IN THE MATTER OF AN ARBITRATION

BETWEEN:

Saskatchewan Government and General Employees' Union
and Bartley Nikota (Grievor)

- and -

Saskatchewan Institute of Applied Science and Technology
(SIAST)

INTERIM DECISION
on PRELIMINARY MATTERS

BEFORE:

MERRILEE RASMUSSEN, Q.C., Arbitrator

Heard in Saskatoon, Saskatchewan on December 6, 2010

Larry Buchinski, for the Union
David Stack, for the Employer

Decision dated at Saskatoon, Saskatchewan, December 7, 2010

INTRODUCTION

[1] This arbitration hearing arises from a series of events that resulted in the Grievor being reverted from a full-time permanent position to his former part-time position. It was agreed that I was properly appointed as Arbitrator and had jurisdiction to hear the two grievances filed in relation to these events, subject to the Employer's objection on the grounds of timeliness in relation to the second grievance that was filed. The parties have requested that I rule on this objection before proceeding further. The parties have also asked that I make a determination about whether or not the first grievance that was filed is appropriately characterized as "disciplinary" and whether the Employer or the Union should proceed first and carry the burden of proof.

[2] The hearing was convened in Saskatoon on the afternoon of December 6, 2010, and it was agreed that I would provide these interim decisions to the parties on December 7, 2010. Both the Union and the Employer called witnesses in relation to the issues for which a preliminary decision is sought. The Union, with the consent of the Employer, filed a book of documents containing a number of exhibits. References to documents in these reasons is to those documents as contained in this binder.

FACTS

[3] The Grievor was employed at SIAST as a systems administrator in the CAD-CAM program at Kelsey Campus. He first began work at SIAST in October 2001, and passed probation in that position at the band 8 level in about April 2005. On November 17, 2008, a job posting for a full-time position for a Systems Manager/Analyst in the Computer Systems Technology Program (CST)

was posted.[1] The posting called for certain required qualifications, skills, abilities and experience. The Grievor was the only internal candidate for the position and he was "screened in" as an eligible candidate and interviewed. The screening process was conducted by the program head, Conrad Kruger, and a human resources consultant, Crystal Lavallee, with a Union observer, Beverley Edwards-Jackson, present. According to both the witnesses for the Union and for the Employer, applicants are only screened in to advance to the interview stage where they meet the "required" components of the job posting.

[4] The Grievor was then interviewed by Mr. Kruger and Ms Lavallee, with Ms Edwards-Jackson again present as an observer and Glen Cassidy, the person holding the second position of Systems Manager/Analyst in the CST Program, also present as an observer. When the interview was complete, there was some discussion about whether or not the Grievor had passed. Mr. Kruger had concerns, but said that he commented that at least there was a probationary period to rely on. Ms Lavallee recalls that Mr. Kruger made reference to probation. Ms Edwards-Jackson did not recall the comment.

[5] It was decided that the Grievor would be offered the position and a letter of offer was sent to him, which is dated December 5, 2008[2]. The letter states that he will commence work on January 5, 2009 and also that, "The probationary period for this position is twelve months". The letter is signed by Ms Lavallee and copied to Mr. Kruger and to the Dean.

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[1]SGEU Document Binder at Tab 8.

[2]SGEU Document Binder at Tab 10.

[6] In June 2009, an interim probationary performance review was conducted in relation to the Grievor's work performance for the period from January 5 to June 15, 2009[3]. The review indicates a number of areas where improvement was required. On October 5, 2009, the Grievor was notified that his performance in the Systems Manager/Analyst position was unacceptable and, in accordance with article 6.3.1 of the Collective Agreement he could revert back to his previous part-time position[4]. A grievance was filed in relation to this action on October 27, 2009[5]. This was grievance 1. During the grievance process in relation to grievance 1, Union officials realized that the Systems Manager/Analyst position was in the same pay band as the part-time CAD-CAM position that the Grievor had moved from. Within a matter of a few days after learning this, a second grievance was filed, on January 25, 2010, in relation to the fact that the Grievor has been placed on probation when he moved into the Systems Manager/Analyst position[6].

ISSUES

[7] Grievance 1 alleges "wrongful dismissal due to an inappropriate assessment of the grievor's probationary review" and asks for his reinstatement into the Systems Manager/Analyst position with an extension of the probation period and appropriate support to assist him to successfully complete the probation. Is this situation a reprimand, suspension or dismissal to which article 23.10 applies, which would require the Employer to bear the burden of proof?

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[3]SGEU Documents Binder at Tab 4.

[4]SGEU Document Binder at Tab 3.

[5]SGEU Document Binder at Tab 14.

[6]SGEU Document Binder at Tab 16.

[8] Grievance 2 was not filed until more than 13 months after the Grievor received the letter of offer for the Systems Manager/Analyst position. Is this outside the 30-day time limit provided by article 24.2.1 of the Collective Agreement for filing a grievance and, if it is, is this a time limit I should exercise my discretion to waive under clause 25(2)(f) of *The Trade Union Act*?

POSITIONS OF THE PARTIES

[9] In relation to grievance 1, the Union argues that the Employer's decision that the Grievor had not satisfactorily completed the probationary period is a "dismissal" to which article 23.10 applies, and that the Employer therefore has the burden of proof. In relation to grievance 2, the Union argues that neither the Grievor nor Union officials were aware that the Grievor's CAD-CAM position was a band 8 position and that therefore his move into the Systems Manager/Analyst position was a lateral move, not a promotion, and, in accordance with the Collective Agreement, no probationary period could be applied. The Union points out that the initial letter of offer referring to a 12 month probationary period was not copied to the Union and the Grievor himself assumed that the Employer was acting properly in applying a probationary period. The October 5, 2009 letter reverting the Grievor back to the CAD-CAM position referred to article 6.3.1 of the Collective Agreement which applies only to promotions. It was only during the grievance process in relation to grievance 1 that Union officials learned that the positions were both in pay band 8 and as soon as they had this information they immediately filed grievance 2.

[10] In relation to grievance 1, the Employer argues that article 6 of the collective agreement relating to probation applies and that this is therefore not a grievance described in article 23.10 and it does not bear the burden of proof. In relation to grievance 2, the Employer argues that the 30-day

time period described in article 24.2.1 begins to run when all of the facts on which the grievance is based are known to the employee or to the Union. The Employer argues in addition that if the 30-day time period expired before grievance 2 was filed that this time should not be waived as the Employer has been prejudiced in having acted on the basis of assessing the Grievor on the standard applicable to a probation rather than the standard applicable to dismissal for just cause.

DECISION

Grievance 1

[11] On October 27, 2009, when grievance 1 was filed, all parties were acting on the understanding that the Grievor was properly on probation, which is governed by article 6 of the Collective Agreement. I acknowledge that the grievance as written refers to "wrongful dismissal" but the Union is not able to transform the essential character of the alleged contravention by attaching a label to it. If it is ultimately determined that there is a breach of the Collective Agreement in regard to the Grievor's being reverted to his former position, then the breach must be a contravention of article 6. Any possible contravention of article 6 cannot be characterized as a "reprimand, suspension or dismissal" so as to make article 23.10 apply, and thus, the burden of proof is on the Union.

[12] The Union provided me with a copy of the decision in *Edith Cavell Private Hospital v. Hospital Employees' Union, Local 180 (Datwin Grievance)*[7]. The decision reinstated an employee who was dismissed for non-culpable poor job performance, based on the Employer's failure to meet the test applicable in that respect. This case is not a dismissal, but a failure of a probation and the

[7] [1982] B.C.C.A.A.A. No. 290.

Edith Cavell Hospital decision therefore does not provide any assistance.

Grievance 2

[13] Once the Union realized that the Grievor had been placed on probation after a lateral move, it filed grievance 2.. Article 24.2.1 states that a grievance "must be initiated within thirty (30) days from the date on which the employee became aware of the alleged infraction". The facts that constitute the alleged infraction occurred on December 5, 2008, when the Grievor was notified that he would be placed on probation in the new position. On that date, or shortly thereafter depending on how the letter dated December 5, 2008 was sent to him, the Grievor was "aware of the alleged infraction". Thus, the grievance should have been initiated on or before January 4, 2009, but it was not initiated until January 25, 2010.

[14] However, *The Trade Union Act* allows an arbitrator to relieve against breaches in the time limits set out in a collective agreement with respect to the grievance procedure "on terms that, in the arbitrator's opinion, are just and reasonable"[8]. Arbitral jurisprudence generally establishes that relief for non-compliance with time limits should be limited to situations in which there are reasonable grounds for the extension and there is no substantial prejudice that would result from doing so.[9] In determining whether reasonable grounds exist, arbitrators generally take into account a number of factors, including the nature of the grievance, the length of the delay, the reasons for the delay, and whether the grievor is responsible for the delay. Other relevant factors that exist in any particular

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[8] *Trade Union Act*, R.S.S. c. T-17, clause 25(2)(f).

[9] Brown & Beatty, *Canadian Labour Arbitration*, 4th edition (looseleaf), at para. 2:3142.

case will also be taken into account.[10]

[15] In this case, the Grievor clearly was not sufficiently conversant with the Collective Agreement to know whether or not he was appropriately subject to a further probationary period. It was only much later that Union officials became fully cognizant of all of the circumstances. I accept that Mr. Kruger referred to a probationary period after the Grievor's interview, but there is no indication that there was any discussion about whether the Grievor was being promoted or voluntarily transferred. The letter of offer implies that probation attaches to the position, and the letter is not copied to any Union officials. The Notice of Failed Probation letter refers to articles 6.3.1 and 6.3.1.1, which articles apply to situations where an employee is promoted. Union officials saw this letter shortly after the Grievor received it, but did not look at the pay bands associated with the two positions. The Union had no reason to think that this was not a situation to which article 6 applied. Granted, a comparison of the pay bands of the two positions – which was information to which the Union had access – would have provided the information necessary to file grievance 2, if the Union had thought to make the comparison. But it relied on the Employer's characterization at this point in time.

[16] Taking into account all of the factors that arbitrators consider in assessing the reasonableness of relieving against missed time limits as previously listed, it is my conclusion that the delay in filing the grievance is adequately explained and an extension of the time would be reasonable, although the question remains whether it would be just. In this regard, as noted previously, arbitrators consider whether the other party has been prejudiced by the delay. The Employer argues that its

[10] *Ibid*, at para. 2:3144.

actions in June and October 2009 were based on its understanding that the Grievor was on probation. If the grievance challenging the appropriateness of placing the Grievor on probation had been initiated at any time prior to June, or perhaps even October, 2009, I would be inclined to exercise my discretion to relieve this breach of the time limit, because the Employer would not have experienced any substantial prejudice as a result of the delay. However, after making its decision to deal with the Grievor on the basis of his being on probation, it cannot now go back in time and act differently. As a result, I must conclude that grievance 2 is out of time and that I cannot relieve against the breach of the time limit because to do so would not be just, and grievance 2 is therefore inarbitrable.

ORDER

[17] The Union will proceed first and bear the burden of proof with respect to grievance 1. Grievance 2 is dismissed as being out of time.

Dated at Saskatoon, Saskatchewan, this 7th day of December, 2010.

Merrilee Rasmussen Q.C.
Arbitrator