IN THE MATTER OF AN ARBITRATION BETWEEN:

Saskatchewan Government and General Employees' Union	Union
Daryl Demoskoff	Grievor

AND

Saskatchewan Tourism Authority	Employer

AWARD

Before:

Angela Zborosky – Sole Arbitrator

Heard in Regina, Saskatchewan on September 19, 2011

Hannah Gasper	For the Union
Paul Harasen	For the Employer

AWARD

I. BACKGROUND:

[1] The within arbitration was held in Regina, Saskatchewan on September 19, 2011. The Saskatchewan Government and General Employees' Union (the "Union") was represented by Hannah Gasper. The Saskatchewan Tourism Authority (the "Employer") was represented by Paul Harasen.

[2] The grievance filed by the Union on behalf of former employee, Daryl Demoskoff (the "Grievor"), alleged that the Grievor had been wrongfully dismissed from his employment with the Employer.

[3] The parties agreed that the arbitration board was properly constituted and had jurisdiction to hear and determine the grievance filed by the Union.

[4] The hearing for this grievance was initially set for four days. However, in the weeks leading up to the hearing, the parties held discussions which were directed to limiting the issues and evidence that would be put to me at the hearing, in order to conduct the hearing as efficiently as possible. After the exchange of several email messages, I held a conference call with the parties with a view to determining the procedure that would be followed and the issues to be decided. Throughout the pre-hearing communications, the Employer maintained the position that it is not alleging that it had just cause for the Grievor's dismissal or that the Grievor engaged in misconduct. The Employer took the position that the collective agreement permits it to dismiss an employee without cause but upon notice or pay in lieu of notice as prescribed by the collective agreement. During these pre-hearing communications, the Union took the following position: (i) that the collective agreement does not permit the Employer to dismiss an employee for other than just cause; (ii) in the alternative, if the collective agreement language is ambiguous, past practice and negotiating history support its position that an Employer must have just cause in order to dismiss an employee; and (iii) in any event, the nature of the Grievor's termination was disciplinary and therefore the Employer must prove that it had just cause for the Grievor's dismissal. Ultimately, the parties agreed that the issue to be decided first in this case, whether truly "preliminary" in nature or not, is whether the parties' collective agreement permitted the Employer to dismiss an employee without just cause (or without misconduct), upon providing notice (or pay in lieu of notice) as prescribed in Article 18.6 of the collective agreement. Both parties asked that I remain seized of the grievance following this determination, in order to deal with any further issues that the parties want to raise to completely resolve the grievance.

[5] At the outset of the hearing, the Union indicated its intention to introduce extrinsic evidence as an aid to interpretation of the collective agreement, and specifically, to support its position that the parties intended that the collective agreement permit only dismissals for just cause. The extrinsic evidence the Union wished to introduce was evidence of past practice (in the form of grievance settlements) and negotiating history. The Employer opposed the introduction of this evidence indicating that there was no ambiguity in the collective agreement, an element necessary to introduce such evidence. Upon hearing arguments by representatives of both parties, I determined that I would hear the Union's evidence in the first instance but reserve on a determination of whether the evidence was admissible.

[6] Also at the outset of the hearing, the parties agreed to the entry of the following exhibits:

Exhibit A-1 – Agreed Statement of Facts

Exhibit A-2 – Termination Letter dated March 23, 2010

Exhibit A-3 – Union's Grievance Claim Form, dated April 5, 2010

Exhibit A-4 – Employer's Step 1 Grievance Response Letter dated April 19, 2010

Exhibit A-5 – Employer's Step 2 Grievance Response Letter dated June 2, 2010

Exhibit A-6 – Letter of Understanding #223 (Transfer Agreement)

Exhibit A-7 – Collective Agreement – October 1, 2004 to September 30, 2007

Exhibit A-8 – Collective Agreement – October 1, 2001 to September 30, 2004

Exhibit A-9 – Collective Agreement – October 1, 1998 to September 30, 2004

Exhibit A-10 – Collective Agreement – April 1, 1996 to September 30, 1998

Exhibit A-11 – Collective Agreement – October 1, 2007 to September 30, 2010

Exhibit A-12 – PSGE Collective Agreement – October 1, 1991 to September 30, 1994

[7] The Union called two witnesses. The first was Kyle Robinson, an employee of the Employer and a Union steward and member of the Union's bargaining committee. The second witness was Dave Stewardson, a former employee who retired in 1999 but served as Chair of the Union's bargaining committee in 1993 to 1994. Both witnesses testified under oath and were subject to examination in chief and cross-examination. Additional exhibits were entered into evidence by both parties through the witnesses.

[8] Following the closure of the Union's case after the presentation of evidence through the witnesses, Counsel for the Employer indicated that it would not be calling any witnesses to give evidence.

[9] Following the closure of the Employer's case, counsel for both parties presented both oral and written arguments. Counsel are to be commended for their thorough coverage of the issue that arose in this case.

II. THE GRIEVANCE:

[10] The Union filed a grievance on April 5, 2010on a standard grievance claim form (exhibit A-3) alleging that the Grievor, Daryl Demoskoff, had been wrongfully dismissed and referencing the dismissal letter of March 23, 2010. The settlement sought included "Full redress, including but not limited to lost wages, benefits, pension."

[11] The relevant portions of the letter of termination, dated March 23, 2010, states as follows:

> *We regret to inform you that your employment with Tourism Saskatchewan is terminated effective immediately.*
>
> *Although we have identified concerns about your behaviour in the workplace, there have continued to be problems with your actions. You have been disrespectful to your supervisors and have also exhibited very difficult behaviour in the course of routine communications. As well, we are aware of negative comments that you made on the evening of March 14th in front of members of our Board of Directors and individuals from our tourism industry which were inappropriate.*
>
> *Despite our concerns and dissatisfactions, we will provide you with six week's pay in lieu of notice as stipulated in Article 18.6 of the collective agreement. This will be paid to you along with any outstanding vacation credits that you have earned as well as unpaid days worked to the end of March 23rd. We will require a final accounting from you of hours worked during the February/March averaging period.*
> *…*

[12] Following the Union's filing of the Grievance, on April 19, 2010, the Employer responded to the Union at Step 1 of the Grievance procedure. This letter states as follows:

> *Please accept this as Step One of our response to the grievance submitted on behalf of Mr. Daryl Demoskoff that contends that he was wrongfully dismissed from Tourism Saskatchewan.*
>
> *As in our recent correspondence, let me express my disappointment that the collective agreement has not been followed. The language stated in our agreement clearly indicates that the Union will request a meeting to discuss a concern before a grievance is filed. Since this meeting was requested before any of the three most grievances were filed, it appears obvious that the Union has unilaterally, chosen to simply ignore this step.*
>
> *In our interest-based relationship and the culture that has developed between management and the Union, this is most upsetting. I would like to request a formal response as to why the Union is choosing not to follow this mutually agreed upon language in the collective agreement.*
>
> ***Article 18.6 states how a termination will take place. We are content that Tourism Saskatchewan followed this language. Progressive discipline is intended to establish "just cause" for a dismissal, whereby no payment in lieu of notice would be required. We, however, provided payment in lieu of notice to Mr. Demoskoff.***
>
> *The grievance indicates that the settlement sought is "full redress". We believe that this wording is deliberately vague. It makes it impossible for Tourism Saskatchewan to know what settlement would be acceptable to the griever [sic] or the Union.*
>
> *If you truly wish to seek resolution, we require forthrightness and clarity. Please tell us what settlement is sought. We are requesting a respectful filing of this grievance with clear information and are of the strong view that Mr. Demoskoff was not wrongfully dismissed.*
>
> *[**my emphasis added**]*

[13] The Employer's June 2, 2010 letter to the Union represents its response at Step 2 of the grievance procedure. The portions of that letter that are relevant to the issues before me, state as follows:

> *Please consider this out response to the meeting held on May 19, 2010, about the termination of Mr. Daryl Demoskoff from Tourism Saskatchewan.*

…

Our collective agreement provides language that speaks to the process that is to be used when an employee is terminated for misconduct. In this case, no pay in lieu of notice is required. However, if the Employer chooses to terminate without an allegation of misconduct, Article 18.6 lays out the payment that is required by the Employer. We paid the amount specified in this article.

We contend that progressive discipline is used when there is an expectation that an employee can improve and when an Employer needs to build a case for termination with misconduct. Given that we have not alleged misconduct, we did not have this obligation.

You have requested some specific examples of the behaviours exhibited by the employee that were unacceptable. These will be provided to you in a separate document. The over-riding demeanour exhibited by the employee from the time the written reprimand was provided to when the termination took place was one of anger, uncooperativeness, withdrawal, hostility, and dissatisfaction. He was difficult during routine work situations, had extreme responses to normal working communications, and appeared to struggle with inquiries from his supervisor. The examples that will be provided to you are just that: examples. They are not meant to document every time the employee demonstrated inappropriate behaviour. They are, however, indicative of how he acted in the workplace for an extended period of time.

Based on the information that you provided at our May meeting, we cannot agree to the reinstatement settlement that is sought by the Union. Having the employee back in our workplace would be detrimental to our organization and to other employees at Tourism Saskatchewan. Additionally, we believe this would not be healthy for the employee. We encourage you and the employee to consider other options to resolve this grievance.

*[**my emphasis added**]*

III. RELEVANT PROVISIONS OF COLLECTIVE AGREEMENT:

[14] The Collective Bargaining Agreement under which the grievance was filed is effective for the period October 1, 2007 to September 30, 2010. This grievance primarily involves the interpretation of the provisions of Article 18 of the collective agreement titled “Discipline, Suspension and Dismissal,” though the Employer specifically relies on Article 18.6 in support of its position that it may dismiss a permanent employee without just cause upon payment of prescribed periods of pay in lieu of notice. Article 18, in its entirety, reads as follows:

ARTICLE 18 DISCIPLINE, SUSPENSION AND DISMISSAL

18.1 Preamble

Both parties agree that every effort shall be made through discussion and consultation in an attempt to resolve problems with respect to Employee performance prior to the initiation of disciplinary action.

The Employer acknowledges the right of Employees, including those Employees on probation, to have any differences regarding disciplinary action or dismissal heard through the grievance and arbitration procedure.

In the event the Employer initiates disciplinary action against an Employee, except in cases of serious misconduct, the practice of progressive discipline will take place as follows:

18.2 Right to Have a Union Representative

Where the Employer intends to meet with an Employee for disciplinary purposes, the Employee shall be so notified in advance of the purpose of the meeting, and informed of the right to have a Union representative present at the meeting.

18.3 Verbal Reprimand

The Manager will verbally outline to the Employee any reasons for the reprimand, how he should correct his work or conduct and what will happen if he fails to do so. As a point of process, the event of the verbal reprimand will be noted in the Employee's file.

18.4 Letter of Reprimand

If the Employee displays no positive response to the verbal reprimand, the Manager shall reprimand that Employee by means of a letter of reprimand to the Employee within sixty (60) days attendance in the workplace after the delivery of the verbal reprimand. A copy shall be sent concurrently to the Union office. Such letters shall become part of the Employee's record.

18.5 Suspension

If there is still no positive response from the Employee, he will be given written notice of the suspension by the President and the reasons for it in the notice. The days of suspension with or without pay shall be included in the notice. A copy of the suspension notice shall be sent concurrently to the Union office.

18.6 Dismissal

Dismissal shall be effected by the President, and the Employee shall receive written notice of the reasons for dismissal. Any Employee who is dismissed, except in cases of misconduct, will be entitled to notice or pay in lieu of such notice as follows:

- *One (1) week if without seniority*
- *Four (4) weeks if permanent but less that five (5) years service*
- *Six (6) weeks if five (5) years service but less than ten (10) years*

- *Eight (8) weeks for Employees with ten (10) or more years of service.*

Such pay shall be in addition to the payment in lieu of earned vacation leave. Earned vacation leave due an Employee shall not be used as any part of the period of notice above.

A copy of the dismissal notice shall be sent concurrently to the Union office.

18.7 Involuntary Demotion

Thirty (30) calendar days notice shall be given to an Employee who is to be demoted involuntarily. Such notice shall be given to the Employee in writing and shall set out in detail the reasons. A copy of this notice shall be supplied concurrently to the Executive Director of Operations of the Union.

18.8 Burden of Proof

In all cases of discipline and demotion, the burden of proof of just cause shall rest with the Employer. Evidence shall be limited to the grounds stated in the original notice given to the Employee.

18.9 Records of Employees

Employees shall have the right to review their personnel file. Employees have the right to have their written response to disciplinary action placed on their personnel file. A Union representative, with the written authorization of the Employee and with reasonable notice to the Employer, shall have access to the file. The HR Manager or designate will be present with the Employee, Employer or Union Representative during viewing of the file.

Records of disciplinary action on an Employee's personnel file shall be removed from the file after twenty-four (24) months, unless there are disciplinary documents of equal or greater severity placed on the Employee's file within that period. When such documents are removed, they shall be returned to the Employer or the Union.

[15] Several other articles in the collective agreement were referred to during the course of the Union's argument. Upon my review of the collective agreement, I found other articles that bear relevance to the issues I am called upon to decide. The following articles are contained in the collective agreement between the parties:

ARTICLE 1 DEFINITIONS

1.2 Continuous Service/Employment

All Employees transferred to the Tourism Authority October 1, 1994, or subsequently transferred on April 1, 1996, will be credited with accumulated days of seniority acquired while employed by the Public Service of Saskatchewan, TISASK, STEC, or Economic Development.

***1.4 Employee** or **Employees** means a person or persons to which the terms of this Agreement apply as indicated in Article 2.*

1.17 Permanent Employee *means an Employee who has completed a probationary period from date of hire and accrues seniority.*

ARTICLE 3 UNION SECURTIY

3.1 Recognition

The Tourism Authority agrees to recognize the Saskatchewan Government and General Employees' Union as the sole and exclusive collective bargaining agent for the Employees covered by this Agreement and hereby agrees to negotiate with the Union or its designated bargaining representatives in any and all matters pertaining to working conditions.

No Employee or group of Employees shall undertake to represent the Union at meetings with the Employer's representatives without the proper authorization of the Union. The Union will provide the Employer with the name of its officers. The Employer shall provide the Union with a list of personnel with whom the Union may be required to transact business.

No individual Employee will be permitted or required to make a written or verbal agreement with the Employer or the Employer representative which may conflict with the terms of this Agreement.

ARTICLE 4 APPOINTMENTS

4.6 Filling Vacant Positions

Steps in and filling a Vacant position are:
1. Appointment of senior qualified applicant (internal).
2. Appointment of external qualified applicant.

Then these may occur:

3. Appointment most qualified internal applicant (underfill) as per Article 4.6.2.
4. Appointment of most qualified external applicant (underfill) as per Article 4.6.2.

4.6.1 Appointment of Senior Qualified Applicant

Positions shall be filled by the senior qualified applicant. Seniority will be counted as of the closing date of the posting. To be considered qualified, applicants must meet the minimum requirements as set forth in the posting.

Should the Employer decide not to appoint the senior qualified applicant, the Employer's representative will so notify the applicant and the Union in writing with his reasons, and the applicant will be entitled to engage the expedited arbitration procedure (without having to engage the grievance procedure).

No posting will be cancelled once it has been determined that there is at least one qualified applicant with seniority unless agreed to by the parties.

4.6.2 Under-filling Positions

Where it is determined through posting that there are no qualified applicants for a posting and the Employer decides to underfill a position, the Employer will select the most qualified applicant. The Employer shall notify the union, prior to the underfill posting, of the selection criteria for the underfill. The Employer shall notify the union of their selection and rationale.

. . .

4.7 Role of the Union

The Employer shall notify the Union of the applicants in each posting, and of the seniority, if any, of each of them, and of the time, place and date of the assessment of applications and interviews.

The Union shall be entitled to have the union representative present:

– during the development of the KSA's required for the position to be posted
– during the assessments of the applicants' resumes
– during the interviews as an observer
– during the post-interview discussion as an active panel member

The Union representative will attend without loss of pay providing she is an Employee of the Employer.

The Union representative will not attend assessments of resumes or interviews when there are no seniority-rated applicants.

The Union representative will attend assessments of resumes and interviews when an internal applicant has been excluded and the competition has gone to external applicants. (This process will be reviewed on or before April 1st, 2009.)

ARTICLE 5 SENIORITY

5.1 Definition of Seniority

Seniority is defined as the total length of continuous service in the bargaining unit. Such seniority shall include all paid days of employment.

A total of two hundred and sixty (260) working days shall equal one (1) year; Employees cannot earn more than that total in any one (1) year.

5.2 Permanent Employees Have Seniority

All Employees within the scope of this Agreement shall, after successful completion of the initial probation, be credited with seniority from the date of employment with Tourism Authority.

Less-than-full-time Employees who have not completed their probationary period will be recalled in order of service to the Employer, so as to enable such Employees to complete their initial probation and become permanent.

5.4 Maintenance and Accrual

Seniority shall be maintained and accrued during:

a) All periods of paid leave.
b) Leave of absence without pay for periods not exceeding ninety (90) days.
c) Parental Leave (maternity, paternity and adoption).
d) Layoff up to and including ninety days.
e) Compassionate leave.
f) Wage replacement benefits for a period of three (3) years or less for Workers' Compensation benefits, SGI benefits and Long Term Disability Benefits.
g) Employees under Article 17.13 Leave of Absence for Union Business.

Maintenance of Seniority

Seniority shall be maintained, but shall not accrue during:

a) Periods of leaves of absence over ninety (90) days.
b) Layoff over ninety (90) days.
c) Appointments to an out of scope position.
d) Wage replacement benefits for a period longer than three (3) years for Workers' Compensation benefits, SGI benefits and Long Term Disability benefits.
e) Employees under Article 7.4 Re-employment list.

5.5 Loss of Seniority

Seniority shall be lost by reason of:

a) Resignation in writing not withdrawn within seventy-two (72) hours.
b) Termination
c) Being unable to secure re-employment within three (3) years following conclusion of an indefinite leave.
d)Failure to return to work without an acceptable reason following completion of a leave of absence.
e) Failure to return to work without acceptable reason within fourteen (14) days' notification by the Employer to return to work following a non-permanent layoff.
f) If a less-than full-time Employee, a period of non-employment of greater than three (3) years, unless the Employee is on an approved leave.

ARTICLE 6 PROBATION

6.1 On Initial Employment

6.1.1 Upon initial appointment, all Employees shall serve a probationary period as defined herein. The probationary period may be extended in accordance with Article 6.1.3.

The following classifications will have six-month probationary period:
…

All other classifications will have a probationary period of one year.

6.1.3 The Employer may request from the Union, an extension no later than two (2) weeks prior to the expiration of the probationary period, and shall include written reasons for the request. Up to two (2) three-month extensions may be requested with a work plan.

6.1.4 Dismissal shall be affected by the President, and the Employee shall receive written notice of the reasons for dismissal. Any Employee who is dismissed, except in cases of misconduct, will be entitled to notice or pay in lieu of one (1) regularly scheduled workweek. The Employee will be given an opportunity to respond, and if necessary, to engage the grievance procedure contained in this Agreement.

Such pay shall be in addition to the payment in lieu of earned vacation leave. Earned vacation leave due an Employee shall not be used as any part of the period of notice above.

A copy of the dismissal notice shall be sent concurrently to the Union office.

6.3 On Promotion

6.3.1 A permanent Employee who has been promoted shall serve a probationary period as stipulated for the class. A permanent Employee who chooses to revert within the probationary period, or does not successfully complete the probationary period, shall revert to her former position, or by mutual agreement between the Employee and the Employer, the Employee may revert to a similar position in the original work unit at the same step in the salary range, subject to any increments she would have earned had the promotion not taken place.

6.3.2 A permanent Employee displaced through Article 6.3.1 shall also have the right to revert to her former position at her former step in the salary range, subject to any increments she would have received had she remained in that position. If no former position is available, she shall have the right to utilize Article 7.

6.9 Completion of Probation

Upon successful completion of a probationary period, the Employee shall be appointed as a permanent Employee.

Subject to Article 6.1.3, when the Employer does not terminate or fail the Employee before the end of her probationary period, she will be deemed to have become a permanent Employee in that position and classification.

ARTICLE 7 JOB ABOLITION AND LAY-OFF

7.1 Notice of Position Abolishment

…

Written notice of at least sixty (60) days in advance of layoff shall be given to any permanent Employee whose position is to be abolished. In no case will the notice given to any Employee be less than that provided for in Section 43 of The Labour Standards Act.

Both parties recognize that job security shall increase in proportion to seniority. Therefore, in the event of job abolition or layoff, Employees shall be laid off in reverse order of seniority within each work unit affected, on a headquarters basis. However, this does not apply to term Employees. New hires who have not completed their probationary period shall not be entitled to bumping, recall or re-employment list provisions.

7.2 Options of Permanent Employees Who Have Received Notice of Position Abolishment

An Employee who holds permanent status in the position which is being abolished shall have the right to exercise any one of the following options:

a) To accept one of the options presented by the UMC Committee.
b) To go on lay-off and thereafter be entitled to exercise re-employment rights, in accordance with Article 7.4.
c) To retire.
d) To resign and receive severance pay, in accordance with Article 7.8, or
e) Take indefinite leave of absence, in accordance with Article 17.9.

7.8 Severance Pay

A permanent Employee who resigns as a result of actions taken under Article 7 shall be entitled to receive severance pay on the basis of one (1) month's pay for each year of the first eight (8) years of service or portion thereof, and two (2) weeks' pay for each year of service or portion thereof beyond eight (8). Severance pay is a payment to an Employee to ease the effects of involuntary separation through job abolishment and lay-off. It is not compensation for past services.

Eligible years for the purpose of severance pay will include all continuous employment with the Employer.

ARTICLE 19 GRIEVANCE PROCEDURE

19.2 Definition of a Grievance

A grievance shall be defined as any difference or dispute between the Employer and the Union on behalf of any Employee(s), or any difference or dispute between the Employer and the Union

…

19.3 Access to Grievance Procedure

With the exception of a grievance which relates to a termination of employment, access to the grievance procedure is limited to an Employee who, at the date of the initiating the grievance, is an Employee within the scope of this Agreement.

ARTICLE 20 ARBITRATION

20.2 Procedure

20.2.2 The arbitrator shall determine the procedure, but shall give full opportunity to all parties to present evidence and make representations. The arbitrator shall, as much as possible, follow a layperson's procedure and shall avoid legalistic or formal procedure.

20.2.3 No grievance shall be defeated by any formal or technical objection and the arbitrator shall have the power to allow all pertinent information to the grievance and the power to waive formal procedural irregularities in the processing of the grievance, in order to determine the real matter in dispute and to render a decision according to equitable principles and the justice of the case.

20.3 Decision of the Arbitrator

20.3.3 The arbitrator shall not have the power to change this Agreement or to alter, modify, or amend any of its provisions. Subject to the foregoing, the arbitrator shall have the power to dispose of the grievance by any arrangement which the arbitrator deems just and equitable.

IV ISSUES:

[16] According to the agreement of the parties, the issue before me is whether the Employer is entitled to dismiss without just cause but on notice (or pay in lieu of notice) in the amount prescribed by Article 18.6 of the collective agreement.

V. FACTS, EVIDENCE AND EVIDENTIARY RULING:

[17] At the outset of the hearing, the Union and the Employer entered an Agreed Statement of Facts. The Statement reads as follows:

1. *The Parties are subject to the Saskatchewan Tourism Authority and SGEU October 1st, 2007 – September 30th, 2010 Collective Agreement.*

2. *Daryl Demoskoff was hired on May 17, 2004 as a Marketing Media Relations Coordinator that was classified as a Tourism Industry Consultant II (2) level. He passed probation. This position was reclassified to a Tourism Industry Consultant III (3) level on January 26, 2006. At the time of termination, he was a permanent employee.*

3. *He was terminated on March 23, 2010 and was provided 6 weeks pay in lieu of notice as stipulated in Article 18.6 of the Collective Agreement.*

[18] In addition to the Agreed Facts, the Employer made the admission that the Employer did not have just cause for the Grievor's dismissal and the Employer does not assert that the Grievor has engaged in "misconduct."

[19] As previously indicated, the parties agreed to the entry of a number of documents as exhibits. These are itemized earlier in this Award.

[20] Also as previously indicated, the Union called to two witnesses to testify: Kyle Robinson (an employee of the Employer and a Union steward and member of the Union's bargaining committee) and Dave Stewardson (a former employee who retired in 1999 but served as Chair of the Union's bargaining committee in 1993 to 1994). Mr. Robinson testified concerning some instances in which employees had been dismissed from their employment and given pay in lieu of notice in amounts that exceeded the sums set out in the collective agreement. Copies of the dismissal letters as well as copies of the Union`s grievances filed on behalf of the dismissed employees were entered as exhibits. In cross-examination, additional dismissal letters and grievance forms were entered as exhibits. None of these grievances proceeded to an arbitration hearing. I note that the dismissals in question all appeared to deal with probationary employees.

[21] Mr. Stewardson testified about the history of the Tourism Authority and in particular, the transfer of employees and bargaining rights from the Employer`s predecessor, the Government of Saskatchewan (the employees were transferred from the Department of Economic Development), to the newly created Tourism Authority in the early 1990`s. He also testified about two other non-unionized organizations whose employees were transferred to the bargaining unit. Mr. Stewardson also was on the bargaining committee during the negotiation of the first collective agreement with the Tourism Authority in 1996 (prior to that, the parties operated under the collective agreement that existed between the Union and the Public Service Commission). Mr. Stewardson noted that the PSC-SGEU collective agreement was complicated and had many provisions that were unnecessary. He said that they intended to use that collective agreement as a framework but clean up and clarify the language. As such, many changes were made to the collective agreement. Mr. Stewardson was asked questions about various provisions of the collective agreement, including Article 18, in an effort to understand the parties' expectations and intent. He spoke of the parties wishing to incorporate a progressive discipline process in the discipline article and that was done along with keeping some but not all of the language of the PSC agreement. He said that his understanding of the word "misconduct" used in Article 18.6 was that it meant conduct such as theft and that the burden of proof of just cause was meant to apply to all forms of discipline set out in Article 18. I note that there were many instances in which Mr. Stewardson could not recall any specific discussions about the provisions he was asked about.

[22] I have not set out the evidence of the witnesses in great detail because I have found that much of their evidence was in the nature of "extrinsic" evidence, both in terms of past practice and negotiating history, and not admissible in this case as an aid to interpretation of the collective agreement. The admissibility of this evidence was argued at the outset of the hearing. Based on the provisions in the collective agreement that govern the powers of arbitrators (in particular, Articles 20.2.2 and 20.2.3), along with the fact that sometimes such evidence is necessary to disclose an ambiguity in the language of the collective agreement, I allowed the Union to introduce such evidence and reserved my decision on the issue of admissibility. I note that the Union led this evidence in support of an alternate argument. The Union's initial position was that the collective agreement language is not ambiguous and that the collective agreement, either expressly or by implication, requires just cause for dismissal. The Union asked that I consider its evidence of past practice and negotiating history only in relation to its alternate position, that is, if the collective agreement is ambiguous about the requirement of just cause for dismissals, evidence of past practice and negotiating history should be used to assist in resolving the ambiguity. In this case, I have decided that the evidence in question does not meet the tests for admissibility and it is neither necessary nor proper to consider it.

[23] In Brown and Beatty, *Canadian Labour Arbitration*, 3rd edition, the authors set out the general rule concerning extrinsic evidence at page 3-88:

> Parol or extrinsic evidence, in the form of either oral testimony or documents, is evidence which lies outside, or is separate from, the written document subject to interpretation and application by an adjudicative body. Although there are numerous exceptions, the general rule at common law is that extrinsic evidence is not admissible to contradict, vary, add to subtract from the terms of an agreement reduced to writing. If the written agreement is ambiguous, however, such evidence is admissible as an aid to interpretation of the agreement to explain the ambiguity but not to vary the terms of the agreement.

[24] Therefore, in order to consider such aids to interpretation as past practice and negotiating history, I must first be satisfied that the collective agreement language is ambiguous. For the reasons that follow under the "Decision" portion of this Award, I find that the language is not ambiguous – that there is a "clear preponderance in favour of one meaning, stemming from the words and structure of the agreement as seen in their labour relations context" (taken from Brown and Beatty, *Canadian Labour Arbitration*, at 3:44300).

[25] Even if I had found that the collective agreement language was ambiguous, I note that the evidence of Mr. Richardson concerning past practice is not "unequivocal," that is, there is no clear meaning that arises from the circumstances of the dismissals he testified about, other than that we know that the Union disputed the

dismissals by filing a grievance. While there was no evidence to suggest that the Employer took the same position in relation to those dismissals and grievances as it is taking here, I cannot conclude that there was a practice that reveals the common intention of the parties. It was my opinion that it was inappropriate to admit any "without prejudice" settlement that may have resulted from the filing of the grievances, however, such a settlement or settlement(s) could not appropriately form the basis of an "unequivocal" practice in any event. In my opinion, the evidence of past practice that was led tends only to show that the issue of whether the Employer may dismiss without just cause remains a disputed one, although I note that the employees dismissed in those instances were probationary employees and that in itself may distinguish those dismissals from the dismissal at issue before me.

[26] In addition, the evidence of Mr. Stewardson, as it relates to negotiating history, is also not admissible for the purposes of determining the intentions of the parties, given that I have determined that the language of the collective agreement is not ambiguous. I note that caution must be used when deciding whether to consider negotiating history evidence as an aid to interpretation. In a decision cited by the Union, *Re: DHL Express (Canada) Ltd. and C.A.W.-Canada, Locs. 4215, 144 & 4278*, [2004] C.L.A.D. No. 613, Arbitrator Hamilton quotes from his decision in *Re Fort Garry Care Centre and U.F.C.W., Loc. 832* (unreported), May 3, 2002, [summarized 69 C.L.A.S. 47] regarding the manner in which negotiating history must be assessed:

> In order for negotiating history to be an aid to interpretation, the evidence adduced must disclose either a shared intention or consensus between the parties with respect to the meaning urged by one party (see *Re Hiram Walker and Sons Ltd. and Distillery Workers, Local 61* (1973), 3 L.A.C. (2d) 203 (Adams) at p. 209). It is not unusual for a party to leave the bargaining table with its own view of what a particular clause means. But, such unilaterally held views cannot be the determinant of an arbitrator's primary task whish is to ascertain the common intention of the parties by interpreting the language which both parties have agreed to in the Agreement.
>
> When an arbitrator delves into negotiating history to analyze statements made during the give and take of negotiations, caution must be exercised. As noted, the evidence must disclose a consensus and not simply transform the "unilateral hopes" or expectations of either party into a meeting of the minds. In *Re Hallmark Containers Ltd. and Canadian Paperworkers Union, Local 303* (1983), 8 L.A.C. 117 (Burkett), the board commented on the admissibility of negotiating history to both establish and resolve a latent ambiguity. At p, 122:
>
> > "… a board of arbitration must be mindful of the dynamics of the bargaining process and assessing evidence of this type tendered for this purpose. The difficulty lies in the fact that each party approaches a bargaining table with its own agenda and its own expectations which may colour its understanding of what has transpired. If evidence of negotiating history is to establish and resolve a latent ambiguity it must establish that the parties were of a single mind as to the meaning and application of the language in

> dispute. Evidence of one side's expectations or of one side's understanding is not evidence of agreement and a board of arbitration must be sensitive to this essential distinction when relying on evidence of negotiating history as an aid to ascertaining the intention of the parties." [My emphasis.]

[27] In this case, the evidence of Mr. Stewardson fell far short of establishing a shared intention or consensus between the parties as to the meaning of Article 18. However, as mentioned, it is neither necessary not appropriate for me to consider evidence of negotiating history because I have not found any ambiguity in the collective agreement language.

[28] I further note that the Union was clear that it was not introducing the evidence of past practice and negotiating history for the purposes of establishing an estoppel. As such, I find it unnecessary to address that issue.

[29] In light of the above evidentiary ruling, in reaching a decision in this matter, I have considered only the facts contained in the Agreed Statement of Facts, the documentary evidence adduced at the hearing by agreement, the Employer's admission and the evidence of the witnesses that did not relate to past practice and negotiating history.

IV. POSITIONS OF THE PARTIES

[30] The parties filed written arguments at the hearing and provided oral argument as well. A number of arbitration decisions were also provided. Not all of the authorities will be cited in this decision, but I have carefully reviewed the material filed. I thank counsel for their thorough efforts. What follows is a summary of the positions of the parties:

The Employer:

[31] The Employer takes the position that the unambiguous language of the collective agreement permits dismissal without just cause, provided that certain notice or pay in lieu of notice is given. The Employer submits that the clause most relevant to the interpretation is Article 18.6, which governs "Dismissal." The Employer submits that by including the words "except in cases of misconduct," this Article contemplates a category of employees dismissed for misconduct and another category of employees who are dismissed without misconduct. In the Employer's view, this Article clearly provides that a dismissed employee, "except in cases of misconduct," is entitled to notice or pay in lieu of notice. The employees who are dismissed for misconduct are the "excepted" category and are not entitled to receive notice or pay in lieu of notice. The Employer asserted that this Article clearly contemplates that there may be dismissed employees who are guilty of no misconduct. Although this Article also requires that the employee receive "written

notice of the reasons for dismissal," this does not imply that those reasons must constitute just cause for dismissal; there may be reasons not involving just cause as to why an employee is being dismissed.

[32] The Employer submitted that the requirement under the collective agreement to provide notice or pay in lieu of notice makes little sense if employees may only be dismissed by the Employer with just cause, noting that the notice provisions in the collective agreement are very similar to those set out in s. 43 of *The Labour Standards Act* (except that the collective agreement is more generous toward employees with between one and three years' service). The Employer pointed out that s. 43 of *The Labour Standards Act* is interpreted in precisely the same way that the Employer argues Article 18.6 should be interpreted, that is, that employees may be dismissed without just cause, provided that they receive the prescribed notice or pay in lieu of notice.

[33] With reference to Article 18.8, titled "Burden of Proof," which indicates that the burden of proof of just cause shall rest with the Employer, the Employer submits that this clause reflects the common law and its inclusion means only that ***if*** the Employer should ***choose*** to dismiss an employee for just cause, the burden of proving that lies with the Employer. In other words, where the Employer is not asserting just cause for the dismissal of an employee, Article 18.8 has no application.

[34] The Employer further asserts that given the wording of Article 18.6, it would be absurd to suggest that all of the disciplinary steps set out in Article 18 would have to be followed prior to dismissal. This is because under Article 18.6, there can be dismissed employees who have not committed any misconduct. As such, there would be no basis to proceed through a prior disciplinary step, such as a reprimand, if no misconduct had been committed by the employee.

[35] The Employer submitted that there is no clear provision in the collective agreement that requires just cause for dismissal. The absence of such a clear and commonly used provision should not be implied where it does not appear. The Employer noted that this Union has negotiated several collective agreements with other employers and included a very clear "just cause" requirement in those collective agreements. The Employer included a sampling of such collective agreements with its written argument. The Employer also referenced the arbitration decision of *Re British Columbia Hydro and Power Authority and British Columbia Nurses' Union* (1983), 10 L.A.C. (3d) 76 in which a similar discharge clause appears and where the arbitration panel concluded that the language, given its plain meaning, gives the employer a discretionary right to dismiss an employee without cause and upon notice. There was not only the absence of language requiring just cause but an express right to terminate on notice.

[36] The Employer also submitted that Article 5.5 of the collective agreement, titled "Loss of Seniority," states that seniority will be lost in a number of ways, including

by reason of "termination." The Employer suggests that this may be contrasted with other collective agreements where the language states that seniority may be lost through "dismissal or termination for cause and not reinstated" or similar language.

[37] The Employer asserted that taking a contrary interpretation to that proposed by the Employer in this case, would lead to a "tortured meaning" of the type described in the decision of Professor Laskin in *Re A.C. Horn Co. and International Chemical Workers Union, Local 424* (1953) 4. L.A.C. 1524 (a decision which will be discussed in the "Decision" portion of this Award).

[38] The Employer seeks a declaration that the collective agreement permits dismissal of employees without just cause, provided the notice or pay in lieu of notice entitlements set out in Article 18.6 are provided. The Employer agreed that regardless of the outcome, the arbitrator should remain seized with the grievance to deal with any further issues that arise from the Award. The Employer noted that even if the arbitrator concludes that the collective agreement does not permit dismissal of an employee without just cause, there may be additional issues to address, such as remedy, even though the Employer has taken the position that it did not have just cause for the Grievor's dismissal, nor did the Grievor engage in misconduct.

The Union:

[39] The Union primarily took the position that Article 18 permits dismissals only on the basis of just cause and that if there is no express language setting out this requirement, such a term should be implied on the basis of the wording of Article 18, particularly when it is read in the context of the collective agreement as a whole.

[40] By way of background, the Union referred to several provisions of the collective agreement to assist in determining the intentions of the parties in agreeing to the language they did in Article 18.6 and Article 18 as a whole. The Union noted that the collective agreement contains four different provisions that relate to severance pay; three others in addition to those set out in Article 18.6. Article 6.1.4 requires the Employer to provide notice or pay in lieu of notice of one work week to probationary employees who are dismissed, except when dismissed for misconduct, also noting that such an employee may respond and if necessary, engage the grievance procedure. Article 7.8 deals with severance pay on job abolishment or lay-off situations and entitles a resigning employee to severance pay of one month per year of service up to eight years and two weeks per year of service thereafter.

[41] The Union also pointed to several articles that demonstrate the value the parties have placed on seniority, including Article 4 ("Appointments") (particularly 4.1, 4.6, 4.6.1, 4.7), Article 5 ("Seniority"), Article 7 ("Job Abolishment and Lay-off") (in particular Articles 7.1, 7.2, 7.3, 7.4, 7.5, 7.5.1 and 7.6). In addition, there are several

provisions that protect employees' job security and provide employees with specific rights to process or protection with respect to discipline. These include provisions relating to limitations on contracting out, rights on technological change, rejection on probation, rights of reinstatement following a leave of absence, right to return from union leave, maintenance of status following leave for workplace injury or for other illness or injury, rights to refuse unsafe work and be free of reprisals, right of all employees to access the grievance procedure upon termination, and the right to access the full grievance and arbitration process (rather than the expedited process) for grievances related to discipline and dismissal.

[42] The Union submitted that when interpreting the words of a collective agreement, those words must be read in their entire context, harmoniously with the scheme of the collective agreement and the intention of the parties. The "entire context" includes consideration of the entire agreement and how the provisions interact, as well as the legislative structure within which the collective agreement exists and current judicial and arbitral views.

[43] The Union pointed out that the right to grieve a dismissal, as contained in the collective agreement, confirms that the Employer may not dismiss an employee without cause. That *The Saskatchewan Trade Union Act* contains a provision that gives an arbitrator authority to substitute a penalty for the discharge or discipline of an employee (except where the agreement contains specific penalties for an infraction) supports the position that all dismissals must be for just cause. The arbitration provisions of the collective agreement also allow the arbitrator to dispose of a grievance by "any arrangement" which the arbitrator deems "just and equitable."

[44] The Union referenced several arbitration awards in support of its position that it is necessary to examine the provision in question as well as the collective agreement as a whole to determine whether the parties intended that a dismissal may only occur if the employer has just cause. In *Mississauga Hydro-Electric Commission and E.B.E.W., Loc. 636*, 13 L.A.C. (4TH) 108, the arbitrator, noting that the collective agreement provided a discharged employee access to the grievance procedure, concluded that on the basis of this and other provisions of the collective agreement, the parties intended that a restriction would be placed on the employer's right to terminate a regular employee, even though there was no express term in the collective agreement concerning the requirement of just cause. The Union submitted that the parties in this case have granted both permanent employees and probationary employees' access to the grievance procedure for dismissals and discipline and, along with the power of an arbitrator to substitute an appropriate penalty, this leads to the conclusion that the parties intended to restrict dismissals of employees to reasons of just cause. Furthermore, the Union submitted, the Article 18.1 right of employees "to have any differences regarding disciplinary action or dismissal heard through the grievance and arbitration procedure," would be rendered meaningless if the Employer could dismiss without cause upon notice, because other than a dispute about the existence of "just

cause," what other "difference" could the parties possibly have to grieve and arbitrate? The Union submits that the narrow interpretation proposed by the Employer results in an absurdity that flies in the face of arbitral jurisprudence, natural justice and the collective agreement as a whole. Other cases cited by the Union that supported the implying of a term requiring just cause for all dismissals, based on a reading of the relevant terms in the context of the agreement as a whole, included *Canadian Union of Public Employees, Local 3243 v. Board of Education of the Broadview School Division No. 18 of Saskatchewan* (unreported decision of Beth Bilson, 1999), *L-3 Communications Spar Aerospace Ltd. v. International Association of Machinists and Aerospace Workers, Local Lodge 1579*, [2010] 201 L.A.C. (4th) 85 (Wakeling), *POS Pilot Plant Corp. v. United Food and Commercial Workers, Local 342-P3*, [2004] S.L.A.A. No.1 (Priel), and *Kamsack (Town) and C.U.P.E., Loc. 1881*, [2000] 89 L.A.C. (4th) 153 (Pelton).

[45] The Union also submitted that other provisions in the collective agreement that deal with seniority, job abolishment and lay-off would be rendered meaningless if a termination on notice, without cause, were permitted.

[46] The Union submitted that Article 18.8 (which indicates that the burden of proving just cause rests with the Employer in all cases of discipline and demotion) further supports its position. When this Article is read in the context of Article 18 as a whole, it is apparent that it applies to each of the steps of progressive discipline previously set out in Article 18, including verbal reprimand, written reprimand, suspension, dismissal and involuntary demotion (which are all set out in a progressive manner but for involuntary demotion). The closing words of Article 18.1 are also instructive. It states that "In the event the Employer initiates disciplinary action against an Employee, except in cases of serious misconduct, the practice of progressive discipline will take place ***as follows:***" with the concluding colon after the word "follows" indicating that the subsequent provisions are the steps of progressive discipline that the Employer must follow. These steps include "dismissal" in Article 18.6 and the layout of Article 18 affects how article 18.6 must be interpreted – dismissal in Article 18.6 can only refer to disciplinary action. Further, the layout of the article indicates that Article 18.8 dealing with the burden of proof of just cause must apply to the foregoing provisions.

[47] With respect to Article 18.8 and the requirement of the Employer to prove just cause, the Union noted that this standard applies even where a termination is for non-culpable reasons. The Union submitted that the notice provisions in Article 18.6 apply to non-culpable dismissals (such as excessive innocent absenteeism), that is, dismissals that are not for "misconduct." The Union submitted that under Article 18.6, if an employee is dismissed for culpable reasons (i.e. misconduct), no notice or pay in lieu of notice is given, but if an employee is dismissed for non-culpable conduct (i.e. not misconduct), the employee is entitled to notice or pay in lieu, in the amounts prescribed by Article 18.6. The Union submitted that arbitral authority requires an employer to prove just cause for all dismissals, whether the dismissal was for culpable or non-

culpable reasons. The employee is entitled to the same rights and protections whether the conduct at issue was culpable or non-culpable.

[48] The Union also submitted that to imply a term in this collective agreement requiring the employer to establish just cause for termination is consistent with the preamble in the parties' collective agreement. The Preamble states that it is the parties' desire to maintain the harmonious relationship between the Employer and the Union. While acknowledging that the preamble does not override the specific provisions of the collective agreement, the Union suggests that those words provide a framework or a purpose within which interpretation decisions should be made. The Union submitted that the Employer's proposed interpretation subverts numerous bargained rights under the collective agreement, by allowing it to dismiss any employee it wishes upon a simple and minimal payout.

[49] The Union requested a declaration that the collective agreement requires the Employer to establish just cause for any dismissal of any employee. Although the Union asked that the grievance be upheld and the Grievor reinstated to his employment (because the Employer has admitted that it does not have just cause for the Grievor's termination), the Union recognized that the Employer wished to make further arguments in the event that I accepted the Union's interpretation. The Union agreed that I should remain seized of the matter and reserve jurisdiction to address any further issues that result from this ruling or the implementation of the ruling, should the parties be unable to resolve the same.

V. DISCUSSION:

(a) Rules of Construction

[50] The fundamental objective in determining the meaning of provisions of the collective agreement is to discover the true intentions of the parties at the time they agreed to the provisions in question. We start with the proposition that "*the parties are assumed to have intended what they have said, and that the meaning of the [collective agreement] is to be sought in its express provisions.*" [1] Also in Brown & Beatty, *supra*, at para. 4:2100, the authors provide a summary of the general rules of construction applicable to the interpretation of collective agreements:

> *In searching for the parties' intention with respect to a particular provision of an agreement, arbitrators have generally assumed that the language before them should be viewed in its normal and ordinary sense unless that would lead to some absurdity or inconsistency with the rest of the collective agreement, or unless the context reveals that the words were used in some other sense …*

[1] Brown & Beatty, *Canadian Arbitration Law* (3rd ed.), para. 4:2100.

> *The context in which words are found is also a primary source of their meaning. Thus, it is said that the words under construction should be read in the context of the sentence, section and agreement as a whole.*

[51] In the judicial review decision *Alberta Health Services (Calgary Area) v. Health Sciences Association of Alberta (Paramedical Professional/Technical Unit),* 2010 AQBQ 555 (CanLII), the Alberta Court described an arbitrator's interpretative task in similar but simpler terms, stating at paragraph 35:

> *The provisions of a collective agreement are to be interpreted in the context of the agreement as a whole and in a manner that avoids conflicts or internal inconsistencies. This dictates an interpretive approach that seeks to reconcile the provisions of the agreement with each other: United Food and Commercial Workers' Union, Local 401 v. Real Canadian Superstore, 2008 ABCA 210 (CanLII), 2008 ABCA 210, 432 A.R. 212 at para. 15.*

[52] Also at 4:2100 of Brown and Beatty, concerning the task of discerning the intention of the parties, it states:

> *When faced with a choice between two linguistically permissible interpretations, however, arbitrators have been guided by the purpose of the particular provision, the reasonableness of each possible interpretation, administrative feasibility, and whether one of the possible interpretations would give rise to anomalies. …*

[53] In addition, when interpreting provisions of a collective agreement, arbitrators are to apply the presumption that all words used in a collective agreement are intended to have some meaning. Also, in determining the meaning of certain words used in a provision of the collective agreement, arbitrators often use dictionaries as a corroborative aid to the interpretation of a collective agreement.

[54] In a decision cited by the Union, *Toronto Transit Commission and Amalgamated Transit Union, Local 113* (unreported decision of P. John Brunner, 2009), the arbitrator referenced a recent re-examination of the principles of contract interpretation by the Ontario Court of Appeal and arrived at a useful summary of those principles insofar as they are applicable to interpretations of a collective agreement. At page 16, Arbitrator Brunner states as follows:

> *The agreement is to be interpreted:*
>
> *(a) as a whole, in a manner that gives meaning to all of its terms and avoids an interpretation that would render one or more of its terms ineffective;*
>
> *(b) by determining the intention of the parties in accordance with the language they have used in the written document and based upon the cardinal presumption that they have intended what they have said;*

> *(c) with regard to objective evidence of the factual matrix underlying the negotiations of the contract, but without reference to the subjective intention of the parties; and (to the extent there is any ambiguity in the contract),*
>
> *(d) in a fashion that accords with the sound labour relations principles and good labour management sense, and that avoid a labour relations absurdity.*
>
> *It has also been said that each word in an agreement is not to be placed under an interpretive microscope or in isolation and given a meaning without regard to the entire document and the nature of the relationship created by the agreement. A court should not strain to dissect a written agreement into isolated components and then interpret them in a way that, while apparently logical at one level, does not make sense given the overall wording of the document and the relationship of the parties.*

[55] It is through the application of these rules of construction that I will attempt to discern the true intentions of the parties in agreeing to the terms of Article 18 of the collective agreement, including Article 18.6, and whether the collective agreement requires that dismissals be only for just cause.

(b) Onus of Proof

[56] Before turning to the interpretation issue, I wish to make some comments about the onus of proof. In typical cases involving an employee's termination of employment, there is a shifting onus. This means that once the grievor or the union has established that the grievor is an employee, that the grievor was disciplined, and that the grievor is a bargaining unit member covered by the collective agreement, the onus shifts to the employer to prove that the conduct of the employee warranted discipline and that the discipline issued was appropriate in all of the circumstances. In the present case, the Employer is not alleging just cause for the Grievor's dismissal and as such, we are not dealing with a typical termination or discipline case. The present case requires an interpretation of the collective agreement, a decision which requires that I discern the true intention of the parties in agreeing to the language of the collective agreement. Given the nature of my task, it would seem that the issue of who bears the onus of proof is irrelevant or at least of minimal importance as it is not a question of whether the Union can prove that it has the better interpretation – it is a question of determining the meaning of the collective agreement language based on the true intentions of the parties. Having said this, I am prepared to accept that the Union/Grievor bears the onus of proof in this case, on the basis of the analysis and conclusion of Arbitrator Priel in the *POS Pilot Plant* case, *supra*. Arbitrator Priel makes the following comments concerning the proper onus of proof in an interpretation case similar to the case before me:

> *In my opinion, an employer has the right, exercising its management rights, to make decisions concerning the day-to-day management of its business. In so doing, the Employer would have the right to place an interpretation on a particular section of the Collective Bargaining Agreement. The decision of the*

> *Employer, in placing a particular interpretation on a clause in the Collective Bargaining Agreement, is subject to challenge by a Union or a Grievor under the grievance and arbitration process provided by the Collective Agreement. In grievance arbitration proceedings, the onus is on the grievor … to satisfy a board of arbitration, on a balance of probabilities, by a preponderance of evidence, that the interpretation placed on the contract by the Employer was not the proper interpretation of the Agreement and that by placing upon the Collective Agreement the interpretation which the Employer did, the Employer has breached the collective agreement. In such a case, an arbitration board is not restricted to adopting either the interpretation proposed by the Employer or that put forward by the Union. Once the arbitration board is seized with the jurisdiction to interpret the Collective Agreement, it is charged with the duty of determining what it perceives to be the correct meaning of the provision of the Collective Agreement in question.*

[57] While I note that the parties have failed to include a typical "management rights" clause in their collective agreement, I find that, for this decision, the Union/Grievor will bear the onus of proving, on a balance of probabilities, that the Employer's proposed interpretation (that the collective agreement permits it to dismiss employees without just cause upon notice or pay in lieu of notice) is incorrect.

(c) Interpretation issue

[58] I now turn to the task of interpreting the collective agreement in order to determine whether the Employer was in breach of the collective agreement when it dismissed the Grievor without just cause but with the provision of pay in lieu of notice.

[59] The Employer asserted that Article 18.6 gives it the power to choose to dismiss an employee without just cause, provided the Employer gives notice of the dismissal or pay in lieu of notice in the amounts specified in Article 18.6. The Employer states that properly dismissed the Grievor in accordance with Article 18.6 by choosing to pay him six week's pay in lieu of notice rather than asserting just cause for his dismissal. For the sake of convenience, I will repeat Article 18.6. It states as follows:

18.6 Dismissal

> *Dismissal shall be effected by the President, and the Employee shall receive written notice of the reasons for dismissal. Any Employee who is dismissed, except in cases of misconduct, will be entitled to notice or pay in lieu of such notice as follows:*
>
> - *One (1) week if without seniority*
> - *Four (4) weeks if permanent but less than five (5) years service*
> - *Six (6) weeks if five (5) years service but less than ten (10) years*
> - *Eight (8) weeks for Employees with then (10) or more years of service.*

> *Such pay shall be in addition to the payment in lieu of earned vacation leave. Earned vacation leave due an Employee shall not be used as any part of the period of notice above.*
>
> *A copy of the dismissal notice shall be sent concurrently to the Union office.*

[60] With respect, I cannot accept the Employer's assertion that Article 18.6 gives it the power to dismiss an employee without just cause upon notice or pay in lieu of notice. The Employer's argument focuses primarily on that portion of Article 18.6 that says "*Any Employee who is dismissed, except in cases of misconduct, will be entitled to notice or pay in lieu of such notice as follows:*" along with the specific periods of notice based on years of service. While it is not appropriate to interpret this sentence in isolation from the remainder of Article 18.6 or for that matter, Article 18 as a whole, it is my view that the plain wording of this portion of Article 18.6 (a view with which the Employer would appear to agree) is that an employee's right to receive notice (or pay in lieu of notice) arises when an employee is dismissed, except if the employee is dismissed for "misconduct." This contemplates that an employee's rights differ depending on whether the employee is dismissed for misconduct or for some other reason. It appears that the parties intended to create a distinction between employees who commit misconduct and those who do not. However, in my view, the purpose of Article 18.6 is not to create a "right" or "power" for the Employer (i.e. to dismiss without cause) but rather an "obligation" to give notice (or pay in lieu) when it dismisses an employee, except in cases where the employee is dismissed for misconduct. Described another way, the provision clearly creates a right or entitlement for an employee.

[61] To understand the parties' intentions in making the distinction I have described, we need to understand more specifically what that distinction is. I note that the collective agreement does not define the term "misconduct." In such circumstances, it is appropriate to consult dictionary definitions to determine the ordinary meaning of the word, with consideration as to how it is used in a labour relations context. Consulting on-line dictionaries reveals the following definitions for the word "misconduct":

> *Google dictionary: unacceptable or improper behaviour; behave in an improper manner*
>
> *Oxford dictionary: unacceptable or improper behaviour especially by an employee or professional person*
>
> *Merriam free dictionary: … 2. Intentional wrongdoing; specifically: deliberate violation of a law or standard especially by a government official. 3a: improper behaviour*

[62] In addition to the above definitions, I note that the Wikipedia website also defines and discusses the term "misconduct" and specifically, how that term is understood in the labour and employment context. Although not a source widely relied upon in labour matters, I find that this Wikipedia entry reflects basic, widely-accepted principles concerning workplace misconduct. It states that misconduct:

> *… is a legal term meaning a wrongful, improper or unlawful conduct motivated by premeditated or intentional purpose or by obstinate indifference to the consequences of one's acts … Misconduct in the workplace generally falls under two categories. Minor misconduct is seen as unacceptable but is not a criminal offence (e.g. being late, faking qualifications). Gross misconduct can lead to dismissal, (e.g. stealing or sexual harassment).*
>
> *… Misconduct refers to an action, rather than neglecting to take action, or inaction which could be referred to as poor performance.*

[63] It would seem that the term "misconduct" used in Article 18.6 is similar in nature to the term "culpable," a term which is often used in the labour relations context to describe misbehaviour or wrongful conduct by an employee that is deliberate or intentional. I also note that the word "culpable" is defined in the "Free Online Dictionary" as "*deserving of blame or censure as being wrong, evil, improper or injurious,*" a definition similar to that for "misconduct." This may be contrasted with non-culpable behaviour which is often used to describe improper conduct by an employee which lacks blameworthiness or intention. A common example of non-culpable behaviour is poor work performance (due to lack of skill, ability or judgment) or excessive innocent absenteeism. Arbitral case law supports that while culpable and non-culpable behaviour are different in nature, an employee may be disciplined or dismissed for either type of behaviour and generally speaking, the rights and obligations in the collective agreement that relate to "discipline and dismissal" apply in situations of both culpable and non-culpable conduct by an employee.

[64] In the *Alberta Health Services* decision, *supra*, the Court upheld an arbitrator's decision that declared disciplinary action to be void because the employer failed to hold a meeting with the grievor with her choice of a union representative, at the time of her dismissal. In that case, an employee was dismissed for excessive innocent absenteeism. The arbitrator had been called upon to interpret a union representation clause in the "Discipline and Dismissal" provision of the collective agreement. The employer argued that it did to need to comply with the union representation clause because the employee was not being disciplined but rather was being dismissed for non-culpable reasons. The arbitrator determined that the union representation clause applied even though the dismissal was for non-culpable reasons (i.e. excessive innocent absenteeism). The arbitrator's decision was based on the principle that an employee can be disciplined or dismissed for both culpable and non-culpable conduct "*if the conduct results in the employee failing to meet the obligations and reasonable expectations of*

the employer under the collective agreement." In reaching this conclusion, the arbitrator placed significant reliance on the decision of the Supreme Court of Canada in *Alberta Union of Provincial Employees v. Lethbridge Community College*, [2004] 1 S.C.R. 727, that has effectively removed any distinction in the treatment of culpable and non-culpable dismissals. In the *Lethbridge Community College* case, the Supreme Court of Canada determined that a provision of the Alberta *Labour Relations Code* that permitted an arbitrator to substitute a penalty in circumstances where an employee has been discharged or otherwise disciplined by an employer, applied not only to dismissals for culpable conduct but also non-culpable conduct, stating that "*dismissal for non-culpable and culpable just cause serve the same purpose and that it would be unduly restrictive to differentiate between them in the circumstances*." In the *Alberta Health Services* decision, the Court upheld the arbitrator's conclusion at paragraph 56, in the following words:

> *I find that the Board's reasons for interpreting the term "discipline" in Art. 37.10 as including "dismissal" for non-culpable just cause are reasonable, rational and intelligible and that his decision falls within a reasonable range of decisions in the circumstances.*

[65] That the parties have chosen to treat employees differently depending on whether they have engaged in blameless or unintentional conduct (non-culpable behaviour) as opposed to misconduct (culpable behaviour) is not surprising. An employee who is dismissed for non-culpable conduct has, through no personal fault and without intention, "failed to meet the obligations and reasonable expectations of the employer" and given this situation, it would not lead to an absurd result for the parties to have agreed to provide such an employee with notice or pay in lieu rather than penalize the employee with immediate dismissal.

[66] In further support of my view that the parties intended that Article 18.6 describe employee entitlements dependent on whether the dismissal is based on culpable or non-culpable behaviour, is the inclusion, in Article 18.6, of the right of the employee to receive written notice of the reasons for dismissal in Article 18.6. Whether the employee is dismissed for culpable or non-culpable reasons would be important for an employee to know because such characterization explains their entitlement or disentitlement to notice or pay in lieu. In addition, the inclusion of the requirement to provide written reasons for the dismissal supports the view that this clause deals with employee entitlement and that it is not a source of Employer power (to dismiss without just cause). If the parties intended that this provision gave the Employer power to dismiss without cause, it would be absurd to require written reasons for the dismissal because, in effect, the Employer would not have any reasons to give! Furthermore, the inclusion of a requirement that the Employer send a copy of the dismissal notice to the Union supports the conclusion that the dismissals referred to in Article 18.6 (whether for culpable or non-culpable conduct) are disciplinary matters about which the Union should have notice in order to determine whether the dismissal violates the rights of an

employee and warrants the filing of a grievance. Lastly, the statement that the pay in lieu of notice does not include earned vacation pay also supports the conclusion that Article 18.6 deals with employee entitlements.

[67] Having identified the parties' intention with respect to the nature of the employee entitlement or right provided by the terms of Article 18.6, I return to my earlier conclusion that Article 18.6 was not intended by the parties to give the Employer an unrestricted right to dismiss an employee without just cause but with notice. As indicated, I find that the parties did not intend that Article 18.6 create a "right" or "power" for the Employer, but rather it created an obligation on the part of the Employer (or, a right or entitlement on the part of the employee) to give notice (or pay in lieu) should the Employer dismiss an employee for reasons other than misconduct.

[68] Therefore, if the Employer asserts a right to dismiss without just cause and upon notice (or pay in lieu of notice) based on the entitlements or amounts prescribed by Article 18.6, that right must be found elsewhere. I note that there is no express provision contained in the collective agreement granting the Employer this right. However, the Employer asserts that the fact that the collective agreement is silent on the issue of a just cause requirement means that the parties intended that the Employer would have an unrestricted right to dismiss an employee without just cause, although with the notice or pay in lieu of notice that is prescribed in Article 18.6. The Employer asserts that without a clearly expressed provision in the collective agreement that states that the Employer may only dismiss on the basis of just cause, the Employer is free to dismiss at its discretion. The Employer maintains this position despite the fact that the parties have failed to include a "management rights" clause in their collective agreement, a clause typically included in collective agreements to indicate that the Employer reserves the right to make decisions on any matters not covered by the collective agreement. In response, the Union asserts that the language of Article 18 clearly expresses the parties' intent that the Employer must have just cause in order to dismiss an employee. The Union further asserts that in any event, the collective agreement as a whole supports an interpretation that the parties intended that such a restriction be placed on the Employer and therefore, such a term is implied in the collective agreement. The Employer took the position that it would be inappropriate to imply such a term in the collective agreement as the parties' intent must be found in the express provisions of the collective agreement.

[69] I am therefore left to consider whether the parties intended that the Employer would have an unrestricted right to dismiss without just cause but with notice, given the express wording of Article 18 as whole, but also in circumstances where Article 18.6 does not contain a clearly expressed requirement of just cause for all employee dismissals and where the collective agreement contains neither an express term permitting the Employer to dismiss without cause, nor a management rights clause reserving all rights to the Employer concerning matters not covered by the collective agreement. I was referred to several arbitration decisions that dealt with the issue of

whether an employer may dismiss an employee without cause where there is no express provision in the collective agreement that states that the employer may dismiss only with just cause. In many of those decisions, the arbitrator found an implied term of just cause, based on a reading of the collective agreement as a whole. However, before turning to that issue and consideration of the Union's argument that such a term should be implied in the collective agreement, I will first address the argument that the provisions contained within Article 18 clearly and unambiguously express the parties' intention that the Employer must have just cause in order to dismiss an employee.

[70] In my view, Article 18.8 of the collective agreement expressly requires that the Employer must have just cause for the dismissal of an employee. In my view, it is not open to the Employer to choose whether to dismiss an employee with or without cause, and if without cause, provide notice or pay in lieu according to Article 18.6. Although set out earlier in this Award, for the sake of convenience, Article 18.8 provides as follows:

> ***18.8 Burden of Proof***
>
> *In all cases of discipline and demotion, the burden of proof of just cause shall rest with the Employer. Evidence shall be limited to the grounds stated in the original notice given to the Employee.*

[71] To discern the true intentions of the parties, Article 18.8 must be read in the context of Article 18 as a whole and consideration must be given to the titles or headings of Article 18 as well as the specific provisions within Article 18 and the layout of those provisions. That Article 18 is titled "Discipline, Suspension and Dismissal" suggests that the within provisions relate to the rights and obligations of the employees and the Employer concerning disciplinary matters. While on its face, the word "Dismissal" might relate to matters that are not disciplinary in nature, when the provisions of this Article are read together, there is a clear indication that the dismissal provisions relate only to discipline in the broad sense that the parties intended to prescribe rules related to discipline for both culpable and non-culpable conduct on the part of the employee. Again, for the sake of convenience, I will repeat Article 18 in its entirety:

> ***ARTICLE 18 DISCIPLINE, SUSPENSION AND DISMISSAL***
>
> ***18.1 Preamble***
>
> *Both parties agree that every effort shall be made through discussion and consultation in an attempt to resolve problems with respect to Employee performance prior to the initiation of disciplinary action.*

The Employer acknowledges the right of Employees, including those Employees on probation, to have any differences regarding disciplinary action or dismissal heard through the grievance and arbitration procedure.

In the event the Employer initiates disciplinary action against an Employee, except in cases of serious misconduct, the practice of progressive discipline will take place as follows:

18.2 Right to Have a Union Representative

Where the Employer intends to meet with an Employee for disciplinary purposes, the Employee shall be so notified in advance of the purpose of the meeting, and informed of the right to have a Union representative present at the meeting.

18.3 Verbal Reprimand

The Manager will verbally outline to the Employee any reasons for the reprimand, how he should correct his work or conduct and what will happen if he fails to do so. As a point of process, the event of the verbal reprimand will be noted in the Employee's file.

18.4 Letter of Reprimand

If the Employee displays no positive response to the verbal reprimand, the Manager shall reprimand that Employee by means of a letter of reprimand to the Employee within sixty (60) days attendance in the workplace after the delivery of the verbal reprimand. A copy shall be sent concurrently to the Union office. Such letters shall become part of the Employee's record.

18.5 Suspension

If there is still no positive response from the Employee, he will be given written notice of the suspension by the President and the reasons for it in the notice. The days of suspension with or without pay shall be included in the notice. A copy of the suspension notice shall be sent concurrently to the Union office.

18.6 Dismissal

Dismissal shall be effected by the President, and the Employee shall receive written notice of the reasons for dismissal. Any Employee who is dismissed, except in cases of misconduct, will be entitled to notice or pay in lieu of such notice as follows:

- *One (1) week if without seniority*
- *Four (4) weeks fi permanent but less that five (5) years service*
- *Six (6) weeks fi five (5) years service but less than ten (10) years*
- *Eight (8) weeks for Employees with then (10) or more years of service.*

Such pay shall be in addition to the payment in lieu of earned vacation leave. Earned vacation leave due an Employee shall not be used as any part of the period of notice above.

A copy of the dismissal notice shall be sent concurrently to the Union office.

18.7 Involuntary Demotion

Thirty (30) calendar days notice shall be given to an Employee who is to be demoted involuntarily. Such notice shall be given to the Employee in writing and shall set out in detail the reasons. A copy of this notice shall be supplied concurrently to the Executive Director of Operations of the Union.

18.8 Burden of Proof

In all cases of discipline and demotion, the burden of proof of just cause shall rest with the Employer. Evidence shall be limited to the grounds stated in the original notice given to the Employee.

18.9 Records of Employees

Employees shall have the right to review their personnel file. Employees have the right to have their written response to disciplinary action placed on their personnel file. A Union representative, with the written authorization of the Employee and with reasonable notice to the Employer, shall have access to the file. The HR Manager or designate will be present with the Employee, Employer or Union Representative during viewing of the file.

Records of disciplinary action on an Employee's personnel file shall be removed from the file after twenty-four (24) months, unless there are disciplinary documents of equal or greater severity placed on the Employee's file within that period. When such documents are removed, they shall be returned to the Employer or the Union.

[72] The provisions in Article 18.1, titled "Preamble," set the context for the remaining provisions in the Article. The Preamble makes repeated reference to "disciplinary action," clearly evidencing the parties' intention to set out the rules as they relate to discipline. It is here that the Employer acknowledges the right of all employees (meaning both permanent and probationary) to have any "*differences regarding disciplinary action or dismissal heard through the grievance and arbitration procedure*." What is of particular significance in the Preamble section are the concluding words of Article 18.1, that is, when the "*Employer initiates disciplinary action against an Employee, except in cases of serious misconduct,* ***the practice of progressive discipline will take place as follows:***". In my view, the parties clearly intended to incorporate the concept of progressive discipline (for behaviour that does not involve "serious misconduct") into the collective agreement and require the Employer to follow certain steps or "practices" which are then set out in the remainder of Article 18. This intention is made obvious not only by the content that follows in Articles 18.2 to 18.9, but also by reason of the deliberate use of a colon (":") after the words, "as follows." Prior to setting out the specific steps of progressive discipline (largely in the order of seriousness), the parties chose to include a provision describing the employee's right to have advance notice of a disciplinary meeting and the right to have a union representative present at the meeting (Article 18.2). This provision clearly applies only in situations in which discipline will be discussed and given its placement within Article

18, it is one of the practices to be followed by the Employer in relation to the issuance of discipline including throughout the subsequent “steps” of progressive discipline.

[73] Following Article 18.2 are the steps of progressive discipline: Article 18.3 (verbal reprimand), Article 18.4 (letter of reprimand), Article 18.5 (suspension), Article 18.6 (dismissal) and Article 18.7 (involuntary demotion). With the exception of involuntary demotion, these steps are listed in order of increasing seriousness, a fact not only gleaned from the type of discipline, but from the wording of each provision: each increasing step contemplates the need for progressive discipline when the desired behaviour is not achieved through a lesser penalty. I note that while involuntary demotion is not a step that is more serious than a dismissal, its placement after dismissal rather than before is of no consequence. It would appear appropriate to include it after dismissal as demotion is likely a step that the Employer may or may not want to impose given its potential to affect other employees. In any event, it is clear that Articles 18.3 through 18.7 prescribe the steps of progressive discipline to be followed by the Employer.

[74] As I noted earlier, the parties clearly chose to limit the application of progressive discipline to improper or unacceptable behaviour that does not involve “misconduct.” I have previously indicated that Article 18.6 entitles an employee to notice or pay in lieu of notice if the employee is dismissed for reasons other than misconduct, further indicating my view that the parties chose to make a distinction between dismissals for misconduct (culpable behaviour) and dismissals for reasons other than misconduct (non-culpable behaviour). Those employees who are dismissed for reasons other than misconduct are entitled to notice or pay in lieu of notice. This distinction and interpretation is further supported by the wording used in the Preamble (Article 18.1) and the wording used in Articles 18.3 through 18.5. Although the Preamble refers to “serious misconduct” rather than simply “misconduct,” the parties clearly decided to require the Employer to follow the practices of progressive discipline for behaviour other than misconduct. It is my opinion that this is implicit recognition that there are numerous factors, both aggravating and mitigating, that go into a decision about the appropriate disciplinary response to various types of employee misconduct. Progressive discipline may or may not be appropriate for misconduct; it often depends on the type and seriousness of the misconduct. For example, being late for work obviously warrants a lesser disciplinary response than say, theft, which may be misconduct of sufficient seriousness to warrant immediate dismissal.

[75] With respect to the wording the parties used in Articles 18.3 through 18.5, it is clear that the purpose of using progressive discipline is to attempt to correct an employee’s behaviour. For example, at the stage of the verbal reprimand, the Employer is to advise the employee of the reasons for the reprimand and how the employee should correct his work or his conduct, as well as the consequences of failing to do so. Also, in the steps subsequent to the verbal reprimand, the provision references the next disciplinary step as one to take when there was no positive response to the prior step.

That all of these provisions are disciplinary in nature, whether for culpable or non-culpable reasons, is also supported by the requirement in each of 18.3 to 18.7 that the Employer create a written record of the action, with copies of reprimands/notices to be delivered to the Union and to be placed in the employee's personnel file. Article 18.9, the final provision of Article 18, deals with the rules concerning the records of employees. It clearly speaks only to the employee's personnel records upon which documentation of disciplinary action is kept. Article 18.9 includes: the right of an employee to place on his or her file a response to disciplinary action taken; an employees' right to review a file; and the right to have records of disciplinary action removed from the file essentially if the employee has a clear record for 24 months. The provision of Article 18.9 deal solely with the rules concerning employees' records of disciplinary action and further support the view that all of Article 18 involves discipline.

[76] I now return to Article 18.8, having set out the context in which it appears. It is my view that read in this context, Article 18.8 applies to all forms of disciplinary action and dismissal taken by the Employer against an employee. Article 18 as a whole deals with the rules surrounding disciplinary action for both culpable and non-culpable behaviour. As with Article 18.9 (containing the rules concerning an employee's disciplinary records) Article 18.8 appears immediately after the specific steps of progressive discipline that Article 18.1 requires the Employer to follow. Based on the overall context and Article 18.8's placement, it is my view that the parties intended that this clause to apply to all forms of discipline issued by the Employer. Given my findings that Article 18 contains the rules for disciplinary action by the Employer and that there is nothing in Article 18 (including Article 18.6) that gives the Employer the right or power to dismiss without just cause, Article 18.8 must apply to all forms of disciplinary action, including all dismissals that fall within Article 18.6, whether for culpable or non-culpable reasons. It is on this basis that I find that Article 18.8 represents an express provision that requires the Employer to have just cause for the dismissal of any employee, including the Grievor in this case.

[77] The above conclusion is sufficient to answer the issue put before me and conclude that the Union has satisfied its burden of proving that the Employer's interpretation is incorrect and that the collective agreement requires just cause for all dismissals. However, I intend to address the additional arguments that the parties put forward in the event that I did not find an express provision in the collective agreement that required that the Employer have just cause in order to effect a dismissal of an employee.

[78] As previously mentioned, the parties referred to several arbitration decisions that dealt with the issue of whether an employer may dismiss without just cause where the collective agreement fails to include an express term that permits dismissal only on the basis of just cause. In earlier decisions, arbitrators began their analysis of the issue by considering an employer's rights at common law. In the *POS*

Pilot Plant decision, *supra*, Arbitrator Priel explains an employer's rights of discharge at common law as follows, at paragraph 36:

> *The common law right of an employer to discharge without cause is considered a term of the individual contract of employment into which an obligation to provide reasonable notice of such action may be implied by a court of equity. In this case, an employee has recourse to the courts to challenge an allegation of cause or to challenge the reasonableness of the employer's estimate of its notice obligations.*

[79] Although not specifically framed by the Employer in quite this way, it would appear that the Employer here is advancing an argument, typically made in these types of cases, that an employer retains its common law right to discharge an employee without just cause, unless that right is taken away by the terms of the collective agreement. The Employer's position is evident in its reliance on the often quoted decision of *Re A.C. Horn Co. Ltd*. (1953) 4 L.A.C. 1524. Arbitrator Bilson acknowledges this argument and references the *A.C. Horn* decision at page 7 to 8 of her decision in *Broadview School Division*:

> *The representatives of both parties referred the board to arbitration awards dealing with issues similar to those which arise in this case. Though most collective agreements contain provisions which place explicit limitation on the power of an employer to dismiss employees, there have been a number of instances where the question has arisen of whether, in the absence of such clear restrictions, any recourse is available to trade unions representing employees who have been discharged.*
>
> *In the arbitration awards to which we were referred, there was an ongoing debate about the significance of the absence of explicit limitations on the powers of an employer to discharge an employee without just cause. In a number of these cases, arbitrators reached the conclusion that, where there was nothing in the agreement to indicate that the parties had agreed to any limitations, there was no basis for arbitration of the discharge question, however much this seemed at odds with the rationale for collective bargaining. In one of the most-quoted of these awards, Re International Chemical Workers Union and A.C. Horn Co. Ltd. (1953), 4 L.A.C. 1524 (Laskin), the arbitrator made the following comment, at 1526:*
>
> > *It may well be urged that it is unthinkable that a Collective Agreement should fail to contain a clause respecting grievance rights to challenge a discharge. Such rights stand in the very forefront of Collective Bargaining understandings, and are among the basic guarantees that Unions seek in Agreement negotiations. This being so, an arbitrator (so it may be argued) should be astute to find these guarantees somewhere in the terms of the Agreement, or perhaps he should imply them as basic*

> *presuppositions of the Agreement. There is a limit, however, to the extent to which words may be tortured into a meaning they do not ordinarily bear, and it would only bring the arbitration procedure into dispute (as well as make a mockery of the Collective Agreement itself) if terms were read into the Agreement without some firm foundation in other words set out therein. Occasions do arise when in the course of interpretation it becomes necessary to spell out effective meanings from words or phrases which would otherwise be innocuous. But this is a different thing from what would be necessary in this case if I am to find jurisdiction to deal with unjust discharges. The fact that express provision for discharge cases is so common makes it all the more difficult to read such a provision into terms which cannot reasonably be said to include it. Perhaps the parties meant to provide for review of discharges through the grievance procedure but they have not done so expressly or through any reasonable implication which can be found in any of the express terms of the Agreement, and in such circumstances, an arbitrator himself cannot rectify the omission. To do so, in the absence of evidence indicating that the omission was the result of mutual mistake, would be to act outside the very frame of reference by which his selection and his jurisdiction is governed. True, the Ontario Labour Relations Act, R.S.O. 1950, c. 194, provides that an arbitrator may determine whether or not a matter is arbitrable, but this necessary authority was not intended to give him the right to pull himself up by his own bootstraps. It assumes a sense of responsibility in the arbitrator and a due appreciation of the fact that the Agreement under which he acts is the Agreement of the parties.*

[80] As noted in the decisions *POS Pilot Plant, Broadview School Division, and the Town of Kamsack,* all *supra,* there are a number of decisions (many of which were decided several years ago) that have followed the *A.C. Horn* decision and concluded that the collective agreements in question did not provide for a review of discharge by an employer, in circumstances where the collective agreement "does not contain a just cause provision but does recognize the Employer's right to discharge or discipline an employee without any apparent limitations on that right" (see *POS Pilot Plant* at paragraph 40). However, these three decisions refer to more recent arbitration awards which found an implied just cause provision in the collective agreements, based on the inclusion of other provisions, particularly those dealing with seniority, grievance and bumping rights. In such cases, it was found that the employer did not have the right to terminate without cause in light of the inclusion of these other provisions. A detailed review of many of these types of decisions is undertaken in both the *Broadview School Division* decision of Arbitrator Bilson and the *Town of Kamsack* decision of Arbitrator Pelton, and a review of those decisions will not be repeated here.

[81] In the *Broadview School Division* case, Arbitrator Bilson undertakes an extensive analysis of not only the arbitral awards in this area, but also of recent judicial

developments that suggest the approach an arbitrator should take in considering the issue before me. The primary considerations are summarized in the *POS Pilot Plant* decision, in which Arbitrator Priel states at paragraphs 42 and 43:

> *Arbitrator Beth Bilson, a very well respected Saskatchewan Arbitrator, and a former Chair of the Saskatchewan Labour Relations Board, in the Broadview School Division case, points out at page 12 of her decision that the Supreme Court in the cases of Weber v. Ontario Hydro (1995), 2 S.C.R. 929, and New Brunswick v. O'Leary (1995), 2 S.C.R. 967, reinforce the proposition that arbitrators have a broad and flexible jurisdiction to address disputes arising in the context of collective bargaining relationships and the court sees it as important for arbitrators to be able to address all facets of these disputes.*
>
> *Arbitrator Bilson points to the case of Battlefords and District Co-operative Limited v. Retail, Wholesale and Department Store Union and Marcella Peters (1998), 1 S.C.R. 1118, as a reinforcement of the view that arbitrators should take a liberal and flexible view of their jurisdiction. At page 14 of her decision, Arbitrator Bilson referred to the following quotation from the Peters' decision:*
>
> > *"Employers must have the ability to reorganize their departments and staff. Yet, in the absence of clearly expressed intention to the contrary, the provisions in a collective agreement should not generally be interpreted in a way that undermines acquired seniority rights and fundamentally alters the nature of the employment."*

[82] In the *Broadview School Division* case, an employee was terminated without cause but with notice as per the requirements of *The Labour Standards Act*. I note that in that case the employer's arguments were similar to that which the Employer made in this case, including that it asserts a right to choose to dismiss an employee for just cause or without just cause and that it only needs to follow the just cause requirements in the collective agreement if it has *chosen* to dismiss for just cause. In upholding the Union's grievance, Arbitrator Bilson reasoned at pages 16 to 17:

> *As we have indicated earlier, our understanding of recent judicial decisions is that arbitrators should exercise their jurisdiction in a way which addresses issues arising out of a collective agreement in a holistic and flexible way. In the Marcella Peters decision in particular, the Court cautioned against adopting too readily an interpretation of the agreement which would undermine the seniority rights and other protections accorded to employee under the agreement.*
>
> *We have concluded that to accept the position advanced on behalf of the Employer in this case would have serious implications for the position of the employee in the bargaining unit. The logic of this argument would permit the Employer to terminate the employment of an employee on an entirely arbitrary basis. In the circumstances of the earlier grievance filed on behalf of Ms. Sefton, the Employer could, on this footing, have terminated her employment rather than accepting the outcome of an assertion of her seniority rights. In our view, to allow the Employer this authority would frustrate the whole point of the seniority rights negotiated by the Union on behalf of employees.*

> *Since the employees covered by the collective agreement are no longer entitled to recourse through legal proceedings, it would mean that the decision of the Employer could not be challenged on any basis whatsoever, putting discharged employees in a worse position than if they were not represented by the Union.*
>
> *It is our view that there are sufficient indications in the collective agreement taken as a whole to dispel the assertion that this is what the parties agreed to. The "Dismissal for Just Cause" provision in Article 9.3, combined with the exception for probationary employees in Article 8.3, suggests that it was not contemplated that there would be dismissals of permanent employees other than for cause. This is confirmed by the list in Article 10.4 of instances in which seniority rights are forfeited.*

[83] The arbitrators in the *POS Pilot Plant* and *Town of Kamsack* decisions found the reasoning of Arbitrator Bilson very persuasive and adopted her approach. At paragraphs 45 and 46 of the *POS Pilot Plant* decision, Arbitrator Priel states:

> *It seems to me, from reviewing all of the aforementioned authorities, that arbitrators are today prepared to recognize that they have a broad and flexible jurisdiction and that they generally conclude that Collective Agreements should not be interpreted in a way that undermines acquired seniority rights and fundamentally alters the nature of employment.*
>
> *Arbitrators today appear to be far more prepared to consider an argument such as was raised here by the Employer by analyzing the Collective Bargaining Agreement with respect to which the arbitrators are dealing. In those circumstances, it might well be concluded that at this time, in the face of seniority, layoff, and bumping rights provisions, that in the absence of a very clear indication in the contract that the Employer and the Union recognized the continuation of the Employer's right to terminate an employee without cause, an argument based upon the Employer's traditional management right to do so may well not succeed.*

[84] At paragraph 54 of that decision, Arbitrator Priel concludes:

> *When I view the Collective Bargaining Agreement as a whole, I must say that it is not logical to assume that these two parties would restrict management rights to discharge, except for cause, and would negotiate seniority rights (which include a statement of how the employment relationship would terminate), and further would negotiate a provision for the use of seniority in filling promotions and vacancies, would also negotiate a layoff and recall provision in which seniority plays an important role and, in the face of all that, could have intended to leave with the Employer the right to discharge, without cause, on notice or pay in lieu thereof. In the absence of a very clear provision in the contract with which I am dealing recognizing the Employer's right to discharge without cause on notice, I am not prepared to conclude that the Employer has retained that right.*

[85] In the *Town of Kamsack* decision, in following Arbitrator Bilson's approach, Arbitrator Pelton concludes:

> *Having regard to the seniority provisions and the role seniority plays in both lay offs as well as in promotions and the filling of vacancies and new positions; the fact that under Article 8(d)(ii) seniority ceases if an employee is discharged and such discharge it not reversed through the grievance procedure; coupled with the grievance process I outlined in Article 11 and suspension and discipline outlined in Article 25, I have concluded that "there are sufficient indications in the collective agreement taken as a whole" to infer that the Town of Kamsack does not have the right to terminate Ms. Erhardt without cause. …*

[86] What is evident from these three decisions as well as numerous other authorities referred to in those decisions, is that the arbitrator must discern the parties' intentions based on the unique wording of their collective agreement and that those intentions must be gleaned from a review of the collective agreement as a whole. No single provision is determinative of the issue, although arbitrators commonly examine the role that seniority plays under the agreement as well as clauses dealing with management rights, discipline and dismissal, and the grievance and arbitration provisions.

[87] Before turning to an examination of the collective agreement provisions in this case, I wish to point out what appears to me to be a significant development flowing from Arbitrator Bilson's decision and one that was followed by Arbitrator Priel. It concerns the applicability of common law rights in the collective bargaining context. This is important because a number of the earlier authorities analyze the issue in dispute by starting with the proposition that the employer retains its common law rights to discharge an employee without just cause unless those rights are specifically restricted by the collective agreement. In the *POS Pilot Plant* decision, Arbitrator Priel cautions against the consideration of common law rights in the collective bargaining relationship. Arbitrator Priel quotes from the decision of the Supreme Court of Canada in *Ainscough v. McGavin Toastmaster Ltd.* (1975) 4 N.R. 619 in which the question of the survival of an individual contract of employment in the context of a collective agreement is dealt with. The Supreme Court of Canada states at page 624 of its decision:

> *The reality is, and has been for many years now throughout Canada, that individual relationships as between employer and employee have meaning only at the hiring stage and even then there are qualifications which arise by reason of union security clauses in collective agreements. The common law as it applies to individual employment contracts is no longer relevant to employer-employee relations covered by a collective agreement which, as the one involved here, deals with discharge, termination of employment, severance pay and a host of other matters that have been negotiated between union and company as the principle parties thereto.*

[88] This point was considered in greater depth in Arbitrator Bilson's decision in *Broadview School Division* decision, *supra*, and also taken into account in Arbitrator Pelton's decision in the *Town of Kamsack*, *supra*. The approach that emerges from this reasoning is that the relevant question is not whether the Employer has retained its common law right to discharge without cause, but rather the reverse, that is, whether the collective agreement contains an express provision permitting the employer to dismiss without just cause. In the arbitral jurisprudence, it appears that arbitrators have considered the management rights clause in the collective agreement as a source for the Employer's power to dismiss without cause, unless a contrary intention appears from the express or implied wording of the collective agreement. In this case, there is no management rights clause from which the Employer could derive such a power. While that factor alone could dispose of the issue before me, I am prepared to consider it as only one factor of several in my assessment of the question of whether the parties intended that the collective agreement permit the Employer the right to dismiss an employee without just cause.

[89] Based on the principles set out in the arbitral authority discussed above and, in particular, using Arbitrator Bilson's approach to the facts of this case, I find that the parties did not intend that the Employer could dismiss an employee without having just cause. A review of the specific provisions in issue as well as a consideration of the collective agreement as a whole leads me to conclude that the parties intended that an employee could only be dismissed with just cause.

[90] To be clear, in reaching this decision, I have not considered the absence of a management rights clause (which either expressly or by implication may have given the Employer the right to dismiss without just cause) to be wholly determinative of this issue. Other, and perhaps more important, factors lead me to this conclusion. As previously indicated, I made a finding that there is an express provision in this collective agreement (Article 18.8) that limits the Employer's right to dismiss only for reasons of just cause. However, if I am wrong on that point, I find, for the reasons expressed earlier, that the provisions in Article 18 as whole support an inference that the parties intended that the Employer could only dismiss for just cause. In addition, there are several provisions in the collective agreement that support this conclusion. They primarily include provisions in Article 4 (Appointments), Article 5 (Seniority), Article 6 (Probation), and Article 7 (Job Abolishment).

[91] Several provisions of the collective agreement establish the importance of seniority rights of permanent employees. Article 5 sets out the rules the parties have agreed to concerning seniority, noting that seniority accrues from the date of hire once an employee passes his or her probationary period and gains permanent status. Article 5.3 also provides some rights to non-permanent employees by requiring the Employer to recall, in order of service, less-than-full-time employees who have not completed their probationary period so as to enable them to complete their probationary period and become permanent employees. Article 5 also details the rules concerning the

maintenance and accrual of seniority during various periods of leave under the collective agreement. In Article 4, the senior qualified applicant is entitled to be appointed to a position that is posted and if the senior person is not appointed, the Employer must provide written reasons for that decision and the employee may access the expedited arbitration process to challenge the decision. The protection of these rights and this process is evident in the parties' agreement concerning the involvement of the Union in the development of job requirements and participation in the interview and selection process. Seniority also plays a significant role in the job abolishment and lay-off provisions of Article 7. Certain periods of notice are required in the event of job abolishment or lay off and employees must be laid off in reverse order of seniority and re-called in the order of seniority.

[92] The Employer's interpretation that it may dismiss without cause but on notice is in direct contradiction to the many provisions the parties have agreed to that emphasize the importance of seniority of permanent employees. Such an interpretation frustrates the point of seniority rights. However, there are additional provisions in these articles that demonstrate that the parties could not have intended to permit the Employer the right to dismiss without just cause, at any time, upon notice, because the provisions are incompatible or render other rights and protections ineffective or meaningless.

[93] Notably, Article 7.1 contains a provision that the parties "recognize that job security shall increase in proportion to seniority." Not only is this a clear statement that the parties have agreed on the importance of seniority, but this statement is in direct contradiction with the Employer's position that it may dismiss an employee without just cause. Such a position results in significant job insecurity and fundamentally alters the nature of the employment relationship. In addition, the set of protections prescribed by Article 7 for permanent employees who will be laid off and/or have their job abolished would be rendered completely ineffective or meaningless if the Employer could dismiss an employee at any time without cause. Article 7.1 requires that the Employer give a permanent employee at least sixty days advance notice of lay-off if their position is to be abolished (and greater notice if so required under *The Labour Standards Act* based on years of service). In addition, in Article 7, the parties have agreed to provide several options to permanent employees who have received notice of job abolishment, including the right to go on lay off and stay on a re-employment list (and exercise rights based on seniority), the right to take an indefinite leave of absence, the right to resign and receive prescribed severance pay, the right to retire, or the right to accept an option agreed to at the time by the union management committee. Of particular significance are the severance pay provisions in Article 7.8. Should an employee choose to resign and receive severance, the amount of the severance pay is significant; one month per year of service up to 8 years and two weeks per year of service after 8 years. It is abundantly clear that the set of protections that I have described places an employee in a much, much better position than an employee would be in if the Employer were permitted to dismiss an employee without just cause rather than abolish the employee's position or otherwise subject the employee to a lay off. The employees' rights to receive at least 60

days notice of lay-off, along with the option of resigning and receiving severance pay (whether exercised at the time of notice of lay-off or later, during the time the employee is on the re-employment list) comes at a significant cost to the Employer and it is difficult to imagine the Employer ever permitting such a situation to arise – it would simply dismiss the employee without cause and upon payment of the very minimal amounts set out in Article 18.6. The rights contained in Article 7 would be significantly undermined, if not rendered completely ineffective, if the Employer were permitted to dismiss without just cause.

[94] In addition to the above provisions, Article 6, concerning probationary periods, also supports the conclusion that the parties intended that the Employer must have just cause in order to dismiss an employee. It is clear that the parties have created a distinction between probationary employees and permanent employees, agreeing that if an employee is not dismissed within the probationary period, the employee becomes a permanent employee with seniority dating back to the date of hiring. In my view, the probationary clause is meaningless if one accepts the Employer's position that it may dismiss an employee at any time without just cause. There is no purpose served by agreeing to the inclusion of such a probationary period, including a clause that distinguishes between probationary and permanent status and grants an employee the right to become a permanent employee, if the collective agreement was said to allow the Employer to dismiss an employee at any time for no reason. In Article 6 the parties have agreed that if an employee is dismissed during a probationary period, the employee may access the grievance and arbitration procedure which, in the circumstances, can only mean that the employee has the right to challenge the failure of probation and the employer's dismissal decision. However, if the Employer's position is accepted, this access can effectively be denied by the Employer choosing to dismiss an employee for no reason and pay the employee one week's pay. That the Employer would have such a choice leads to a denial of the right in Article 6 that a probationary employee has to challenge the Employer's decision. Also, in this article, the parties have agreed to several rules concerning when a probationary period will apply (beyond that which applies on initial employment), the length of the probationary period along with limitations on the Employer's ability to extend the probationary period, as well as the right a permanent employee has to revert to his or her former position during the probationary period or upon an employee's failure of probation. Such reversion rights would be meaningless if the Employer could simply dismiss the employee without just cause.

[95] In argument, the Employer pointed to Article 5.5 dealing with "Loss of Seniority," and in particular, clause b) that indicates that seniority shall be lost by reason of "termination," in support of its position that an employee's employment may properly come to an end under the collective agreement when an employee is terminated without cause. The Employer pointed out that other collective agreements do not simply include the word "termination" alone but instead include additional words to the effect that it is a termination without cause or without reinstatement through the grievance procedure. In

my view, this is insufficient to support a conclusion that the parties intended that the Employer could terminate an employee without just cause, particularly in light of my analysis concerning the incompatibility of this position with many provisions in the collective agreement. Furthermore, it is my view that the word "termination" can only refer to a termination that is lawful under the terms of the collective agreement.

[96] Having regard to: the seniority provisions and the role that seniority plays in both job abolishment and lay-offs as well as in the filling of vacancies and new positions; the specific employee rights with respect to job abolishment and lay-off, including the right to resign and receive significant severance pay; the probationary provisions including the distinction between probationary and permanent employees and their respective rights and protections; the right to have "difference" resolved through the grievance process; the lack of a management rights clause; the provisions in Article 18 governing discipline, suspension and dismissal, and in particular, the burden of proof set out in Article 18.8, I have concluded that "there are sufficient indications in the collective agreement taken as a whole" to infer that the Employer does not have the right to dismiss an employee, including the Grievor, without cause, with or without the notice or pay in lieu of notice set out in Article 18.6.

VI. DECISION:

[97] The Union claimed that the Employer has violated the Collective Agreement by dismissing the Grievor without just cause. The Employer maintained that the Collective Agreement permits dismissal without just cause, upon the provision of notice or pay in lieu of notice in the amounts set out in Article 18.6.

[98] Having considered all of the admissible evidence and case authorities provided by the parties, I have concluded that it was the parties' intention that Article 18.8, which places the burden of proof of just cause on the Employer in cases of discipline, applies to all dismissals. Given that the Employer did not have just cause for the Grievor's dismissal, the Employer is in breach of the collective agreement. In addition, or in the alternative to there being an express provision requiring just cause for all dismissals, I have found that there were sufficient indications in the collective agreement taken as a whole to infer that the Employer does not have the right to dismiss an employee, including the Grievor, without cause, with or without the notice or pay in lieu of notice set out in Article 18.6.

[99] It is my understanding that this ruling may or may not completely resolve the issues between the parties and that they are in agreement with my retaining jurisdiction over the grievance to deal any issues that may arise with respect to the final resolution of the grievance or that result for the implementation of this ruling. Therefore, at this point I will set out only declaratory relief:

(1) The parties' collective agreement permits the dismissal of an employee only for just cause.

(2) The Employer has breached the collective agreement by dismissing the Grievor from his employment without just cause.

[100] I will retain jurisdiction over this grievance to deal with any further issues between the parties, including issues that result from my ruling or that arise out of the implementation of my ruling.

DATED at Regina, Saskatchewan, this **2nd day of April, 2013.**

Angela Zborosky,
Sole Arbitrator

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