agree to sign the retirement forms.

Friday - He could respond - until I get a response …

Hurley - I didn't feel any encouragement - I felt flat lined

*Friday - I feel there was no negative the sentiment of dismissal_*
Noel - You said 3 - years notice so you can backfill.
At the end of the day. You have to eliminate a top salary - there is a financial winfall here.

Friday - the Principal is trying to ensure that the practices are legal - He is doing that

Friday – Bargaining - everyone is being careful
Noel - It is a game of Poker.
There are elements that are unique to us.

Friday - Does the collective agreement that does talk about letters?

Noel - the problem with TB is that they want to standardize the language in all the collective agreements. These letters of agreement are unique to us.

Friday - Why is this not entitled MOA?

Noel - It is a memo to the Deans.
TB doesn't want to sign these letters because they don't want other unions to know about this

Luu - The concern was previously whether he could do this

Friday - this has been superceded by another agreement

Noel: and renewed in 2011

Luu - as Josée at TB explained to us …

Friday - Is that the case or not. If it is not part of the agreement - Is this an equitable process for the faculty - then the should come in

Luu - We are certain that it is an agreement.
We are befuddled that it is taking so long to get answers

Friday - the clock is ticking. answer - I have nothing before me that this is an agreement.
If I have to respond today, this is what I will respond.

Luu - the soonest we can transmit to Level III is Monday.
We can't wait.

Friday - I will continue to investigate.

[*Sic* throughout]

[156] On July 6, 2015, the day after the second-level grievance hearing, Dr. Luu wrote to Dr. Kowal as follows:

…

It has come to my attention that there may have been some

> *misunderstanding in the consultation with Michael Hurley about his retirement—specifically that you may not have realized that Michael was requesting to formalize a retirement agreement with you along the terms outlined in the 1 July 2007 MOA between TB and the CMCFA. I am therefore writing to make the formal request on Michael's behalf, asking whether you would be willing to uphold the terms of the 1 July 2007 MOA outlining how UTs are to be assessed in the three years prior to a scheduled retirement, and whether you would be willing to formalize this commitment in a letter like the one attached.* ***Please note that the attached letter is offered solely as an example of a letter outlining the terms of a retirement agreement, not as a demand for the same terms.***
>
> *As you know, the grievance is proceeding, but I thought it would be worthwhile to clear up any possible confusion surrounding this point.*
>
> …
>
> [Emphasis added]

[157] The letter attached was one of the anonymized ones that Dr. Sokolsky had provided to Dr. Luu and that he had authored in 2010.

[158] Dr. Kowal replied on July 9 to Dr. Noël, as follows:

> …
>
> *I am sending this response to you since I know Helen is away at a conference and then on leave. I have cc'd her simply to keep her in the loop since she was the one who sent me the request.*
>
> *I appreciate Helen trying to clear up the confusion, but the redacted letter she attached to her e-mail discusses not only the issue of faculty assessments but also sabbatical and course relief. Rest assured, I am committed to abiding by the Collective Agreement (articles 13 (Distribution of Teaching Workload) and 18 (sabbatical leave) would apply here) and I am equally committed to conducting annual performance assessments as per the TB Salary Administration Plan.*
>
> *As per my e-mail to you on 28 May 15, I am discussing the letter in question with Josee and Corporate HR. Unfortunately, I was on leave for a week and now Josee is on leave and we have not had the opportunity to re-connect* [*sic*]*. Until I do and until I get perspective from HR, I cannot answer Helen's question.*

> *If Michael is considering retirement, he can do so and I can connect him with HR to provide him advice.*
>
> …

[159] The employer's second-level response is dated July 15, 2015. It refers to the grievance and the corrective action requested and recites the individuals who were present at the second-level hearing. The response in substance reads as follows:

> …
>
> *5. At this time, I do not have available to me information that confirms the validity of reference B* [Memo to Deans and Heads] *as being an official element of the terms and conditions of your employment. RMCC has sought clarity on this aspect from higher headquarters, but I have not yet received a definitive response. Noting the time requirements dictated by the grievance process for my response to you, and noting you expressed your intent to forward this grievance as soon as possible to the third level as is clearly your right, I must decide on this matter based on the information I have currently available to me. Based on the information available to me at this time, I cannot support your grievance as presented. Hence your grievance is denied and the requested corrective measures will not be forthcoming.*
>
> …

3. <u>The third-level hearing</u>

[160] The final-level grievance hearing took place on August 7, 2015, by telephone. Present on the line were Dr. Luu, Dr. Hurley, Dr. Noël, and Dr. Sylvain Leblanc for the bargaining agent. Ms. Bing attended for the employer.

a. <u>Dr. Luu</u>

[161] Dr. Luu stated that they discussed the MOA. The biggest sticking point was whether it was a term and condition of employment. The employer was still calling into question how equitable it was to all bargaining unit members. She focused on describing why it was equitable. She also laid out the time frame in which notice to bargain had been given and the effect of the statutory freeze.

[162] The retirement letters from Dr. Sokolsky were referred to as a past practice and as involving all three components of the retirement plan.

[163] On that date, Dr. Luu forwarded copies of the retirement letters together with a draft document with respect to performance review and awarding increments that Dr. Sokolsky had prepared in the spring of 2011.

b. Ms. Bing

[164] Ms. Bing has held her senior labour relations officer position in Ottawa since May 2015. Her main role and responsibility is to hear final-level grievances on behalf of the Director General Workplace Management. She listens to the arguments, documents them, then analyzes the file and makes recommendations to the director general. Her standard practice is to make notes during hearings. She refers to them after the hearing, and they are passed on to the director general. She has significant experience taking notes. She tries to capture the arguments that are presented.

[165] Dr. Hurley's file was assigned to her. Before the hearing, she reviewed all the material on file, including the replies at the first and second levels. Her understanding from the file was that the issue was increments before retirement. She recalled that the bargaining agent was trying to establish that the terms of the MOA were frozen as terms and conditions of employment under s. 107 of the *Act*. She understood that Dr. Hurley was seeking the fulfillment of the provisions of the MOA. She understood that the bargaining agent was trying to establish the MOA as past practice.

[166] Ms. Bing did not recall much of the final-level grievance hearing and referred to her notes, which had been typed and signed later on the hearing day so that the person taking over the file would understand what had happened at the hearing, as she had been about to go on maternity leave.

[167] In advance of the hearing, Dr. Luu had sent Ms. Bing documents written by Dr. Sokolsky, including a letter (one of the letters from 2010 granting double increments, a sabbatical, and course relief to a UT who had signed a notice of retirement three years in advance) and a draft paper on performance review and awarding increments.

[168] During the hearing, Dr. Sokolsky's draft paper was referred to. The bargaining agent was trying to establish that the MOA was a past practice. The draft paper referred to the MOA at point 10.

[169] The following are Ms. Bing's notes:

> [August 7, 2015, at 10 a.m.; Dr. Luu, Dr. Hurley, Dr. Noël, and Dr. LeBlanc attended by phone]
>
> …
>
> *- large grp – designated rep/grievance officer*
>
> *- JM @ level 2 hearing – was witness to conversation @ nego table*
>
> *- SL – most recent addition; interested in hearing level 3 grievances*
>
> *- WB – told okay*
>
> *- HL - to present facts.*
>
> *- Anything outside info the grievor can clarify.*
>
> *- timeline - facts on the table*
>
> *- memo to D* [Deans] *+ Heads (Ref A) MOU prior to retirement*
>
> *- 1st negotiated July 2007 (signed)*
>
> *- signed by Principal + CMCFA nego @ the time*
>
> *- sentence written above it references TBS agreement, even though sig.* [signatories] *weren't* [TBS]
>
> *- Feb 2011 - last bargaining round*
> *renewed @ the table w/ Soko* [Sokolsky] *+ JMN*
> *JL was also present*
>
> *- CA signed March 2011.*
>
> *JMN - last nego was expedited. Had an agreement that anything not brought to table during that round would be renewed as they were in 2007. CMCFA asked the MOUs would all be renewed, includ'g all letters.*
>
> *- bc expedited, did not have all 'shopp'g lists' of all items.*
>
> *HL - In all these discussions its never been contradicted that these MOUs were not renewed.*
>
> *107 PSLRA – notice to bargain given, T+Cs are frozen + in force.*
>
> *- feel letter was renewed + ratified in 2011*

- (A) notes as 'past practice' @ top. Immediately after the last round of bargaining.
reference 10 - refers to memo. JS captures in his notes as still in force.

HL 28 Feb 2014 – NTB: feel this is a T+C under MOA + JS notes; allotment of increments are frozen under PSLRA + still in force.

HL now to speak about grievor.

- His case captures why this MOA was created
- served RMC exceptionally for 27 years
- received 1 + nominated 3 times for teach'g excellence award.
- declined nomination to allow others to use.

Para # 1 - this agreement created to recognize that once a "professor has decide to retire (last 2 lines of para) ["… there exists a common pattern of decline of energy, of easing off in voluntary value added activities, and of a natural reluctance to take on new or unfamiliar tasks"]

- recognizing the natural decline due to long stand'g service, in a really demand'g profession. Memo designed to counter decline due to age + service. Can counteract decline by creat'g a measure of performance that recognizes that decline + then creat'g a standard of performance that is fair to them.

- this was raised @ L1 + L2 given salary increment quota.

- fair bc to recognize natural decline due to age + yrs of service.

- takes on more energy to continue wt / greater performance required + more demand'g

- standards for achiev'g sat are higher under memo than for regular UT.

- the diff in standard comes in para 4, ref A for those retir'g, standard for achiev'g sat in each of 3 categories evaluated separately. To be evaluated sat under each is harder than to be achieve sat. as a whole.
- Allows for the redistribution of effort under ordinary circumstances.
- If this standard was applied to all UTs, then they would be satisf.
- then this form of evaluation becomes

- In UT performance, we recognize stage of career. ie UT 2 may put more effort as hav'g their profession.

- In final yrs of career as UT 4 (highest standard of profession) the natural decline is normal + expected.

- memo is (a) try'g to recognize this, (b) be fair to prof + stage of career, (c) is fair as a standard of measure of performance bc to achieve sat. in all 3 categories would be superior under normal perferance.

In terms of good mgmt/HR planning (d) context of RMC + department + larger institute allows good perf. in light of retirement w/in 3 yrs. In Uni sett'g it takes a long time to hire/replace this posn in context of mil /gov't /uni - bureaucracy

- hir'g takes at least a yr
advertise nat'l + int'l; follow rythym of academic yr.
- Ads come Oct/Nov for follow'g yr
- need authority, approval to hire, staff'g cmttee; HR requirements.

- Not an exaggeration to say it takes @ least 3 yrs. to hire

(e) Not encourag'g retirement, want to hire in timely fashion. Cost sav'g – replac'g the highest salary w/ the lowest

(f) Hv to understand its cost neutral bc of quota system.: limited number of increments. To recognize a UT in that posn is deserv'g of their performance

- baffel'g that mgmt would not honor when not an addit'l cost, and ent

- entirely deserving, fair + equitable.

- Not an automatic allocat'n of the x2 increment
- pt5 Given realization … [that maintaining high performance in the three years before retirement]
"provided that … [their performance in each of teaching, research, and service, assessed separately, is] *sat or better"*
- if UT not rated as sat in one of these then does not receive it.
- this has happened in the past.
- speaks to mgmt's obj to the memo bc its not fair to younger UTs. Hwvr; to be satisfactory in all 3 is similar to being sup. regularly.

- Dr. Luu regard'g L1 + L2 responses.
technical aspects. L1 response that its not a T+C para 2. Dr. Bates takes issue w/ T+C (TBS) 'memo is not a policy instrument'. Union view: local agreements + MOAs are policy instrument. they make up (as Dr S noted) make up a past practice govern'g T+Cs.
- In addition, recognized by JL @ TBS. Put question to her, she confirmed yes. And confirmed it was a T+C.

- NB - when did that occur?

- HL - will get a date on when the conversation took place.
- in the context of this specific grievance.
- during this round of CB [collective bargaining]
- was in regards to Dr B's response that it was not a T+C.

- Also past practice. Clearly written in MOA.
- Under 8 of CA + 26 joint consultation
- 26.03 changes in cond of emple or w.c. not gov'd by agreement.
- this was not done by local mgmt

- During nego this wk, the MOA came up bc principal is ref. to recognized. He declared he did not rec. MOAs + would not be honor'g them. This was announced
- He may not like, obj to, but under Art. 26. he is obliged to consult w/CMCFA
- Which is why HL sent to NB the 2010 retirement agreements + JS notes
- Documented, known and reasonable. Nego prior to JS' term as principal, whether or not he agreed to them he honored them. like CA, they are negotiated. The Prin. posn that he is not bound by agreement bc he signed shows his inexperience in LR [labour relations]

- Also show how recently invoked (2010). Nothing after bc WFA took place after. Lost 32 profs.
- JS honored in 2010. No other opportunities to do so.

- MOA was live + present @ table; and referred to in JS notes.

- Comes down to PSLRA 107, T+C, recognized instrument - past practice + memo. Subject to 26.03 - must consult w/ CMCFA to renegotiate. entirely fair + equitable to all UTS.

- MH - Interested at arriving at the fact. feel HL + JMN and have done a great job.

HL - In L2 + L1 response - mgmt has sought clarification and advice.
NB - we are still waiting - Consultation ongoing on legal aspects
JMN - Not sure of timelines will be
JL meet'g w/ LServices on 19 Aug.
JMN. Under the impression, DND legal has reached an opinion.
HL - Is that something we know you can base your decision on
- Mgmt has taken a long time to find ans. Someone's life is on hold

HL - If you hear that DND has reached an opinion could we

share it.

- *Can we share it.*

NB – I can look into sharing it.

HL - responsive in try'g to set this up; lost email, recognize its a priority. If there's any way to get a response sooner than later it would be appreciate.

NB - Hv to go thru our bureaucracy, approval stages, etc. Would also be awaiting TBS legal discussions

JMN - You are aware mgmt + unions like to resolve issues @ lowest possible level. Could end up in adj and only bc someone doesn't like MOUs. Wast'g a lot of people's time. Disappointed we are at where we are at on this issue.

…

[*Sic* throughout]

[170] After reviewing her notes, Ms. Bing stated that all parts of the conversation were recorded. She felt that she had thoroughly captured everything that was said and the arguments that were presented.

[171] The two redacted letters, which were identical, also mentioned sabbaticals and course relief. Those issues were not raised. They were provided to show that granting double increments was a past practice.

[172] The bargaining agent did not raise anything else as a past practice. If any argument was presented, Ms. Bing would have noted it.

[173] After the hearing, she began to work on the analysis and to conduct research into whether the MOA was binding. She did not understand that course relief or sabbaticals were part of the grievance.

[174] In cross-examination, she was asked whether it was possible that the bargaining agent talked about course relief and sabbaticals, suggesting that if it had raised those issues and she did not understand them, they would not have gone into her notes. She replied that she did not take notes to understand but to write down the words so that she could perform an analysis.

[175] Ms. Bing was asked whether the 2010 retirement letters were in the file before the hearing. She knew that she had had copies of them. She did not know if they were in the file, but she had seen them before. There was also an unfair labour practice complaint from the bargaining agent that might have been in the file. She had seen the attachment before. She could not confirm whether she had seen it in the file or somewhere else.

[176] Ms. Bing was advised that Dr. Luu had testified that sabbaticals and course relief were discussed at the third-level hearing. She replied that she took note of the arguments.

[177] It was suggested to Ms. Bing that as she had read the grievance and the replies before the hearing, she had already concluded that the issue related to double increments before going into the hearing.

[178] She agreed that that was her initial understanding and stated that nothing she heard caused her to change her mind.

[179] She confirmed that the retirement letters substantiated that the MOA had been used in the past. She confirmed that she wrote down Dr. Luu's words, not conclusions about what Dr. Luu said but just her words.

[180] In re-examination, Ms. Bing was asked whether she wrote down what was relevant to the grievance. She answered that she tried to write everything down. A few things arose that were not relevant to the grievance, but she noted them all the same.

4. <u>The referral to adjudication and subsequent events</u>

[181] The grievance was referred to adjudication on July 10, 2015. At that time, no final-level response had been received from the employer.

[182] On October 30, 2015, Dr. Luu received a letter from Dr. Kowal, stating that the employer agreed to honour the terms of the MOA with respect to double increments. She realized that the time for Dr. Hurley to apply for a sabbatical was that day. Dr. Hurley was entitled to a sabbatical under the provisions of article 18 of the collective agreement. She helped him complete his application for a sabbatical to start in January 2017 and to last six months. Dr. Kowal accepted the application, although it was late.

[183] Dr. Kowal agreed to abide by the terms of the email in his letter of October 30, 2015, to the bargaining agent. After that, he recalled discussing with Dr. Bates the point that Dr. Hurley's grievance was now resolved. He did not believe that there were any other matters outstanding from the grievance, which he expected would be withdrawn. Over time, it became clear to him that the bargaining agent claimed that the grievance had more dimensions than just the MOA.

[184] Dr. Bates stated that when management decided to uphold the MOA, he recalled with great clarity talking to the Principal and stating that the grievance was over and that they had met what they had wanted to meet. Quite frankly, he stated that he was gobsmacked when he learned the grievance was still outstanding.

[185] On April 21, 2016, Dr. Luu sent a letter to Dr. Kowal in which she addressed whether a UT was required to return to full teaching upon his or her return from a sabbatical. The letter reads in part as follows:

…

> *Jean-Marc mentioned to me that you had some questions and concerns about Michael's request for 6 months free of teaching following his upcoming sabbatical in the Winter term of 2017….*
>
> *As I understand it, your first concern is that you believe the Collective Agreement requires a UT to return to full teaching upon return from sabbatical leave. In response, I would like to point out that Article 18.08 states only that a UT must "return to service as a UT" (18.08[a]) and "return to the department for a period of employment equal to their period of sabbatical leave" (18.08[b])….*
>
> …
>
> *… there is nothing in this article that describes how a UT's workload is to be distributed upon return from sabbatical. Rather, the same flexibility in the distribution of workload that applies in any other time also applies to the period following a sabbatical….*
>
> …
>
> *… we are open to discussions on a without prejudice basis with a view to resolving this grievance prior to adjudication….*
>
> …

[186] Dr. Luu stated that she did not receive a reply, although she was quite sure that she had emailed it to the Principal.

[187] On June 6, 2016, in the context of another grievance, Dr. Kowal mentioned to Dr. Luu that if Dr. Hurley wanted the double increments, the Merit Board would meet in December. That board decides which UTs and how many receive increments.

[188] Dr. Luu set up a meeting with Dr. Kowal. Along with Dr. Noël, they met on June 6, 2016, and Dr. Kowal purportedly stated, "I know I owe you a response. I am sorry." Dr. Luu had a hard copy of the April 21, 2016, letter, which they discussed.

[189] Dr. Luu identified the employer's final-level response, dated November 25, 2016, which was addressed to Dr. Hurley and copied to her. It was signed by the Director General Workplace Management for the Deputy Minister and read in part as follows:

…

> *Further to my review of the file, I do not find that the Employer violated the 1 July 2007 Memorandum of Agreement as you have not yet executed the forms which establish a retirement date as stipulated in this said document. Consequently, I find that you have not been aggrieved.*
>
> *As no action has been taken, and as you have not been aggrieved, I do not find that section 107 of the Public Service Labour Relations Act was violated nor any other policy, directive, statute, or other.*
>
> *Accordingly, for the reasons identified above as well as those outlined in the previous grievance response, your grievance is denied and the corrective measures requested will not be granted.*

…

D. Summary of the *Burchill* arguments

1. For the bargaining agent

[190] The employer stated that the past practice of a three-part plan should not be considered because such a plan was not discussed in the grievance or during the grievance process.

[191] The CMCFA's response was twofold:

(1) The three-part plan was referred to in the grievance, at least inferentially.

(2) The three-part plan was discussed during the grievance process.

[192] The arbitration decision in *Toronto District School Board v. Canadian Union of Public Employees, Local 4400*, [2011] O.L.A.A. No. 229 (QL), which was a private arbitration carried out under the Ontario *Labour Relations Act, 1995* (S.O. 1995, c. 1, Sched. A), provides a very helpful summary of the leading cases with respect to preliminary objections to the scope of a grievance. The starting point is the seminal authority of *Blouin Drywall Contractors Ltd. v. United Brotherhood of Carpenters and Joiners of America, Local 2486* (1975), 8 O.R. (2d) 103 ("*Blouin Drywall*").

[193] *Blouin Drywall* stands for the principle that cases should not be won or lost on a technicality of form but on their merits to ensure that disputes are fully, fairly, and promptly resolved. Grievances should be construed liberally so that the real complaint is dealt with.

[194] The *Blouin Drywall* principle was cited with approval and adopted by the Supreme Court of Canada in *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42 ("*Parry Sound*"). The Court stated that procedural requirements, such as one to provide details of a grievance in writing, should not be stringently enforced unless there is some prejudice to the employer. Unless some exists, it is more important to resolve the factual dispute that gave rise to the grievance.

[195] A fundamental principle of labour law is resolving workplace disputes expeditiously and with as little technicality as possible. In addition to cost considerations, that is the entire rationale for statutorily required arbitration. Without it, employers and unions might as well run to court for every dispute.

[196] The case of *Dominion Citrus Ltd. v. Teamsters, Local 419*, [2001] O.L.A.A. No. 419 (QL), again confirms the principle that adjudicators ought to deal with the real dispute unless there is evidence of actual prejudice stemming from genuine surprise, which on its own is not enough.

[197] The decision in *Electrohome Ltd. v. International Brotherhood of Electrical Workers, Local 2345* (1984), 16 L.A.C. (3rd) 78, does a good job of capturing the issue.

There are two basic guidelines: (1) grievances should be liberally construed so that the real dispute can be resolved, but that must be balanced with (2) ensuring that there is no prejudice. A party may be prejudiced if it loses the ability to deal with the issue during the grievance process.

[198] In *McMullen v. Canada Revenue Agency*, 2013 PSLRB 64 at para. 102, the former Public Service Labour Relations Board adopted the same principles. It articulated that *Burchill* is consistent with labour relations principles. Grievances and the grievance process exist to allow parties to express their dispute and expose each other to their arguments, to eliminate surprise. The *Burchill* principle prevents a party from being deprived of the right to deal with an issue during the grievance process.

[199] Applying these principles to the grievance form, it could be clearer. But remember that lawyers did not draft it. Dr. Luu and Dr. Hurley may be sophisticated academics, but neither has legal training. A retirement plan is referenced repeatedly. The grievance does not expressly reference what the plan consists of. It is true that it does not mention course relief, but it does not mention pay increments either.

[200] The first paragraph refers to the MOA but not to a past practice. The second paragraph refers to a past practice but not to the MOA. Dr. Luu stated that the language is different in those two paragraphs because the bargaining agent was asking for different things. The first paragraph asks for the MOA (the performance evaluation scheme), which was reduced to writing. The second paragraph asks for the other elements of the three-part plan, which were not reduced to writing but were an established past practice.

[201] In the final two paragraphs are requests for the MOA and the past practice. The employer would have this interpreted as referring to the same thing. If that were true, there would be no need to mention both.

[202] The April 2015 meeting discussion is disputed. Drs. Hurley and Noël stated that all three parts were discussed. Drs. Kowal and Bates stated that only the MOA was discussed.

[203] Drs. Hurley and Noël testified that they had spent a considerable amount of time before the meeting discussing and working out the details of what Dr. Hurley's

three-part plan would look like and the timing of each component. Dr. Hurley stated that the process started in January, and he called it "elaborate and painstaking". Dr. Noël stated that only once they worked out the details did they set up the meeting with the Principal. Neither of them was challenged on that in cross-examination. Therefore, there is uncontested evidence.

[204] After taking months to elaborately and painstakingly set out the details of a three-part plan, why would Dr. Noël and Dr. Hurley mention only one part of it at the meeting?

[205] There is no need to find that Drs. Kowal and Bates were untruthful on this point. It is possible, but it is also possible that their memories have faded or that they did not understand what Drs. Noël and Hurley said.

[206] There are many reasons that evidence may not be reliable. Witness credibility is just one.

[207] In examination-in-chief, Dr. Kowal suggested that he might have a good memory of the meeting because the term "victory lap", used to describe course relief, would be memorable to him. He said that if it was used at the April 2015 meeting, like Dr. Noël said it was, then he would have remembered it.

[208] In cross-examination, it arose that that term was not so memorable to Dr. Kowal after all. When pressed, he admitted that he really did not recall when he first heard it.

[209] In conclusion, the bargaining agent's evidence is more persuasive because it is more unequivocal and more consistent with the undisputed facts. Clearly, Dr. Hurley wants the three-part plan. If he wanted only the MOA, the bargaining agent would not have litigated the issue.

What was discussed at the Step #1 meeting?

[210] Dr. Luu stated that all three parts were discussed. Dr. Bates stated that only the MOA was discussed. His evidence is not consistent with the undisputed facts. Clearly, Dr. Hurley wants the three-part plan. He wanted it before the April 2015 meeting, and he took painstaking steps to create it in January 2015. Since those facts are true, why did Drs. Hurley and Luu not raise all the plan's components during step one?

What was discussed at the Step #2 meeting?

[211] Dr. Luu stated that all three parts were raised, which, Ms. Hau's notes confirm. There is no dispute that the words "course relief" and "sabbatical" were uttered at the meeting. The employer would have everyone believe that the words were uttered, but the bargaining agent was not looking for those things. The employer relied on Dr. Sokolsky's letters, but it wanted only one of the three things listed in them, which is difficult to believe.

[212] At page 7 of the notes, Brig.-Gen. Friday stated that he was concerned about a sabbatical, as discussed in the 2010 letters signed by Dr. Sokolsky. Dr. Luu did not state that there is no need for concern or that that was not being examined. She tried to justify the request and stated that it was consistent with sabbatical entitlements (presumably, she was referring to the collective agreement).

[213] Brig.-Gen. Friday expressed concern about the exemption from teaching load in the 2010 letters signed by Dr. Sokolsky and about no mechanism permitting it.

[214] Dr. Noël did not say that nobody should worry because they were also not seeking that. He stated that the dean was responsible for assessing teaching load. In other words, he justified the request. He also told Brig.-Gen. Friday that there was a mechanism for exempting UTs from their teaching load.

[215] Dr. Noël told Brig.-Gen. Friday that Dr. Hurley "wants to retire … he wants the letter [emphasis added]", not that he wanted the MOA or the increments. He wanted the letter — the three-part letter referring to the two letters signed by Dr. Sokolsky in 2010.

[216] The bargaining agent was surprised that the employer still maintained its position, in light of these notes.

What was discussed at the Step #3 meeting?

[217] Dr. Luu stated that all three parts of the plan were discussed. Ms. Bing disagreed, stating that only the MOA was discussed. In addition to the undisputed facts considered earlier (namely, Dr. Hurley wants the three-part plan, he wanted it before the April 2015 meeting, and he went to painstaking detail to create an elaborate plan before the meeting), there are now fourth and fifth undisputed facts, namely, all three parts of the plan were discussed at step two, and the bargaining agent provided a

copy of Dr. Sokolsky's letter at that meeting.

[218] The evidence is more consistent with Dr. Luu's evidence, which was that the bargaining agent raised all three parts during the step three meeting, than it is with Ms. Bing's evidence, which was that they did not.

[219] From Ms. Bing's notes, it is clear that in the bargaining agent's view, the MOA and pay increments were cost-neutral items. It is also clear that the bargaining agent raised the workforce adjustment (WFA) issue.

[220] If the MOA were cost neutral as the bargaining agent believed, then there would have been no reason to stop it during WFA. So, the only inference to be drawn is that the bargaining agent was referring to something other than the MOA. It must have been referring to the parts of the plan that had associated costs; namely, the sabbatical and course relief.

[221] One observation that may explain the misunderstanding between the two sides is that the employer had new people at each hearing.

[222] The other thing learned is that before each hearing, the employer's participants were briefed by those who had dealt with the situation before them. No one had direct knowledge of what had happened before each hearing, and they formed conclusions based on what their colleagues had told them.

2. <u>For the employer</u>

[223] This grievance has always been about the MOA. The bargaining agent started asking for the three-part plan only after Dr. Kowal confirmed that he would abide by the MOA, which was after the grievance was referred to adjudication. The bargaining agent and Dr. Hurley continued pursuing this grievance simply as an attempt to receive more than they originally asked for, either for Dr. Hurley or for their membership.

[224] However, this was an improper use of the grievance process, and it violated the *Burchill* principle. While the bargaining agent insists that it has been asking for the three-part plan throughout the grievance process, this is simply not true, from the evidence.

Review of the evidence of the April 2015 meeting

[225] From the evidence and from a plain reading of the grievance, it is clear that the grievance is all about the MOA. The bargaining agent wanted it applied to Dr. Hurley. Neither Dr. Kowal nor Dr. Bates recalled Dr. Hurley or his representative (Dr. Noël) bringing up course relief or sabbaticals at their informal April 2015 meeting. They recalled that the discussion was just about the MOA. Dr. Noël confirmed that neither he nor Dr. Hurley had the MOA at the meeting; it was sent afterward. There is also no evidence that any other documents were brought forward at the meeting (such as a proposed retirement plan, a three-part plan, or Dr. Sokolsky's sample 2010 retirement letters). The only follow-up after the meeting was with respect to the MOA.

[226] The bargaining agent was under the impression from that meeting that Dr. Kowal would not apply the MOA. He testified that he made it clear that no decisions were made at the meeting and that it had been held only for information gathering. He also testified that as of the meeting, he had not even been familiar with the MOA. So he asked for more information about it and for a copy of it before he made any decisions.

The grievance

[227] Dr. Hurley, supported by the bargaining agent, then filed this grievance, which on plain reading is all about the MOA and Dr. Kowal's apparent refusal to implement it. There is absolutely no elaboration on what "past practice" might refer to besides the MOA, and from the construction of the sentences and paragraphs, "past practice" clearly refers to the MOA. Nothing else in the grievance would lead to a conclusion that the past practice is about anything other than the MOA.

[228] The testimonies of Dr. Kowal and Dr. Bates also reflect that from their perspective, no decision was made, let alone a refusal.

[229] After the grievance was filed, the university administration then looked into all memoranda of understanding (MOUs, including the MOA). Based on comments from Dr. Kowal, the bargaining agent was under impression that the MOUs would no longer be upheld. It then filed an unfair labour practice complaint, citing a breach of the statutory freeze under s. 107 of the *Act.*

a. The first-level hearing

[230] At the first-level hearing, Dr. Bates testified that the bargaining agent's discussion and presentation was all about the MOA. He testified that a big focus of its arguments was whether the MOA could be considered a term and condition of employment and part of the collective agreement. He testified that it did not bring up course relief or sabbaticals and that it did not submit any documents. He was clear on his recollection that these topics did not come up.

[231] Accordingly, Dr. Bates then gave a detailed first-level response to the MOA arguments. He testified that had course relief or sabbaticals come up at the hearing, he would have addressed them in his response. Since they did not come up, he did not address them.

b. The second-level hearing

[232] At the second-level hearing, as Ms. Hau testified, the focus was again all about the MOA. From her recollection, the bargaining agent presented one of Dr. Sokolsky's 2010 sample retirement letters, and it was heavily redacted. Her recollection was that it was presented to establish that the MOA had been applied in the past, to bolster the past-practice argument. Her notes reflect this at page 7. Dr. Luu presented the document during her arguments about the MOA and about how it did not contravene the 40% quota for performance increments. According to page 7 of the notes, upon providing the letter, Dr. Luu stated, "Michael was expecting the Principal to say: I am aware of the memo, this is what we will be doing. this memo does not contravene the 40% salary admin plan. None of this is inconsistent with the salary admin plan … [*sic* throughout]". These references refer directly to the MOA and have nothing to do with course relief or sabbaticals.

[233] Sabbaticals and course relief were discussed only because the commandant, Brig.-Gen. Friday, began reading the sample retirement letter carefully. He then saw those two other parts and had concerns. At page 7, the notes show that the bargaining agent simply said that it was consistent with sabbatical entitlements and that the dean was responsible for assigning the teaching load. It then returned to the MOA and stated that something "… is not automatic - manoevrability [*sic*] of management …". The employer submitted that this comment likely refers to course relief because the bargaining agent was trying to argue that the performance rating and double

increment should to a certain extent be automatic. The discussion, especially from the bargaining agent, then returned to performance increments.

[234] Course relief and sabbaticals were not a significant part of the discussion, and Ms. Hau came away with the impression that everything was all about the MOA, that the sample retirement letter just showed that the MOA had been applied in the past, and that the bargaining agent wanted the MOA applied to Dr. Hurley. The bargaining agent did not make it clear to the employer that it wanted the three-part plan applied to Dr. Hurley; nor did it present any arguments to support that the three-part plan, or course relief or sabbaticals, were also past practices that should be applied to him. Accordingly, the second-level grievance response discusses only the MOA.

[235] On July 6, 2015, between the second- and third-level grievance hearings, Dr. Luu emailed Dr. Kowal. She stated that she felt that there had been a misunderstanding during his meeting with Dr. Hurley and that he "… may not have realized that Michael was requesting to formalize a retirement agreement with you along the terms outlined in the 1 July 2007 MOA between TB and the CMCFA" [emphasis added]. She then made the following formal request:

> *… asking whether you would be willing to uphold the terms of the 1 July 2007 MOA outlining how UTs are to be assessed in the three years prior to a scheduled retirement, and whether you would be willing to formalize this commitment in a letter like the one attached. Please note that the attached letter is offered solely as an example of a letter outlining the terms of a retirement agreement, not as a demand for the same terms.*
>
> [Emphasis added]

[236] Again, it is clear from the plain wording of this email that the letter was offered solely as an example of a retirement agreement, that the bargaining agent asked only for the terms of the MOA, and that it clearly did not ask for the other terms in the three part plan (i.e., sabbaticals and course relief).

[237] Dr. Kowal testified that upon reading this email, he understood that the bargaining agent was looking only for the MOA's terms to be offered to Dr. Hurley and that it wanted that offer put into a letter.

[238] He wrote back, indicating (as he testified) that he was confused because two other items were mentioned in the retirement letter (sabbaticals and course relief) and

that he understood that the bargaining agent was asking for the MOA to be applied. However, Dr. Kowal did confirm that he would abide by the terms of the collective agreement relating to course relief and sabbaticals, which, if the employer fails on its *Burchill* objection, shows that it did not refuse to abide by those terms.

c. The third-level hearing

[239] At the third-level hearing, things were the same as at the first two hearings — the discussion and bargaining agent presentation were all about the MOA. Course relief and sabbatical did not come up at all. Again, Ms. Bing recalled that her impression was that the two 2010 retirement letters submitted by the bargaining agent had been proffered as evidence of a past practice of the MOA being applied. Her notes show that Dr. Luu spoke about the MOA and how it was documented, known, and reasonable, and that they "… [a]lso show how recently invoked (2010) … JS honored in 2010. No other opportunities to do so. MOA was live + present @ table; and referred to in JS notes" [*sic* throughout].

[240] The bargaining agent made no other references to the retirement letters in its presentation. As explained in the last paragraph, the only reference clearly shows that they were used as evidence that Dr. Sokolsky invoked the MOA in 2010. At no point did the bargaining agent state that Dr. Hurley wanted everything in the letters. It never mentioned course relief or sabbaticals, let alone argue that those two items also constitute a past practice, and it offered no arguments whatsoever about course relief or sabbaticals. As such, Ms. Bing was left with the impression that the grievance was all about the MOA.

[241] The third-level response was not issued within the time frame to issue one, and the grievance was referred to adjudication on October 7, 2015.

d. After the referral to adjudication

[242] On October 30, 2015, Dr. Kowal wrote a letter that clarified that the employer would abide by the MOA's terms until the next collective agreement was signed. Both Dr. Bates and Dr. Kowal testified that they were excited because they thought that this letter would make Dr. Hurley's grievance go away, since it granted the corrective measure requested. Dr. Bates testified that he was gobsmacked when the grievance continued. Dr. Kowal recalled being surprised as well.

[243] Dr. Kowal testified that only after he wrote the letter did he begin receiving requests from the bargaining agent for more things for Dr. Hurley; namely, a sabbatical followed by course relief, in addition to double increments.

[244] On April 21, 2016, Dr. Luu wrote a letter. That was well after the grievance was referred to adjudication and well after the October 30, 2015, letter. It was the first written document specifically requesting a sabbatical and course relief for Dr. Hurley, and according to Dr. Kowal, it was the first time they were specifically requested — period.

[245] Her letter references conversations starting in November, which again was after the grievance was referred to adjudication. Its context seems to be an attempt to settle or resolve the grievance, and the employer submitted that it was the bargaining agent's attempt to obtain more for Dr. Hurley before withdrawing the grievance, since the bargaining agent had now "gotten [*sic*]" the terms of the MOA.

[246] Dr. Luu's letter also shows that Dr. Hurley's retirement date was still not set. The bargaining agent offered several options for one and stated that they were flexible, depending on the circumstances. The letter confirms what Dr. Hurley testified to on the stand — his retirement date is not yet set in stone. To reiterate, Dr. Hurley still has not submitted his retirement form, which is the only official tool to set a retirement date.

[247] The evidence shows that the *Burchill* principle has been violated.

[248] Based on the mountain of evidence about what this grievance has truly been about all along — the MOA alone — the Board should also be gobsmacked that the bargaining agent tried to suggest that the grievance has always been about a three-part plan.

[249] It tried to rely on what it characterized as vague wording in the grievance and the two sample retirement letters it submitted during the grievance process to say that what it meant by "past practice" all along was a three-part plan — even though it never made such an argument at any point.

[250] Essentially, the bargaining agent stated that the employer should have been reading its mind all along and that it should have read something else into oblique references to the retirement letters and the words "past practice."

[251] This is not how the grievance process works, and it is a textbook example of a violation of the *Burchill* principle. The bargaining agent could not present the grievance as being about one singular thing all along and then, long after the grievance was referred to adjudication, state that it had actually been arguing something else, based on vague and obscure references, which it asked both the employer and the Board to look back on and to read-in things that were never there to begin with. It tried to apply revisionist history.

[252] The whole point of the *Burchill* principle is that the bargaining agent was supposed to clearly make the employer aware of what the grievance was about. The employer had to know what it was up against. It could not be expected to read the bargaining agent's mind and try to decipher what words like "past practice" could possibly mean; it was up to the bargaining agent to spell that out. And what it clearly spelled out in this case was that it felt that the MOA was a past practice. It did not make the employer clearly aware that it felt that the three-part plan was past practice and that it also wanted the plan applied to Dr. Hurley.

[253] It is clear from the evidence and from no fewer than four witnesses who testified that they understood that the grievance was all about the MOA that the bargaining agent tried to establish the MOA as a past practice and that the retirement letters were submitted to show that the MOA had been applied in the past. The bargaining agent started asking for the sabbatical and course relief for Dr. Hurley only after the referral to adjudication.

[254] The bargaining agent could not apply a revisionist history and state that it asked for a three-part plan all along because the evidence is clear that it did not.

Case law: the *Burchill* principle

[255] The *Burchill* principle is clear — neither the grievor nor the bargaining agent can change the nature of a grievance or add elements to it after it has been referred to adjudication. The following case law is relevant: *Burchill*, at para. 5; *Boudreau v. Canada (Attorney General)*, 2011 FC 868 at paras. 17 to 19*; Shneidman v. Canada (Attorney General)*, 2007 FCA 192 at paras. 24 and 26 to 29; *Canada (Treasury Board) v. Rinaldi*, [1997] F.C.J. No. 225 (T.D.) at paras. 22 and 28; *Boudreau v. Treasury Board (Department of National Defence)*, 2010 PSLRB 100 at paras. 32 to 35, especially paragraph 35, which states: "As a general rule of natural justice, the employer should

not at adjudication be required to defend against a substantially different characterization of the issues than it encountered during the grievance procedure"; *Baranyi v. Deputy Head (Canada Border Services Agency)*, 2012 PSLRB 55 at paras. 104 and 120, especially paragraph 120, for the proposition that making a passing reference to something at the final-level grievance hearing is not enough; *Robertson v. Deputy Head (Department of National Defence)*, 2014 PSLRB 63 at paras. 51 to 53; and *Babiuk v. Treasury Board (Department of Citizenship and Immigration)*, 2007 PSLRB 51 at paras. 48 to 51, especially paragraph 51, which states in part as follows:

> *[51] … In order that the internal grievance procedures are allowed to work to resolve complaints quickly and informally in the workplace, and in order to foster sound labour relations, it is fundamental that the subject matter that gave rise to the grievance be made perfectly clear. How can the parties move forward if they present one case to the employer and a different case, yet unanswered, to an adjudicator?*

[256] The Board might be tempted to say that the employer anticipated that a sabbatical and course relief would come up at the hearing and that it seemed prepared to address them, so it suffered no prejudice.

[257] The employer submitted that that is <u>not</u> how the *Burchill* principle works. Just because it addressed those issues at the hearing and did not request to bifurcate the hearing for expediency does <u>not mean</u> that the sabbatical and course relief issues were properly before the panel of the Board. The *Burchill* principle is clear; a bargaining agent cannot change the nature of a grievance after it is referred to adjudication.

[258] The prejudice caused to the employer by this change in position means that it did not have the chance to address and resolve the issues during the grievance process because it had no knowledge of what was in dispute. In this case, the employer had to do exactly what the *Burchill* principle aims to prevent; it had to change tack at the hearing to address a shifting grievance and had to come up with arguments and evidence, which it never did during the grievance process because these two issues were <u>not</u> on the table. This is a classic *Burchill* case; the employer should not have had to defend a different case than it defended in the grievance process.

[259] Even though the course relief and sabbatical were in the sample retirement letters provided during the grievance, and even though Brig.-Gen. Friday raised questions about them when he saw the letters at the second-level hearing, they were not clearly placed as true issues in dispute before the employer. They were mentioned only in passing and came up only peripherally as a result of the bargaining agent using the letters to prove that the MOA was a past practice. They were never presented as a true source of contention or as something that the bargaining agent was demanding for Dr. Hurley.

[260] Based on the clear evidence presented in this case, the Board should find that the *Burchill* principle has been violated, and it should refuse to address whether either the three-part plan or a sabbatical followed by course relief was a past practice that should be applied to Dr. Hurley.

Analysis re the *Burchill* Objection

[261] In making reliability assessments, the following statement, by Mr. Justice O'Halloran, in *Rex v. Pressley*, [1948] B.C.J. No. 63 (QL) at para. 12, is helpful:

> *… The judge is not given a divine insight into the hearts and minds of the witnesses appearing before him. Justice does not descend automatically upon the best actor in the witness-box [sic]. The most satisfactory judicial test of truth lies in its harmony or lack of harmony with the preponderance of probabilities disclosed by the facts and circumstances in the conditions of the particular case.*

[262] The most apt articulation of the *Burchill* principle and its consistency with the principles articulated by the Supreme Court of Canada in *Parry Sound* is found in the Federal Court's *Boudreau* case, in which Mr. Justice Martineau stated at paragraphs 18 and 19 as follows:

> *18 The Court notes that the arbitral decisions referred to by the Supreme Court in* Parry Sound*, above, establish that "the grievance should be liberally construed so that the real complaint is dealt with" (*Re Blouin Drywall Contractors Ltd. and United Brotherhood of Carpenters and Jeiners [*sic*] of America, Local 2486*, (1975) 8 OR (2d) 103 (CA) at page 108) and, as stated by the Supreme Court of Canada in* Parry Sound*, above, at para 69, reflect the view that procedural requirements should not be stringently enforced in those instances in which the employer suffers no prejudice.*

> *The Court sees no inconsistencies with these principles and what the Federal Court of Appeal has decided in* Burchill, *above, as long as the referral to adjudication under section 209 of the Act does not change the nature of the grievance originally filed by an employee or the bargaining agent under section 208 of the Act or the collective agreement.*
>
> *19 In the Court's opinion, the rules of procedural fairness dictate that employer should not be required to defend in arbitration against a substantially different characterization of the issues than it encountered during the grievance procedure. This is not merely a technicality, but is fundamental to the proper functioning of the dispute resolution system for labour disputes in the federal public administration….*

[263] The test of adjudicative ability in these cases is whether during the grievance process, the employer knew what the grievance was about and whether it had an opportunity to address the issue. Neither party should be surprised at the adjudication stage by the subject matter of the grievance. The adjudicator must determine whether the grievor's question was submitted for determination during the grievance process.

[264] Traditionally, the adjudicability of such grievances is determined by such factors as the context of the situation, the wording of the grievance, the evidence of what was said during the grievance hearings, and a review of the employer's responses to the grievance.

1. <u>Applying the jurisprudence to the facts</u>

[265] I have recited the evidence in considerable detail. I will briefly review the pertinent evidence from the April 2015 meeting through to the reference to adjudication to determine the adjudicability of the grievance as far as it relates to course relief.

[266] As noted at the meeting, there is no consensus on what was discussed. However, there is no dispute concerning the following facts. The meeting lasted only about a half hour. Dr. Hurley expressed interest in retirement and in giving three years' notice in return for certain benefits. The MOA was discussed. Dr. Noël did not have a copy of it with him, but he orally communicated its contents to Dr. Kowal, who was not familiar with it. Dr. Noël undertook to provide him with a copy. Neither Dr. Hurley nor Dr. Noël presented Dr. Kowal with any documentation outlining Dr. Hurley's retirement plans.

[267] On the issue of whether course relief was discussed, the recollections of the witnesses differ. Dr. Noël stated that he referred to the victory lap, the faculty expression for course relief. Dr. Kowal stated that had that term been raised during the meeting, he would have recalled it, as at that time, he did not know what it meant.

[268] Dr. Noël did attempt to send a copy of the MOA to Dr. Kowal. However, Dr. Kowal did not receive it as he was not on the "To" list on the email.

[269] On May 19, 2015, some weeks after the April 2015 meeting, Dr. Sokolsky, the former principal, sent Dr. Luu a draft document on performance review that he had prepared in 2011 and that outlined the MOA's provisions, the two anonymized retirement letters that he had signed as the principal in 2010, and a notice of retirement.

[270] On its face, the grievance refers to the MOA, to a past practice under article 8 of the collective agreement, to s. 107 of the *Act*, and to any other related policies, etc. It does not refer to sabbaticals or course relief.

[271] The witnesses differed with respect to their recollections of what was discussed at the first-level hearing. Dr. Bates prepared a lengthy and exhaustive reply and analysis that does not mention course relief or sabbaticals.

[272] The witnesses also differed with respect to their recollections of what was discussed at the second-level hearing. Ms. Hau's notes state that one of Dr. Sokolsky's retirement letters was produced, with the following exchange occurring:

> *Luu - Provided a copy of a retirement letter.*
> *Michael was expecting the Principal to say: I am aware of the memo, this what we will be doing.*
> *this memo does not contravene the 40% salary admin plan.*
> *None of this is inconsistent with the salary admin plan - this memo does - It is not inconsistent*
> *It allows room for manoevring.*
> *It is consistent with FAA.*
> *This costs nothing - We have the 40% increment.*
>
> *Friday - Looked at the memo that Dr. Luu handed him*
>
> *Noel - When we went through WFA we had individuals who wished to rescind their retirement, but couldn't*
>
> *Friday - I have concerns*

> *Proceeding was sabbaticals*
>
> *Luu - It is consistent with sabbatical entitlements*
>
> *Friday – 'Exempt from teaching load" - I am not aware of mechanism would govern this particular aspect..*
>
> *Noel - the dean is responsible for assigning the teaching load - 3 year increment*
>
> *Luu - It is not automatic - manoevrability of management*
>
> [*Sic* throughout]

[273] The following day, Dr. Luu wrote to Dr. Kowal, stating in part as follows:

> …
>
> *… I am therefore writing to make the formal request on Michael's behalf, asking whether you would be willing to uphold the terms of the 1 July 2007 MOA outlining how UTs are to be assessed in the three years prior to a scheduled retirement, and whether you would be willing to formalize this commitment in a letter like the one attached. Please note that the attached letter is offered solely as an example of a letter outlining the terms of a retirement agreement, not as a demand for the same terms.*
>
> …

[274] Ms. Bing's notes from the third-level hearing do not reflect that either sabbaticals or course relief were discussed.

[275] On October 30, 2015, Dr. Kowal wrote to Dr. Luu, advising her that the employer agreed to honour the terms of the MOA with respect to double increments.

[276] On April 21, 2016, Dr. Luu wrote to Dr. Kowal, advising that nothing in clause 18.08 of the collective agreement described how a UT's workload was to be distributed upon a return from sabbatical and that the same flexibility in distributing workload that applied at any other time also applied to the period following a sabbatical. She also advised that the bargaining agent was open to discussions on a without-prejudice basis to resolve Dr. Hurley's grievance before adjudication.

[277] The employer's final-level reply denied the grievance and was dated November 25, 2016.

[278] In my view, based on the harmony of the preponderance of probabilities disclosed by these facts, I am not persuaded that sabbaticals and course relief were raised at the April 2015 meeting, on the face of the grievance, or during the grievance process.

[279] The letter dated July 6, 2015, requested that Dr. Kowal uphold the terms of the MOA and formalize the commitment in a letter like the one attached, i.e., one of the retirement letters. That request expressly states that the attached letter is only an example and is not a demand for the terms recited in the letter, i.e., the MOA, a sabbatical, and course relief.

[280] The letter dated April 21, 2016, raised in the documentary record for the first time the issue of course relief for Dr. Hurley. This has been critical in reaching my conclusion. I am satisfied that on a balance of probabilities, it is more likely than not that course relief for Dr. Hurley was raised for the first time after the grievance was referred to adjudication. Therefore, the employer was denied the opportunity to deal with the course relief issue during the grievance process.

[281] The prejudice to the employer is that it was required to address the issues of course relief and sabbaticals at adjudication by marshaling evidence and developing arguments on issues that were not raised during the grievance process. Based on the *Burchill* principle, I conclude that I do not have jurisdiction to deal with course relief.

[282] Nevertheless, purely as a matter of *obiter (or as an aside)* in the nature of a non-binding opinion, I will recite the relevant evidence and will briefly consider whether course relief is incorporated into the collective agreement under article 8.

V. Is the grievance moot insofar as it relates to the MOA?

[283] The employer submitted that the grievance is moot given that it granted the only remedy requested in it during the grievance process; i.e., it agreed to implement the terms of the MOA for Dr. Hurley. There is no live issue left between the parties to decide and no remedy left to grant.

[284] The employer relied upon *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 at paras. 15 and 16, where the Supreme Court of Canada set out the test and criteria for mootness as follows:

> ***15*** *The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice. The relevant factors relating to the exercise of the court's discretion are discussed hereinafter.*
>
> ***16*** *The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. The cases do not always make it clear whether the term "moot" applies to cases that do not present a concrete controversy or whether the term applies only to such of those cases as the court declines to hear. In the interest of clarity, I consider that a case is moot if it fails to meet the "live controversy" test. A court may nonetheless elect to address a moot issue if the circumstances warrant.*

[285] See *Mak v. National Research Council of Canada*, 2012 PSLRB 63 at para. 30, where the mootness principle was applied in a case in which a grievance was allowed at the final level of the grievance process, and the corrective action requested had been granted.

[286] The employer argued that this case meets the test in *Borowski*. Nothing is to be gained from a decision as it already agreed to apply the MOA to Dr. Hurley. There would be no value in the Board awarding the same remedy that has already been provided. All Dr. Hurley has to do is to submit his retirement form, and he will receive the double increments.

[287] The bargaining agent submitted that even if the grievance is only about the MOA, the employer has not given Dr. Hurley the benefit of it, so there is still a live dispute between the parties that blends into the prematurity issue.

[288] This issue is intertwined with the argument that an adjudicator does not have jurisdiction to deal with the three-part plan or even the MOA because they are not terms of the collective agreement.

Analysis on the Mootness Issue

[289] This is a reference to adjudication of a grievance filed under s. 209(1)(a) of the *Act* alleging a violation of the MOA, a past practice under article 8 of the collective agreement, and s. 107.

[290] This reference to adjudication is not a complaint alleging that the employer contravened s. 107 of the *Act*, which would have to be filed under s. 190(d) and determined by the Board. I understand that such a complaint was filed; however, it is not before me.

[291] As a grievance adjudicator, I do not have jurisdiction to grant the corrective action sought by Dr. Hurley in his complaint based on a contravention of s. 107 of the *Act*, assuming his complaint is not premature. The jurisdiction of a grievance adjudicator is limited to alleged violations of a collective agreement.

[292] There is a difference between whether a term or condition of employment is contained in a collective agreement or is outside one and is in force when notice to bargain is given and caught by the bargaining freeze. The latter is a wider concept.

[293] The wording of s. 107 of the *Act* states that "…each term and condition of employment applicable to the employees in the bargaining unit to which the notice relates that may be included in a collective agreement, and that is in force on the day on which the notice to bargain is given …". The language of that section contemplates that both terms and conditions of employment included in the collective agreement and those outside it that are in force on the day notice to bargain is given are continued in force.

[294] The bargaining agent argued that article 8 clearly incorporates into the collective agreement any working conditions existing before the date of the collective agreement so long as the requirements in article 8 are met. It argued that this includes the MOA and course relief.

[295] The determination of whether the MOA's terms and conditions are incorporated into the collective agreement is not resolved by the employer's acknowledgement that the MOA was a term or condition of employment in force when notice to bargain was given. This is not merely an abstract or hypothetical question.

[296] Therefore, I conclude that the issue is not moot and that as an adjudicator, I have jurisdiction to determine whether the MOA is incorporated into the collective agreement under article 8.

[297] Based on Ms. Lefebvre's evidence that the Treasury Board had no involvement in the creation of or the signing of the MOA and that it was a local standing policy signed between the bargaining agent and the RMC's principal, it is not disputed that unless the MOA and course relief are incorporated into the collective agreement, an adjudicator does not have jurisdiction to hear Dr. Hurley's grievance.

[298] Section 209 of the *Act* establishes an adjudicator's jurisdiction. Section 4 defines the parties in relation to collective bargaining as the employer and the bargaining agent. The employer is defined in s. 2 as the Treasury Board.

[299] In *Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN v. Treasury Board*, 2010 PSLRB 85 at paras. 57 to 59, it was determined that local ancillary documents were not found to be part of a collective agreement as the parties to the collective agreement had not agreed to incorporate them. As such, the employer's decision to rescind local agreements was not within an adjudicator's jurisdiction.

[300] It must be remembered that unlike in the private sector, in the original 1967 *Public Service Staff Relations Act* (R.S.C., 1985, c. P-35) and in later versions, Parliament decided to limit the categories of grievances that could be referred to adjudication.

[301] This distinction was commented upon by the first chief adjudicator of the Public Service Staff Relations Board, Harry Arthurs, in this manner in *Segodnia and Kunder v. Treasury Board (Department of National Revenue) (Customs and Excise)* Adjudication file No., 166-2-23 at p.2, as follows:

> *It is evident that Parliament could have given a broad mandate to adjudicators to hear and decide all matters which can be made the subject of grievances. Instead the legislation specifically limits adjudication to grievances*

> *involving either the administration of the collective agreement, or disciplinary action, although an employee has a right to grieve where his interests are affected whereby the interpretation or application of the provision of a statute, or a regulation, bylaw, direction or other instrument…. dealing with the terms and conditions of employment.*

[302] Since I have determined that the issue is not moot, and not caught by the *Burchill* limitation, I have jurisdiction to determine whether the MOA was incorporated into the collective agreement under article 8.

VI. Are the MOA and Course Relief incorporated into the collective agreement as past practices under the terms of article 8?

[303] To be considered a past practice under article 8, working conditions existing before the date on which the collective agreement is signed continue to apply provided that they are not inconsistent with the collective agreement; they are reasonable, certain, and known; they may be included in the agreement in accordance with the *Act*; and they are carried out in a fair and equitable manner.

[304] Were the terms and conditions of employment contained in the MOA and the practice with respect to course relief in existence before the date the collective agreement was signed, i.e., March 11, 2011? If so, do they meet the conditions set out in article 8 of the collective agreement?

Evidence of past practice with respect to the MOA and Course Relief

[305] Dr. Cowan and Dr. Graham entered into the MOA outside the 2007 round of bargaining.

[306] Dr. Sokolsky, the principal from the summer of 2008 until the summer of 2013, had seen the MOA when he was the Dean of Arts. He did not remember reviewing it when he was the principal. He was aware of its contents as he remembered discussing concepts relating to it at the Dean's Council when it was being developed.

[307] Dr. Sokolsky agreed with the policy at the time it was developed. He was well aware of its provisions and thought it was in RMC's best interests. As the Dean of Arts, the policy at that time was manageable. It did not impair his ability to deliver his programs to students.

[308] During his time as principal, he applied the MOA on two occasions. He signed two letters relating to the retirements of two UTs, in June and September of 2010. The texts of the retirement letters were identical, save for the dates and the addressees, which have been anonymized, and read as follows:

…

> *I am writing this letter to outline our agreement about your future pattern of work.*
>
> *The College agrees that you will continue with your regular duties until* [date]*. Commencing* [date] *you will proceed on a six month sabbatical until* [date]*. Upon your return from sabbatical in* [date] *you will be exempt of your teaching load while you perform research activities. The College further agrees to consider granting you a double increment for each of the three years prior to your retirement date.*
>
> *I acknowledge that you are scheduled to officially retire* [date] *and have signed the standard form to that effect. You are to exhaust all vacation leave in advance of your retirement.*

…

[309] The two letters provided for three things: double increments, sabbaticals, and course relief. What prompted them was that the faculty members approached him individually about retirement. Each requested the benefits outlined in the letters. In return, they signed irrevocable letters of retirement, stating the specific dates on which they would retire.

[310] Dr. Sokolsky was aware of the business conditions prevailing at the time and would have discussed the situation with the respective deans of the faculties of the two UTs to ensure that the retirement conditions would not impair delivering programs, as everything had to be balanced with the students' needs.

[311] By the time the two UTs came to his office to discuss retirement, the deans and the department heads concerned had expressed their agreement with the retirement plans. The discussions took place, and the forms were signed afterward. Dr. Sokolsky held the two letters until he received the retirement notices.

[312] To take a sabbatical, a UT had to be eligible for one under the terms of the collective agreement.

[313] A UT looking to retire in circumstances in which he or she wanted to complete research would request a sabbatical and no assigned teaching duties when he or she returned from sabbatical. Dr. Sokolsky needed to know in advance from the dean concerned that there would be no impairment to teaching if a sabbatical and course relief were granted.

[314] When a UT takes a sabbatical, the UT must return to work for the same length of time as the sabbatical, or else he or she must repay the Crown for the allowance (salary) paid during the sabbatical.

[315] UTs have three duties: teaching, research, and service. A UT could devote his or her entire time to research or be assigned to service duties on his or her return from a sabbatical. This policy allowed UTs to come back from sabbaticals to complete their research. The MOA only mentions double increments; it does not mention course relief. That came from Dr. Cowan's approach. Double increments were an incentive to maintain teaching standards.

[316] Dr. Sokolsky explained that at that time, in 2010, the policy was manageable within the RMC's budget. If a UT is not teaching, RMC has to hire other UTs to cover the UT's assignments as well as pay him or her.

[317] Dr. Sokolsky signed only the two letters. He could not recall whether any other UT requested these benefits subsequent to 2010. He stated that faculty members retired without making these arrangements, for unknown reasons. He identified three persons who had done so. The deal was not for everyone.

[318] On May 4, 2011, Dr. Sokolsky, while he was still the principal, prepared a draft paper entitled, "FACULTY SALARY DETERMINATION RE: PERFORMANCE REVIEW AND AWARDING OF INCREMENTS", which was noted as a draft only for discussion purposes. It represented his attempt to capture the practice of awarding increments for the UT group. The draft paper states at paragraph 10 as follows:

> *10. In 2007, the then Principal and the Faculty Association agreed that faculty members who had established a fixed retirement date and were within three years of that date "* [*sic*] shall *be evaluated overall as 'superior' provided that their performance in each of teaching, research and service, assessed separately, is satisfactory or better."*

[319] There is no mention of course relief in the paper.

[320] By the summer of 2011, RMC was in a difficult budgetary situation. Dr. Sokolsky told the deans of the faculties that he could not grant these benefits any longer as he could not justify doing so during a time of fiscal difficulty and could not defend doing so.

[321] There was no budget for hiring sessional teachers to cover course relief for UTs returning from sabbaticals.

[322] Sabbaticals were paid out of separate funds. He advised the deans not to bring him any recommendations for retirement done this way. He was focused on budgetary issues and money. Course relief costs money. Increments were not as big a hit to the budget. He did not recall talking to the bargaining agent at the time.

[323] WFA came in after 2011.

[324] In the summer of 2012, Dr. Sokolsky was called to a meeting at which he was advised that there would have to be permanent reductions to RMC's workforce, including faculty. Most of 2012 was spent reducing the workforce. One of the means of accomplishing reductions was to make offers to UTs to retire.

[325] The terms of the offers that were made under the WFA program were superior to the terms of the two letters signed in 2010. The two UTs who had submitted notices of retirement sought to revoke them. They were not permitted to as the notices were deemed irrevocable.

[326] During the WFA period, no UT asked Dr. Kowal for a letter similar to those signed in 2010.

[327] After the WFA program was completed, most of the UTs eligible for retirement had left RMC. There was no need to do anything to encourage retirement.

[328] Dr. Sokolsky believed he had the discretion as principal to stop granting course relief since he had the financial responsibility to, as course relief costs money.

[329] With respect to double increments, he assumed that they would carry on. He had undertaken to honour letters of understanding at the 11th hour in the 2011 round of bargaining. He agreed to continue the MOA for that round but not indefinitely. He did not believe that he was bound to continue the MOA at the next

round of bargaining.

Dr. Luu

[330] Dr. Luu acknowledged that when she became involved with Dr. Hurley's case in 2015, she was not completely sure about the past practice. She set out to verify it. She relied on Dr. Noël's indirect experience. He advised her that others had received the benefits. She stated that the direct evidence consisted of the two letters that Dr. Sokolsky had signed in 2010. On May 19, 2015, he had emailed her the retirement letters together with the draft document on performance review.

Dr. Noël

[331] Dr. Noël testified that he was familiar with these retirement arrangements. They came into being while the parties were in bargaining in 2007. The MOA was signed in 2007 and was included in the package. Presumably he was referring to the three part plan. He assumed that these arrangements started at that point. He explained that the bargaining agent very seldom gets involved in retirement arrangements as they are normally directly done by the bargaining unit member and the principal. It becomes involved only if problems arise or if a bargaining unit member is denied an arrangement. The bargaining agent's actions are complaint driven. In this case, Dr. Hurley asked Dr. Noël to assist him.

[332] The bargaining agent learned of the two letters signed by Dr. Kowal in 2010 only when the two UTs involved sought Dr. Noël as they were seeking to have the retirement letters rescinded because the WFA transition support program was offering much richer benefits than those provided in the letters. Dr. Noël was not involved in the discussions that led to these packages.

Dr. Kowal

[333] Dr. Kowal recalled that during the meeting with Dr. Hurley and Dr. Noël, Dr. Noël explained to him that the motivation for the MOA was to incent faculty members to take retirement. Dr. Kowal recalled saying that he did not want to incent anyone to retire and that the UTs should select their own retirement dates, in accordance with the collective agreement. He remembered telling Dr. Hurley that he valued his contribution to RMC and that he had no reason to incent him to retire earlier than he wanted to. Dr. Kowal was not aware that the MOA existed.

[334] Dr. Kowal believes in supporting faculty who wish to take sabbaticals that they are entitled to under the terms of the collective agreement because it is an investment in RMC and allows faculty to carry out research. A UT's duties are teaching, research, and service. The Treasury Board expects that a UT will return to all three aspects of his or her duties after a sabbatical.

[335] Course relief comes with a financial obligation to RMC, not to the Treasury Board.

[336] If a UT is not in the classroom, then RMC needs to hire a sessional teacher. The cost to RMC is between $7000 and $10 000 per course. If a UT scheduled to teach three courses is granted course relief, the institution has to bear the cost, approximately $30 000. Dr. Kowal's view was that the public should not have to pay for sessional hires because a UT has decided that he or she does not want to teach after returning from a sabbatical.

[337] RMC is constrained by salary/wage envelopes as well as by the number of full-time equivalents on staff. So are other organizations. Oversight is necessary to ensure that RMC is financially accountable.

[338] The authority to grant course relief is given to the department heads, the program chairs, and the associate deans on a case-by-case basis. Course relief has been granted in RMC's interests.

[339] Dr. Kowal was not convinced that there was a past practice with respect to granting course relief but qualified his response by acknowledging that he was not a labour relations expert. He was aware of only the two cases. He has not granted course relief in retirement situations since he became principal.

Dr. Bates

[340] Dr. Bates joined RMC in 1996. He worked as a UT there. He was the acting department head of chemical engineering and was the dean of engineering from 2010 to 2014. He described from his perspective RMC's practice with respect to course relief. He stated that a UT on sabbatical would have full course relief while on it.

[341] As the Vice-Principal academic, he reviews the teaching plan to ensure that everyone is teaching the correct number of courses. He presents the plan to the

principal.

[342] Article 13 of the collective agreement mandates that department heads are not to be required to teach more than the normal annual teaching workload of other UTs in their departments, less two one-term courses or equivalent. Those that hold a Canada Research Chair are provided with course relief.

[343] Course relief is granted on a case-by-case basis depending on the merits of the case and the resources available. For any course relief granted, RMC has to hire a sessional instructor to teach the course that the faculty UT is not teaching. RMC is limited to a certain number of full-time equivalents. If the institution has to hire a sessional instructor, it consumes money and those equivalents.

[344] Clause 13.01 of the collective agreement defines a teaching workload as being consistent with the normal average teaching workload of UTs in a given UT's academic department. In the Chemical Engineering Department, a normal average teaching workload is four courses.

[345] Clause 13.08 provides that despite clause 13.01, the teaching workload may vary materially from the normal average teaching workload due to two factors, the number of hours devoted to administrative duties and the level of productive scholarly activity. That clause also provides that a greater than normal involvement in scholarly activity may not result in a reduction in teaching workload unless such a reduction can be accommodated within the department's resources.

[346] Dr. Bates was aware of two cases that occurred in 2010 when he was the dean of engineering. He was copied on the two letters Dr. Sokolsky wrote that year. He identified the two faculty members who worked in his department. He was also familiar with them because during WFA, those two faculty members tried to rescind the retirement letters and attempted to take advantage of WFA benefits.

[347] Before becoming the dean, Dr. Bates was unaware of any other faculty members who had received the benefits described in the two letters. He stated that they were the only two people that he was aware of who had received this offer. He was not aware of anyone else who received it later on. As the dean, had there been such offers, he would have been copied on the correspondence.

[348] Not long after the letters were written in 2010, RMC went into WFA.

[349] Dr. Bates was not aware of anyone asking for these benefits under the MOA as well as sabbatical and course relief. He did not believe that retiring UTs being granted course relief subsequent to a sabbatical was generally known. He based that belief on discussions he had with colleagues in the Faculty of Science and Science Engineering. He was aware of three faculty members who before retiring did not receive any kind of course relief following a sabbatical. They retired before the WFA.

[350] Dr. Bates was shown a list of some 49 UTs who had retired, of which only the 2 to his knowledge had received course relief following a sabbatical. Other than five of them, three of whom who did not receive course relief following a sabbatical and the two who did, the rest of the names on the list retired as a part of the WFA program. He was not aware of any of them receiving course relief following a sabbatical.

[351] Nor was he aware of any UTs other than the two, who received double increments. He acknowledged that some might have received the benefit but he did not know whether this was the case.

[352] During cross-examination he acknowledged that he had direct knowledge of the terms of retirement of the two employees who received the benefits described in the 2010 letters from Dr. Sokolsky.

[353] He had partial knowledge of the terms of retirement of three other employees who did not get course relief although Dr. Bates did not know whether they received double increments. Two of the UTs did not ask for course relief and he did not believe the third requested course relief.

[354] He was aware of another employee who was in his department. He recalled that he had a sabbatical prior to retirement but he could not recall whether he received double increments.

[355] Dr. Bates confirmed that the list of retirees did not identify those UTs who had left because of the WFA program. The list did not identify those UTs who gave three years advance notice nor did the list identify those who left to take another job nor those employees who were terminated.

[356] He was asked in his experience how clause 13.08 has been applied. Since he has been the vice-president academic, it has been applied to five UTs who are Canada Research Chairs and who have been granted course relief. The Canada Research Chairs come with money; $70 000 is allocated against the Chair's salary.

[357] One other UT, who had been responsible for a huge research project, had been granted course relief. The project came with funding of approximately $5 million. One other person was granted course relief because he was providing services to the military.

[358] Funding is always an issue when granting course relief. These six UTs except one were provided with partial course relief. Even UTs performing significant administration duties are provided with partial course relief. For example, Dr. Bates was teaching at a 25% course load at the time of the hearing and a 50% course load the year before.

The bargaining agent's arguments re past practice

1. The "article 8" factors

[359] The first step in the analysis is whether a condition on double increments existed immediately before the collective agreement was signed.

[360] The two letters signed by then-principal Dr. Sokolsky from 2010 are on hand.

[361] Dr. Sokolsky stated that the three-part plan was created under Dr. Cowan. He agreed with the practice. He thought it was in RMC's best interests. Most importantly, he continued it. He described how the practice worked.

[362] In reviewing each of the enumerated factors, it is clear that a practice will not constitute a past practice if it is inconsistent with a collective agreement.

2. Whether a practice is inconsistent with the collective agreement?

a. The MOA

[363] Clearly, the MOA is not inconsistent with the collective agreement, and the employer agreed to honour the MOA as evidenced by Dr. Kowal's letter to Dr. Noël dated October 30, 2015, in which it is acknowledged that the MOA is deemed to be a term and condition protected by s. 107 of the *Act*.

b. Course relief

[364] Is the practice of granting course relief following a sabbatical during the three years before retirement inconsistent with the collective agreement?

[365] The only relevant provision is clause 13.08(b), which states that a UT can be granted course relief due to his or her level of productive scholarly activity. Dr. Sokolsky testified that that is the entire rationale behind course relief as part of the three-part plan as it allows UTs to complete research before retiring. There is no inconsistency with the collective agreement.

[366] Clause 13.08(b) states that course relief for scholarly activity will be subject to departmental resources. That is consistent with the past practice that Dr. Sokolsky described. In fact, Dr. Sokolsky testified that when RMC had limited resources during WFA, he did not grant the three-part plan, presumably because of a limited ability to hire replacement professors to cover for course relief when the mandate was to eliminate positions.

[367] The bargaining agent does not take the position that Dr. Kowal was obligated to give Dr. Hurley course relief under any circumstance and at any cost, regardless of the state of the department's resources.

[368] Instead, the bargaining agent stated that Dr. Kowal was obligated to do what Dr. Sokolsky did, namely, to sit down with Dr. Hurley, discuss a three-part plan, and investigate whether it could be done within departmental resources, in consultation with the department head. Perhaps the plan needed to be adjusted or delayed. He was also obligated to reach a verbal agreement and put it in writing so that Dr. Hurley would have some assurance of what would happen as he signed the irrevocable retirement form.

[369] Dr. Bates stated that in addition to administrative duties and scholarly activities, course relief could be granted on a case-by-case basis. That clearly is also consistent with Dr. Sokolsky's past practice.

3. Was the M0A and the three-part plan reasonable, certain, and known?

[370] This is the key factor in the case, and in the bargaining agent's view, it is the only one disputed.

[371] Dr. Sokolsky's evidence was that the practice, the three-part plan, was reasonable, certain, and known. He testified that he thought that it was reasonable and in the best interests of RMC and the faculty. A sabbatical and course relief allowed a UT to focus on completing research, which would benefit RMC as it was associated with the research. If the UT retired and never completed the research, it would be lost.

[372] The double increments were reasonable because they provided an incentive to faculty members to maintain their performance.

[373] Dr. Cowan thought the practice reasonable, as he initiated it.

[374] There is no question that the bargaining agent thinks that the practice is reasonable. From 2007 until Dr. Kowal became the principal in 2013, both parties were operating under the understanding that it was reasonable.

[375] It was an established practice at the time the collective agreement was entered into. It had been in place for a number of years. Dr. Sokolsky stated that a UT could be certain that he or she would receive the three-part plan, and the only exception was during the WFA period. He stated that after that, he would have had no reason not to continue the practice. He could not state a single time when a UT had asked for the three-part plan and he had denied it.

[376] The employer suggested that the practice might not have been so certain. It relied on the list of 49 UTs who retired between 2007 and 2013. In the bargaining agent's view, it is not a helpful document as it states nothing about who received the three-year plan and who did not, who gave three years' notice and who did not, who asked for the three-year plan and who did not, and who legitimately retired or left for other reasons, including death. Nor does it inform as to who was part of the WFA program.

[377] It is true that there is clear evidence only of two people receiving the three-part plan during the principal tenures of Drs. Sokolsky and Kowal, but the evidence is that those were the only two UTs that ever asked for it during that time, apart from Dr. Hurley. Both Dr. Sokolsky and Dr. Bates said that they were aware of only those two, and no one else who asked was denied.

[378] In addition to the two 2010 letters, Dr. Sokolsky stated that other UTs received the three-part plan under Dr. Cowan. He had direct knowledge from his time as dean

and because some of those UTs returned from sabbatical while he was the principal.

[379] Dr. Sokolsky stated that individual UTs approached him about the three-part plan. This could have happened only if the practice was known to the UTs.

[380] Dr. Sokolsky stated that he had to tell the deans that he was ending the three-part plan during the WFA program. He would have had to do that only if the practice was known to the deans.

[381] It is also known that the bargaining agent knew of the practice as Drs. Noël and Luu testified to that effect.

[382] Dr. Bates suggested that the practice was not known because he spoke to three people who told him that they did not know anything about it. Besides being complete hearsay, the evidence is not probative. Even if they did not know of the practice, it does not inform anyone about what other people might have known.

4. Could it have been included in the collective agreement in accordance with the *Act*?

[383] There is no reason to spend any time on this point as Dr. Kowal testified that as the principal, he had the authority to carry out each of the items in the three-part plan, as did Drs. Sokolsky and Cowan.

5. Was it carried out in a fair and equitable manner?

[384] Dr. Sokolsky testified that he believed the practice was fair and equitable. He also testified that the practice stopped with the WFA program implementation. That does not mean that there was no longer an established past practice. It was simply a reflection of the need to properly consider exceptional circumstances when department resources were inadequate, which is reflected in article 13 of the collective agreement.

[385] If there were no exceptional financial circumstances and Dr. Sokolsky just ended the practice, then he was not legally permitted to. He testified that he never informed the bargaining agent about stopping the practice. It cannot be said that the bargaining agent somehow consented to that or waived an objection.

[386] Dr. Noël testified that the bargaining agent did not know about Dr. Sokolsky ending the practice. It was done during WFA, and the WFA packages were better than

the three-part plan. In the circumstances, why would the bargaining agent have suspected that there was a problem with no UTs obtaining the benefits of the three-part plan?

[387] The employer cannot establish a practice, secretly and unilaterally stop it, and then say that it no longer exists. Doing so would completely frustrate the entire concept of article 8.

The employer's arguments re past practice

1. Neither the MOA nor a three-part plan can be considered a past practice

[388] The evidence must be examined against the conditions set out in article 8 of the collective agreement to determine whether the application of the MOA can be considered a past practice (and, if the *Burchill* objection fails, whether a three-part plan or sabbatical followed by course relief can also be considered past practice).

2. The case law

a. Basic principles of collective agreement interpretation

[389] Palmer and Snyder, in *Collective Agreement Arbitration in Canada*, sections 2.10 to 2.26, state that the basic principles of collective agreement interpretation are that words are to be given their ordinary meaning, collective agreements are to be read as a whole, and each word should be given some meaning, to avoid redundancy; see *Chafe v. Treasury Board (Department of Fisheries and Oceans)*, 2010 PSLRB 112 at paras. 50 and 51.

b. Past practice

[390] Brown and Beatty, in *Canadian Labour Arbitration*, state as follows at paragraph 2:2221, entitled "Estoppel - Past practice": "… the doctrine [of past practice] has been held not to apply where the evidence failed to establish the practice with clarity …".

[391] At paragraph 3:4430, entitled "Extrinsic Evidence - Past practice", they discuss it again. A past practice cannot conflict with the clear meaning of the collective agreement. The requirements to establish a past practice include the following. When a party is unaware of the practice, it cannot be relied upon. One or two occurrences will not normally constitute a sufficient practice to be reliable. And when arbitrators have relied upon a past practice, it typically was a uniform practice over a number of years.

[392] See the following case law: *John Bertram & Sons Co. v. International Association of Machinists, Local 1740* (1967), 18 L.A.C. 362 at para. 13 (a test — four requirements for a past practice to exist); *Canada (Attorney General) v. Lamothe*, 2008 FC 411 at paras. 40, 45, and 74 (that a mere assertion by one person referring only to a single case is not sufficient evidence of a past practice); and *Board of School Trustees of School District No. 36 (Surrey) v. Canadian Union of Public Employees, Local 728*, [1982] B.C.C.A.A.A. No. 181 (QL) at para. 50 (a few examples do not prove a practice, which involves more than one, two, or three repetitions).

3. Application to article 8

[393] The case law on general collective agreement interpretation principles states that the collective agreement must be read as a whole and that each word should be given some meaning, to avoid redundancy.

[394] In this case, in interpreting article 8, one must take into account that sabbaticals are covered under article 18, and course relief is covered under article 13. The collective agreement must be read as a whole. The premise of article 8 is in circumstances "[w]here this Agreement is silent on working conditions …". In this case, the collective agreement is not silent on them.

[395] One must look at each condition in article 8. A past practice must meet each part of the following test:

- the conditions of the practice must not be inconsistent with the agreement;

- the conditions must be reasonable, certain, and known;

- they may be included in the collective agreement in accordance with the *Act*; and

- they are carried out in a fair and equitable manner.

a. Course relief and Sabbaticals: the conditions must not be inconsistent with the collective agreement

[396] If granting course relief was automatic for retiring UTs, it would not allow management the discretion afforded by the collective agreement to determine whether resources are available to accommodate the course relief. Not only would this violate

the collective agreement, but also, it would be unfair to other UTs (going to the "fair and equitable" part of the test) and would strain both financial and human resources.

[397] Dr. Sokolsky testified that sabbaticals and course relief had to be applied case by case. He assumed that the departments had already approved and accommodated the cases that had come to him. He agreed that it was possible that some requests never came to him because they could not be accommodated.

[398] So if, in reality, course relief was consistent with the other provisions of the collective agreement, then it was not a separate past practice; it just followed the other articles already in the collective agreement. And if the bargaining agent argued that course relief should be automatic, then that would clearly be inconsistent with the collective agreement.

b. Course relief and sabbaticals: Were the practices reasonable, certain, and known and carried out in a fair and equitable manner?

[399] The case law on past practices described earlier is helpful for interpreting the meaning of the words "reasonable, certain and known". The employer submitted that they mean that a past practice must be consistent (How can something be certain and known if it is not consistently practised over a long period? How can something be certain if it occurred only twice?). As the case law notes, one or two examples do not prove a past practice.

[400] In terms of being certain and known, the same evidence applies; two instances do not make a past practice. Dr. Bates testified that he knew three UTs (whom he was able to name) who retired during the relevant time, not under WFA, who did not receive either a sabbatical or course relief, and two of them did not even know they could have.

[401] Only two UTs asked Dr. Sokolsky for the three-part plan, and he knew at least three others who did not ask for it. This suggests that the practice was not known; otherwise, would not many of the other UTs who retired during this time frame have asked for it? While Dr. Sokolsky testified that maybe the plan was not for everyone, it stands to reason that had it been more well known, many others would have asked for it, as objectively, it seems like an attractive deal. There was not even an MOA on it, like there was for the increments, which made it even less certain and known.

[402] With respect to certainty, Dr. Sokolsky confirmed that the three-part plan was approved on a case-by-case basis, depending on whether resources could support a sabbatical followed by full course relief. He said he would have had to consider departmental resources and the impact on students. So again, the practice was not certain.

[403] The bargaining agent's two witnesses, Drs. Luu and Noël, also did not know of any examples of UTs who had obtained sabbaticals followed by course relief, except for the two who did under Dr. Sokolsky in 2010. They testified that they learned about these two cases only after the fact, when they tried to undo their plans during WFA and the "Deficit Reduction Action Plan" (DRAP), which was after the collective agreement was signed. Dr. Luu said that she had to confirm with Dr. Noël if the three-part plan was a past practice, since even though she had heard about it (although only through these two examples), she had to confirm with someone who had been there longer as to whether it was a past practice.

[404] Dr. Noël knew only of these two examples. He testified that Dr. Hurley was the first UT to approach him for retirement plan advice. Dr. Noël had been involved with the bargaining agent for several years, including in the years before the 2011 collective agreement was signed.

[405] The bargaining agent's evidence does not confirm that this was a known and certain practice.

[406] In terms of whether the practice was reasonable, Dr. Kowal and Dr. Bates explained why it was not.

[407] It is not fair to ask RMC and the taxpayer to pay for full course relief for retiring UTs just after they have been on a sabbatical. The purpose of a sabbatical is to finish research. If a UT needs more time, he or she should take a longer sabbatical. It costs significant money to hire sessional professors to cover courses that cannot be taught when a UT is not teaching (and of course, it is not fair to ask other UTs to pick up the slack).

[408] It is not fair to other UTs who are not retiring and who are still expected to teach on return from a sabbatical. In general, under article 13, UTs are expected to be able to carry a course load and conduct research at the same time. There is no

justification to grant full course relief to a UT who is returning from sabbatical just because he or she may retire soon.

[409] Dr. Bates also testified that it is very rare for someone to obtain full course relief, and he named some truly exceptional circumstances (which also came with significant funding to compensate). In most cases, even UTs with significant administrative duties, such as vice presidents, are still expected to teach.

[410] Dr. Bates also explained how the knowledge gained from conducting research during a sabbatical is not transmitted to the classroom if the UT does not return to teaching. A benefit to students is lost.

[411] The employer submitted that the bargaining agent did not establish that the MOA or sabbatical followed by course relief met the conditions of a past practice in the period immediately before the collective agreement was signed in March 2011.

c. The MOA: was it reasonable, certain, and known, and carried out in a fair and equitable manner?

[412] With respect to whether the application of the MOA was certain and known, there was clear evidence of it being applied only twice in the period immediately preceding the collective agreement's signing (Dr. Sokolsky's two letters). Dr. Sokolsky testified that only two UTs asked him for it. He knew of at least three others who retired while he was principal who did not ask for it.

[413] While Dr. Sokolsky said that he knew of others who had received it under his predecessor, Dr. Cowan, this evidence is vague and had no specifics. Nothing is known about the conditions under which those UTs might have received double increments. This evidence is not reliable.

[414] The list of retirees shows that many more than two UTs retired immediately before the collective agreement was signed, and there is no certainty with respect to whether the MOA was applied to them (again, under Dr. Sokolsky, only two UTs asked for it).

[415] One strong inference from this evidence is that UTs did not know about it.

[416] Dr. Sokolsky testified that shortly after the MOA was "renewed" during bargaining, he put an end to it due to financial constraints (WFA and the DRAP).

He testified that he was not sure whether he would have continued it after the financial constraints had been resolved. The evidence from Dr. Bates and Dr. Kowal was clear that the MOA did not continue, as evidenced by the lack of UTs who asked for or received it.

[417] Dr. Bates testified that he became aware of the MOA only once he became a dean. He had not heard about it when he was just a UT, and the only two cases he was aware of were the same two referenced in Dr. Sokolsky's letters. Again, this is evidence that it was not certain or known.

[418] In terms of reasonability and of whether the application of the MOA was carried out in a fair and equitable manner, Dr. Kowal testified about how he felt that it was unreasonable and unfair to UTs who were not retiring or who were retiring under different conditions or at a different age. The mental decline argument does not make sense for all retirees and could even be viewed as discriminatory towards older UTs.

[419] Dr. Kowal and Dr. Bates felt that it gave retiring UTs an unfair advantage. They had only to do the bare minimum, and they would receive a higher performance rating. Dr. Kowal raised the following point: how could a UT receive a "superior" rating if he or she was on sabbatical and not even teaching? Given that there is a 40% quota for salary increments, it would have been unfair to assign a large part of it automatically to retiring UTs just because they were retiring. That would have been unfair to other UTs who would have had to work even harder to obtain a higher rating and a piece of the diminished 40% quota.

[420] In terms of fairness and equitability, and given that it was applied for certain only to two retiring UTs, clearly, it was not applied fairly and equitably.

[421] The employer submitted that given the evidence, the application of the MOA was not reasonable, certain, and known and was not carried out in a fair and equitable manner. As such, it cannot be considered a past practice under article 8 of the collective agreement.

Analysis re the Past Practice Issue

[422] Article 8 of the collective agreement provides as follows:

> ***8.01*** *Where this Agreement is silent on working conditions, the conditions existing immediately before the*

> *date of this Agreement shall continue to apply provided that:*
>
> *(a) they are not inconsistent with the Agreement*
>
> *(b) they are reasonable, certain and known;*
>
> *(c) they may be included in this Agreement in accordance with the* Public Service Labour Relations Act*;*
>
> *and*
>
> *(d) they are carried out in a fair and equitable manner.*
>
> ***8.02*** *The onus of establishing an existing practice within the meaning of 8.01 shall rest on the party who alleges the existence of same.*

A. <u>Course relief</u>

[423] At the commencement of the hearing, I understood the bargaining agent's position to be that Dr. Hurley was entitled to, and RMC was obligated to provide, the benefit of the three-part plan as outlined in Dr. Sokolsky's 2010 letters, namely, double increments, sabbaticals, and course relief, in accordance with article 8 of the collective agreement.

[424] In final argument, the bargaining agent took the position that it was not saying that RMC was obligated to give Dr. Hurley course relief under any circumstances, at any cost, regardless of the state of departmental resources. Its position was that Dr. Kowal was obligated to sit down with Dr. Hurley to discuss a three-part plan and investigate whether it could be done within departmental resources, in consultation with the department head. Dr. Kowal was also obligated to reach a verbal agreement with Dr. Hurley and to put it in writing so that Dr. Hurley would have some assurance of what would happen before he signed an irrevocable retirement form.

[425] The employer argued that the issues in the grievance had shifted once again and that the bargaining agent's position ran afoul of the *Burchill* principle. The bargaining agent was now saying that the past practice with respect to course relief was about the process and that the Principal was obligated to meet with Dr. Hurley to discuss his retirement plans. This was not raised during the grievance process.

[426] In response, the bargaining agent stated that it was not saying that course relief was just about process. There was a substantive right to the three-part plan; however,

it was not unlimited. Exceptional circumstances might arise, such as the WFA program.

[427] The employer did not have an opportunity to consider the bargaining agent's position, which was that there was a limited obligation on the employer to grant course relief, including a procedural obligation on the Principal to meet with Dr. Hurley to discuss his retirement plans, during the grievance process or to adduce evidence on or to make submissions with respect to the bargaining agent's position at adjudication.

[428] I clearly do not have jurisdiction to deal with this issue as it was raised for the first time in final argument before me, which clearly offends the *Burchill* principle.

[429] I will confine my analysis of course relief with respect the position the bargaining agent articulated at the beginning of the case, which was that granting it following a sabbatical was an unqualified obligation of the Principal and an entitlement of the retiring UT. This issue was the subject of evidence.

[430] Is the collective agreement silent with respect to course relief?

[431] Article 13 of the collective agreement deals with the distribution of the teaching workload. Clause 13.01 provides that a UT's teaching workload is to be consistent with the normal average teaching workload of the UT's department and that teaching duties in excess of the workload are considered overload. Clause 13.08 deals with circumstances in which the normal average teaching workload may be varied. The collective agreement is not silent with respect to course relief. Although I could conclude the issue of course relief at this point, I will continue with the analysis.

[432] Is the entitlement to course relief to a UT returning from sabbatical inconsistent with the collective agreement?

[433] In my view, such an unqualified entitlement would be contrary to clause 13.08(b), which states that course relief will be granted only if reducing the teaching workload can be accommodated within departmental resources.

[434] Is the entitlement to course relief to a UT returning from sabbatical reasonable?

[435] In my view, the parties have already addressed this issue in the collective agreement as they have provided that course relief will be granted only if it can be accommodated within departmental resources.

[436] Therefore, I conclude that course relief is not a past practice in accordance with article 8 of the collective agreement and is not incorporated into the collective agreement.

B. <u>The MOA double increments</u>

[437] The MOA was entered into as a local agreement between Dr. Cowan and Dr. Graham in conjunction with the 2007 round of collective bargaining. It was not entered into or approved by the Treasury Board, the employer in law and under the provisions of the *Act*, and was not part of the collective agreement.

[438] At the conclusion of the 2011 round of bargaining, Dr. Sokolsky, as the principal, verbally undertook to honour memorandums of agreement that had not been addressed in bargaining. The MOA was not considered individually but was one of the agreements he undertook to honour. The Treasury Board was not a party to this undertaking.

[439] Dr. Sokolsky stated that it was unclear what would have happened had he remained principal. He did not believe that he was bound to continue the MOA at the next round of bargaining. He agreed to continue it for that round but not indefinitely.

[440] The collective agreement expired on June 30, 2014. Notice to bargain was given in February 2014.

[441] In October 2015, Dr. Kowal agreed to abide by the terms of the MOA as the Treasury Board had deemed it a term and condition of employment continued in force pursuant to s. 107 of the *Act*. As noted, the Treasury Board's recognition did not mean that the MOA was part of the collective agreement. If the MOA is not part of the collective agreement or incorporated into it, then an adjudicator does not have jurisdiction under the *Act* to hear a grievance with respect to the MOA or to grant corrective relief.

[442] Is the MOA or double increment benefit incorporated into the collective agreement under the provisions of article 8? As noted, the onus of establishing that the MOA was a past practice under article 8 was on the bargaining agent.

[443] To repeat, to be considered a past practice, working conditions existing as of the date on which the collective agreement was signed, i.e. March 11, 2011, continue to

apply provided the agreement is silent with respect to the working conditions, they are not inconsistent with the agreement, they are reasonable, certain, known, and they are carried out in a fair and equitable manner.

[444] The MOA is a written document. Drs. Cowan and Graham signed it. It states that it is in effect as of July 1, 2007. It is addressed to "Deans and Heads". Its operative words are set out at paragraph 5, as follows:

> *5. Given the realization that maintaining high performance in the three years prior to retirement requires extra effort, faculty members who have already executed the forms which establish a retirement date and who are within three years of that date shall be evaluated overall as "superior", provided that their performance in each of teaching, research and service, assessed separately, is satisfactory or better.*

Is the Collective Agreement silent with respect to the evaluation of the performance of UTs in the three years before they retire? Are the working conditions provided in the MOA inconsistent with the collective agreement?

[445] I did not understand the employer to take the position that the collective agreement contains provisions dealing with the evaluation of the performance of UTs in the three years before they retire or that the MOA was inconsistent with the collective agreement.

[446] Clause 40.01 of the collective agreement provides that the terms and conditions governing the application of pay to UTs are not affected by the collective agreement. Those terms and conditions are set out in the Treasury Board manual that the parties agree does not form part of the collective agreement. As the collective agreement does not contain provisions dealing with those terms and conditions, then clearly, the MOA is not inconsistent with the collective agreement. In that sense, the collective agreement is silent with respect to those terms and conditions.

Was the MOA certain, known, and reasonable?

Was it certain?

[447] Unlike course relief, the MOA is in writing. Its terms are clear.

[448] Before the summer of 2008, while he was Dean of Arts and while Dr. Cowan was the principal, Dr. Sokolsky was aware of some UTs who had reached an agreement of this nature with Dr. Cowan.

[449] As principal of RMC from the summer of 2008 until the summer of 2013, he granted double increments on two occasions, in June and September of 2010 to two UTs who had approached him individually. The collective agreement was signed some months thereafter in March 2011.

[450] By the time the two UTs came to his office to discuss retirement the deans and the Department heads concerned had expressed their agreement with the retirement plans. Dr. Sokolsky stated that some three faculty members retired without making these arrangements for unknown reasons. The deal was not for everyone.

[451] In May 2011 Dr. Sokolsky prepared a draft paper entitled "Faculty Salary Determination Re-Performance Review and Awarding of Increments," which represented his attempt as the principal, to capture the practice of awarding increments for the UT group.

[452] There is express reference to the 2007 MOA being a practice as of the date of the paper, which is subsequent in time to the signing of the collective agreement on March 11, 2011.

[453] I conclude therefore that on a balance of probabilities it is more likely than not in or about the time frame prior to March 11, 2011 that if a UT had sought the benefits of the MOA from Dr. Sokolsky it would have been granted and at that point in time the benefit was certain had a UT sought this arrangement.

Events subsequent to March 11, 2011

[454] In or about the summer of 2011, RMC was in a difficult budgetary situation. Dr. Sokolsky told the deans of the faculties that he could not grant these benefits any longer (both course relief and double increments), as he could not justify doing so during the time of fiscal difficulty and he could not defend doing so.

[455] When WFA came in 2012, RMC was required to permanently reduce its faculty. This was achieved by incenting UTs to retire. The benefits offered were much superior to those contained in the two retirement letters that Dr. Sokolsky signed in 2010, such that the two UTs sought to rescind their retirement notices.

[456] During the WFA period, no UT asked Dr. Sokolsky for a letter similar to those he had signed in 2010. No UT was granted double increments after that until Dr. Kowal

agreed to honour the MOA based on the fact that the Treasury Board had advised him that it was caught by the statutory freeze period.

[457] The events described in evidence subsequent to the signing of the collective agreement in my view do not assist in the analysis of whether the practice existed immediately before the date of the signing of the collective agreement.

2. Was it known?

[458] As noted the MOA was signed by Dr. Graham, the then President of the bargaining agent, and Dr. Cowan effective July 2007.

[459] It was discussed at the Dean's Council while it was being developed.

[460] Dr. Sokolsky recalled that it was applied to some UTs while Dr. Cowan was principal prior to Dr. Sokolsky's appointment as principal in the summer of 2008.

[461] As noted, Dr. Sokolsky applied the MOA on two occasions in June and September 2010. The deans and Department heads, including Dr. Bates, reviewed and agreed with the retirement plan(s).

[462] The two individual UTs approached Dr. Sokolsky about giving notice of retirement and seeking the benefits set out in the MOA.

[463] Dr. Sokolsky in May 2011, in his paper "Faculty Salary Determination Re: Performance Review and Awarding of Increments" referred to the MOA as an existing practice. The document is noted to be a draft. The opening lines state: "N.B. This draft is for discussion purposes only. It represents an attempt to capture 'past practice' in the awarding of increments for the UT group. It is not a policy document."

[464] Although there was no direct evidence on point a reasonable inference is that Dr. Sokolsky's paper was discussed with deans and Department heads.

[465] Of significance to this case, Dr. Hurley had heard of the protocol whereby if a UT gave as much notice of retirement as possible he would be entitled to certain benefits. This led him to speak with Dr. Luu and Dr. Noël.

[466] Before becoming Dean of Engineering in 2010, Dr. Bates as a UT was unaware of any other faculty members who had received the benefits described in the two letters. He was aware of the two cases that occurred in 2010 because he was copied on the letters as he was Dean of Engineering. He was not aware of anyone else who received the offer after that.

[467] He identified a list of some 49 UTs who had retired, of whom only the two to his knowledge had received double increments, although he acknowledged that some might have. He did not believe that faculty members generally knew about these benefits being available to retiring UTs.

[468] I understand the list of 49 UTs covers the period from May 2007 until May 2013. Although the term retirement is used to describe the reason for termination I understand retirement was used to describe any UT who ceased employment from RMC for whatever reason, including resignation or termination. The list did not identify those UTs who had given three years notice of retirement. The list did not identify those UTs who were subject to the WFA program. The list did not identify those who benefited from the MOA, course relief or sabbaticals. In reviewing the list of retirees Dr. Bates, although certain that three UTs did not receive course relief, was not certain that they did not receive double increments.

[469] Dr. Noël, the bargaining agent's president since July 2008, assumed that the arrangements came into being after the conclusion of collective bargaining in 2007. He explained that the bargaining agent very seldom becomes involved in retirement arrangements as they are normally done directly by the bargaining unit member and the principal. It becomes involved only if problems arise or if a bargaining unit member is denied an arrangement. Its actions are complaint driven.

[470] The bargaining agent learned of the two letters signed by Dr. Kowal in 2010 when the two UTs involved met with Dr. Noël, as they sought to rescind them. He was not involved in the discussions that led to them receiving the three-part plan.

[471] Based primarily on the evidence of Dr. Sokolsky. the principal of RMC at the material time, I am persuaded on a balance of probabilities it is more likely than not that it was known that double increments were available to retirees who gave the appropriate notice. The relevant period is from July 2007 when the MOA took effect until the period prior to March 2011 when the collective agreement was signed.

[472] Although there are only two concrete examples, they happen to have occurred in the relevant period immediately before the signing of the collective agreement. Clearly, those two faculty members were aware of the benefit. Their deans and Department heads who approved the retirement arrangements were aware of the benefit. The principal who agreed to confer the benefit was clearly aware of the benefit and confirmed shortly after the renewal of the collective agreement that it was an existing practice. The bargaining agent who was the other party to the MOA even though it seldom became involved in retirement arrangements was aware of the practice.

[473] There is evidence that Dr. Cowan granted the benefit to several UTs between July 1, 2007, and the summer of 2008 when Dr. Sokolsky became principal, although the individual UTs were not identified. Clearly these UTs were aware of the benefit.

[474] Dr. Hurley was aware generally of the protocol.

Events subsequent to March 11, 2011

[475] Shortly after the renewal of the collective agreement in March 2011 due to budgetary constraints, Dr. Sokolsky advised the deans and Department heads that he would no longer approve any retirement packages containing course relief and double increments.

[476] In 2012, under the WFA, UTs were incented to retire with benefits far superior to those in the MOA. The practice obviously changed.

[477] There is no evidence that the practice of granting double increments was resumed after the WFA program ended.

[478] The events that occurred subsequent to March 11, 2011, do not assist me in resolving the issue of whether the arrangements described in the MOA were known at the material time.

3. Was it reasonable?

[479] Dr. Sokolsky agreed with the MOA at the time it was developed in consultation with the Dean's Council. He was well aware of its provisions and thought it was in RMC's best interests. As Dean of Arts, at that time, the MOA did not impair his ability to deliver his program to students. Granting double increments was an incentive to

maintain teaching standards at the time.

[480] The MOA was developed in consultation with the Dean's Council. It was designed to reduce the workforce. Many institutions have instituted enhanced buyouts or incentives to incent employees to retire in similar situations. This appears to me to have been reasonable at the time especially based on subsequent events necessitating the downsizing of the workforce.

[481] In Dr. Sokolsky's opinion, as principal, in 2010, the MOA was manageable within RMC's budget immediately before the renewal of the collective agreement. He signed the two letters granting the benefit.

[482] Based on this evidence, I conclude that the double increments benefit was reasonable at the material time immediately before the signing of the collective agreement on March 11, 2011.

Events subsequent to March 2011

[483] By the summer of 2011, the RMC was in a difficult budgetary situation. Dr. Sokolsky told the deans of the faculties he could not grant these benefits any longer as he could not justify them during a time of fiscal difficulty and could not defend them.

[484] In the summer of 2012, Dr. Sokolsky was involved in reducing the workforce via making retirement offers to UTs under the WFA program. The terms under the WFA program were better than those set out in the MOA. After the WFA program completed, most UTs eligible for retirement had left RMC. There was no need to do anything to encourage retirements.

[485] Dr. Kowal testified that Dr. Noël had advised him at the April 2015 meeting that the purpose of the MOA was to incent UTs to retire. Dr. Kowal stated that in his view, he did not want to incent any UT to retire. In fact, RMC was seeking to hire new UTs. I heard evidence that the purpose of the MOA was both to incent UTs to retire and to maintain teaching performance during the last three years before retirement. I also heard evidence that in 2012, RMC was required to reduce its faculty significantly, which was accomplished by offering enhanced retirement packages to its UTs.

[486] However, the events that occurred subsequent to March 11, 2011, are not of assistance in resolving the question before me, which is whether the practice immediately before the signing of the collective agreement was reasonable.

4. Whether the MOA may be included in the collective agreement in accordance with the PSLRA

[487] The employer did not take the position that the terms of the MOA may not be included in a collective agreement because the terms of the MOA were not compliant with the provisions of the *Act*.

5. Was it carried out in a fair and equitable manner?

[488] The last condition that must be satisfied is whether the practice was carried out in a fair and equitable manner.

[489] Dr. Sokolsky testified that he agreed with the terms of the MOA at the time it was developed in 2007 and that he thought it was in RMC's best interests. Dr. Cowan, the principal, developed it in conjunction with the deans. The bargaining agent had sought this benefit and clearly had agreed with it. Dr. Sokolsky stated that had the bargaining agent thought the MOA was inequitable, it would have raised that issue with him.

[490] Dr. Kowal felt that the practice was unfair to UTs who were not retiring or who retired at a different age. Both Dr. Kowal and Dr. Bates believed that the practice gave retiring UTs an unfair advantage as they had to perform only at a satisfactory level yet received a higher performance rating, which included double increments. It was unfair to other UTs given the 40% quota for "superior" performance assessments.

[491] The bargaining agent has the duty of the fair representation of its members and the obligation to reconcile competing interests among the bargaining unit members. Given Dr. Sokolsky's evidence, I am satisfied that at the time the parties entered into the MOA and up to the signing of the collective agreement on March 11, it was carried out in a fair and equitable manner. I am satisfied that during this time, there was a need to incent UTs approaching retirement age to retire and to incent those approaching retirement age to maintain their performance. This is borne out by the fact that a significant number of UTs were approaching retirement age as borne out by the need to downsize the number of faculty.

[492] In summary, as a grievance adjudicator, I do not have jurisdiction to hear and determine a grievance relating to course relief as that issue was not raised in the grievance or discussed during the grievance process. However, *in obiter*, it is readily apparent that an unqualified entitlement to course relief following a sabbatical is inconsistent with the provisions of article 13 of the collective agreement.

[493] With respect to the MOA, I have concluded that the bargaining agent has met its onus of establishing on a balance of probabilities that all the requirements recited in article 8 of the collective agreement to incorporate the MOA into the collective agreement have been satisfied.

[494] Given this conclusion, I must determine whether Dr. Hurley's grievance is premature.

Is the grievance premature?

[495] The employer argues that Dr. Hurley is not yet aggrieved because he has not completed the forms establishing a retirement date. Consequently, his grievance is premature.

[496] The bargaining agent states that the process operates differently. The parties meet and discuss a proposed retirement plan and agree on terms. Only then does the employee sign a retirement form because once the form has been signed it is irrevocable.

The evidence

[497] Dr. Sokolsky described the process that he followed in the two instances in 2010. The individual faculty members approached him to discuss their retirement. They met. The individual would ask for the benefits if they signed an irrevocable letter of retirement with a fixed retirement date.

[498] Dr. Sokolsky prepared a letter outlining their understanding with respect to the benefits and confirmed that the UT was scheduled to officially retire on a date certain and had signed the standard form to that effect. He held the letter until he had received the notice of retirement from the UT.

[499] In the circumstances of this case, the letter from Dr. Luu dated April 21, 2016, after the grievance was referred to adjudication confirms that at that time Dr. Hurley's retirement date is still not set. The bargaining agent offered several options for retirement dates and stated that they were flexible depending on the circumstances.

[500] Dr. Kowal identified a form entitled notice of resignation/retirement. The first part is filled out by the member. It is not official until it is accepted by management, someone who has authority to accept it. This form was in place in 2015. In addition the retirement process is covered by article 38 of the collective agreement.

[501] Dr. Kowal testified that on October 30, 2015 he sent a letter to Dr. Noël confirming that he would uphold the terms of the MOA until a new collective agreement was signed.

[502] Since that time two faculty members had come to him with a notice of resignation/retirement referencing the MOA. At the last pay increments meeting, the two UTs were awarded double increments. Dr. Kowal accepted their retirement letters as the two UTs met the criteria of the MOA.

[503] Article 38 of the collective agreement provides as follows:

> ***38.01*** *Except in extenuating circumstances, UTs shall give at least four (4) months notice of retirement or resignation and shall select a retirement or resignation date falling:*
>
> *(a)* *between the end of the winter term supplemental examinations and the start of fall term,*
>
> *or*
>
> *(b)* *between the due date for fall term marks and the end of the week in which the last fall supplemental exam is held.*

[504] Dr. Kowal explained that article 38 requires a minimum notice period of retirement. The document needs to be signed. It is not official unless signed. It triggers the retirement process.

[505] Dr. Hurley testified that as of the date of his testimony his retirement date was not set in stone and that he had not executed the retirement forms.

[506] Dr. Kowal confirmed that as of the date of the hearing Dr. Hurley had not as yet submitted a retirement form nor had he accepted such a retirement form.

Argument of the bargaining agent

[507] The employer says this grievance is premature because Dr. Hurley has not yet signed his retirement forms. It says he cannot get the MOA terms or any of the three-part plan until he signs his retirement forms.

[508] In response, the bargaining agent submitted that is not what the practice is. The practice is that the UT and the principal agree verbally on terms of the retirement plan, then the principal puts it in writing, and then the UT signs the irrevocable retirement papers.

Argument of the employer

[509] The reason Dr. Hurley did not submit the retirement form after Dr. Kowal confirmed to Dr. Noël in October 2015 that he would honour the terms of the MOA was that he was seeking additional benefits including course relief. There was no need after October 2015 for a detailed conversation between Dr. Hurley and Dr. Kowal. All Dr. Hurley had to do was to submit the retirement forms and he would have been entitled to the benefits of the MOA.

Analysis

[510] As I have concluded that the MOA has been incorporated into the collective agreement it follows that the arbitral rules concerning the interpretation of provisions of the collective agreement apply to the interpretation of the MOA.

[511] As noted previously the operative provision of the MOA is paragraph 5. It reads as follows:

> *Given the realization that maintaining high performance in the three years prior to retirement requires extra effort,* ***faculty members who have already executed the forms which establish a retirement date*** *and who are within three years of that date shall be evaluated overall as "superior", provided that their performance in each of teaching, research and service, assessed separately, is satisfactory or better.*

[Emphasis added]

[512] In this case, the bargaining agent argues that the employer's position that Dr. Hurley cannot obtain the benefit of double increments until he signs the retirement forms is in error because this is not the past practice.

[513] The basic rule in grievance arbitration is that collective agreements are to be interpreted without resort to "extrinsic evidence" unless the agreement is ambiguous.

[514] Extrinsic evidence is evidence that is outside the collective agreement itself such as past practice and negotiating history. Arbitrators generally are not justified in relying upon extrinsic evidence unless the collective agreement is ambiguous. (See Palmer and Snyder, *Collective Agreement Arbitration in Canada*, fifth edition, at paragraph 2.51.)

[515] It was not argued nor do I find any ambiguity in the following wording of the MOA: "faculty members who have already executed the forms which establish a retirement date". It is clear and unambiguous. It is a condition precedent agreed upon by the parties that must be fulfilled in order to be entitled to the benefit of a superior evaluation, assuming the other criteria are met.

[516] In my view, this is not a question of whether the grievance is premature but rather whether a condition precedent to the granting of the entitlement has been satisfied.

[517] Dr. Hurley and his bargaining agent were advised by Dr. Kowal in October 2015 that he would honour the terms of the MOA until the conclusion of a new collective agreement. All Dr. Hurley had to do was to execute the retirement form to receive the benefit. Other employees since that time have done so.

[518] Accordingly, I dismiss the grievance because the condition precedent to the granting of double increments has not been fulfilled.

[519] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

VII. Order

[520] The grievance as it pertains to course relief is dismissed for lack of jurisdiction.

[521] I declare the MOA effective July 7, 2007, constitutes a past practice, which is incorporated into the 2011 collective agreement under article 8.

[522] The grievance as it pertains to the MOA is dismissed as the condition precedent to the entitlement of double increments, namely the execution of the retirement form, has not been fulfilled.

April 26, 2018.

David Olsen,
a panel of the Federal Public Sector Labour Relations and Employment Board