

IN THE MATTER OF AN ARBITRATION UNDER THE  
BRITISH COLUMBIA LABOUR RELATIONS CODE

BETWEEN:

CITY OF SURREY

(the "Employer")

AND:

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 402

(the "Union")

Re: Wage Rate Grievance

ARBITRATOR:

Emily M. Burke

COUNSEL:

Keith Murray  
for the Employer

Chris Buchanan  
for the Union

DATE AND LOCATION OF HEARING:

March 12 and 13, 2007  
Vancouver, B.C.

DATE OF AWARD:

March 27, 2007

I. INTRODUCTION

The Union has filed a grievance maintaining the Employer has breached the collective agreement by placing new employees at a wage rate other than Step 1 of the wage grid in the collective agreement. The Union maintains the wage grid is mandatory for employees whether new or existing. The employee must be placed at the location in the wage grid which their service and position provides, unless the parties agree otherwise. In response, the Employer says it has the ability and has been hiring new employees above Step 1 of the wage grid for at least three decades. It maintains this practice is consistent with the collective agreement language.

II. BACKGROUND

Laurie Larsen, the President of the Canadian Union of Public Employees, Local 402 (the "Union") testified in this matter. The total membership of the Union is 2100. Of that number, the City of Surrey employs 1600 members of Local 402. Approximately 500 employees are outside workers, with the remainder of the 1600 being inside workers. Larsen has been employed at the City of Surrey since 1986. She became a shop steward in 1992/93; was elected to an Executive at large position in 1996; spent a year as first Vice-President; acted as President for part of 1997 and was elected to that position in 1998. Larsen was an observer in collective bargaining between the parties at the end of 1997 and took an active role in the next round of bargaining.

Article 8 of the collective agreement is entitled "**Wages and Salaries**". Article 8 (a) reads:

- (a) The schedule of wages, classifications and salaries for all the employees of the City covered by this Agreement, shall be in accordance with the Schedules attached hereto and forming part of this Agreement.

Schedule B sets out "Inside Staff Pay Grades" in part as follows:

	Standard Step 1	6 Month Step 2	18 Month Step 3	30 Month Step 4	42 Month Step 5
8	\$1,257.38	\$1,268.29	\$1,282.87	\$1,316.80	
9	\$1,268.29	\$1,282.87	\$1,316.80	\$1,343.48	

As set out above, Schedule "B" of the collective agreement provides for Inside Staff Pay Grades. Sequential pages set out the wage grid for each year from 2003 to 2006. Pay grades commence at Pay Grade 8 and an employee progresses through each of the four Steps. Progression commences from employment in the position. An employee is hired at Step 1; moves to Step 2 after six months in the position; Step 3 in 18 months; and Step 4 in 30 months. Movement is predicated upon service in the position; not overall service with the Employer. Larsen indicated the Union has previously requested in bargaining in the past that the incremental steps be replaced with hourly pay rates as accorded to the outside workers. The Employer has denied this request. It advised the steps were necessary for new employees in that time period to become knowledgeable about the Employer's unique customs, policies and procedures.

An exception to the wage grid placement agreed to by the parties occurs when an existing employee is promoted and the wage grid does not provide an increase in pay. In that situation, the parties have agreed the employee can be moved to the next Step on the grid which provides a raise in pay. In addition, special services pay is given to certain employees who are working outside their current job description. This may occur during a wait for reclassification.

The Employer has raised the issue of recruitment with the Union in the past. The Employer approached the Union and proposed a 2 stage wage increase for

planners. The Union signed off on a letter that established a new rate for those positions. The afternoon shift for mechanics was also an issue and the Union agreed to a proposed grid change in that situation. The parties are presently in bargaining for a new collective agreement.

In preparation for that bargaining, in August 2006 the issue of new employees being placed at steps higher than Step 1 was raised within the Union. Larsen had assumed all new hires were placed at Step 1 and progressed through the existing steps, other than in the promotion situation. As a result of this concern being raised, Larsen checked to see if employees at the City of Surrey were being hired at steps higher than Step 1. Her review revealed this had occurred in the past and Larsen contacted the Employer to discuss the matter. Ultimately this grievance was filed. Larsen reviewed bargaining notes for the most recent collective agreement and the previous two sessions. She found no mention of the issue. Larsen also found no mention of this matter in Labour/Management minutes between the parties.

Article 3 of the collective agreement requires the Employer to notify the Union in writing when an employee covered by the collective agreement is hired, promoted, demoted, transferred, laid off, recalled, resigns, is suspended or terminated. As a result, the Union is copied on the letters of appointment for each employee. Larsen reviews these letters to ensure an employee has won a job posting, and to check on an employee's status. Larsen indicated she does not receive all the appointment letters. When an employee is hired a Union card is signed. The Union regularly finds it has more Union cards than appointment letters. The Union then e-mails Human Resources to obtain copies of the letters, as it uses these to input address and contact information for new employees. Larsen indicated the form of the appointment letters varies as some are sent out by Human Resources and some directly by the managers. The letters do not necessarily contain pay grade information. Some indicate joining the Union is required; others do not. The Union also receives letters when an employee

changes from part-time to regular part-time, temporary to term employee.

Despite the receipt of these letters from the Employer, Larsen was not aware of the Employer's practice of placing new employees at higher than Step 1. When cross-examined, she indicated nothing in these letters told her the individual was a new employee. Her focus was on whether the individual was filling a full-time posting; whether the job offer complied with the posting. If the pay was not Step 1, she assumed the individual was already an employee or part-time staff being converted to regular employee status. Larsen is the only full-time person in the Union office other than a clerical employee.

The Union is concerned new employees placed at higher than Step 1 on the wage grid bypass senior employees and obtain higher wage rates. In addition, existing employees do not have an opportunity to post for that higher wage. The Union also maintains the Employer is bargaining directly with these new employees. While Larsen confirmed in cross-examination this matter had not been brought to her attention by the bargaining unit members, she noted employees are upset since it has been mentioned in a general membership meeting.

George Siudut, currently Manager of Administration and Special Projects, has been employed by the Employer for over 20 years. From 1983 to 1994, he worked in the Human Resources Department. In 1983, the City employed approximately 460 full-time employees and 200-300 part-time employees. At the time, Bill Eccleston, who had been in the department since 1974, was the Director of Personnel. During the time Siudut was in Human Resources, he was involved in hiring, personally making offers to employees above the Step 1 wage rate. When doing so, Siudut checked with the Director of Personnel. Eccleston advised him the past practice was to make offers at higher than Step 1 if the circumstances warranted it. While this did not happen often, at various times a challenge in recruiting existed. Due to these difficulties, the Employer would offer a starting

wage above Step 1. In doing so, the Employer did not seek the Union's permission. Siudut reviewed a number of appointment letters over the years where offers had been made above Step 1. Those included 11 letters from 1977-1997 and 16 letters since that point in time. In order to locate appointment letters reflecting this situation, Siudut reviewed a current staff list, focused on the challenging positions to fill and certain names came to mind. He then located original letters of appointment reflecting this practice.

Siudut said these letters were provided to the Union a number of different ways. In the early 1980s, some of the Union executive worked within the City Hall. Siudut said it was not uncommon to send a copy of a letter to the Union through the internal mail system, or simply walk the letter down to the Union executive. In the 1990s, the President of the Union worked out of the yard. As a result, copies to the Union President and/or Secretary were sent through internal mail. While Siudut cannot be absolutely certain the Union received all the letters, he said he "would be amazed" if the Union was not aware of this practice. It was a small community, the process was intended to be open and the Union was given copies of the appointment letters. Siudut was not aware of any complaint, grievance or any expression of discontent by employees on this issue.

Siudut became the Manager of Administration and Policy in 1994. In that position he has also hired employees above Step 1. While not often, this again occurred when it was difficult to fill the position. Siudut said employees were hired first for their academic qualifications and secondly for their experience. Specific knowledge is part of the orientation of employees. The fundamental needs and requirement of the job were the same. In his view, whether an individual knows the Employer's procedures was irrelevant with respect to a selection decision. The scarcity of candidates created a competitive process to attract and retain staff.

In cross-examination, Siudut conceded movement on the wage grid was based on service in the position. Existing employees could not move on the wage

grid inconsistent with that position. The only exception outside of promotion was "acting" pay when doing work in a higher position; special services pay when undertaking special duties; and theoretically an employee could be reclassified. Siudut reiterated in cross-examination the right to hire someone other than at Step 1 was based on the past practice he became aware of when he started in Human Resources and has continued since.

### III. ARGUMENT

At the outset, the Union maintains the Employer cannot ignore the exclusive bargaining agency of the Union and bargain a start rate for new employees. The wage rate is based on the service of an employee in the position at issue. Whether the Employer has a good reason for doing this is not relevant. Issues such as retention and recruitment have come up and changes agreed to between the parties in the collective agreement.

The Union points out it receives hundreds of appointment letters each year. In Larson's time as President she has likely received 3000 appointment letters; recently receiving over 300 in an eight-month period. The Employer has only produced 16 examples over a 10-year period where employees have been hired above Step 1. A review of those letters indicates only half advise the employee is required to join the Union and two out of three do not give any indication the individual is a new employee. Prior to the tenure of Larson, from 1977 to 1997, the Employer has produced only 11 appointment letters over Step 1. Further, the Union points out it did not have a full-time President until the mid-1990s. The present full-time President and Secretary must deal with approximately 2000 workers with four sub-locals and Local 402. This contrasts with the dozen individuals in the Human Resources Department for the Employer. The Union cannot reasonably be expected to have captured this problem over the last nine years, never mind the last 20 years. It cannot scrutinize a problem it is not aware of. Larson reviews the appointment letters for potential violations of the collective

agreement that the Union is aware of including issues with job postings and the use of temporary employees.

The Union maintains there is no discretion for an employee to be paid other than on the wage grid. The wage grid is based exclusively on service in the position and starts at Step 1. An individual with no service must commence at Step 1. The only exception is when an employee obtains a promotion which would not result in a wage increase if starting at Step 1. Only in that situation does an employee start at a step higher than Step 1 on the wage grid. Article 8 of the collective agreement attracts the standard interpretation of minimum and maximum. While the Employer argues the word "standard" provides discretion, it is evident from the Employer witness the alleged discretion is unconnected to any language in the collective agreement and is based solely on the practice of Human Resources. The Employer does not simply pay a higher rate; they in effect assign service in a position to an employee who has no service. The fundamental problem of interpretation for the Employer is that if they have that right for new employees, it follows they have that right for existing employees. In effect, the Employer must establish it has the right to credit employees for service not earned. Further, the Union points out the job postings state clearly pay is at Step 1 of the pay grade. They do not indicate a range of pay. This is the only indication of pay in the position.

Turning to the jurisprudence, the Union maintains first there is no room for private negotiation in the collective bargaining relationship with those individuals covered by the collective agreement. When an employee is hired the terms of the collective agreement must be complied with. (See *Atomic Energy of Canada Ltd. and Society of Professional Engineers and Associates* (2000), 90 LAC (4<sup>th</sup>) 129) Indeed, the Union points out Article 1.3 in this collective agreement goes beyond the recognition clause and requires the bargaining authority of the Union not to be impaired during the term of the collective agreement. Further, as set out in *Re International Chemical Workers Union and Chemical Developments of Canada Ltd.*

(1968), 19 LAC 302, allowing the employer to negotiate a new higher rate with individual employees creates an invidious distinction between individuals in the same category and goes beyond the clear language of the collective agreement containing a schedule of wages. (See also *Re National Grocers Co. and Teamsters, Local 91* (1999), 82 LAC (4<sup>th</sup>) 278; *City of Ottawa and Ottawa Professional Firefighters Association* (2006), 146 LAC (4<sup>th</sup>) 186). The Union points out further the language here is stronger as progression is based on service in the position. It would be perverse to conclude the Employer can recognize non-service in hiring a non-employee and cannot do that for existing employees. New employees are given priority over existing employees which is not what the Union bargained (*Re Participating Hospitals and Ontario Nurses Association* (1984), 16 LAC (3d) 348). The language of the wage grid makes clear the Employer has no discretion to treat employees without seniority better than employees with seniority.

Further, the Union maintains the Employer has not established a clear unequivocal practice in this case; nor has it proven actual or constructive knowledge of the Union. If past practice is to be used as an aide to interpretation, it must demonstrate the mutual understanding of the parties. If there is no actual knowledge, that cannot be demonstrated. Further, the Union maintains there is a serious question as to whether constructive knowledge can ever support an aide to interpretation based on past practice. In this case, there was no Union knowledge and no complaint from the members. As a result, one cannot reasonably expect the Union in reviewing over 3000 letters to find the dozen or so situations where a new employee starts higher than at Step 1 of the wage grid. Indeed, it is more reasonable to conclude the Union was unaware of this practice. (*Re Georgian College and OPSEU* (1997), 59 LAC (4<sup>th</sup>) 129). Even a long-standing error of interpretation can be corrected once it is discovered (*Re Corporation of the City of Victoria and Canadian Union of Public Employees, Local 50* (1974), 7 LAC (2d) 239). With respect to the principles of *John Bertram and Sons* (1967), 18 LAC (362), the Union maintains first there is not sufficient ambiguity to examine past

practice. More importantly none of the factors are met. The Employer cannot prove a Union official was aware of the practice. Trade union silence cannot be considered approval in the circumstances.

The Union also maintains while one can draw the concept of estoppel from constructive knowledge, the Employer fails to establish estoppel in two significant ways. Neither unequivocal representation nor detrimental reliance is established. The mere continuance of a long-standing practice is not sufficient to create an estoppel. A bare assertion the matter would have been raised in collective bargaining is not sufficient to establish detrimental reliance. (See *Fording Coal Ltd. v. United Steelworkers of America Local 7884* [2002] BCCAAA No. 205; *The City of Cranbrook and International Association of Firefighters* [2001] BCLRBD No. 294). Further, the Union is under no obligation to tell the Employer it is acting inaccurately in its interpretation of the collective agreement (*Corporation of the District of Maple Ridge and Canadian Union of Public Employees, Local 622*, BCLRB No. 209/2001).

The Union maintains the collective agreement is clear the wage grid is based on service. The Employer has no discretion to give a wage other than on that basis. If the Employer believes it has the discretion to move an individual on the wage grid, it needs to bargain that right. As a result, the Union maintains there has been a breach in the collective agreement. It does not seek a retroactive remedy; but seeks a declaration the Employer cease and desist its practice of hiring employees above Step 1 of the wage grid.

At the outset, the Employer maintains it is free to negotiate a start rate with a prospective employee as there are no restrictions in the collective agreement. There is nothing inherently unlawful about an Employer and a prospective employee discussing the rate the employee will commence at. There is also nothing inappropriate about paying for experience other than with the Employer. Part of the Union's argument is premised on the basis the wage grid is entirely

service driven. This is not accurate as is evident from an employee being placed above Step 1 if a promotion does not result in a wage raise. Further, there was no evidence of what would happen when someone in a certain classification is moved into another classification where they already have special skills.

The Employer maintains management has the right to set wage rates and wage progressions subject to the express limitations in the collective agreement. These items are bargained by the Union and either limit or abrogate what would otherwise be a management right. A limit must be expressly contained in the collective agreement. The Employer points out *University of Northern British Columbia and Canadian Union of Public Employees, Local 3799* [1999] 55 CLAS 188, found nothing in the collective agreement expressly prohibiting the Employer paying newly hired employees a salary above the base rate falling within the set salary range. Cases where the first step is determined to be a start rate include the word "start" as the first step. This collective agreement does not use the word "start"; it uses the word "standard". (See also *Coca-Cola Ltd. and International Union of Soft Drink Workers* (1964), 15 LAC 16). These cases rejected the Union's argument that a presumption exists in a wage scale requiring a new employee to start at the bottom. Rather, the specific wording in the collective agreement determines whether management's ability to hire above the lowest rate is restricted. Any cases reaching that conclusion include the word "start".

The Employer reviewed the history of the collective agreement between the parties commencing from 1955. In that collective agreement the schedule of monthly wages and salaries included columns setting a wage rate for the first, second, third and fourth year. The Employer pointed out this wording leads to a strong argument new employees start at the beginning of the grid. In the 1957 collective agreement however the parties appeared to turn their mind to some of the issues and changed some of the language. The first step no longer said "first year" but was changed to "Minimum". The word "Standard" was used at the end of the wage scale. The Employer maintains the use of the word "Standard" implies

there can be exceptions to that standard. In the 1963 collective agreement the word "Standard" was moved to the beginning of the wage schedule and the word "Maximum" moved to the end. The Employer points out if no discretion existed there would be no reason to change the word to "Maximum". The movement of the word "Standard" to the beginning column of the pay scale confirms there is room for discretion. Although there is no evidence of bargaining history with respect to these provisions, the Employer maintains this is a reasonable interpretation. Most employees would start at the rate in column 1 but there could be exceptions. If no discretion existed, the word "start" would be used. The Employer points out past practice is consistent with this interpretation. Most employees start at Step 1. Where warranted an employee can start at a higher rate. Siudut's evidence establishes this practice has existed since 1973.

The collective agreement requires the Union to be notified of new hires. Siudut testified the letters were delivered to the Union. While the Union at present may get an extensive number of appointment letters, in the 1970s and 1980s, City Hall was a small community. The Employer points further to specific agreements in the collective agreement which support its position. The parties agreed in 1982 that the position of Instrument man 1 will not start on a step in Pay Grade 17 which will produce the same or lesser than the equivalent hourly rate for the position of Rodman. This language confirms the ability for the Employer to start people above Step 1, with the use of the word "somewhere" above the Rodman confirming the Employer has discretion. By 1981/82, four columns were set out in the Inside Staff Pay Grades indicating standard, six-month, 18 month and 30 month wage rates. That language continues in the next few collective agreements until 1997 when "Steps" began to be used. Larson indicated she was an observer in the 1997 bargaining and there was no discussion about starting above the first column. Accordingly, one cannot conclude that the change from "rate" to "step" had any significance. Further, the Employer points to Letter of Understanding #8 in the 1997-99 collective agreement which deals with skating instructors to argue if every new hire was started at the bottom there would be no need to have this Letter of

Understanding. That provision reads:

**Article 8 – Wages and Salaries** – not applicable except for Section 1(a) and (b) and (d) of the Collective Agreement.

- (a) Rates for Head Skating Instructor and Skating Instructors in Schedule D as follows:

	<u>Level 1</u>	<u>Level 2</u>	<u>Level 3</u>	<u>Level 4</u>
Recreation Skating Instructor	\$14.50	\$15.00	\$15.50	\$16.00

	<u>Level 1</u>	<u>Level 2</u>	<u>Level 3</u>
Head Recreation Skating Inst.	\$16.50	\$17.00	\$17.50

- (b) Employees who are members of the skating instruction staff as of date of ratification will be assigned to the pay rate that they are at presently and progress through the range thereafter. Employees hired after the date of ratification will be placed at the minimum of the range and proceed through the range thereafter. Employees will be credited with the hours worked since the date of their last increment.
- (c) Employees shall progress to the next highest pay level once they have completed 300 hours of work.

Further, the 2000 collective agreement provides for another exception where Step 1 of Survey Assistant is set out as "start rate". There would be no need for this provision otherwise. Accordingly, the Employer maintains the existing language and the history of the collective agreement clearly favours the Employer's interpretation in this case. The onus is on the Union to prove on the balance of probabilities that they have bargained to restrict the Employer to hiring people only at Step 1.

The Employer relies upon *Re Newfoundland Treasury Board representing the Workers' Compensation Board and Newfoundland Association of Public Employees* [2006] 13 CLAS 86 to argue where step progression exists in the collective agreement, the question of initial placement for new employees is not addressed. The Board in that case found nothing in the collective agreement to

limit the employer on initial step placement. The Employer maintains the reasoning in the *City of Ottawa and Ottawa Professional Firefighters Association, supra*, that each step in a wage grid is a minimum and maximum rate of pay for the employees is overstated or wrong. The use of the word "start" is very different from the use of "standard" in this collective agreement. That language and the collective agreement history and provisions confirm the Employer has the ability to start new employees above Step 1.

The Employer also maintains past practice can be used as an aid for interpretation of the collective agreement or alternatively for estoppel. Even if Larson was not aware of the practice herself, it is hard to imagine at some point during the last 30 years the Union was not aware of this practice. The evidence of Siudut was the Employer was much smaller, and the Union was advised of the practice by delivering the letters. This along with the collective agreement obligation to advise the Union makes it is hard to conclude the Union did not know at some point this was occurring. The Employer maintains the letters gave sufficient indication new hires were involved, referencing steps above Step 1, welcoming the individuals to the Employer, requiring them to join the Union and being addressed in some cases to locations outside of British Columbia. On this basis, it is fair to make an assumption, especially in the absence of evidence from previous Union presidents, that the Union knew this was happening. The Employer argues that knowledge should be imputed to the Union and used as an aid to interpretation. (*Re Coast Hotels Ltd. and Hotel, Restaurant and Culinary Employees and Bartenders Union, Local 40* (1995), 50 LAC (4<sup>th</sup>) 1; *Re Toronto Transit Commission and Amalgamated Transit Union, Local 113* (1992), 26 LAC (4<sup>th</sup>) 196 and *Nanaimo v. International Association of Firefighters, Local 905* [1995] BCCAAA No. 24). Letters going back as far as the late 1970s have to be regarded as persuasive of the mutual intention of the parties. That in conjunction with the language in the collective agreement makes it difficult to conclude the Union bargained a right that all people must start at Step 1. While the Employer agrees where past practice is used as an aid to interpretation the Union must be aware of

the practice, where the practice has been in existence for so many years knowledge can be imputed to the Union. The facts in this case establish knowledge should be imputed to the Union. Alternatively, the Union can be found to have been aware on the basis it should have been aware of this practice and it is relevant to the interpretation of the collective agreement.

The Employer points out estoppel is to be viewed from the perspective of the party asserting it. Accordingly, if a party has followed the practice for a number of years without complaint from the Union, even though the practice may be inconsistent with the collective agreement, the party asserting estoppel is permitted to conclude the Union has consented to the practice. The Employer maintains estoppel has clearly been made out on the basis of past practice for a minimum of 30 years. There has been silence from the Union with no objection to the practice. The Employer can assume the Union is aware or import knowledge to the Union. Detrimental reliance exists in the lost opportunity to bargain. (*City of Owen Sound and Owen Sound Police Association* (1984), 14 LAC (3d) 46; *Toronto Transit Commission and Amalgamated Transit Union Local 113, supra* and *ICBC and OPEIU Local 378* (2002), 106 LAC (4<sup>th</sup>)).

#### IV ANALYSIS

In considering the collective agreement interpretation issue in this case, it is helpful to review some basic principles as articulated by the parties. As pointed out by the Union in *Atomic Energy of Canada Ltd., supra*, the collective agreement determines the terms upon which the employer conducts its relations with its employees. There is no room for private negotiations between employer and employee. The Employer says however as set out in *University of Northern British Columbia, supra*, if a limit is to be found on a management right ability, it must be contained in the collective agreement.

In *Atomic Energy of Canada Ltd., supra*, the arbitrator referenced the

Supreme Court of Canada in *McGavin Toastmaster Ltd. v. Ainscough* [1976] 1 SCR 718 and concluded:

It is clear from the foregoing that Union recognition stands at the forefront of the substantive terms of the Collective Agreement and that the Collective Agreement tells the employer on what terms he must conduct his relations with his employees. Also, the Collective Agreement defines the terms for all employees and it makes those terms identical for all. The employer is bound to regulate its relationship with its employees according to the agreed terms of the Collective Agreement; there is no room left for private negotiations between employer and employee. There are also a number of arbitration decisions that confirm that the employer has no right to bypass the Union in dealing with individual employees and that the employer is bound by the terms of the Collective Agreement...

(at 10)

*Re National Grocers Co., supra*, similarly noted:

As a general matter, "where the agreement contains a wage schedule or a term stipulating the wage rates that are to prevail during the life of the agreement, arbitrators have generally held that an employee may not, no matter how legitimate or well meaning its motives, unilaterally decrease or even increase the wages of some or all of its bargaining unit personnel". (Brown & Beatty, *Canadian Labour Arbitration*, 3<sup>rd</sup> ed., 8:1400)

(at 281)

The Employer relies upon *University of Northern British Columbia, supra*, where the arbitrator commenced his analysis by pointing out:

This Collective Agreement contains in Article 2.01 a broad management rights clause which states that "the Union recognizes and agrees that except as specifically abridged, delegated, granted or modified by specific terms in this Agreement, all of the rights, powers and authority which the University had prior to the signing of this Agreement are retained by the University, and remain within the

rights of management". The question then is to what extent have these parties elsewhere in the Collective Agreement limited the Employer's ability to determine the wages it will pay.

There is an explicit provision in this Agreement (Article 27.01) regarding the payment of wages which states that "the University shall pay employees on a bi-weekly basis in accordance with the rates established in this Agreement detailed in Schedule A attached to and performing part of this agreement". This type of express reference to detailed wages in a wage schedule is discussed in a number of cases cited by both Counsel...where such a reference is included in an agreement, it is generally acknowledged that it places strict limitations on the scope of management rights.

In our view, Article 27 of this Agreement is clear recognition by these parties that the rates set out in Schedule A are intended to limit the rights of the University with regard to the setting of salaries. Schedule A contains detailed salary ranges for the various positions and in our view this must be interpreted to mean that the employees must be paid within those ranges. There appears to be no scope within this Agreement for an employee to be paid a salary above the high end or below the low end of the range attached to his position. Therefore, we conclude that to extent that any employee's basic salary has exceeded the high end of the salary range, there has been a breach of this Collective Agreement by UNBC.

The other aspect to this issue is whether the Employer can pay a newly hired employee a salary above the base rate but which nevertheless falls within the salary range set out in Schedule A. First of all, there is nothing in this collective agreement which on its face prohibits such action. Mr. Merrick in his testimony candidly admitted that was the case. Put another way, the agreement does not expressly establish where a new employee is to be placed within any salary range, and therefore, it appears that management' rights to make that decision has not been abrogated by the language of this Agreement. It is clear that for the specific circumstances, the parties did contemplate the notion of the base rate. For example, in Article 27.03 is expressly stated that employees who were promoted or reclassified may very well start at above the "base rate" of their new salary range. The inclusion of reference to the base rate in the sections makes the absence of a stated requirement of the base rate being applicable to all starting salaries all the more glaring.

Further, there is no discussion in these provisions of a step-system with specific levels of pay within each salary range. In other words, there is no specific wage progression provision in the

Agreement, i.e. a starting salary with specific salary steps. In our opinion, this is a further indication that there was no mutual agreement that employees had to start at the base of the salary range and then proceed to specific levels of pay.

In summary on this point, this Collective Agreement on its face contains no limitations concerning where an employee must begin within the salary range, or to put it another way, there is no express requirement that the starting salary must be at the bottom of the salary range.

(Paragraphs 30 to 35)

The Employer also relies upon *Re Newfoundland (Workers' Compensation Commission) and NAPE, supra*, for the same proposition. That case concluded while wage rates were fixed as per the collective agreement, initial placement is distinct from progression. In the absence of a provision in the collective agreement which limited the employer to paying step one salaries to all new employees, it found the employer is not required to start all employees at Step 1.

This conclusion is to be contrasted with the recent case of *Re City of Ottawa and Professional Firefighters Association, supra*, which followed the reasoning articulated in earlier case such as *Chemical Developments of Canada, supra*. Arbitrator Brown concluded the collective agreement did not sanction recognition of experience gained before joining the service and the employer was required to place new recruits at Step 1 of the wage grid. As part of his analysis, the arbitrator said:

The cases cited above show arbitrators generally have treated a rate specified in a collective agreement as not only a minimum but also a maximum. This was the approach taken in *Chemical Development of Canada* where the agreement contained a single rate for the classification of instrument mechanic. Arbitrator Weatherill held the employer lacked any discretion to alter this rate, noting such alterations could result in invidious distinctions among employees. This ruling recognizes one function of collective bargaining, perhaps a primary function, is to standardize rates of pay by curtailing management discretion in compensating employees.

In *Chemical Developments of Canada* there was a unitary rate for the classification in question, whereas here a wage grid comprised of four steps applies to dispatchers. This is a distinction without a difference for present purposes. Just as a single rate is both the floor and the ceiling for all employees in the classification governed by it, each step in a grid is a maximum, as well as a minimum, for employees belonging to the group to whom that step applies. The rationale for treating rates of pay as maxima is the same in both contexts -- to standardize compensation and limit management discretion. This reasoning was applied to wage grids comprised of multiple steps in both *County of Ponoka* and *Hamilton Health Services Corp.* where the "start" rate was held to be a ceiling as well as a floor. The foregoing analysis leads me to conclude each step in the wage grid for dispatchers sets not only a minimum rate of pay, but also a maximum, for the group of employees to whom that step applies.

Who then belongs to the group that must be paid the step 1 rate? This group is made up of new recruits. I come to this conclusion because one criterion for progression between steps is the completion of one year of service for full-timers or the equivalent number of hours for part-timers. As service is one factor driving progression into higher steps, it follows that those with the least service must be paid at the lowest step. In other words, the Step 1 rate in this agreement is the functional equivalent of the "start" rate in the cases cited by the association....

(at p 191)

In *Chemical Developments of Canada Ltd.* the arbitration board elaborated on the concern behind its conclusion. It said:

..the union's exclusive right to represent and bargain for the employees in the bargaining unit is not, however, confined to those periods. The prohibition in Section 59 of the Act applies where notice to bargain has been given "and no collective agreement is in operation". Here, the collective agreement is in operation, and the Union is recognized, by Article 4 (1), as the exclusive representative of the employees in the bargaining unit "for the purpose of collective bargaining with respect to hours of employment, rates of pay and other conditions of employment" as set forth in the agreement. To consider the schedule of wages as merely a list of minimum rates, and then to allow the Company to negotiate an entirely new (albeit higher) schedule with individual employees, changing, it may be,

their relative positions on the schedule as introducing, perhaps, invidious distinctions between individuals in the same category plainly goes beyond clear language of the agreement.

(Page 304)

As noted above, in support of its position, the Employer relies significantly upon the two cases; *University of Northern British Columbia, supra* and *Re Newfoundland (Workers' Compensation Commission), supra*. It maintains the comments in *Re City of Ottawa*, finding a wage grid to set not only a minimum rate of pay, but also a maximum is overstated or simply wrong. In considering this proposition, careful review of the two aforementioned cases must be made. In *University of Northern British Columbia*, the wage schedule at issue in that case set out the list of pay grades with an "annual salary range" applicable to a list of jobs. In coming to the conclusion that the collective agreement contained no limitations as to where an employee must begin within the salary range, the arbitrator while noting no "base" rate was set out, also noted there was no specific wage progression provision, i.e., a starting salary with specific salary steps. This he found to be an indication there was no mutual agreement that employees have to start at the base of the salary range and proceed to specific levels of pay. This is unlike the collective agreement here where a very specific step progression system is set out based on the amount of service in the position, commencing at Step 1 and increasing the wage rate in six months; 18 months and finally 30 months in the position. This is a significant distinguishing feature from the collective agreement in *University of Northern British Columbia, supra*, which did not have a step progression system but referred to an "annual salary range".

In *Re Newfoundland (Workers' Compensation Commission), supra*, the arbitration board found the concept of progression was applicable to employees as they move through their period of employment but did not address the question of initial placement on the step progression. It points out however there were two mechanisms in determining the pay as set out in B1 and B2. That provision reads:

B. Step Progression

1. Employees shall continue to advance one step on their respective salary scales for each twelve (12) months of service accumulated, effective when the additional twelve (12) months of service was accumulated.
2. New employee shall advance one step in their respective salary scales for each twelve (12) months of service, and thereafter from year to year for each additional twelve (12) months of service accumulated.

This led in part to the conclusion that the parties had not addressed the question of initial placement on the step progression for the new employees. It also noted that in *County of Ponoka, supra*, the agreement referred specifically to "starting salaries" and the grievance was upheld largely on the basis of this clear and unambiguous language. As part of its analysis however it distinguished its case from the reasoning in *Chemical Developments of Canada, supra*, by noting the collective agreement before it did not refer to "rates of pay" as in the former case. This is also unlike the case before me which does refer to pay grades or rates of pay; a wage grid. Indeed, there is no specific reference to the nature of the wage table considered in *Re Newfoundland (Workers' Compensation Case), supra*.

A review of this case law establishes arbitrators generally have treated a specified rate on a wage grid in the collective agreement as not only minimum but a maximum as set out in *Re City of Ottawa, supra*. In conjunction with that however is the recognition the question of the initial start rate is determined by the wording in the collective agreement. In this case, a wage grid with step progression is in place in the collective agreement. As such, the comments in *City of Ottawa, Chemical Developments of Canada Ltd.* and *National Grocers* are particularly applicable. The one critical feature the Employer maintains distinguishes it from all these cases is that Step 1 is not referred to as a "start" rate but rather a "standard" rate. In addition, it seeks to utilize past practice of the Employer in support of its interpretation. To counter that proposition, the Union refers to the extensive jurisprudence set out above that establishes the wage grid

to be the minimum and maximum. Further, it points to the fundamental premise behind this conclusion that there is no room for private negotiations between employer and employee and to exceed to the Employer's interpretation in this case creates an invidious distinction between individuals in the same category. More importantly however the Union maintains if the Employer is correct in its interpretation it would also have the discretion to give all employees credit for service not earned.

In disputing the proposition that the wage grid is entirely service driven, the Employer points to the placement of an employee above Step 1 if a promotion does not result in a wage increase. Further, it points out there is no evidence of what would happen when someone in a certain classification is moved into another classification in which they already have special skills. The evidence is however clear. Other than exceptions reached by agreement of the parties, the Employer witness agreed there was no ability to move other than on the wage grid or as specifically set out in the collective agreement. That wage grid is based on service in the position. Indeed, a review of the collective agreements over the years can be said to support this. The Employer pointed to the 1982 agreement in the collective agreement concerning the Instrument man 1, the Letter of Understanding reflected in the 1997-99 collective agreement dealing with skating instructors, and other changes over the years. Those agreements however can also support the Union's argument that unless specifically bargained, employees' wage rates are determined by placement on the wage grid. Ultimately, the review of the collective agreement history is not determinative one way or another. While the Employer's theory on these changes may well be plausible, those changes in conjunction with the specific agreements which differ from the wage grid as easily lend credence to the Union's argument in this matter.

The Employer also relies on the past practice to support its position. The use of past practice as an aid to interpretation is set out in *John Bertram and Son, supra*. To be of value, ambiguity in the collective agreement must be present; one

party must have engaged in conduct which unambiguously is based on one meaning of the provision at issue; the other party must have acquiesced in the conduct for a long period of time; and there must be evidence that members of the Union or management who had real responsibility for the meaning in the agreement have acquiesced in practice. The Union in this case says there is not sufficient ambiguity in the provisions and the Employer cannot prove the Union was aware of the practice. The Employer argued strongly that it is hard to imagine at some point in the last 30 years the Union was not aware of the practice. Further, it points out in view of this length of time, knowledge of the practice can be imputed to the Union on the basis it should have been aware of the practice. (See *Re Coast Hotels Ltd.*, *supra*, *City of Nanaimo*, *supra*, and *Toronto Transit Commission*, *supra*.)

In reviewing the cases relied upon by the Employer, it is apparent in *Coast Hotel*, *supra*, where knowledge was imputed to the union, the past practice continued for a significant number of years. In that time, the union performed a full audit and raised the issue with the employer. Union executives were found to have actual knowledge of the practice. In both *City of Nanaimo*, *supra*, and *Toronto Transit Commission*, *supra*, the employer's policy at issue was published in its manuals and applied without objection. This must be contrasted to the provision of letters to the Union in the case at hand which did not specifically note the policy or its application. Further, while Siudut sent copies of appointment letters including those of individuals hired above Step 1, this applied to very few individuals in the bargaining unit. It was not a practice affecting the entire bargaining unit. Indeed, the evidence establishes only 16 examples over the recent 10 year period, and 11 over the previous 20 years. While no doubt City Hall was much smaller 20 years ago, this is not sufficient to establish knowledge of the practice by responsible Union executives existed. There was no direct evidence these letters were delivered to the Union prior to Siudut's time in Human Resources. Larsen was completely unaware of this practice despite the fact 16 examples occurred over the previous 10 years. The Union has indicated ill health and other unavoidable

matters made the presence of previous Union Presidents impossible at the hearing. In view of this, I do not find their absence creates an adverse inference on this point. The combination of these factors distinguish this case from those relied upon by the Employer where it can be said that the practice was pervasive throughout the bargaining unit over many years. Despite the best efforts of the Employer, the essential element of knowledge of the Union of the past practice has not been established in this case. Accordingly, the practice does not meet the threshold requirements necessary to make it of assistance in the interpretation of the mutual intent of the parties in this matter.

These determinations also affect the question of estoppel. While there has been silence from the Union with no objection to the practice argued by the Employer, the Employer has not been able to establish the necessary knowledge in this case.

After considering all the above, I conclude the Employer does not have discretion to place new employees at other than Step 1 of the wage grid. As set out in *Coca-Cola Ltd., supra*, the pattern for an automatic progression within the range decided upon and the periods in which certain fixed increments are to be given is usually the subject of keen and prolonged negotiation between the parties. In order to accede to the Employer's position in this case, I would have to conclude the wage grid is merely a list of minimum rates and the Employer can negotiate a new wage with individual employees. This as noted in *Chemical Developments*, creates "invidious distinctions" between individuals in the same category. The parties have recognized service in the position as the factor driving progression in the wage grid.

The case before me is unlike *University of Northern British Columbia, supra*, which did not have a step system with specific levels of pay within each salary range. There was no specific wage progression provision further indicating there was no mutual agreement the employees at the start of the case of the salary

range and perceived or specific levels of pay. The arbitration board in *Re Participating Hospitals, supra*, pointed out:

...There is a price that is paid by bargaining unit employees for a collective agreement and it would require an overriding sense of altruism to pay the price that is required in order to achieve benefits and rights for non-bargaining unit personnel. It should require very specific language to find that bargaining unit employees negotiated rights for non-bargaining unit personnel that gave them priority over members of the bargaining unit and it is difficult to imagine that propriety rights would be granted to those who had not paid union dues, participated in the union processes and to those who had not been prepared to withdraw their services to achieve gains in a collective agreement...

(at p. 350)

As set out in *City of Ottawa, supra*, an employer can recognize experience gained before joining the employer for a variety of reasons including issues of recruitment:

The employer's desire to recognize experience gained before joining the fire service is a legitimate management objective, so long as it is accomplished by treating all employees in a consistent manner. Nonetheless, it is an objective not sanctioned by the collective agreement. Some agreements expressly stipulate the initial placement of employees on the wage grid is based upon prior experience and provide a formula governing the placement of all employees. There is no such stipulation of formula in this agreement....

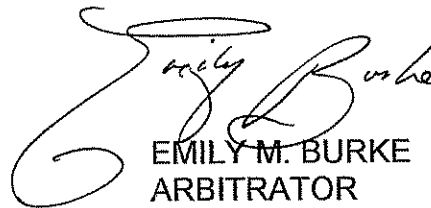
(at p. 191-192)

The collective agreement history between these parties establishes the parties are capable of meeting that objective through mutual agreement as set out specifically in the collective agreement. Although, as the Employer maintains, the word "start" is not present at Step 1 of the wage grid, the factors set out above lead to the conclusion as in *City of Ottawa* that the Step 1 rate in this agreement is the functional equivalent of the start rate set out in other cases. Unless bargained

between the parties, the Employer does not have the discretion to place new employees at other than Step 1 on the wage grid.

For all these reasons, the grievance of the Union is successful. The Employer is directed to cease and desist hiring individuals above Step 1 on the wage grid in the collective agreement.

Dated at Vancouver, B.C. this 27<sup>th</sup> day of March, 2007.

  
EMILY M. BURKE  
ARBITRATOR