IN THE MATTER OF AN ARBITRATION

BETWEEN:

THE MINISTER OF HUMAN RESOURCES
(GOVERNMENT OF THE NORTHWEST TERRITORIES)

Employer

-and-

THE UNION OF NORTHERN WORKERS

Union

POLICY GRIEVANCE RE: LEAVE FOR ELECTED OFFICERS
GRIEVANCE NO. 13-P-01594

AWARD

BEFORE:	TOM JOLLIFFE, Q.C.
FOR THE EMPLOYER:	TRISHA PARADIS KIM WICKENS
FOR THE UNION:	MICHAEL PENNER ROXANNA BAISI
DATES OF HEARING:	FEBRUARY 18, 2014 MARCH 31, 2014 JUNE 24 AND 25, 2014
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In this matter, the Union filed a policy grievance where the difference between them was described as being the interpretation of article 12.09 of the collective agreement dealing with leave for elected Union officers. More particularly, the issue requires a consideration of article 12.09(f) whereby the Parties have expressed their mutual intention concerning the employment of returned employees following their leave having concluded. The grievance requires one to consider their job-placement rights in accordance with this provision. It reads as follows in its entirety:

LEAVE FOR ELECTED OFFICERS

12.09 (a) (I) Upon the request of the Union, employees elected as President or Vice-Presidents of the Union of Northern Workers or the Public Service Alliance of Canada or for the President of the Northern Territories Federation of Labour shall be granted leave of absence for the term of office. During the leave of absence such employees shall maintain all accumulated rights and benefits to which they are entitled under the Collective Agreement.

(ii) Upon reasonable notification, the Employer shall grant leave without pay to a Union representative seconded for a minimum period of one week to serve as President of the Union on a temporary basis.

(b) The Employer shall continue to pay such employees their applicable salary in accordance with the terms of the Collective Agreement plus any additional amounts as advised by the Union. Upon invoice by the G.N.W.T., the Union shall reimburse the Employer for the amounts so paid.

(c) The benefits of any group plan shall be extended to such employees and the Union will reimburse the Employer for any costs involved.

(d) Such employees shall continue to receive salary increments during their leave of absence to the maximum step of the applicable pay range for their position.

(e) Such employees shall advise the Employer as soon as possible when an extension of the leave of absence is applicable due to re-election.

(f) Upon termination of their leave of absence such employees shall be offered as a minimum the position they held with the Employer in the same work site and community before they commenced the leave of absence. When such employees wish to invoke this clause of the Collective Agreement they shall provide the Employer with a three month notice of their intent to do so.

(g) Notwithstanding Clause 12.09(f), the Employer may make an offer of employment to such employees to a position inside the Bargaining Unit should such employees bid on a competition and be the successful candidate.

The Union holds to the view that article 12.09(f) in clear and unambiguous fashion requires that the employee coming off a period of leave be returned to their home position "at a minimum," meaning as a starting point – the least allowable. In the event that the position is no longer available due to whatever unavoidable circumstances have prevented a return – perhaps the job duties no longer exists – the Union contends it would not just be at matter of the Employer searching out an "equivalency," such express language not being contained in the provision. The Employer would be required to entice the person into a better job in order to fulfill the contractual obligations. Indeed, the Union views the Employer as always having the authority to attempt to entice a returning employee into a better job as a matter of fulfilling the "as a minimum" language. It is a quite different situation than a returning employee voluntarily bidding on a competition for some other position he/she might like to take. Presumably, under paragraph (g), the employee could always bid on a competition and seek to be the successful candidate, with attendant probationary ramifications were he/she to be successful on that basis.

At the same time, the Union has observed that the applicable language does not say there is any difference between a job having been rendered obsolete, perhaps no longer existing due to technological change, and a position made unavailable as the minimum due to a "convenience issue" such as having already filled it on a permanent basis with someone else for business reasons. This reality presents an additional problem in application of the language.

The Employer takes the position in its administering article 12.09 that the language of paragraph (f) certainly provides a guarantee to return the employee to one's home position if it is available, also seen to be the "ideal" return placement and one to be respected where possible, but if the position has been rendered unavailable through the passage of time then it requires placement into an "equivalent" position in fulfilling the "as a minimum" language. It contends that there might be any number of valid reasons why a position eventually needs to be filled on a full-time indeterminate basis for valid operational reasons prior to the employee's return from union leave, or even that the position to no longer exists. The Employer does not see the language as providing any bumping rights to the returning employee.

With the possibility existing that the language of article 12.09(f) presents an ambiguity, as asserted by the Employer, either the patent or latent variety as the terms are addressed in numerous arbitration awards, three witnesses were called to testify with the possibility that their evidence could be used as an aid to interpretation of the contractual language. It involved both past practice and negotiating history to be helpful. In allowing this kind of testimony to be presented the arbitrator nevertheless observes that the evidence of relevant negotiating history should be unequivocal and show a mutual intention, also, reliance on a steady and established past practice can provide grounds for inferring that a mutual intention exists in accordance therewith – were an ambiguity found to exist.

It is also to be observed that the parties tabled cases dealing with the proper interpretation of extrinsic evidence as an aid to interpretation. See for example *Northwest Territories (Minister Responsible for the Public Service Act) v. Union of Northern Workers (Relief Workers Grievance),* [2008] N.W.T.L.A.A. No. 1 (Jolliffe) and *Health Employers Association of British Columbia and British Columbia Nurses Union (Kelly Besse Grievance)*, unreported April 29, 2014, M. Brown). These cases provide reviews of the principles involved, including that an arbitrator should hear the extrinsic evidence as presented, subject to the usual rules on relevancy, and then decide whether it is necessary to resort to using it as an aid to interpretation, and to what extent, that is – where an ambiguity is found to exist as opposed to finding a clear meaning. But one should never forget the words the parties have used to express their mutual intentions. See Brown and Beatty, *Canadian Labour Arbitration (4th ed)* at topics 3:4420 and 3:4430 dealing with extrinsic evidence covering negotiating history and past practice.

The Union's current Director of Membership Services, Roxanna Baisi, has been involved in internal union administrative work for many years and has been a member of its bargaining team for at least the last dozen years. She testified that the language of article 12 has not changed during her time dealing with collective bargaining issues. By her description, the Union currently has only two elected officials on full-time leave under article 12. She said that the perceived difficulty with the Employer's approach is that the Union sees it as having injected an element of equivalency as a qualifier to the existing language that returning employees "shall be offered as a minimum the position they held with the Employer in the same work and community before they commenced the leave of absence". She did not testify that every employee returning from Union leave over the years had gone back into their

home position, although, by her description, clearly that would have been hers and the Union's expectation were the Employer to be assiduously following article 12.09(f).

Ms. Baisi testified that returning to one's home position is very significant in that it gives one freedom to run for Union office full time knowing that there is security of job, and eventually going back to the position they left, not having to worry about offers which are being put forward on the basis of some kind of equivalency being advanced by management. She foresees the possibility of difficulties ahead where no offer of the home position has been made on the basis that the original position is no longer available, for whatever reason. There may well be training expectations sought to be imposed by the Employer, and the possibility of a probationary period attaching, which barring successful completion could arguably could lead to lay off, although the Union would resist any such approach. She nevertheless sees the possibility of the Employer taking the view that it would not be much different than the requirements following any successful competition bid, which the Union does not take to be the intended meaning of article 12.09(f) as a matter providing continuing job security throughout and at conclusion of the Union leave. The need to maintain or update qualifications on returning to work, she said, could be dealt with as with any other returning employee from a leave situation, no difference there.

By Ms. Baisi's description, the Union fears that the expectation of an employee returning from Union leave could be blocked simply by having already put someone in the job after whatever period of time Employer considers to be appropriate – the alleged valid business reasons' situation. In short, her testimony focussed on foreseeing difficulties arising in a variety of situations where the employee was not allowed to return to their own job "as a minimum" requirement under article 12.09(f). She also acknowledged that she has no firsthand knowledge of past practice or negotiating history although

believing that so far, at least over the last several years, anyone returning from Union leave has gone back into his/her substantive position.

During her cross-examination, Ms. Baisi was directed to as the article 2.01 definition language which contains no explanation of "as a minimum" but under paragraph (cc) does define "reasonable job offer" as:

> **... means an offer of indeterminate employment within the Public Service, normally at a pay level equal to or greater than the employee's current level. Where practicable, a reasonable job offer shall be within the employee's headquarters.**

Ms. Baisi testified that with there being no express reference to reasonableness in article 12.09(f), she sees no connection with the Employer's contractual obligation to offer the employee's own position "as a minimum". Upon further reflection, she said that she could accept that in a situation where there had been a restructure and the work no longer existed, the position eliminated, there could be an equivalency concept injected to satisfy the "as a minimum" requirement, or as close as could be arranged, but not to be invoked simply because the Employer at some point had chosen to put someone else in the job as a regular full-time placement.

The Employer's first witness called in this matter, Herb Hunt, is now retired from his long time position of Director of Labour Relations. He chaired the Employer's negotiating team through numerous rounds of collective bargaining. These included the negotiations leading to the 1989 expiring collective agreement when the current language of article 12.09(f) first appeared. While not making reference to any notes, Mr. Hunt said that he retained a "fairly good recollection"of what occurred at the negotiating table. He went on to testify that the current language was the Union's proposal which the Employer took to require that at the end of a Union official's leave he/she would be returned to a

position within government "preferably the one he had left (and) if not there then into another government position". He also remarked that he thought the language recognized it was possible that "organizational and job changes would make it very difficult to put (someone) back into an identical position which sometimes did not even exist anymore". He said that the Government accepted that it "wanted to make sure it provided a job but the exact job might not be available (and it) wanted language to be flexible of organizational changes and other changes making exact duplication impossible".

By Mr. Hunt's description, the Union's main concern at the negotiating table as the Employer understood it was that the person should have a job to go back to and not be relocated elsewhere, fearing that management might create a position too far removed physically and then assert that it had met its obligation. Thus, the inclusion of job site and community. He said that the Employer did not understand there to be any intention to guarantee that one's home position would be offered in every instance, there being any number of circumstances which could interfere with that possibility. He referred to "operational requirements" as including to the Employer having to find a replacement which in some circumstances might conceivably mean offering indeterminate full-time employment in order to secure an appropriate candidate. The employing department might like to use the backfilling option until the leave situation ended, but that might not always be possible. He said he did not recall any discussion over the Employer's right to staff the position at some point prior to the Union official's return from leave, but he believes both sides' negotiators understood that the language was not intending as being any guarantee of absolute position security. He took the parties to understand there was a need for some flexibility in the nature of an intended equivalency placement as a possibility.

Mr. Hunt also testified that thereafter, during the 1992 round of collective bargaining, the Employer tabled a proposal which he viewed to be a matter of putting the collective agreement "in plain language" and not considered by it to be new or changed contractual language in substantive meaning. Numbered as proposed article 14.13(g) and (h) to replace the existing 12.09(f) and (g), it reads as follows:

> **(g) When the leave of absence ends, elected officials will be offered a position equivalent to the one they held before they started the leave of absence. They must give the Employer three months' notice of when they wish to return.**
>
> **(h) Elected officials may bid on competitions. If the bid is successful, the Employer may make an offer of employment.**

Mr. Hunt acknowledged that the language change was not accepted by the Union negotiators with respect to this provision or the numerous other re-worded provisions. By his recollection they were concerned that if there was any alteration to any existing language there might be some "inadvertent" change to the intent to be taken therefrom. At the very least, they saw the possibility of needing arbitrations to sort through any possible differences, a difficult prospect. Accordingly, the entire Employer proposal for plain language changes to the collective agreement was withdrawn. Nevertheless the use of the term "position equivalent" with respect to a Union official coming back to work, he thought, reflected the parties' mutual intent to be taken from the unchanged existing language, still in place through several more rounds of collective bargaining. He also remarked that he did not recall the existing language having yet been accessed by anyone at the time of the suggested "plain" language change during the 1992 round. The Union's president at the time, Darm Crook, had been holding that position, on Union leave, since the language was originally negotiated for inclusion in the 1989 collective agreement.

In cross-examination, Mr. Hunt acknowledged that a civil service position is a defined job with a specific number attached to it. But, he testified that from his perspective, in applying article 12.09(f), one needs to recognize the "dynamic work culture" of the workplace where "things change" and one's job might not still be existing in any recognizable form. The Employer, he said, took the language as needing to be interpreted to meet that ongoing reality. He said that if a returning employee's job still existed and was able to be filled the person would be returned to it but there was a possibility that current operational requirements might make it extremely difficult or impossible to put the person back in the same work. He also remarked that "generally"a bargaining unit employee taking a leave of absence to fulfill his/her Union officer's position would not be formally vacating the civil service position in order to do so. It might also be that a specific approach of returning into a particular position could be agreed to between the parties at some point. By Mr. Hunt's recollection, when Mr. Crook left the Union presidency during the mid-1990s, he returned to a civil service position, over which there may have been some discussion, although he has not been informed whether it was identical to the one he had left at the time of commencing Union leave.

The Employer's second witness in this matter, Darm Crook commenced his career as a civil servant in 1970. By 1984 when he was first elected as Union president he held a general trades foreman's position in Hay River. He held the presidency for 12 years and during that time took part in several rounds of collective bargaining, including being at the table during the negotiations leading to the 1989 collective agreement. At one point he had notes detailing the various proposals but has no current access to them, if indeed any still exist. Nevertheless, he testified that he can recall the basic principles of what occurred during the negotiations leading to the inclusion of article 12.09(f). It was the Union's proposal drafted by him. He could not recollect whether the final wording was exactly as

he drafted it but the concern at the time was ensuring that the Corporation could not exercise any control over who might run for Union president by denying leave or otherwise making it difficult to return to one's civil service job in one's home community. Up to that point, by his understanding, Union leave had always been considered and granted on a case-by-case basis, usually in line with a specific letter of understanding. By his description, it had long been recognized between the Parties that a person on leave maintained his /her employment, and could always bid into another position at any time as a matter of exercising seniority rights. There was entered in evidence the specific one-off agreement between the Parties dating from 1985 dealing with Mr. Crook's leave situation. As an example of the kind of approach taken prior to the language being incorporated into the 1989 expiring collective agreement, it reads as follows:

> **(d) Return to Government Service**
>
> **Mr. Crook's position as Trades Foreman in Hay River will be filled on a term basis until June 30, 1987. At this time Mr. Crook will state his intention to return to his position or run for re-election. Should Mr. Crook run for re-election, Mr. Crook will be deemed to be the incumbent of an equivalent position in the Government of the Northwest Territories upon his return. Therefore, his period of leave should be considered as continuous service.**

Mr. Crook testified that incorporating an agreeable provision into the collective agreement meant doing away with individual secondment agreements and better enshrining the rights of the employee. Further, he did not view his own agreement as covering all the principles which needed to be negotiated such as ensuring work site and community placement In his dealing with the current language first negotiated into the 1989 expiring collective agreement, by his understanding the "as a minimum" language was seen by the Union to require one coming off a Union leave situation to be offered his/her own position or at least an equivalent one were that necessary, meaning a guarantee of

same range and step as would have been the case in one returning to their own job, and located in the same work site and community. He did not provide any larger understanding of his view of "equivalency". Nevertheless, by his recollection, the Union was aware that it could occur in some cases of a returning employee that the Employer would not be able to offer the exact position which had been held at the time the leave commenced, that the Employer needed some flexibility in order to react to changed organizational requirements. He also testified that the Employer was not precluded from making an offer to the returning employee which might be considered "an enhancement", an offer of a better position, but there had to be a suitable position made available at the minimum in line with the protections set out in the contract language. He was assuming that if he was placed into an equivalent position there would be no probationary period attaching, a different situation than voluntarily bidding into a position which had become available.

Mr. Crook testified he was aware that during the 1992 round of negotiations the Employer's proposals included their wanting to allegedly "simplify" the collective agreement. The Union saw it as unworkable inasmuch as any attempts at incorporating supposed plain language might have the effect of weakening established arbitral precedents and give rise to more arbitrations than would otherwise be the case. In having reviewed the 1992 Employer proposal document he was aware that there was an Employer concern over its ability to offer a position to include returning a person to their home community and worksite, which one could observe was not guaranteed by the proposed new article 14.13(g), and which the Union saw as a "must"to protect with the kind of express language set out in article 12.09(f). He said that the kind of "balance" which he took to be included in the contractual language would not be met in a situation where the employer offered a position by exercise of its "as a minimum" obligations and insisted on a period of probationary employment. He also testified that

during negotiations there was never any reference to the *Public Service Act* and no mention of it somehow constraining their agreeing to the contractual language.

In recalling his own situation, Mr. Crook testified that his position had been eliminated by the time of his returning from Union leave after 12 years, the job described as no longer available due to a major reorganization. He had been the only Union official on full-time leave. He recalled it having led to an initial offer which he did not consider was acceptable or equivalent, and also meant moving to another community. Mr. Crook filed a grievance, followed by settlement negotiations which resulted in his accepting a term position with a different position number, no break in service, doing basically the same job with the same duties in the same community as before. It lasted until retirement approximately 18 months later. He was satisfied with the placement.

Argument:

Mr. Penner on behalf of the Union, in argument submitted the testimony revealed that neither party explored all the possibilities and permutations possible on application of the article 12.09(f) language, for the first few years applicable only to the Union President's office as the only person on full-time leave. It is now apparent that what the Employer wants is that the offer to the returning employee of the same position "as a minimum" should include placement into an equivalent position for whatever business reasons the Employer deems appropriate, presumably with the equivalency aspect to be assessed by the Employer which effectively has management control over the offer. Thus, the language as interpreted by the Employer would provide no real protection to anyone wanting to return to his/her own position, or having the job preserved in order for that to be done, as opposed to management feeling free to give the position and its job-related duties to someone else on a permanent

basis for whatever business reasons is thought to be significant enough at the time. Obviously, there is no clarity as to how long the Employer would wait or the extent of the circumstances giving rise finding another incumbent. The Employer's line of thinking, he said, has to be taken to have added to the contractual language and detracted from the returning employee's job security in such a way not to comply with the "as a minimum" wording meant to protect the person's work situation on returning from leave.

Counsel submitted that the kind of approach espoused by the Employer would undoubtedly present a host of problems, including the negative effect on the individual employee looking to seek Union office of not preserving his/her position as available on return from Union leave, and relying on management in a given situation to provide something suitable as an alternative; also raising the issue of whether there should be a probationary period attaching to another position. Does the revamped approach interfere with anyone else's bidding rights, and does the position chosen by management for the returning employee need to be vacant and available? There is also the possible litigious issue of determining what actually amounts to an "equivalency" as opposed to it just being a convenient placement into some other job duties which are available. Overall, the equivalency approach, he said, injects uncertainty as apparently Mr. Crook encountered on his return to work some years ago. Fortunately he was only looking at about 18 months of further employment and was eventually able to negotiate an agreeable placement into a temporary position within his own community, which apparently was not the Employer's first offer inasmuch as the Employee's initial offer generated a grievance. In short, incorporating the concept of "equivalency", not being mentioned in the contract language, specifically rejected in the 1992 negotiations, could present a thorny issue on a case-by-case basis.

Mr. Penner also submitted that it is necessary to interpret article 12.09(f) in the context of the entire article meant to set the stage for employee involvement in internal Union politics which includes returning the individual to his job when his Union services been completed. Obviously, protecting one's working situation could be critical to an employee choosing to seek Union office. It is otherwise notable, he said, that paragraph (g) contemplates the possibility of the Employer making an offer of a position within the bargaining unit which was open for bidding on competition, a matter of one seeking to be the successful candidate, as opposed to relying on the rights under paragraph (f).

Mr. Penner acknowledged in argument that it was necessary to deal with the obvious issue of the home position possibly having become obsolete by the time of the Union officer's return from full-time leave, no longer existing due to business reorganization, with the example being a ferry operator's position where a bridge has been built to replace the ferry. That scenario would be quite different, he said, than simply choosing to staff the position with someone else as a declared vacancy where the work had not disappeared. The "valid business reasons" approach would effectively permanently displace the incumbent at some point while on Union leave while the same work continued to be performed. The two situations are quite distinguishable, with the starting point always having to be the requirement to return one to the position "as the minimum". The Union acknowledges, he said, that they may give rise to a different approach, which admittedly might be seen to present a "gap" in the language, but should not suggest any validity to management's giving the job to someone else on a permanent basis due to the business inconvenience of having to wait any longer for the Union official to return from leave. The language contained no time restrictions.

Mr. Penner cited arbitrator Saltman's award in *McKellar General Hospital v. O.N.A.,* [1986] O.L.A.A. No.5 where the union had challenged the employer's absentee control program as being

inconsistent with the terms of the collective agreement. The arbitrator reviewed the case law where arbitrators wrestled with the possibility of having to imply a term of the collective agreement. She particularly cited the Ontario Court of Appeal judgment in *Re Council of Printing Industries of Canada and Toronto Printing Pressman and Assistants' Union No. 10 et al* (1983), 149 D.L.R.(3d) 53 for the test which she said in essence allows an arbitrator to imply a term into a collective agreement if two conditions are met, namely:

> **(1) if it is necessary to imply a term in order to give "business or collective agreement efficacy"to the contract, in other words, in order to make the collective agreement work; and**
>
> **(2) if, having been made aware of the omission of the term, both parties to the agreement would have agreed without hesitation to its insertion.**

The Union holds to the view that it would never have agreed to the possibility of someone returning to work from a period of article 12.09 leave having to embark on the probationary period due to moving into another position, there being no evidence supporting the view that the Employer would find any support for that possibility. Further, he said, the difficulty encountered by Mr. Crook upon his returning to duties after 12 years of Union leave, is not something the Union would likely support at this point as a matter of applying the "as a minimum" language. Certainly it is a situation that can be distinguished from the fact of a true business reorganization realistically having done away with the kind of work which had been the person's job at the time of taking Union leave, the discontinued ferry operator example. Counsel also pointed out that under article 37.22 "the arbitrator shall not have the authority to alter or amend any of the provisions of this Agreement, or to substitute any new provisions in lieu thereof, or to render any decision contrary to the terms and provisions of this Agreement..."

In argument on behalf of the Employer Ms. Paradis submitted that the Employer recognizes that its first responsibility under the language of article 12.09(f) is to provide the returning employee his/her own position. But, she said, in the event that this position is no longer available, no longer existing due to reorganization, or even in the event of it having to be eventually filled for valid operational reasons on a full-time indeterminate basis, the Employer should be able to apply a reasonable equivalency test in searching for an appropriate placement situation. She submitted that the language is clearly ambiguous on its face and that the extrinsic evidence shows that the Parties' principal negotiators at the table when the language was formulated, Mr. Hunt on behalf of the Employer and Mr. Crook on behalf of the Union, had it in mind to apply some flexibility in terms of dealing with the returning employee, the "equivalency" approach where the job was no longer available. She reviewed at some length the concerns remarked upon by both of these witnesses, the recognition of employment security, home community, and worksite commitment, but appreciating that a situation could arise where the returning employee's job was no longer available. Hence the need to look for equivalency. As she put it in argument, it seems that they were both "on the same page" in recognizing that it might not always be possible to place the person back in their own job, which is what occurred with Mr. Crook – although one might observe that his return was somewhat controversial and led to a grievance and negotiations concerning his placement into something eventually thought by him to be suitable enough over the last 18 months of his employment. Neither witness suggested in their testimony that the Parties ever had it in mind not to look at possible equivalencies in appropriate circumstances.

Ms. Paradis submitted that the language of article 12.09(f) could be contrasted with the language of article 21.04(b)(iv) dealing with an employee returning from maternity leave which provides real position security in requiring that "no employee shall be laid off, transferred or relocated

while on, or within six (6) months of his/her return from maternity leave without the consent of the employee, the employer and the union", i.e., no possibility of there being any inference of an equivalency test. In short, the Employer holds to the view that stronger language could have been used had the parties intended an "absolute return" to the job the person had been performing before taking Union leave. The matter, counsel submitted, is capable of being determined on the basis of an ambiguity of language needing to be resolved and the parties should be taken as having formed the joint intention that it is not in all circumstances where the person's own job will be still available, that there is some room for equivalency application in appropriate circumstances.

In reply, Mr. Penner submitted that the maternity leave language of the collective agreement provides an entirely different scheme for return to work, there being different variables in play and different jurisprudence concerning returning one to work. While the language of article 12.09(f) and (g) no doubt contemplates the possibility of the returning employee taking a different job, nevertheless the position they held before commencing the leave of absence "shall be offered as a minimum".

Decision:

I think it to be appropriate at outset of my analysis to acknowledge the overall significance of provisions regularly included in collective agreements involving broader public sector employers and their sizable unions meant to protect the job situations of bargaining unit employees while away from work holding full-time union office. Sometimes the language is compactly presented as simply ensuring their entitlement to the ongoing leave while the elected office or appointment continues, with continuation of seniority rights, salary and benefits on that basis, monies to be reimbursed by the union. The obvious reality existing is that a person on leave has never formally resigned from his/her position

or vacated it on other than a temporary basis, possibly requiring backfilling or other temporary replacement while the leave continues. No one could assert that holding elected Union office is necessarily a permanent situation. Simply put, as a general proposition, the position remains available to the incumbent who continues to exercise proprietary seniority-based rights while on leave for such time as the position continues to exist. Occasionally, it can be seen, the incumbent on leave will choose to bid into another position as an exercise of seniority rights which are being maintained and perform in that other position upon returning to work when the leave concludes.

It can also be observed that contractual provisions requiring the employer to extend leave while the employee is performing full-time union duties in an elected or possibly appointed office is obviously of critical importance both to any union and its members. The union needs to entice talented and committed bargaining unit members to run for office without jeopardizing their jobs. The employees who might want to seek union office obviously want some assurance that their jobs will be there when their service has been completed, perhaps with the expectation of encountering some hard feelings while exercising their union responsibilities. This is not to say that one can avoid interpreting a specific negotiated provision in accordance with the wording which the parties have chosen to express their intention.

In turning to the specific contractual language under review, there is no evidence indicating that it would be expected for the Union official while on leave to have resigned his/her position. Indeed article 12.09(b) requires the Employer to continue paying the employees their applicable salary with reimbursement by the Union. Paragraph (d) requires that the employee shall continue to receive salary increments during the leave of absence to the maximum step of the applicable pay range for the position. Hence the connection to a specific position is maintained during the leave of absence. I do not

see the possibility for any interpretation of article 12.09(f) which lends itself to the eventuality of one returning to the position he/she held "as a minimum" requirement being frustrated or avoided simply by reason of management unilaterally choosing at some point during the leave to place someone else in the position on an indeterminate full-time basis, as somehow being the new incumbent. There could be any number of reasons for an employer wanting to do so, no doubt able to be supported on a valid business reasons' argument were that to be the test. However this kind of language is meant to protect the working situation of an elected union official while on leave and not to tempt one to consider the possibility on any basis of filling the still existing job with someone else on a permanent basis so as to effectively do away with the "as a minimum" obligation and leave one having to search for alternatives in the nature of supposed equivalencies to be assessed by the Employer. To find otherwise would give rise to the possibility of mischief which is something to be avoided in interpreting collective agreement. Searching out alternatives can sometimes be a difficult issue, as one might observe occurred with Mr. Crook's return to work, at least to some extent.

In one having to give a labour relations meaning to a term which requires a bargaining unit member being offered his/her position after returning from leave, whether that leave be of a short or lengthy duration which is not said by article 12.09(f) to be a consideration, one presumably has to have regard to the ordinary meaning of the term "as a minimum". Ordinary word usage would normally require an interpretation tantamount to the person's position being offered at the least, or as the lowest offer permitted, or the bottom level offer to be extended. The provision on its face does not suggest taking an alternate path where one's position still exists, or should legitimately continue to exist, of looking for equivalencies. The concept of equivalency which denotes the state of being equivalent or even interchangeable requires an examination and comparison of alternatives which injects an element

of subjective assessment. Plainly, it is not quite the same as the minimum offer being one's own position, which term tends to suggest that if anything else is offered it should be other than just the minimum, which is to say something better and not just the minimum. One might also observe what the contract language does not include; notably, it does not say that the person will be returned to his/her position as a minimum only in the event it is still available, or only in the event that management has not already given it to someone else.

At the same time, there is no doubt that the Parties' negotiators at the table when the language was first placed into the collective for the 1989 expiring collective agreement were thinking in terms of the possibility of an equivalent placement occurring, or perhaps a better one, when it would not be possible to use the person's own position as the minimum placement to be offered. However I do not see that there was any certainty of intention as to when it might be reasonable for one to consider this approach, whether as would be the Employer's view it should be available whenever valid business reasons required filling the person's position prior to the Union leave ending and the person returning to work, or in the Employer dealing with something more catastrophic such as a workplace reorganization which has terminated the duties associated with the position, i.e., the ferry boat discontinuance where a bridge has been built. I do note that when the Employer attempted to insert the term "position equivalent" as replacement language in 1992 the Union rejected any change in the language. It remains unchanged.

As it currently stands, there might well be an ambiguity existing, at least of the latent variety which means the ambiguity may not be apparent on its face but the language becomes ambiguous in operation when dealing with a specific set of facts, which here would mean what to do when the job duties no longer exist. In that regard, I take the extrinsic evidence in the form of negotiating history to

have provided some assistance to me on this language interpretation issue, but I do not take that as detracting from the overall concept of offering the returning employee of their own position "as a minimum" in a situation where those duties and still exist. It has long been accepted that arbitrators should strive to interpret the intention of the parties from the language they have used.

On my examination of the language of article 12.09(f) in the context of the entire article and also other provisions of the collective agreement which deal with the rights and obligations concerning various leaves of absence, including the maternity leave mentioned in argument, I conclude that the preferable interpretation for this provision requires consideration of more than one facet. There should be some recognition of the difference between the duties of the position no longer being performed inasmuch as they do not exist by the time of the employee's return from leave, and their continuing to exist but being performed by someone else as a matter of business convenience sometimes described as an exercise of management rights, or done for valid business reasons, were no contractual limitation to apply. My conclusion on the interpretation of the language, keeping in mind the existence of some measure of latent ambiguity and the testimony entertained as an aid to interpretation, is as follows:

(1) The stated requirement in article 12.09(f) that upon termination of one's Union leave of absence the Employer will offer "as a minimum" the position the person held in the same worksite and community before commencing the leave provides no avenue nor justification for the Employer to open up the same position for bidding on any indeterminate full-time basis, i.e., seeking to permanently replace the incumbent on leave in that position and those duties for whatever reason. This includes what would otherwise be valid business reasons such as wanting to attract a candidate on other than a temporary or back-fill basis as opposed to waiting for the incumbent to return from

Union leave, or finding that it is more efficient to have committed the work to an attractive indeterminate employment candidate. Not preserving the job/work availability in the event that the duties are still there to be performed would give no chance for the Employer to meet its obligations under article 12.09(f) to offer the position "as a minimum"and would constitute a violation of that requirement.

(2) In the event the Employer offers a better work situation in line with article 12.09(f) as a matter of it reasonably presenting more than just the minimum then the Employer has fulfilled its obligations to the returning employee. At the same time, I do not see that such offer taking the person outside the community and the same worksite could constitute a better offer, and such offer would be a violation of the "as a minimum" requirement.

(3) In the event the work associated with the position no longer exists, will not exist at the time the employee is expected to return, and is not being performed by anyone on any fill-in or back-fill basis, by reference to the extrinsic evidence as an aid to interpretation, the Employer is free to apply equivalencies in finding a position at least as good as the extinguished position which would have been offered as the minimum had the work still been in existence. The same worksite and community stipulation should be respected as a normal ingredient of equivalency given the full language of article 12.09(f).

(4) The returning employee from Union leave can always freely agree on an alternate placement, being a variation of a better offer.

(5) I do not see that the Employer's fulfilling its obligations under article 12.09(f) raises any issue of probationary period inasmuch as the starting point for the placement requirement is back into the persons position "as a minimum". Injecting an equivalency into that situation where the job no longer exists does not suggest any probationary requirement to be added as a condition of continued employment.

(6) These directions are not seen as interfering with the separate rights and obligations contained in article 12.09(g) which addresses an offer being made by the Employer following the returning employee bidding on a competition, and being the successful candidate on that basis, presumably accepted on the same basis as with any other candidate.

The above six numbered paragraphs being my conclusions reached respecting the application of article 12.09(f), constitute my directions which are to issue as a declaratory decision. I remain seized in the event that any further directions or clarification is required to complete the award.

DATED at Calgary, Alberta this 23rd day of July, 2014.

Tom Jolliffe, Q.C.