KING'S BENCH FOR SASKATCHEWAN

Citation: **2025 SKKB 36**

Date: **2025 03 06**
Docket: KBG-SA-01418-2023
Judicial Centre: Saskatoon

BETWEEN:

SASKATCHEWAN POLYTECHNIC

APPLICANT

- and -

SASKATCHEWAN POLYTECHNIC FACULTY ASSOCIATION

RESPONDENT

Counsel:

Robert J. Affleck	for Saskatchewan Polytechnic
Gordon D. Hamilton	for Saskatchewan Polytechnic Faculty Association

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DECISION — MORRALL J.
March 6, 2025

Introduction

[1] Saskatchewan Polytechnic [SP] applies for judicial review of the decision of an arbitrator [Arbitrator], rendered on November 3, 2023, 2023 CanLII 104917 (Sask LA) [*Decision*] with respect to grievances filed by Dr. Dagenais and Ms. Fleming [Grievors] on behalf of the Saskatchewan Polytechnic Faculty Association [SPFA] pursuant to their Collective Bargaining Agreement [CBA] with their employer, SP. SP

seeks an order setting aside the *Decision* of the Arbitrator and requests that this court substitute its own conclusions.

[2] In April of 2021, SP advised the Grievors, both long term employees of SP, that they were being reassigned from their current positions. At the time, a decision from this court had indicated that, pursuant to the CBA between the SP and SPFA, the Grievors had no right to severance as an option should they decline this reassignment request and should SP also have subsequently decided not to keep the Grievors in their original employment position. The Grievors accepted the reassignment and both individuals retired within a year of their acceptance. Subsequently, a decision from the Saskatchewan Court of Appeal reversed the decision from this court so that severance became an option under the CBA.

[3] The Grievors filed grievances under the CBA alleging that they should have been entitled to a contractual severance payout based on the Court of Appeal ruling. SP disagreed and argued that they should not receive severance and, if severance was ordered, the earnings of the Grievors before retirement from SP should be deducted any severance award. Pursuant to the CBA, the Arbitrator was called upon to adjudicate the dispute.

[4] The Arbitrator's *Decision* found that the Grievors were entitled to the severance they would have received had they been able to opt for severance under the CBA at the time of reassignment rather than accept the reassignment. Further, he also ordered that the amount of severance should be calculated without any deduction for the amounts the Grievors earned in the time periods following their reassignments.

[5] By originating application, SP seeks to set aside the *Decision* in this court arguing that it is unreasonable.

Issues

[6] While the originating application identified six ways the *Decision* was unreasonable, SP reframed their arguments in their brief outlining the following five points of contention:

1) The Arbitrator inappropriately considered the Saskatchewan Court of Appeal's interpretation of the pertinent article in the CBA;

2) The Arbitrator inappropriately applied the principles of discoverability;

3) The Arbitrator inappropriately considered and applied binding legislation;

4) The Arbitrator inappropriately considered the factual and legal constraints relating to remedy; and

5) The internal inconsistencies in the *Decision* render it unreasonable.

[7] In my opinion, a more focused and coherent way to approach this review would be on the basis of the order of topics dealt with by the Arbitrator in his *Decision*. In this manner, all areas of reproach alleged by SP will still be addressed.

[8] Therefore, I would outline the issues as follows:

1) What is the appropriate standard upon which I must conduct this judicial review of the Arbitrator's *Decision*?

2) Was the Arbitrator reasonable in finding that the Grievors did not relinquish their rights to severance when they accepted their reassignment and were entitled to retroactively claim these rights through filing their grievances?

3) Was the Arbitrator reasonable in finding that the grievances were made in a timely fashion and, alternatively if they were not made in a timely fashion, that it was reasonable to exercise his discretion under s. 6-49(3)(f) of *The Saskatchewan Employment Act*, SS 2013, c S-15.1 [*SEA*] to relieve against any untimely filing?

4) Having found that the Grievors were entitled to severance, was the *Decision* of the Arbitrator reasonable in finding that the amount of severance should be calculated without any deduction for the amounts earned by the Grievors in the time period following their reassignments?

Background

[9] To put the issues into context, I will outline the salient facts as they pertain to the issues before the Arbitrator and this court. I will not detail every fact nor parse through every argument but attempt to provide a helpful overview of the dispute between the parties.

[10] I begin with an examination of a prior dispute between SP and SPFA involving reassignment and severance as this forms part of the present factual matrix involving these parties. This dispute did not involve the Grievors in this action.

[11] In August and December of 2017, two members of the SPFA filed grievances against SP relating to SP failing to provide those members with the rights and benefits they believed they were entitled to under the CBA on reassignment.

[12] On January 5, 2020, an arbitrator (who happens to be the same arbitrator as in the case at bar), in determining that the two members had been reassigned, also concluded that they had no right to claim the severance option under the CBA (see *Saskatchewan Polytechnic v Saskatchewan Polytechnic Faculty Association,* 2020

CarswellSask 8 (WL) (Sask LA) [*Marcia Decision*]). The SPFA disagreed with that conclusion and applied for judicial review in the Court of Queen's Bench (as it then was).

[13] On the basis of argument that solely focused on the issue of the availability of severance as a remedy, the Chambers Judge found on December 14, 2020, that although he may or may not agree with the arbitrator's decision, the decision was reasonable (see *Saskatchewan Polytechnic Faculty Association v Saskatchewan Polytechnic*, QBG-SA-00283-2020).

[14] On January 12, 2021, SPFA filed a notice of appeal to the Saskatchewan Court of Appeal alleging errors made by the Chambers Judge in the Court of Queen's Bench.

[15] On June 8, 2021, in this matter, the Grievors were advised by letter that pursuant to article 4.17.1 of the CBA and notification made on April 28, 2021, SP was reassigning both individuals effective July 1, 2021. The Grievors positions of Program Development Consultants were to now fall under the Learning and Development Division. This letter also advised that, "Should you choose not to be reassigned, you will be laid off and allowed to exercise rights under article 7.6." They also advised that, "Please note and as discussed previously, as per the collective agreement 7.6.1 c) you are not able to access severance pay and access to career assistance as an option as you are an incumbent of the position."

[16] On June 14, 2021, Dr. Dagenais accepts the reassignment. On June 17, 2021, Ms. Fleming accepts the reassignment. They began their reassignments on July 1, 2021.

[17] The appeal at the Saskatchewan Court of Appeal regarding the chambers Judge's decision was heard and argued on September 17, 2021.

[18] On November 29, 2021, Dr. Dagenais filed a grievance through the SPFA alleging that, when she was reassigned, SP did not provide her with access to the rights and benefits to which she is entitled under the CBA.

[19] On December 31, 2021, both Grievors retire from their employment at SP.

[20] On March 9, 2022, Chief Justice Richards of the Saskatchewan Court of Appeal releases the court's decision finding that the Chambers judge erred in his assessment of the arbitrator's decision and that decision is unreasonable (see *Saskatchewan Polytechnic Faculty Association v Saskatchewan Polytechnic*, 2022 SKCA 30 [*SaskPoly*]). As a result, he found that both members were entitled to severance pay under article 7.6.1(c) of the CBA.

[21] On March 11, 2022, Ms. Fleming filed a grievance through the SPFA alleging that, based on the decision of the Saskatchewan Court of Appeal of March 9, 2022, SP failed to provide her with her complete options when they reassigned her.

Analysis

Standard of Review

[22] All parties agree that, as set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 653 [*Vavilov*], the standard of review given the issues outlined in this case is reasonableness. I agree.

[23] Recently, the Court in *Lince v Saskatchewan (Human Rights Commission)*, 2024 SKKB 58 [*Lince*], detailed the appropriate considerations in assessing reasonableness according to *Vavilov* and *Andritz Hydro Canada Ltd. v The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 179*, 2023 SKCA 69 at paras 53 to 56.

The Court in *Lince* summarized the considerations as follows at paragraph 56:

> [56] To summarize, two main questions must be asked in a reasonableness review here. First, is the *Decision* rational, logical and internally coherent, and is the reasoning transparent? Second, in the context in which the *Decision* exists, are the determinations reasonable? The second question focuses on the outcome and the smaller decisions made along the way that led to it. The first question is more focused on the coherence and transparency of the analytical process.

[24] However, as noted in *Canada Post Corp. v Canadian Union of Postal Workers,* 2019 SCC 67, [2019] 4 SCR 900, the analytical format outlined in *Vavilov* need not be followed like a checklist and may be adapted to fit the circumstances of the case. The court stated as follows:

> [34] The analysis that follows is directed first to the internal coherence of the reasons, and then to the justification of the decision in light of the relevant facts and law. However, as *Vavilov* emphasizes, courts need not structure their analysis through these two lenses or in this order (para. 101). As *Vavilov* states, at para. 106, the framework is not intended as an invariable "checklist for conducting reasonableness review". The structure I have adopted is one that is convenient and useful in the circumstances of this case.

[25] It is clear that deference is owed to the analysis within the *Decision*. It is also clear that this review of the *Decision* must also be robust.

Do the Grievors' Prior Acceptance of Reassignment Preclude Their Present Pursuit of Severance?

[26] To properly contextualize this review, I must outline the relevant sections of the CBA and the legal landscape regarding the interpretation of those sections as it existed before and after the *SaskPoly* decision. These sections were also outlined in the *Decision* in greater detail. Similar sections of the CBA were also outlined in the *SaskPoly* decision albeit with slightly different numbering reflecting some minor

amendments to the CBA that are not relevant to this discussion.

[27] I will outline the pertinent sections of the CBA that apply to reassignments and the options available to employees should that option be exercised by SP. They are as follows:

> Article 1 DEFINITIONS
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> …
>
> 1.45 "Reassignment" is a situation where the details of an employee's assignment may be changed as a result of redistribution of existing work within a program/department. Reassignment may also occur between programs in program divisions that have a common first year providing the employee has the requisite qualifications/skills/abilities. The level of duties and responsibilities involved in the reassignment are at the same level as the employee's current assignment. Reassignments do not involve a change in locale or position.
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> ARTICLE 4 APPOINTMENTS/SELECTION
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> …
>
> 4.17 Reassignments
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> 4.17.1 Notwithstanding 4.2, the employer, in consultation with the employee and the Association, may reassign the duties of an employee within the employee's program/department.
>
> 4.17.2 Reassignments as a result of new work or new funding which are the equivalent of thirty (30) or more full-time employment (F/T) days within an academic year will be posted with an incumbent subject to challenge by more senior qualified applicants within the employee's program/department.
>
> 4.17.3 In a situation where there is a temporarily inadequate workload, work may be reassigned to or from programs/departments. In all cases the campus Association VP or designate shall be advised.
>
> 4.17.4 Reassignments do not involve movement to other locales.

> 4.17.5 If an employee's position is moved to a different program/department in the same locale, the employer, in consultation with the Association, may reassign the employee to that program/department.
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> 4.17.5.1 If the employee chooses not to be reassigned, the employee will be laid-off and allowed to exercise rights under article 7.6.
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> ARTICLE 7 LAY-OFFS
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> …
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> 7.6 Options for the Bumped or Laid-off Permanent Employee
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> 7.6.1 A permanent employee who is laid-off or bumped may elect one (1) of the following four (4) options:
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> (a) to bump, if eligible, in accordance with article 7.4 and 7.7.
>
> (b) to be placed on a re-employment list and have rights in accordance with article 4.
>
> (c) to resign from all positions in the bargaining unit and take severance pay in accordance with article 10.20 and access Career Assistance Options in article 10.21, if the employee does not have an opportunity to remain as the incumbent in their current assignment.
>
> (d) to access retirement programs currently in place.
>
> (e) should the employee not elect (a) to (d) the employee will automatically be placed on the re-employment list.

[28] With respect to the *Marcia Decision* by the arbitrator on January 5, 2020, regarding other members of the SPFA, he found that those members were reassigned but were not eligible to take severance pay. He stated as follows:

> 113 I prefer the position of the Employer and am unable to accept the Association's position that the grievors are entitled to severance pay under article 7.6.1(c). After the reassignment, the grievors continued to work in their reassigned positions and each grievor was in effect "the incumbent in their current

> assignment". There was no evidence that they did not have the opportunity to remain in those assignments. The language of article 7.6.1(c) is unambiguous that if the incumbent is able to remain in his or her current assignment there is no entitlement to severance pay. Had article 7.6.1(c) not contained this last phrase or had clear language exempting reassignments from the restriction contained in the last phrase of article 7.6.1(c), then the SPFA would have been on firmer ground. But that is not the language before me.
>
> 114 The Association would also would have had a more persuasive position had article 7.6.1(c) been the sole option for reassigned employees. In that case, its submission that the absence of severance left no meaningful recourse for reassigned employees would have resonated. But, article 7.6.1 presents several other options, including the right to bump less senior employees, allowing long service reassigned employees like the grievors to bump into positions more to their liking (article 7.6.1(a). They are also entitled to "access retirement programs currently in place" under article 7.6.1(d). Understandably these other options were not nearly as attractive to the grievors compared to a large severance payout, but the availability of these options undermines the position of the Association that the absence of severance rendered the reassignment provisions meaningless.
>
> 115 Ultimately, had the Association intended that reassignment should trigger an uninhibited right to severance pay, it could have negotiated clear and unambiguous contract language to that effect. It did not do so. Accordingly, it is my conclusion that under the current contract language neither Mr. Rupchan nor Mr. Marcia are entitled to severance pay under article 7.6.1(c). They are entitled to other options under article 7.6.1.

[29] The Queen's Bench court found that this decision was reasonable so, at the time when the Grievors were reassigned, the comments made by the arbitrator above accurately reflected the legal landscape as it pertained to the Grievors and their options on reassignment under the CBA, given there is no issue that they were the incumbents in their position.

[30] However, the *SaskPoly* decision by the Court of Appeal rejected this position and stated as follows in determining that severance was an available option for the Grievors:

> 39 Second, and more fundamentally, the fact that there will be situations when it is not entirely clear when or if a reassignment took place cannot justify effectively reading article 7.6.1(c) out of the CBA for employees like Mr. Rupchan and Mr. Marcia. The issue of whether there has been a reassignment arises in relation to all of the alternative courses of action listed in article 7.6.1. As noted, in addition to taking severance pay (article 7.6.1(c)), an employee can elect bumping (article 7.6.1(a)), being placed on the re-employment list (article 7.6.1(b)) or accessing retirement programs (article 7.6.1(d)). The right to access each of these other options arises only, as per article 4.17.5.1, when the employee chooses not to be reassigned, i.e., when there has been a reassignment and the employee elects not to take up their new or modified responsibilities. There can be no suggestion, and indeed there has been no suggestion, that the right to access the options set out in articles 7.6.1(a), (b) and (d) should or could be qualified because there might sometimes be uncertainty as to whether there has been a reassignment or because Polytechnic might sometimes wrongly deny that there has been a reassignment. This is significant because I see no reasonable basis on which the situation with respect to severance pay (article 7.6.1(c)) should be approached on some different ground than the situation with respect to bumping, the re-employment list, and access to retirement programs. Entitlements under collective agreements turn not infrequently on the resolution of threshold questions that are not straightforward. The operation of articles 4.17.5.1 and 7.6 of the CBA is not unusual in that regard.

[31] Turning to the case at bar, the Arbitrator approached the issue in his *Decision* by finding that the Grievors had accepted their proposed reassignments predicated on the information provided by SP which stated "unequivocally" that they were not able to obtain severance pay. He also found that the Grievors would have chosen severance pay if they had the option. He disagreed with the suggestion that, as they did not accept their reassignment under protest, they willingly relinquished their rights to severance.

[32] He then commented on the principle of retroactivity and indicated that he was following the rationale in the Supreme Court of Canada case of *Hislop v Canada (Attorney General)*, 2007 SCC 10, [2007] 1 SCR 429 [*Hislop*] where the court stated at para. 84 that, "… In this perspective, courts grant retroactive relief applying existing law or rediscovered rules which are deemed to have always existed. On the other hand, legislators fashion new laws for the future."

[33] The Arbitrator then states as follows:

> … This is precisely the fact matrix in the current case. The Grievors were denied rights that they always had. I conclude that they did not relinquish their rights to severance when they accepted their reassignment and were entitled to retroactively claim these rights through filing the current grievances. …

[34] SP argues that the *Decision* is unreasonable because the Arbitrator failed to apply and meaningfully assess the guidance provided by the Court of Appeal in the *SaskPoly* decision with respect to the multiple stages involved in a reassignment. An employee may accept or refuse a reassignment. If the employee refuses a reassignment, SP can reevaluate their options and potentially allow an employee to continue in their original assignment. The Grievors' acceptance in these circumstances do not put into play the severance options provide under article 7.6 of the CBA. Contrary to the findings in the *Decision*, this situation was not about rediscovering rules that have always existed as, by accepting the reassignment, the Grievors never engaged with the impugned severance rules. Therefore, the Arbitrator's *Decision* is incompatible with the factual and legal constraints which should have informed his analysis.

[35] SPFA frames their argument by submitting that the "acceptance" of the reassignment was not a true acceptance since the option that both Grievors preferred was categorically indicated to not be available. While there may have been an additional step available to the Grievors in rejecting the reassignment, in reviewing the whole

context of the choices available to them at the time, it would have been unfair to have them to state that their acceptance was conditional in some fashion or take a chance that SP would not reassign them.

[36] Given that the CBA is a contract and the determination of the rights between the parties must be analyzed using contractual concepts, I do not disagree with SP that there are issues with the analysis performed by the Arbitrator in his *Decision*. While I agree with his bottom-line conclusion that the Grievors are entitled to severance, I believe that an approach analyzing the circumstances of the reassignment in terms of contract law as it applies to collective bargaining agreements is more suited to this discussion.

[37] In interpreting the CBA, I am guided by the comments of the Court of Appeal in *Unifor Locals 1-S & 2-S v Saskatchewan Telecommunications*, 2023 SKCA 68 where they stated as follows:

> 46 The arbitrator also explicitly recognized and applied the principles that govern the interpretation of collective agreements. In this regard, he cited the modern principle of interpretation endorsed by the Supreme Court of Canada in *Sattva Capital Corp. v Creston Moly Corp*., 2014 SCC 53 at para 47, [2014] 2 SCR 633 [*Sattva*]. He also referred to the decision in *Alberta Union of Provincial Employees v Alberta Health Services* 2020 ABCA 4, [2020] 9 WWR 12 [*Alberta Health*], which described the interpretive approach to be followed by labour arbitrators in relation to collective agreements as follows:
>
> > [36] Arbitrators apply general principles of contract interpretation, albeit to a specialized type of contract, the collective agreement. As such, they must discern the intention of the parties from the written words. But the words must be read in their entire context, in their grammatical and ordinary sense, harmoniously with the scheme of the agreement and the intention of the parties: *Brown & Beatty at 4:2100, UNA, Local 121 R v Calgary Health Region (Rockyview Hospital)*, 2007 ABCA 341 at paras 28-32, Arbitration Award at paras 31-32.

> 47 The *Sattva* approach, as adapted to the labour relations context by *Alberta Health*, is also consistent with the jurisprudence from this Court. See, for example: *P & H Milling Group a Division of Parrish & Heimbecker, Limited Saskatoon v United Food and Commercial Workers Local 1400*, 2023 SKCA 14 at para 12, 478 DLR (4th) 604.

[38] In examining the initial agreement of the Grievors to the terms provided by SP using a contractual matrix, there can be no doubt that a valid contract was formed. At the point of acceptance, the terms and options for all parties were clear so that there was a meeting of the minds as contemplated in para. 54 in *Neigum v Van Seggelen*, 2022 SKCA 108, 474 DLR (4th) 673. The finding of facts made by the Arbitrator indicate that the Grievors accepted SP's offer of reassignment partly so that they would not be exposed to the potential that they could be laid off in accordance with the CBA.

[39] In examining potential defenses that would result in voiding this contract, the most apt appears to be the principle of common mistake. There are many potential types of defenses available under contract law such as estoppel by representation and others but given the silence of the CBA on the matter and the lack of fault on any party regarding the change in the legal interpretation of the article in the CBA, they do not fit the circumstances.

[40] The principle of common mistake is concisely outlined in *Fram Elgin Mills 90 Inc., v Romandale Farms Limited*, 2021 ONCA 201, 32 RPR (6th) 1, as follows:

> [246] At common law, a contract will be void for mistake when the parties were under a common mistake that changes the subject matter of the contract into something essentially different from what the parties believed it to be: *Miller Paving Ltd. v. B. Gottardo Construction Ltd.*, 2007 ONCA 422, 86 O.R. (3d) 161, at paras. 22, 30. The mistake must have existed at the time the contract was made: *Zeitel v. Ellscheid* (1991), 85 D.L.R. (4th) 654 (Ont. C.A.), at para. 44, [1994] 2 S.C.R. 142.

> [247] In equity, the court may relieve for common mistake when it would be "unconscientious", in all the circumstances, to allow a contracting party to avail itself of the legal advantage it had obtained and granting relief can be done without injustice to third parties. The contract is liable to be set aside if the parties were under a common misapprehension as to the facts or their respective rights, provided the mistake was fundamental and the party seeking to set aside the contract was not at fault: *Miller Paving*, at para. 23.

[41] However, as noted in *Boechler v Boechler*, 2019 SKCA 120 [*Boechler*] at para 49, courts "… will not lightly set aside or rectify agreements through the use of the doctrine of common mistake. …" The court in *Boechler* considered the decision of *Zavarella v Zavarella*, 2013 ONCA 720 [*Zavarella*] where the majority of the Ontario Court of Appeal, in finding that no common mistake existed in the circumstances of the situation before them, that the mistake of the parties had to "go to the root of the agreement" (para. 51, *Zavarella*) and the mistake was not the fault of the individual who has the burden of attempting to void the agreement.

[42] Essentially, the question becomes whether the mistake causes the agreement "to become something essentially different from that which the parties believed it to be." (para. 60, *Zavarella*)

[43] In applying the facts of the case at bar to the law outlined above, it is clear that, at the time of the agreement accepting reassignment, all parties were operating under the presumption that severance was not an option for an employee under the CBA. Neither party was at fault in presuming this state of affairs as there was a decision from this court upholding an arbitrator's decision to this effect. It was not the fault of SP in advising the Grievors of this clear decision from the Court of Queen's Bench (as it then was). It was not the fault of the Grievors or the SPFA for relying upon it. Whether the decision was under appeal or not, the decision of this court must be presumed to be correct unless and until it is overturned. While both parties have a level of sophistication

and knew the Queen's Bench decision was under appeal, they cannot assume to know the will of the Court of Appeal. They were both mistaken as to the applicable law interpreting the terms of the CBA through no fault of their own.

[44] SPFA, who possesses the burden of proof in attempting to void the contract, has proven that the mistake as to the law was not their fault.

[45] In terms of the importance of the mistake, I find that the mistake of law formed was a fundamental part of the agreement. The undisputed findings of fact made by the Arbitrator regarding the Grievors' preference for severance demonstrate the centrality of this legal factor. It is clear that the Grievors accepted their reassignment only because severance was purported not to be an option. Had severance been available, they would not have accepted their reassignment. This is a significant difference with significant impact.

[46] I do not find it relevant that the Grievors never provided SP with the opportunity to consider whether they should decline to reassign either or both of them in the factual context here. While it is correct that there may have been other hypothetical situations that may have occurred, I find that a court is entitled to consider the full contextual background and risks involved in assessing the mistake. Given the risks involved for the Grievors should they not accept the reassignment, I find that it is illogical to try and untether their acceptance of reassignment with the potential of severance pay. Had the Grievors not accepted the reassignment, they could have been terminated. This is a significant risk. As found by the Arbitrator, their decision to accept is inextricably linked to the potential outcomes and consequences of not accepting.

[47] As well, the fact that SP specifically indicated that severance was not an available option when they requested the Grievors acceptance of reassignment also demonstrates the importance of the availability of severance in the determination by the Grievors of whether to accept reassignment. This statement in the letter signals that the

lack of severance is clearly a defining characteristic of the agreement between the parties.

[48] These indicia show that the availability of severance goes to the root of the agreement.

[49] In relation to determining whether it would be “unconscientious” to let the contract stand as is, a court must resort to examining equitable principles in reviewing what is fair and whether any prejudice has been occasioned.

[50] In doing so, I disagree with SP that anything substantial would be gained or any prejudice would be averted had the Grievors signalled their disagreement with the reassignment request by stating that they were accepting under protest. Given that both parties are sophisticated and have experienced counsel embroiled in an ongoing dispute, little would have been served by having two employees contingently label their acceptance of reassignment. Both parties knew that the issue regarding severance was not finally determined and can be taken to have accepted the risks, liabilities and rewards that accompany decisions made in that context.

[51] I will echo the conclusion subsequently made by the Arbitrator in relation to the argument regarding s. 6-49(3)(f) of the *SEA* that there was “some” prejudice to SP as a result of the Grievor’s lack of contingent labelling of their acceptance of reassignment, but I find it rather minimal in these circumstances.

[52] In the end result, I find that not providing the opportunity for severance is "unconscientious” as the Grievors would be “denied rights that they always had”, to use the phraseology of the *Decision*. It is unfair to the Grievors that they be denied their rights as a result of a mistaken view of contractual interpretation because of a decision from this court. They bear no responsibility for the choice that was put on them by their employer. Their acceptance of reassignment was predicated on a legal error. While the

error was not the fault of SP, SP benefitted from that error.

[53] With all other things being equal, it is fair to put the parties in the position they would have been had the error not occurred. Therefore, I find that the principle of common mistake to be applicable to the situation facing the Grievors.

[54] Before making any findings in that regard, I must determine the effect of this finding on the reasonableness of the *Decision* as it pertains to the logic and rationale used by the Arbitrator in coming to his conclusion on this issue.

[55] The Arbitrator approached his conclusion by treating his decision on the availability of severance as a "reversal of an incorrect contract interpretation" where there was no change "in either the contract or the law" so that "The Grievors were denied rights they always had." Using the *Hislop* decision, he finds that it is appropriate to grant retroactive relief in the case at bar as this was not a situation where the legislators changed laws but the discovery of a rule that had always existed.

[56] While the *Decision* is thin on legal rationale, it is essentially using equitable grounds to justify the Grievors' claim which is similar to my analysis regarding the principle of common mistake. There was also a recognition of the issue identified above involving mistaken contractual interpretation. However, the Arbitrator framed the question by examining whether remedies were generally available (is the change retroactive?) rather than analyzing the factual landscape of the case at bar focusing on the reasons why such a remedy would apply to the case at bar (are the Grievors entitled to severance after having accepted reassignment?). The Arbitrator ought to have framed the discussion so as to determine why retroactive relief of some sort would apply to these Grievors rather than simply using a conceptual analogy involving retroactivity. In other words, there needed to be a determination on the question of whether all people in every situation who are "denied rights they always had" are entitled to claim those "rights"? There was no such discussion.

[57] While the *Decision* was rational, logical and internally coherent so as to be transparent, it did not reasonably accord with the relevant factual and legal constraints that bear upon it.

[58] Therefore, the rationale is unreasonable although the ultimate conclusion is correct. However, given that I am asked to substitute my own conclusion in this judicial review, I find that the Grievors acceptance to be voided and that they be entitled to claim severance through the filing of the grievances based on analogous contractual principles as they relate to the CBA so that the bottom-line decision of the Arbitrator remains applicable and reasonable.

[59] The Grievors are able to pursue their claims for severance and are not barred due to their initial acceptance of the reassignment.

Were the Grievances timely and, if not, was the Arbitrator's use of s. 6-49(f) of the *SEA* appropriate?

[60] Article 24.2.1 of the CBA states as follows:

> ARTICLE 24 GRIEVANCES
>
> 24.2 Time Limits
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> 24.2.1 A grievance shall be deemed to have been initiated on the date a written statement of grievance has been received by the immediate out-of-scope supervisor. A grievance to be accepted must be initiated within thirty (30) calendar days from the date on which the employee became aware of the alleged infraction. Notwithstanding the thirty (30) calendar day time limit shall not apply to those items included in the agreement where the Employer has allegedly failed to apply a specific benefit, i.e., salary, vacation leave, sick leave, etc. In these latter instanced the time limit shall be one (1) year after the date on which the alleged infraction occurred. The effective date of any necessary retroactive pay shall be the date on which the infraction first occurred or January 1, 1988 whichever is more recent.

[61] In his *Decision*, the Arbitrator found that the one-year time limit for failure to apply a specific benefit does not apply to the question of an employee's entitlement to severance under article 7.6.1(c) of the CBA. Therefore, the grievance in this matter falls within the 30-day time limit. This decision by the Arbitrator is uncontested.

[62] However, he thereafter found that the 30-day time limit started with the release of *SaskPoly* so that both grievances were timely. This finding is contested.

[63] The Arbitrator came to this conclusion by finding there was no "alleged infraction", using the wording in article 24.2.1 of the CBA, until the Court of Appeal released its decision overturning the Queen's Bench decision. He came to this conclusion based on a rationale that no infraction of the CBA came into existence until the Court of Appeal's decision rather than a discussion based on discoverability principles and determinations regarding when employees should have become aware that an infraction exists or may exist.

[64] Both counsel agree that the Arbitrator's approach in this regard was erroneous and unreasonable.

[65] As noted in the decision of *Saskatchewan (Highways and Infrastructure) v Venture Construction Inc.*, 2020 SKCA 39, 447 DLR (4th) 316 [*Venture*], determining whether discoverability applies to vitiate a limitation period involves "… a heavy factual component …" (para. 33, *Venture*) where "Before a claim can be said to be discoverable, the claimant must know enough material facts on which to base a legal action. …" (para. 40, *Venture*).

[66] The *Decision* contained no analysis of the factual component to the discoverability issue. There was no discussion whether knowledge of the simmering legal dispute should be imputed to the Grievors. Given that one of the grievances was

filed before the Court of Appeal decision, this would have been essential, especially in the context of the professional representation of the SPFA.

[67] As pointed out by SP, the decision of *Pilotte v Zurich North America Canada (2006)*, 80 OR (3d) 62 (Ont Sup Ct) at para 54, states that, "The discoverability principle operates to extend an otherwise applicable limitation period when facts supporting a claim are discovered after expiration of the limitation period. It does not operate when the discovery relates not to facts but to the state of the law at the time of the events giving rise to the claim." Therefore, the Arbitrator would have been expected to tackle the issue of how this may affect his decision given that the "change of law" in the case at bar was a change in the interpretation of a contract, not a change in the legislative provisions governing the subject of the alleged grievance.

[68] This did not occur.

[69] Further, I am not able to substitute my own conclusions as none of the necessary findings of fact were made in the first instance regarding what the Grievors should have known and when they should have known it in the context of the subject of the grievance.

[70] The Arbitrator's conclusion did not accord with the relevant factual and legal constraints that bear upon it. Had there been no alternative means of proceeding with the grievances, I would have referred this matter back to arbitration for reconsideration.

[71] However, this does not end the matter in the case at bar as the Arbitrator, in the alternative, also exercised his discretion under s. 6-49(3)(f) of the *SEA* to allow the grievances to proceed.

[72] In this regard, s. 6-49(3)(f) and 6-49(3)(g) of the *SEA* state as follows:

> 6-49(3) An arbitrator or an arbitration board may:
>
> …
>
> (f)relieve, on terms that in the arbitrator's or arbitration board's opinion are just and reasonable, against breaches of time limits set out in the collective agreement with respect to a grievance procedure or an arbitration procedure;
>
> (g) dismiss or reject an application or grievance or refuse to settle a dispute if, in the opinion of the arbitrator or arbitration board:
>
> (i) there has been unreasonable delay by the person bringing the application or grievance or requesting the settlement; and
>
> (ii) the delay has operated to the prejudice or detriment of the other party;

[73] In the Arbitrator's *Decision* in relation to this issue, he considers that there were "highly unusual circumstances" where the SPFA and the Grievors were "uncertain" whether there was anything to grieve given the initial arbitration decision regarding the severance and the Queen's Bench decision. He specifically found that the Grievors were not "sleeping on their rights" and that these "circumstances alone justify the exercise of discretion."

[74] He then noted that SP's "strongest argument" against his exercising his discretion was "prejudice". He noted their argument that, had the grievances been filed at the time of reassignment, a viable option may have been to leave the Grievors where they were and rescind or delay reassignment. He finds as a fact that the employer was not made aware that the SPFA planned to grieve the denial of the severance pay option if the Court of Appeal overturned the Queen's Bench decision. However, he also found that the SPFA had "clearly signalled its dissatisfaction" with the Queen's Bench

decision by launching an appeal so that "it should not have come as a surprise" that any successful appeal "might have implications" for reassignments implemented since the arbitrator's decision in January, 2020.

[75] He then accepts that there is "some" prejudice to SP but finds that it does not "tip the balance" against exercising his discretion to relieve against the "untimely filing" of the grievances.

[76] Of note, the *Decision* does not mention s. 6-49(3)(g) of the *SEA*.

[77] SP argues that a number of factors pertaining to the assessment of whether the delay was unreasonable outlined in the decision of *Saskatoon (City) v ATU, Local 615 (Read), Re,* 2015 CarswellSask 336 (WL) (Sask LA) at para 63 [*Saskatoon*] were brought to the attention of the Arbitrator but not identified, applied or substantially examined. Further, the lack of fulsome consideration with respect to prejudice and failure to make any reference to s. 6-49(3)(g) of the *SEA* demonstrate that the Arbitrator unreasonably applied uniformed and unfettered discretion to relieve against the time limits.

[78] On the other side of the coin, the SPFA submits that, while the Arbitrator did not refer to s. 6-49(3)(g), he fully and carefully examined the allegations of prejudice and unreasonableness in relation to the issue of timeliness and reasonably dismissed them. The checklist provided in the *Saskatoon* decision is simply a guideline, not statutorily mandated considerations. Given the powers in s. 6-49(3)(f) and s. 6-49(3)(g) are wholly discretionary and the Arbitrator considered the specific factors outlined therein in the context of the "highly unusual" circumstances of the case at bar, his rationale is reasonable.

[79] I will begin by examining the impugned sections of the *SEA*.

[80] While s. 6-49(3)(f) and s. 6-49(3)(g) could be described as two sides of the same coin given they both deal with an Arbitrator's ability to relieve or dismiss a grievance based on a breach of time limits set out in a collective agreement, I do not find that they must be read together so that the terms of s. 6-49(3)(g)(i) and (ii) must not be present before an untimely grievance can be considered pursuant to the terms outlined in s. 6-49(3)(f). In applying a purposive interpretation to this statute, I find that both sections authorize the use of discretion so that an arbitrator "may" either dismiss or consider a grievance so long as the appropriate statutory preconditions outlined in the respective section of the *SEA* are met. Had the legislature intended that both these sections be considered at the same time, they would have been integrated together. However, they are not.

[81] I find that the sections should be read in the following logical fashion. Section 6-49(3)(f) indicates that if an arbitrator decides to relieve a grievor against a breach of time limits, he must do so only on terms that are just and reasonable. On the other hand, if an arbitrator decides to dismiss a grievance due to a grievor's breach of time limits, s. 6-49(3)(g) indicates that he must do so only if there has been "unreasonable delay" in bringing the grievance and the delay has "operated to the prejudice or detriment" of the non-grieving party. The arbitrator will resort to the section that applies to their ultimate decision. They does not need to consider both. The arbitrator may decide to determine whether they should grant relief pursuant to s. 6-49(3)(f) and determine they cannot. Thereafter, they would then have to apply s. 6-49(3)(g) in dismissing the grievance. They could do the opposite as well.

[82] From my review of the legislation, there are fewer outlined statutory preconditions to relieving a party due to non-compliance with a time limit under s. 6-49(3)(f) than dismissing a grievance under s. 6-49(3)(g). In that regard, the focus in s. 6-49(3)(f) is on "just and reasonable" terms that must accompany the relief rather than a decision to relieve that must be "just and reasonable". The focus in s. 6-49(3)(g)

requires that the decision to dismiss may only occur if the statutory preconditions outlined in s. 6-49(3)(g)(i) and s. 6-49(3)(g)(ii) are met. The statutory requirements of s. 6-49(3)(g) are clearly more onerous on their face.

[83] In practise, the discretion involved in determining the applicability of either section is similar so that the various factors outlined in the *Saskatoon* decision should be generally considered whether an arbitrator is applying their discretion to s. 6-49(3)(f) or s. 6-49(3)(g). The reasons underlying the delay as well as the potential prejudice to the non-grieving party are essential considerations. These hallmark factors of the exercise of judicial discretion in relieving parties of consequences due to non-compliance with the rules are also present in *The King's Bench Rules*, Rule 1-6(4) and the case law governing its application (see *Windels v Reddekopp*, 2023 SKCA 38).

[84] Therefore, in a case involving a determination of whether to relieve non-compliant Grievors against their breach of time limits, I find that there is nothing unreasonable in omitting mention of s. 6-49(3)(g) in the Arbitrator's *Decision*. The matter that is of primary importance for a court is whether the Arbitrator reasonably exercised his discretion in a statutory compliant manner with respect to determining that the time limits be overridden.

[85] The *Saskatoon* decision outlined the following "grab bag" of factors in considering s. 6-49(3)(f):

> 63 Counsel for the Union referred to the decision in *Abitibi-Price Inc. v U.P.I.U., Local 1375* (1993), 38 L.A.C. (4th) 59 (Man. Arb.) (*Rennie*), which dealt with factors considered in assessing delay. Factors determining the unreasonableness of the delay were identified as follows:
>
> 1. Does the agreement provide explicit time limits?
>
> 2. How long was the delay?

3. Was the party alleging delay "surprised" by the existence of the dispute?

4. Is there a reasonable explanation for the delay?

5. Was the grievor personally responsible?

6. What is the nature and severity of the prejudice suffered by the party alleging delay, including:

   (a) financial prejudice;

   (b) fading of memory and potential unavailability of important witnesses; and

   (c) the impossibility of retroactively analyzing the grievor's medical condition and occupational potential.

7. Was prejudice unequivocally or unavoidably the result of the delay?

[86] Of note, had this test been used in the determination of the statutorily outlined factors in s. 6-49(3)(g) as requested by SP, it would have been incorrect as 6-49(3)(g) mandates that dismissal requires both "unreasonable delay" **and** "prejudice or detriment" [emphasis added]. Therefore, a test that involves an overall assessment of a variety of factors including prejudice does not meet the outlined statutory criteria.

[87] While this test outlines a multitude of factors, as with every general test, it is made to encompass a variety of factors which may or may not be present in a factual matrix. The factual matrixes involved in the evaluation of unreasonableness and prejudice tend to be idiosyncratic. Further, one factor may be linked with another so that further discussion on a particular point may be simply duplicitous. In the case at bar, as noted by the Arbitrator, the situation facing the Grievors and SP was "highly unusual". I find that there is nothing wrong with a decision-making body focusing on the most material aspects of a test rather than going through a laundry list of factors and stating that many of them do not apply or are not particularly relevant. What is of

importance is that the decision maker not ignore or mischaracterize a relevant factor in coming to his conclusion.

[88] It is clear that, although the Arbitrator did not refer to the *Saskatoon* test in his final analysis, he largely focused on aspects #3 through #7 of the test in any event. I do not find this to be unreasonable as the time limit considerations in aspect #1 and #2 largely were reflective of the length of time it took the Court of Appeal to both hear and arrive at a decision. While it was determined that the time limit for filing a grievance in these circumstances was 30 days and the delay occasioned was between six to ten months, the Arbitrator focused his concerns in addressing this issue in terms of the prejudice suffered by SP and whether SP was "surprised" which was aspect #3, #6 and #7 of the *Saskatoon* test. Even so, at the top of page 22 the Arbitrator still considered the time limit considerations when he wrote that "Ms. Fleming's grievance was filed very quickly after the Court of Appeal decision" despite the delay of "almost a year, a not insignificant amount of time …".

[89] I find that although the Arbitrator did not analyze or reiterate the type of prejudice suffered by SP in that part of his *Decision*, he was clearly alive to SP's prejudice arguments. The Arbitrator outlined SP's concerns related to being denied "the option of maintaining the *status quo*" from an excerpt in their brief that was quoted at page 15 of his *Decision* and stated in his *Decision* that he accepted SP's evidence that they did not know that the SPFA planned to grieve the denial of severance pay. While the *Decision* would have benefitted from some further specific analysis as to why "some prejudice" on behalf of SP would not tip the balance against relieving the 30-day time limit, I find that the reasoning relates implicitly to the Arbitrator's statement that "... the claimed prejudice is not entirely on the Association's shoulders." The Arbitrator had stated in the sentence previous (which would relate to aspect #3 of the *Saskatoon* test) that "it should not have come as a surprise [to SP] that any reversal of the Ponak award might have some implications for reassignments implemented since the Ponak

award." From my review, it is clear that the Arbitrator found that this knowledge of the uncertainty of the ongoing judicial proceedings in the Court of Appeal must be borne by both parties in terms of prejudice. There is nothing unreasonable with this conclusion.

[90] Regarding the tipping of the balance and the factors involved in that balance, I find that the Arbitrator had dealt with aspect #4 and #5 of the *Saskatoon* test at the beginning of his analysis at page 21. He found that the Grievors were not "sleeping on their rights" so that they were not personally responsible for the delay which would deal with aspect #5. He also considered aspect #4 relating to the reasonable explanation for the delay in noting the "highly unusual" circumstances and taking into account Dr. Dagenais' belief that "she could not grieve once she retired".

[91] I do not disagree with SP that the Arbitrator's comments that "he considered the authorities presented by the parties in reaching this decision" does not provide much analysis. However, an overall contextual reading of the *Decision* demonstrate that the Arbitrator considered all the relevant factors that were necessary in an analysis under s. 6-49(3)(f). While it was not in a format that followed the *Saskatoon* test, for the reasons above I found that it was comprised of a rational chain of analysis and internally coherent. Given my analysis of the interplay between s. 6-49(3)(f) and s. 6-49(3)(g), I also found that it was justified in relation to the factual and legal constraints of the statutes.

[92] I find that the Arbitrator did not ignore a relevant factor or mischaracterize a relevant circumstance in coming to his conclusion.

[93] The Arbitrator's decision relieving the Grievors from the breaches of time limits set out in the CBA was reasonable.

[94] Even if I was wrong in this regard, and I was required to consider both s. 6-49(3)(f) and s. 6-49(3)(g), I would have come to the same conclusion.

[95] For the same reason as the Arbitrator, I would have found that there was "some prejudice" to SP as a result of being denied the opportunity to maintain the *status quo* with respect to the Grievors rather than being forced to provide severance pay.

[96] However, in determining whether the delay was unreasonable, I find that while the uncertainty of the legal landscape was not the fault of either party, it is reasonable that the decision maker bear the consequences of that uncertainty in these circumstances. The *SaskPoly* decision sorted out a dispute that established that the Grievors always had a right to severance under the CBA if they were reassigned and SP does not decide to maintain the *status quo*. I find that SP profited from the uncertainty to ask for reassignment when they knew that the potential for severance pay was not an option.

[97] At the end of the day, I find that the Grievors should not bear the consequences of that uncertainty when they had nothing to do with the timing of when the dispute was resolved and there is no evidence that they played a role in the reassignment decision.

[98] While the court process is slow, it is more important that careful consideration be given to arguments on complex matters. Writing a decision of great importance to the parties involved is a thoughtful task without shortcuts and where no stone should be left unturned. Although the delay involved may involve some prejudice to the litigating parties, it is better to be correct than quick given the long-term implications to all of any ruling. Until all avenues of appeal have been exhausted, there will be some uncertainty as to the final conclusion and all parties must make decisions cognizant of the potential for change.

[99] Therefore, in these circumstances, I would not have found any unreasonable delay so that the Grievance should be dismissed under s. 6-49(3)(g). Based on the reasoning above, I would relieve the Grievors against the breach of the time limits of the CBA pursuant to s. 6-49(3)(f).

Should severance be calculated without any deduction for the amounts earned by the Grievors in the time period following their reassignments?

[100] After deciding that the Grievance was justified and timely, the Arbitrator reviewed the issue of remedy in relation to whether the Grievors would be entitled to their severance pay without deduction for the time they worked for SP after their reassignment.

[101] In his *Decision*, the Arbitrator found that the earnings of the Grievors post reassignment "should not be deducted from their severance." He noted that the payment for severance under the CBA was for "the purpose of easing the impact of involuntary separation." Had the Grievors taken severance and worked for another company, there would be "no question" that any amount obtained from this other company would not have been deducted from their severance payments.

[102] He finds that the situation is "not at all analogous" to a claim involving employee compensation following dismissals that were later set aside. In those cases, if an employee is reinstated and was unable or unwilling to mitigate their loss, an employee is being paid by an employer for the time period they did not work for the employer who discharged them. In this case, the Grievors were paid for the work they performed for SP, and it is "neither fair nor contractually justified" that these earnings should be subtracted had the CBA been applied "correctly in the first place."

[103] Further, the Arbitrator notes that the concept of "deductions and offsets for work performed" is expressly noted in article 10.19 of the CBA with respect to pay

in lieu of notice where an employee is laid off and then assigned work during the notice period. However, there is nothing to that effect in article 10.20 of the CBA as it pertains to reassignment. The Arbitrator finds this purposeful.

[104] Articles 10.19 and 10.20 of the CBA state as follows:

> 10.19 Calculation of Pay in Lieu
>
> 10.19.1 Permanent full-time employees who have been laid-off shall receive not less than ten (10) weeks' notice of lay-off or pay in lieu thereof. For purposes of calculating calendar days' notice under this article, the notice period will start the next working day after the employee receives notice, in writing, that the employee has been bumped or laid-off. Pay in lieu of notice will be 2.5/12 of the employee's annual salary, subject to the following:
>
> (a) if the employee is not required by the employer to work any assigned days during the notice period the employee will receive two and one-half (2 ½) months' pay in lieu of notice.
>
> (b) if the employee is required to work any assigned days during the notice period the employee will be paid one hundred ninety-ninth (1/199) for each day worked and will receive two and one-half (2 ½) months' pay less salary earned during the notice period.
>
> 10.19.2 On the date of notice of lay-off an initial pay reconciliation calculation will occur subject to article 7.3.
>
> 10.19.3 At the conclusion of the notice period a final pay reconciliation shall be made in accordance with article 10.13.1 and subject to article 7.3.
>
> 10.20 Severance Pay
>
> 10.20.1 A permanent employee hired on or before June 30, 2014 who is bumped or laid-off shall be entitled to receive severance pay on resignation on the basis of ten (10) assigned days' pay for each year of seniority or portion thereof (rounded up). Pay will be calculated on the basis of the employee's rate of pay at the time of separation. Severance pay is a payment to an employee

> to ease the effects of involuntary separation through lay-off. It is not compensation for past services.
>
> 10.20.1.1 A permanent employee hired on or after July 1, 2014, who is bumped or laid-off, shall be entitled to receive severance pay on resignation on the basis of five (5) assigned days' pay for each year of seniority or portion thereof (rounded up). Pay will be calculated on the basis of the employee's rate of pay at the time of separation. Severance pay is a payment to an employee to ease the effects of involuntary separation through lay-off. It is not compensation for past services.
>
> 10.20.2 Calculation of Severance
>
> 10.20.2.1 Utilize seniority list:
>
> | Up to June 30, 1989 | + July 1, 1989 to June 30, 2005 | + July 1, 2005 to future |
> |---|---|---|
> | 261 | 200 | 199 |
>
> 10.20.3 Eligible years for the purposes of severance pay will include all continuous salaried employment with the employer. The calculation of eligible years for the purpose of severance will be made utilizing the seniority list, the formula included in article 10.20.2.1 and any prior out-of-scope employment except when the employee has utilized the provisions of article 5.3.7 to regain their seniority and has previously collected severance. In those situations the employee will utilize their seniority since the break in employment or since the transfer. For those employees with Saskatchewan Polytechnic as at January 1, 1988, eligible years of seniority will include continuous salaried employment with the urban community colleges, the Government of Saskatchewan, or the Advanced Technology Training Centre.
>
> 10.20.4 A permanent employee who is on lay-off will be paid severance pay at the end of thirty-six (36) months on the re-employment list or on resignation from the re-employment list if the employee did not have an opportunity to remain as incumbent in their former assignment.

[105] Of note, both the arguments of SP and SPFA made regarding this issue that were before the Arbitrator, which are essentially the same as those before me, were fully canvassed in an earlier part of the *Decision*.

[106] SP argues that, given the compensatory nature of severance, the case law suggesting that severance is not compensation for past services and the goal of damages in this situation being to place the employee in the same position as if the breach had not occurred, it is unreasonable for the Arbitrator to ignore the Grievors post-reassignment earnings, which would not have existed had severance been provided. They submit that the Arbitrator's *Decision* takes a punitive approach rather than a compensatory one and fails to meaningfully consider the recent shift in attitude regarding the principles of compensatory loss and mitigation in relation to collective bargaining agreements.

[107] SPFA submits that SP is making the same arguments that they argued before the Arbitrator who fully considered and rejected them. They argue that the application of a mitigation-type approach in these circumstances would have both Grievors effectively working for free after they were reassigned while their opportunity to work elsewhere after being reassigned was not available. In their opinion, this would be a punitive approach. Mitigation applies to damage, not severance which is a different concept. Therefore, the Grievors should be provided their severance pay without any deduction for time they continued to work for SP.

[108] In determining whether the rationale of the Arbitrator was transparent and accorded with the legal and factual constraints regarding an appropriate remedy, I must review case law involving the categorization of damages, mitigation and severance pay.

[109] There is no doubt that an employee has a duty to mitigate his damages if they are unjustly dismissed. As outlined in the decision of *I.A.T.S.E., Local 295 v Saskatchewan Centre of the Arts*, 2008 SKCA 136, [2009] 1 WWR 49 [*IATSE*]:

> [21] At common law, the fundamental rule to apply in assessing damages in wrongful dismissal cases is stated by Laskin C.J.C. in *Red Deer College v. Michaels*, [1976] 2 S.C.R. 324 at pages 330-31:

> The primary rule in breach of contract cases, that a wronged plaintiff is entitled to be put in as good a position as he would have been in if there had been proper performance by the defendant, is subject to the qualification that the defendant cannot be called upon to pay for avoidable losses which would result in an increase in the quantum of damages payable to the plaintiff. The reference in the case law to a "duty" to mitigate should be understood in this sense.
>
> In short, a wronged plaintiff is entitled to recover damages for the losses he has suffered but the extent of those losses may depend on whether he has taken reasonable steps to avoid their unreasonable accumulation.

[110] The court in *IATSE* explained at paras. 25 and 26 that "The damages in such cases … are to compensate for the loss of the employment that the grievor would have had, but for his termination, after the date of his termination. …" and "… any income earned by the grievor from another employment after the termination must be taken into account to the extent that it alters the actual loss …" as "… Otherwise, it is conceivable that a person in the position of the grievor could collect substantial damages far exceeding his actual loss …".

[111] In the context of mitigation, the court has found that mitigation may require an employee to return to work for their "former" employer in some circumstances. Therefore, the fact that the Grievors remained employed with their employer SP after reassignment will not exclude the possibility of the applicability of mitigation. As noted in *Evans v Teamsters, Local No. 31*, 2008 SCC 20 at para 28, [2008] 1 SCR 661:

> 28 In my view, the courts have correctly determined that in some circumstances it will be necessary for a dismissed employee to mitigate his or her damages by returning to work for the same employer. Assuming there are no barriers to re-employment (potential barriers to be discussed below), requiring an employee to mitigate by taking temporary work with the dismissing employer is consistent with the notion that damages are meant to compensate for lack of notice, and *not* to penalize

> the employer for the dismissal itself. The notice period is meant to provide employees with sufficient opportunity to seek new employment and arrange their personal affairs, and employers who provide sufficient working notice are not required to pay an employee just because they have chosen to terminate the contract. Where notice is not given, the employer is required to pay damages in lieu of notice, but that requirement is subject to the employee making a reasonable effort to mitigate the damages by seeking an alternate source of income.

[112] However, the Federal Court of Appeal in *Bahniuk v Canada (Attorney General)*, 2016 FCA 127 outlined some limits on the extent of the duty of mitigation. They stated at para. 20 that "… monies earned by a dismissed employee are deductible on account of mitigation only if they are referable to the loss for which the award of damages is made." Thus, at para. 21, "… only monies earned prior to the expiry of the notice period are set-off against damages payable, which are premised on losses incurred over the relevant notice period". In relation to the *IATSE* decision, at para. 26 they stated that the set-off in that case was appropriate because "the damages awarded were referable to the same period as the monies earned in mitigation."

[113] In the case at bar, Article 10.20 of the CBA specifically states that severance is "not compensation for past services" but "payment to an employee to ease the effects of involuntary separation through lay-off". There is nothing in the CBA that addresses set off or deductions should the employee find other employment in the context of severance. Nor is this severance benefit in the CBA referable to any notion of damage or some contemplation of a duty to mitigate in the context of severance.

[114] I will briefly review the legal principles involving fixed employment agreements where an employee is terminated prior to the conclusion of the agreement and the agreement fixes a period of time but does not contemplate any mitigation. It could be said that such a situation is analogous to the issue of severance in the case at bar as both matters deal with fixed contractual obligations rather than calculations of loss based on a lack notice. However, the approach to such fixed agreements throughout

the country is not universal.

[115] The courts in Ontario have generally followed the approach outlined in *Howard v Benson Group Inc*., 2016 ONCA 256, 129 OR (3d) 677, [*Howard*] where they find that there was no duty to mitigate where the contract specified the penalty for early termination. The court in *Howard* found as follows at para. 44:

> 44 In the absence of an enforceable contractual provision stipulating a fixed term of notice, or any other provision to the contrary, a fixed term employment contract obligates an employer to pay an employee to the end of the term, and that obligation will not be subject to mitigation. Just as parties who contract for a specified period of notice (or pay in lieu) are contracting out of the common law approach in *Bardal v. Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.), so, too, are parties who contract for a fixed term without providing in an enforceable manner for any other specified period of notice (or pay in lieu).

[116] However, the approach in Saskatchewan is different. In *Crook v Duxbury*, 2020 SKCA 43, 447 DLR (4th) 154 [*Crook*], at paras 28 to 41, the Saskatchewan Court of Appeal engages in a detailed analysis of the conflicting jurisprudence on the issue. Under Saskatchewan jurisprudence, wrongful dismissal is addressed as an action for breach of contract, irrespective of whether the contract was a fixed term or indefinite term contract. Absent a contractual provision to the contrary, an employee's cause of action following wrongful dismissal lay properly in breach of contract and, therefore, was subject to the usual principle of law of damages that recovery was limited to actual loss. Despite the parties agreeing that there was no duty on the employee to mitigate her loss, the court found that since the employee did mitigate her loss, the amounts she earned due to the employer’s early termination of the contract were to be taken into account in the assessment of damages.

[117] In this regard, the court stated as follows at paragraph 46 in *Crook*:

> 46 ... Speaking generally, whether the parties to a fixed-term employment contract have contracted, either expressly or impliedly, for an amount to be payable on early termination as contractual damages or liquidated damages depends on the wording of the contract. That is to say, absent a provision to the contrary, the employee's cause of action following wrongful dismissal lays properly in breach of contract and is, therefore, subject to the usual principle of the law of damages, i.e., recovery is limited to the actual loss.

[118] However, the concept of severance and the concept of damages are different. The Supreme Court stated as follows in *Matthews v Ocean Nutrition Canada Ltd.*, 2020 SCC 26 at para 69, [2020] 3 SCR 64 [*Matthews*]:

> 69 I respectfully disagree with the majority of the Court of Appeal on this point. The trial judge did not use the LTIP to calculate severance; rather, he determined the quantum of damages that Mr. Matthews was entitled to under the common law following the constructive dismissal. As the dissenting judge explained in detail, severance and damages are distinct legal concepts. The primary purpose of providing reasonable notice (or damages in lieu thereof) is to protect employees by providing them an opportunity to seek alternative employment (see *Wallace* [*Wallace v United Grain Growers Ltd.*, [1997] 3 SCR 701], at para. 120, per McLachlin J., as she then was, dissenting, but not on this point). Severance pay, by contrast, "acts to compensate long-serving employees for their years of service and investment in the employer's business and for the special losses they suffer when their employment terminates", and is often provided for in provincial employment standards legislation (*Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27, at para. 26).

[119] Thereafter, the court emphasized the differences in outcomes between the two concepts as follows:

> 74 On my reading, this Court in *Sylvester* confirmed that "[d]amages for wrongful dismissal are designed to compensate the employee <u>for the breach by the employer of the implied term in the employment contract to provide reasonable notice of</u>

> termination" (para. 15 (emphasis added)). Authority elsewhere confirms this same idea: there is no such implied term of the contract to provide payment in lieu (see, e.g., *Love v. Acuity Investment Management Inc.*, 2011 ONCA 130, 277 O.A.C. 15, at para. 44).
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> 75 As explained by the Court of Appeal for British Columbia in *Dunlop v. British Columbia Hydro & Power Authority* (1988), 32 B.C.L.R. (2d) 334 (B.C. C.A.), at pp. 338-39, there are three principal reasons why this is an important distinction. First, there are issues surrounding the complexity of an implied term to provide pay in lieu of notice, and whether such a term can readily be implied into an employment contract. Second, implying a term to provide pay in lieu of notice "would mean that if an employer elected to give pay in lieu of notice, the employer would be complying with the contract and not breaking it", and thus "the contract would require the full payment to be made immediately". Third, if the employer elected to invoke such an implied term and gave no notice of termination, "there would be no obligation on the part of the employee to mitigate damages by seeking other employment" since the term requires a payment in full without regard to the employee's actual losses. Ensuring that courts and litigants properly understand this distinction is thus important as it can profoundly affect employees' financial lives. To the extent that some cases suggest otherwise, I respectfully disagree.

[120] In applying the facts of the case at bar to the law, I will begin by examining some aspects of the severance benefit the Grievors were denied the option to pursue.

[121] As noted in the CBA, this severance benefit did not have a compensatory aspect to it to ensure that an employee may have time to look for another job. It was payment to help the laid off employee deal with the effects of being laid off. In interpreting the differences between article 10.19 and 10.20, I find that the CBA provides that severance is distinct and different in its application from time in lieu of notice. From my review, there is nothing preventing an employee from collecting this benefit and then being rehired by SP if that was their desire. In the same fashion and as

noted by the Arbitrator, that employee could collect severance and work elsewhere with impunity as well.

[122] Severance is an immediate obligation that, unlike damages in a wrongful dismissal case, does not involve an assessment of damages to an employee due to the breach of an implied term to provide reasonable notice. Severance is a specific term of a contract which provides an employee with immediate benefits upon being laid off. As noted by the Supreme Court, it is a different concept than damages and involves different determinations.

[123] In *Matthews*, the court found that the plaintiff was entitled to a specific benefit (the LTIR) that he was denied as a result of the breach of his contract. This did not involve the application of the duty to mitigate because there was no way for the employee to mitigate the loss of such a benefit. As opposed to damages due to inadequate notice which can be mitigated if the employee finds another job so that the impact of the inadequate notice is reduced, a severance package is a sum of money that exists independently of any mitigation. Even if the employee works elsewhere or with the same company, they will have lost that benefit if it is denied to them. The loss is not calculated by the lack of notice which can be mitigated by finding other employment but due to the loss of the opportunity to collect the benefit package.

[124] While *Crook* indicates that "recovery is limited to actual loss" irrespective of the duty to mitigate, given that damages and severance are separate concepts, whether or not the Grievors keep working or not in these circumstances, they both lost the opportunity to collect the severance package. Working after the reassignment is not mitigating their loss as the opportunity to collect the severance package is gone and no longer available to them as a result of SP's breach. Had they collected the severance package, they could have still worked, either for SP or any other employer.

[125] However, had the CBA been breached due to inadequate notice, having regard to applicable case law, and both Grievors found employment, even with SP, this mitigation would have reduced the impact of the inadequate notice and the loss suffered by the Grievors.

[126] I agree that the case law is clear that damages must be compensatory and not punitive. I find that it is not punitive to award the Grievors the benefit equivalent of the severance package. This is not double compensation. This is simply providing them the benefit they would have had if the contract had been honored.

[127] While the Arbitrator did not analyze the various legal concepts in his *Decision*, he ultimately came to the same conclusion as I have here. His reasoning was clear and based on equitable principles. While the analysis was limited, his conclusion that the Grievors could have worked for another employer without a need to pay back their severance package mirrors my own. Therefore, I find that his *Decision* accorded with the legal and factual constraints placed upon him.

[128] Even if I am in error and his *Decision* is unreasonable due to his legal analysis or lack thereof, in coming to my own conclusion as directed to by SP, I would have found that the Grievors need not deduct the amount they received as employees of SP between the time of reassignment and retirement from their award of severance for the reasons given above.

Costs

[129] I have found that the Grievors were entirely successful in their application, and given the complexity of the analysis, I award them costs in column 2.

J.
J.P. MORRALL