IN THE MATTER OF AN ARBITRATION, PURSUANT TO THE
B.C. *LABOUR RELATIONS CODE*

BETWEEN:

15930 FRASER HIGHWAY LIMITED
(dba FRESH STREET FARMS)
(the "Employer")

AND:

UNITED FOOD & COMMERCIAL WORKERS UNION,
LOCAL 1518
(the "Union")

(Roastery Grievance)

AWARD

ARBITRATOR:	JULIE NICHOLS
COUNSEL for the EMPLOYER:	LORENE NOVAKOWSKI & MONIQUE ORIEUX
COUNSEL for the UNION:	CHRISTOPHER BUCHANAN
DATE of HEARING:	SEPTEMBER 15, 19 and 23, 2014
PLACE of HEARING:	VANCOUVER, B.C.
DATE of AWARD:	OCTOBER 14, 2014

Introduction

I was appointed to arbitrate this grievance pursuant to section 104 of the *Labour Relations Code*. The dispute relates to whether the Employer has violated the Collective Agreement by contracting with Fresh Cup Roastery Café Ltd. ("Fresh Cup") for the operation of a coffee bar (the "Roastery") in the Fresh Street Farms ("FSF") grocery store.

Employer counsel advised that the corporate name of the Employer is 15930 Fraser Highway Limited (dba a Fresh Street Farms). The Union indicated it was not opposed to referring to 15930 Fraser Highway Limited (dba a Fresh Street Farms) as the Employer, rather than H.Y. Louie Co. Limited (Fresh Street Farms, Surrey), for the purposes of this decision, without prejudice to its position on what entity is the true employer.

The Union called one witness: David Archibald, who has acted as a Union Representative since 1998. The Employer called three witnesses: Jim Townley, President and Founder of Fresh Cup; Scott Coburn, Vice President Human Resources and Distribution & Chief Privacy Officer of H.Y. Louie; and Dave Sherwood, Director of Fresh Operations and Merchandising of H.Y. Louie.

Collective Agreement

The relevant provisions of the Collective Agreement are as follows:

> Section 1 – BARGAINING AGENCY
>
> 1.01 The Employer recognizes the Union as the sole and exclusive collective bargaining agency for all employees of **15930 FRASER HWY LIMITED (dba Fresh St. Farms)**, with respect to rates of pay, wages, hours and all other conditions of employment set out in this Agreement, except and excluding employees working in the Meat Department, the Store Manager, Department Supervisors, and those persons above the rank of Department Supervisor.
>
> The following positions shall be considered Supervisor positions: Front-End Supervisor, Grocery Supervisor, Produce Supervisor, Bakery Supervisor, and Specialty Department Supervisors.

Section 4 – CLERKS WORKS CLAUSE

4.01 With the exception of excluded personnel listed in Section 1 of this Agreement and salespersons or vendor representatives whose product is delivered directly to the store and Specialist personnel of the Employer all work in the handling and selling of merchandise in the retail stores of the Employer shall be performed only by employees of the bargaining unit who are members of UFCW Local 1518.

Section 16 – UNION'S RECOGNITION OF MANAGEMENT'S RIGHTS

16.01 The Union agrees that the management of the company, including the right to plan, direct and control the Store operations, the direction of the working force and the termination of employees for just and proper cause, are the sole rights and functions of the Employer. During the first four (4) calendar months of employment, each new employee shall be on probation and will receive a written evaluation within three (3) months of employment.

...

16.04 The exercise of the foregoing shall not alter any of the specific provisions of this Agreement.

Factual Background

There is very little dispute on the facts and I have summarized the relevant evidence below. The physical layout of the FSF store and the Roastery was described by witnesses through testimony with reference to photographs taken at the store.

Coburn has worked at H.Y. Louie since 1990 and is involved in employee relations, labour relations, health and safety, benefits and compensation, among other areas. He indicated that H.Y. Louie is currently a grocery wholesaler that is in transition to become purely a retailer and is the IGA franchisor for BC. It provides retail operations in which to sell product and moves product through its warehouse. As part of its business, it operates four corporate Tober stores.

Archibald, who has acted as a Union Representative in a number of regions across the Province, testified that the Union represents approximately 20,000 members in BC and 60 to 70 bargaining unit members at the FSF store. A large majority of the bargaining unit are part-time employees who work under 40 hours per week. After completing

probation, part-time employees are entitled to benefits once they average 32 hours per week over a 14 week period.

Coburn testified that the Fresh Street Market ("FSM") store in West Vancouver, which has been in operation for approximately two years and focuses on fresh product, was used as a template for the FSF store which has opened in Surrey. FSM and FSF co-share the "Fresh Street" brand, although each is unique within its community. In Coburn's view, the FSF store is not a traditional grocery store in terms of its products and services (e.g., it offers, on average, 67% perishable goods (as opposed to the 60% dry groceries found in a traditional grocery store) with an emphasis on organic and health products and has a grilling station, a full-service seafood case, etc.). It does not carry a full line of mainstream brands of dry grocery and carries other brands which may come directly from suppliers, including local producers. The FSM and FSF stores have a similar rustic feel and "look", with garage door entrances, polished concrete floors, and large signage.

Coburn was involved in collective bargaining with respect to both the FSM and the FSF stores. The FSM collective agreement was settled in mid-December 2012 and significantly mirrors the PriceSmart Foods collective agreement. The parties agreed that the FSM collective agreement would be the starting point for any new Fresh Street stores.

The FSF store opened on December 13, 2013 and now operates from 7:00 a.m. until 10:00 p.m. There are two bargaining units: UFCW Local 247 represents employees working in meat, deli and seafood; the Union represents all other unionized employees at the store. Collective bargaining began in mid-2013. Coburn testified that the negotiations really consisted of "crossing t's and dotting i's" because, with the exception of the date, the Employer's name, and the timing of the wage scale, the bargain was the same as the FSM agreement. Bargaining concluded in October 2013. Coburn first became aware that the Roastery would be operating in the FSF store in November 2013. The parties did not discuss the Roastery until around the time the FSF store and the Roastery opened in December 2013, after negotiations had concluded.

Archibald became aware of the Roastery when he visited the FSF store in January 2014 and was told Roastery employees were not "part of the Union". He phoned Frank

Pozzobon, who is responsible for negotiations with H.Y. Louie, to inquire if he was aware that a separate entity was operating the Roastery. Pozzobon was surprised and indicated he would speak to Coburn. Archibald filed a grievance a couple of weeks later. In cross-examination, Archibald indicated that, in his view, the FSF store was a traditional grocery store with traditional departments, although he agreed that it carried a larger amount of organic items than other retailers.

Coburn testified that clerks work in classifications within departments (e.g., bakery clerks prepare baked goods and the front-end team works as cashiers) and do not perform the work of clerks in other departments. Hours are assigned by seniority within classifications of the department. In cross-examination, Coburn confirmed that the most senior person must get the same number of hours as the next junior person. He indicated that a Specialty Department is a unique department (e.g., a wok kitchen, full-scale cheese department, etc.). There are also specific supervisory positions which are excluded under Article 1.01.

With respect to Article 4.01, Coburn testified that "Specialist personnel of the Employer" refers to individuals from H.Y. Louie's office who may attend to set up displays, audit departments, etc. The reference to "salespersons or vendor representatives whose product is delivered directly to the store" means that where a salesperson or vendor representative delivers product (e.g., Coke) to the store (i.e., not through H.Y. Louie's warehouse) they can manage that stock. If product is sent from the warehouse, it is handled by a grocery clerk in the bargaining unit. In cross-examination, he confirmed that a number of third party vendors deliver directly to and stock items at the FSF store and that that work is not done by FSF employees. He indicated he did not understand that there was a distinction between the terms salespersons and vendor representatives.

In Coburn's view, there are collective agreements in the industry (e.g., Save-On Foods) which contain more restrictive language than Article 4.01 as only certain individuals can do work in the store (e.g., "rack jobbers", who are third parties who own a space in store where their products are displayed and sold and have the right to stock it with their own items by their own employees (e.g., greeting card spinning racks)).

Coburn testified that the Roastery is not covered by the Collective Agreement and that there is no relationship other than a License Agreement ("LA") between FSF and Fresh Cup. The fact that both companies have "fresh" in their names is coincidental.

Townley, has been Fresh Cup's President since 2000. He indicated that Fresh Cup has pioneered coffee roasting technology which permits a highly efficient micro coffee roaster, called the Roastaire, to operate in retail applications. The roasting of coffee is highly technical and Fresh Cup offers customers the opportunity to see coffee beans transformed into the finished coffee product. He met with Sherwood and they negotiated the License Agreement under which Fresh Cup would lease a section of the FSF store, roast coffee, and operate the Roastery. Fresh Cup also operates another café on Vancouver Island. Townley is the Roast Master and has mentored and trained another individual to act as the Roaster at the Roastery. In his view, the Roastery has built its own clientele and is a "draw" for the FSF store. The Roastery also roasts coffee beans which are sold wholesale to a café in Tsawwassen, BC twice a week.

Through his various roles at H.Y. Louie, Sherwood has been involved in executing the new and unique "Fresh Street" brand which offers destination, nonconventional grocery stores that are focused on passion for food and the community. They hold events that bring customers and suppliers together with a focus on fresh, local and sustainable products and excellent customer service. Sherwood was interested in working with Fresh Cup as its passion for coffee and focus on sustainability fit with the "Fresh Street" brand. Under the License Agreement, which mirrored the agreement relating to the sushi operation in the FSM store, Fresh Cup would provide products and FSF would be paid a percentage from the sales.

The License Agreement, the only agreement that Fresh Cup has with FSF or H.Y. Louie, provides Fresh Cup with a license to operate the Roastery in designated area (LA Article 2.1). Article 2.2 of the License Agreement provides as follows:

> Fresh Cup will operate a micro coffee roaster in the Licensed Premises, in which it will roast whole coffee beans and then bag and sell such beans ("Packaged Coffee") both from the License Premises and from the coffee aisle in the Store. Fresh Cup will also operate a coffee bar from the Licensed Premises selling its own drip and specialty coffee and blended drinks by the cup (collectively, "Liquid Coffee"). In addition, Fresh Cup

> may stock in, and sell from, the License Premises coffee culture related merchandise, such as travel coffee mugs ("Related Products") provided such products have been approved in advance by FSF in its sole discretion. Together, the Packaged Coffee, Liquid Coffee and Related Products will be referred to herein as the "Merchandise" and will at all times, until sold to a FSF customer, remain the property of Fresh Cup. In addition, Fresh Cup will serve and sell bakery items (the "Bakery Items") from the cooler case located in the License Premises, which Bakery Items will be owned, supplied and stocked by FSF.

Fresh Cup is permitted to "produce beans for sale to third parties, provided that such parties do not sell such beans, or coffee made from such beans, in a retail grocery operation and provided that Fresh Cup obtains the prior written approval of FSF for such use, which approval may be withheld" (LA Article 2.3). FSF provides certain space in the store for the use of Fresh Cup, including, among other things, a wash sink, one pallet of dry storage, sufficient venting for the coffee roaster, and space in the coffee aisle for Fresh Cup to sell Packaged Coffee (LA Article 4.1). FSF has agreed that Merchandise may be checked out on its cash registers and provides Fresh Cup with reports from the cash register readings (LA Article 4.6). In consideration for the license and in lieu of any rent or utility payments, Fresh Cup allows FSF to retain 20% of all gross sales of Packaged Coffee and 15% of all gross sales of Liquid Coffee and Related Products at the FSF store, plus applicable sales taxes on such amounts (LA Article 6.1). FSF disburses 80% of sales of Packaged Coffee and 85% of sales of Liquid Coffee and Related Products collected, plus GST, to Fresh Cup monthly (LA Article 4.7). In terms of employees, Article 5.6 of the License Agreement provides:

> Fresh Cup is solely responsible for the hiring of personnel and staffing of the coffee bar at all times during the term of this Agreement. Fresh Cup agrees it will employ and train an adequate and competent force of employees to operate the coffee bar. None of the employees are considered employees of FSF, and Fresh Cup is solely responsible for the supervision, management, payment of all salaries, compensation, withholding taxes, unemployment insurance premiums, workers' compensation premiums, health and welfare benefits or similar charges associated with the employment of its employees. If an assessment is made against FSF, Fresh Cup indemnifies FSF and holds FSF harmless for any such assessment of liability for payment thereof. Compensation and benefits payable by Fresh Cup to or on account of its employees must be provided by Fresh Cup in accordance with such policies and procedures as Fresh Cup, in its sole discretion, adopts, but all such compensation and benefits must comply with and pursuant to all applicable provincial and federal law.

The License Agreement deals with the insurance to be held by Fresh Cup (LA Article 7.1), indemnification (LA Articles 7.3 and 7.4) as well as each party's trademarks and trade names (LA Articles 8.1 and 8.2). Article 8.3 provides:

> Nothing contained in this Agreement is considered or construed by the parties or by any third party to create the relationship of principal and agent, partnership or joint venture, employer-employee or to create any association between FSF and Fresh Cup except as described herein.

Townley testified that Fresh Cup makes all decisions relating to its business and likened its arrangement with FSF to leasing space in a mall.

The Roastery, which operates from 7:00 a.m. to 9:00 p.m, was described consistently by the witnesses. It is located inside the front entrances of the FSF store, adjacent to the bakery. The work area for Roastery staff includes a counter on which product is served, some product is displayed, and a FSF point of sale ("POS") terminal is located which processes product from the Roastery and the store. Behind that counter are an espresso machine, drip coffee machines, and a wall-mounted storage system for green coffee beans. Adjacent to the counter area, are two bakery display cases. One of the bakery display cases can be accessed only from the back and customers require assistance to access products. Behind the two bakery display cases, is the micro coffee roaster. The two bakery display cases are separated from a bread display case and the bakery production area by a floor-to-ceiling brick partition that is approximately the same depth as the bakery cases. Access from the sales floor to the work area of the Roastery and the bakery production area is between the brick partition and the bread case. A "Roastery" sign hangs above the two bakery cases. The Roastery signage belongs to Fresh Cup. Archibald indicated there is a consistent flow of wood and brick throughout the store and the signage over the Roastery is similar to other signage in the store. Coburn indicated that the signage elsewhere in the FSF store is designed to create a focus on a particular department and is not the same style, font or size.

Townley indicated that both parties had an interest in having a POS terminal at the Roastery to track sales. FSF provided a two-hour "crash course" to train Roastery staff on the POS system. FSF provides the Roastery with a float each morning and takes the

cash at the end of the day. Once Fresh Cup receives a sales report (including sales from both the Roastery and the FSF store), Townley sends an invoice to FSF for payment.

Townley testified that FSF provides certain space, facilities and utilities for the Roastery's operations, further to the Licensing Agreement. He indicated that Fresh Cup invested $170,000 in equipment and fixtures in the Roastery, including the micro coffee roaster, a bean cooler, the bean storage unit, a specific espresso machine, three coffee grinders, two refrigeration units, a freezer, the condiment station, the working station, and the bag sealer. Fresh Cup built and installed signage as per the specifications received from H.Y. Louie. Fresh Cup's logo appears in the Roastery.

Townley indicated that Roastery staff ring through product from the FSF store at the POS terminal to encourage the purchase of coffee with other food items. Purchases of a few food items with coffee are processed, but the Roastery does not process large "buggy shops". Roastery staff receive tips every day from a tip jar on the Roastery counter. When a customer asks for an item in the bakery case adjacent to the counter, Roastery staff will assist, unless they are making a coffee. In the latter case, they will ring a bell to alert FSF bakery staff. Roastery staff do not handle customer questions about ingredients relating to products they did not prepare. As the Roastery has become busier, Roastery staff are requesting assistance from FSF bakery staff more often.

Roastery staff use the FSF customer washrooms and take their breaks in the area behind the Roastery counter. Fresh Cup has never used FSF's fax and uses its cell phones, rather than the telephone in the bakery department. At FSF's request, Fresh Cup uses FSF cleaning supplies. Roastery staff are responsible for cleaning and maintaining the Roastery (LA Articles 4.5 and 5.5). In terms of uniforms, Roastery staff wear T-shirts with the Roastaire or Fresh Cup brand (with or without a branded apron) or a plain T-shirt with a branded apron.

Townley indicated that the Roastery provides a boutique handcrafted artisan coffee experience and, as such, is a distinguishable from coffee prepared by the "push of a button" at other establishments. The Roaster is responsible for job postings and hiring staff. The positions are identified as Student Barista, Barista, Barista Supervisor and

Roaster/Manager. The baristas are trained to be able to "pull a shot" consistently, to understand the different standards for shot extractions and to talk to customers about coffee. They watch a set of training DVDs and read a number of books (which takes approximately four to six hours in total) and, then, work with an experienced barista for eight to twelve weeks before they begin to work shifts on their own. The training as a Roaster is distinct from barista training and is only offered after an individual has been with Fresh Cup for considerable period of time. The Roaster reviewed a training manual and attended a two-day technical training session. The Roaster then worked closely with Townley for a month and worked for two weeks in Victoria under another Roaster.

Roastery staff are scheduled weekly and are paid between $10.25 and $15 per hour and receive no other benefits. They do not participate in any FSF benefit plans. They are permitted to consume certain coffee and tea drinks and receive one half pound of roasted coffee beans every two weeks.

Townley testified that FSF staff are not trained on Fresh Cup's equipment in the Roastery and do not receive free drinks from the Roastery, except when samples are offered during promotions.

In cross-examination, Townley agreed that, on average, the Roastery makes approximately $300 in sales of coffee drinks per day. When Roastery staff arrive at the store at 6:45 a.m., FSF has provided the cash in the till and they log on using an allocated cashier number and begin conducting transactions. At the end of the day, FSF takes the money out and does the accounting and reporting. He indicated that, given the cost and potential for the duplication of data, one FSF POS terminal made sense.

Townley agreed that customers are not obligated to purchase coffee or drinks before buying other items at the Roastery POS terminal, noting this provides an opportunity to sell coffee. The location of the bakery case encourages people to pair food with their coffee purchase. He confirmed that when a grocery item is sold at the Roastery, Fresh Cup receives no revenue. Customers do not leave the Roastery without paying for Liquid Coffee, although Packaged Coffee can be paid for at the front till. He agreed that, under the License Agreement, Fresh Cup has committed to assist in selling Bakery Items which

augments its main business which is coffee. He acknowledged that the License Agreement does not indicate Bakery Sales are secondary, but maintained Fresh Cup's business is coffee centric and he did not commit to a specific percentage of bakery sales.

He indicated FSF employees stock, clean and maintain the bakery cases. Roastery staff only pull items from the case, if they are not busy with a coffee customer. They ring for assistance from bakery staff with increasing frequency, currently a couple dozen times each day. In his view, the bakery case is a "neutral zone" and is not part of Fresh Cup's responsibility, other than to assist in the sale of Bakery Items. Townley agreed that Roastery staff work in an aisle of the FSF store to stock Packaged Coffee a couple of times a day. They may also provide samples in store, similar to other suppliers.

In Townley's view, the requirement in the License Agreement that Fresh Cup obtain the prior written approval of FSF (which may be withheld) to produce roasted coffee beans for sale to third parties reflects a courtesy between two co-existing businesses. He agreed that if the Roastery business went well, Fresh Cup would pay FSF its percentage of sales regardless of whether the services offered by FSF had changed. He also agreed that FSF and Fresh Cup would have to agree on changing the hours of operation of the Roastery.

Townley confirmed that only he and the Roaster roast coffee beans; the other staff work as baristas. The Roaster is now principally roasting coffee and works with the Supervisor as a team. Under the job descriptions, Student Baristas do not require experience and Baristas require one year of general café experience (no barista experience). Fresh Cup trains its staff regardless of their previous experience.

Sherwood indicated that the FSF POS terminal at the Roastery would have been installed regardless of who operated the Roastery in order to gather accurate information on the FSF system and to have the ability to see marketing trends. Roastery staff sell Bakery Items because, with the Fresh Street focus on customer service, FSF wanted to ensure that a customer could buy a cookie with their coffee, if they wanted to. He indicated that bakery staff assist with the closed bakery case the majority of the time.

Sherwood testified that a maximum of 10% of the store's product is delivered from the warehouse and the majority of FSF's product is fresh. There are no delivery contracts with vendors who deliver directly to the store. In terms of delivery, fresh product is received at the back door and the department leader or staff displays the product. Few grocery vendors deliver directly to the store. Vendor and sales representatives run demonstrations in fresh departments at both the FSM and FSF stores weekly and monthly as well as during big events. Bargaining unit employees are not involved in the demonstrations.

In cross-examination, Sherwood indicated that he had no personal involvement in negotiating the License Agreement, but wanted a provision which required the sale of Bakery Items to be contained in it. He indicated that, after an early dip, sales are now growing each week. He agreed that there is, generally, a correlation between sales and hours available to employees to work and there may be a need for employee hours to "catch up".

Coburn confirmed that Fresh Cup's Packaged Coffee is available at the Roastery and in the coffee/tea section of the FSF store and does not come through H.Y. Louie's warehouse. He indicated that FSF bakery clerks, generally, work in the adjacent bakery production area and assist in finishing and baking "ready to go" bakery products (i.e., the bakery department is not scratch bakery, but is considered a "bake off" operation) as well as decorating and packaging product and preparing it for placement in the store. There are no training or skills required for bakery or grocery clerks. Coburn was aware that a bell was used to alert bakery staff of the need to assist when it is busy in the Roastery. He testified that cashiers process items at check stands by scanning or punching in Price Look Up numbers (PLUs) and packaging or bagging retail items. With the exception of the Roastery, the main check stands are located at the front of the store. There is a FSF POS terminal in the Roastery due to FSF's desire to get an accurate reading of the royalties it is entitled to. In Coburn's view, there is a significant difference in the operation of the POS terminals at the front and at the Roastery as the Roastery was not designed for and cannot handle large amounts of product. He noted that FSF cashiers process gift cards and coupons, while Roastery staff do not.

Coburn confirmed that FSF employees do not make or serve coffee or perform any Fresh Cup tasks (except for one trial described below), are not trained on the Roastery's equipment, and do not have a tip jar. FSF employees wear a uniform consisting of dark jeans and a brown T-shirt with references to Fresh Street Farms and other sayings. Except for assisting with the closed bakery case, Roastery staff do not perform bakery duties. FSF does not hire or train Roastery staff.

Both Coburn and Townley testified that, in the Summer of 2014, a FSF cashier was assigned to the Roastery to perform cashier duties on a without prejudice basis as a trial to determine if there was a solution to the grievance. A bakery employee was not assigned, as they do not handle cash. The temporary assignment was absorbed within the current schedule and no additional staff were hired. Coburn indicated that, due to minimal volume, the cashier duties at the Roastery did not warrant a full-time cashier and other miscellaneous duties that could be performed close to the Roastery were compiled to make the best use of time. After a few weeks, the arrangement was discontinued as it was determined that it was cumbersome for customers and disrupted the flow of the business for Roastery staff.

In cross-examination, Archibald testified that Safeway stores have Starbucks coffee bars with different signage from the rest of the store. Coburn testified that there are Starbucks coffee bars which are franchised operations in Safeway and some Save-On Foods stores that are operated by Safeway or Save-On Foods employees who are covered by the applicable collective agreement. He indicated that members of the UFCW Local 247 bargaining unit prepare drip urn coffee for customers in the deli at the FSM store. In cross-examination, Coburn confirmed that employees represented by the Union in Tober stores serve drip and specialty coffee. He also agreed that FSF has the ability to create a specialty department and that one option was to create a specialty coffee department in which the staff could perform all tasks.

Coburn testified that there is a sushi operation at the FSF store that supplies its own raw materials and makes fresh sushi in-house. He believes it is run by the same company that operates in the FSM store. The sushi operation is not covered by the FSM or FSF

collective agreements and there is no reference to it in the UFCW Local 247 collective agreement. Archibald understood the sushi operation was part of the FSF meat department. In cross-examination, he confirmed that he believed the duties performed at the sushi bar were not the Union's work because the sushi bar was physically located by the meat department. He was not aware of any in-store sushi operations which make sushi on-site that would fall within the Union's jurisdiction.

Archibald testified that the Union represents members who work in coffee bars for a number of employers throughout the Province. In his view, the barista duties performed at the Roastery are performed by Union members who work for other employers, although he has never seen Union members roasting coffee beans.

In cross-examination, Coburn testified that the Save-On Foods collective agreement is more restrictive in that, for example, it is specifically addresses when Rack Jobbers can be used (who are a more defined subset of third party vendors and would be covered as third party vendors in the Collective Agreement) and carves out an exception for salespersons handling bakery specialties products. The Tober collective agreement also specifically restricts who can stock their own product in store.

Coburn agreed that the vendor and salesperson exception in Article 4.01 applies to third parties who bring products from outside into the store to stock them. He indicated that, in his view, Fresh Cup is acting as a vendor and delivers its product to the store because product is produced in the Roastery, Fresh Cup's business.

When referred to a schedule for Front-End staff which set out the total number of hours employees worked for a certain period, Coburn confirmed that employees can restrict their availability under certain conditions and that restrictions appeared on the schedule.

Positions of the Parties

Union

The Union says this case turns on the interpretation of Article 4.01 which expressly grants job security and protects the identified work from being performed by anyone other than the Union's members by prohibiting contracting out and the assignment of work to other employees. It submits that there are three exceptions to the job protection: excluded personnel under Article 1.01; salespersons or vendor representatives whose product is delivered directly to the store; and specialist personnel employed by the Employer. With respect to the second exception, it notes the evidence that there is no distinction between salesperson and vendor representatives in that the terms refer to a third party bringing products into and stocking them in the store. It argues that, on a proper interpretation, none of the exceptions apply. For the purposes of this case, the Union does not take the position that FSF is the true employer or that this is a case of contracting in. Nor, does it seek a determination that the roasting work performed by Townley or the Roaster falls within the scope "handling and selling merchandise", given that it is likely performed by excluded personnel.

The Union submits that the job protection restricts the Employer, regardless of whether or not: the FSF store is typical or at unique brand; Fresh Cup's business or product is specialized; there were good business reasons for the arrangement; the Employer acted in good faith; a trial solution was ineffective; or there is some impact on profitability or effectiveness for the Employer. It notes that there is no evidence that bargaining unit employees could not develop the skills and perform Roastery duties to the necessary standard. While the Union disputes how busy the Roastery is and how often FSF bakery employees assist, it notes that the level of assistance is irrelevant as there is no *di minimis* exception to Article 4.01. Roastery staff cannot do bargaining unit work, even if it is only a minimal amount.

With respect to management rights, the Union says restrictions on those rights do not have to be clearly expressed and can arise from the interpretation of the Collective Agreement (see *Voice Construction Ltd. v. Construction & General Workers' Union,*

Local 92, [2004] 1 SCR 609). In any event, in light of Article 16.04, management rights cannot trump the express and implied protections in Article 4.01.

The Union says Article 4.01 does not define the job protection in terms of bargaining unit work; rather, it expressly protects the work of "handling and selling of merchandise". Therefore, the scope of bargaining unit work; similarity of work; or whether or not any bargaining unit employees have ever performed the work (or how frequently) are irrelevant considerations. The protection, as defined, is important given there is no historical right to the work because this is a new collective agreement and bargaining unit. It submits that the real question is whether the work at issue is "the handling and selling of merchandise in the retail stores of the Employer". It further notes that, on the language, the ownership of the merchandise is not relevant and the provision should not be limited to the "Employer's merchandise" unless there is a clear restriction. If the Employer wanted to restrict the clause to its own merchandise, it needed to bargain language to that effect (see *Times Colonist -and- Victoria Mailers' Union, Local 121*, (1982), 7 LAC (3d) 204 (Munroe)).

It argues that Article 4.01 prevents any assignment of the protected work to non-bargaining unit employees or third parties, noting a bar to contracting out can be established without the express use of the term "contracting out" (see *Regina Exhibition Association Ltd. -and- Saskatchewan Joint Board-Retail, Wholesale & Department Store Union* (1996), 52 LAC (4th) 170 (Moore)). It says Article 4.01 must be distinguished from the provisions at issue in cases such as *United Steelworkers of America -and- Russelsteel Ltd.* (1966), 17 LAC 253 (Arthurs) which dealt with references to the term "person" and, based on the unique bargaining history, were interpreted as "working foreman" clauses which protected against the assignment of work to non-bargaining unit employees and did not prohibit contracting out. It notes there would be no need for the express reference to "salespersons or vendor representatives whose product is delivered directly to the store" if the provision only protected against the assignment of work to non-bargaining unit employees of the Employer. Given the provision's broad wording, the form of the transfer of work (e.g., whether contracting out or in etc.) is irrelevant as all of the identified work is to be performed by bargaining unit employees.

The Union relies on a number of general principles of interpretation (see *College of New Caledonia -and- Faculty Association of the College of New Caledonia*, [2012] BCCAAA No. 22 (Brown)) with emphasis on the principle that the parties are presumed to be aware of relevant jurisprudence. It says other authorities have held that these types of provisions prohibit work assignments to persons employed by the employer and third parties. As such, it says Article 4.01, which has its origin in industry-wide language, prohibits the contracting out of protected work to third parties and the Employer had to bargain different wording if it did not want the same restriction (see *Canada Safeway Ltd. -and- UFCW, Local 401*, [2005] AGAA No. 110 (Tettensor); *Canada Safeway Ltd. -and- UFCW, Local 1518*, unreported, April 8, 2005 (Ready); *Canada Safeway Ltd. -and- UFCW, Local 401*, [2007] AGAA No. 77 (Jolliffe)).

It says those authorities have also interpreted the term "handling" broadly in relation to physical actions. It notes the term "selling" is defined as "(a) that readily finds a buyer, saleable; (b) that helps to affect a sale" (see Shorter Oxford English Dictionary, 6th ed, Oxford University Press). It submits that the making and selling of coffee and the handling and selling of bakery goods and grocery items fall within the protection of Article 4.01 given that they have the requisite element of physicality in dealing with merchandise.

The Union also argues that the notion that a party has a special onus to establish its interpretation is no longer good law. Rather, the meaning of the provision must be determined from the language itself. It says there is no onus on it to establish a clearly expressed restriction on management rights; there is no higher onus, depending on the nature of the clause at issue (see *Catalyst Paper (Elk Falls Mill) -and- CEP, Local 1123,* unreported, May 3, 2012 (Hall)). Rather, the Employer has an evidentiary onus to establish, on the facts, that the assignment of work falls within one of the exceptions under Article 4.01 (see *Pacific Brewers Distributors Ltd. -and- Brewery, Winery and Distillery Workers, Local 300*, unreported, March 3, 1986 (Munroe) at p. 20; *Times-Colonist -and- Victoria Newspaper Guild, Local 223*, unreported, November 21, 1990 (Ladner) at p. 7; *Alcan Smelters & Chemicals Ltd. -and- Canadian Association of Smelter & Allied Workers, Local 1* (1987), 28 LAC (4th) 353 (Hope) at p. 363).

In terms of remedy, the Union seeks a declaration that the Employer has breached the Collective Agreement and a cease and desist order. It claims compensation for the bargaining unit members who were denied the opportunity to work from December 2013 to date, based on actual hours worked by Roastery staff (less hours worked by Townley and the Roaster) multiplied by the Collective Agreement wage rate of $11.00 per hour, plus vacation and statutory holiday pay, benefits, and pension contributions, to be paid to employees as directed by the Union. It submits the breach has been long-standing and its members are entitled to full redress (see *CEP, Local 1123 -and- TFL Forest Limited (Elk Falls Lumber Mill)*, unreported, July 23, 2007 (Dorsey)). In the alternative, it seeks compensation based on the amount the Employer received under the License Agreement (estimated at approximately $500 per week). Finally, the Union seeks an order that the Employer extend offers of employment in the bargaining unit to existing Roastery staff.

Employer

The Employer notes that its arrangements with Fresh Cup were carried out in good faith for bona fide reasons given the compatibility of Fresh Cup with the "Fresh Street" brand. It maintains that the Roastery work is not bargaining unit work and, even if it is, it is being performed by Fresh Cup employees pursuant to the License Agreement. As there is no express bar to contracting out, the Employer submits that it is within its management rights to contract out the Roastery work and the Union's grievance is an attempt to expand the bargaining unit to include employees it has not organized and does not have the right to represent (see *Westfair Foods Ltd.*, [2008] BCLRB No. B62/2008).

The Employer notes Article 1.01 is a bargaining agency clause that addresses the Union's right to represent FSF employees and specifically relates to the Employer, as defined. It argues that Article 4.01 is a work jurisdiction clause establishing the Union's jurisdiction over the "handling and selling of merchandise in retail stores of the Employer", subject to three exceptions. It says any restrictions on its management rights must be clear and explicit and submits that the parties have not limited those rights. As the Collective Agreement contains no prohibition against contracting out, the Employer has the right to run its operation as it sees fit, further to Article 16.01.

It submits that a work jurisdiction clause is distinguishable from a restriction on contracting out in terms of purpose and effect. A work jurisdiction clause is intended to ensure that certain bargaining unit work is only performed by bargaining unit employees, not managers or other non-bargaining unit employees of the Employer. It says these clauses should be strictly interpreted and narrowly applied as the Union must negotiate specific language to claim jurisdiction over work. Contracting out restrictions, on the other hand, restrict the transfer of bargaining unit work to a third party by means of a commercial contract where the third party's employees perform the work. Contracting out restrictions must be expressly provided in clear language and narrowly applied (see *International Forest Products (Hammond Cedar Mill) -and- United Steelworkers, Local 1-34567*, [2005] BCCAAA No. 210 (McPhillips); *Brown & Beatty*, Canadian Labour Arbitration, para 5:1300; *Sodexho Marriott Services of Canada -and- CUPE, Local 895*, [2001] OLAA No. 207 (Surdykowski)).

The Employer argues that Article 4.01 delineates between bargaining unit and non-bargaining unit work, whereby the Employer agreed to only employ members of the Union to perform work within the jurisdiction of the Union; it did not agree that work would only be done by "employees of the Employer" in the bargaining unit of the Union. It does not contain the requisite express language banning contracting out to third parties. It is a provision that is specific to the retail industry and reflects the manner of operating in a retail store. It recognizes that non-bargaining unit employees of the Employer and salespersons and vendor representatives who deliver their own product directly to the store can do specific work in the store. As FSF does not have commercial contracts with salespersons and vendor representatives, the necessary elements for contracting out (i.e., the transfer of bargaining unit work to a third party out of the control of the Employer) is not present with respect to them (see *Victoria Times Colonist Group Inc. -and- CEP, Local 2000*, [2003] BCCAAA No. 344 (Orr); *Canada Safeway Ltd.* (Ready), *supra*; *Canada Safeway Ltd -and- UFCW, Local 401*, [2005] AGAA No. 27 (Sims); *Prince George School District No. 57 -and- United Brotherhood of Carpenters and Joiners of America Local 2106,* [1990] BCCAAA No. 241 (Larson)).

The Employer notes that the Collective Agreement is based on the PriceSmart Foods collective agreement as adapted for the Fresh Street stores which are unique in terms of their brand, the focus on fresh products, and how they operate. Article 4.01 is less restrictive than other clauses in the industry which specify who can do work within the store. Since 90% of the merchandise is delivered directly to the FSF store, the Union has limited its work jurisdiction to 10% of the store's merchandise. It argues that it was for the Union to negotiate language to reserve more bargaining unit work given the kind of work being done at the FSF store.

In the alternative, the Employer submits that the Roastery work falls within the vendor exception in Article 4.01 given that the product is not delivered through the warehouse. It says Fresh Cup is a vendor that delivers product (i.e., roasted coffee beans, liquid coffee and the Related Products which are its property) from a separate and independent business operating from rented premises directly to the FSF store much like it delivers roasted coffee beans to other locations. Therefore, it maintains that Article 4.01 does not apply and Roastery staff are entitled to carry out the work in the store.

In the further alternative, if the vendor exception does not apply, the Employer submits that the question is whether the specific work assignment is of a nature normally done by bargaining unit members (see *School District No. 68 (Nanaimo) -and- BCTF* (2007), 159 LAC (4^{th}) 390 (Taylor)). It argues that the Union must negotiate specific language to claim work jurisdiction and an interpretation which would result in the jurisdictional scope being any work done in the store would be overly broad (see *Vancouver Shipyards Co. Ltd -and- IBEW, Local 213*, unreported, April 9, 1999 (McPhillips)). The Employer says no one in the bargaining unit roasts, makes or sells coffee.

The Employer notes that the starting point for interpreting the Collective Agreement is the language itself. The object is to ascertain the mutual intention of the parties and their positions with respect to the clause must be viewed within their "climate of expectations" in collective bargaining. It relies on the following interpretation principles: that all of the words agreed upon should be given effect in the context in which they are used, unless an absurdity would result; consideration should be given to the provision's purpose as well

as to the reasonableness of the proposed interpretation; anomalies, inconsistencies and absurdities should be avoided; and, an interpretation must be within the parameters of reasonable expectations. Experienced negotiators are expected to be aware of the import and impact of the clauses they negotiate as well as the jurisprudence relating to the meaning of language used in the industry (see *Southern Railway of British Columbia Ltd. -and- CUPE, Local 7000* (2010), 198 LAC (4th) 284 (Germaine); *Hamilton Entertainment and Convention Facilities Inc. -and- IATSE, Local 129* (1996), 52 LAC (4th) 178 (Bendel); *British Columbia Rapid Transit Co. -and- OTEU, Local 378* (1988), 1 LAC (4th) 328 (McPhillips)).

Specifically, it maintains that the term "handling" covers basic tasks such as receiving orders, breaking them down, staging product, and moving product to coolers, freezers or shelves; it does not encompass the roasting of coffee beans, providing a coffee experience for customers as well as the preparation and sale of complex specialty product prepared by baristas with particular skill and knowledge. When industry jurisprudence is considered, the term "handling" has been limited to non-skilled work (see *Canada Safeway Ltd.* (Jolliffe), *supra*; *Canada Safeway Ltd.* (Tettensor), *supra* for the scope of the term "handling", not for the concession that the provision restricted contracting out). It says the Roastery is focused on coffee roasting and the production of drinks at the store is for the promotion of that business. In roasting coffee and making specialty coffee drinks, Roastery staff are involved in food and beverage production. Had the parties intended to restrict the work of food or beverage production, clear wording was required. To the extent that Roastery staff handle Baked Items, those duties are integral to the Roastery work, are related to FSF's unique brand and focus on exceptional customer service; as such, they are not protected. Thus, it submits that Article 4.01 does not apply as Roastery work does not involve the "handling and selling of merchandise". Further, while the Union does not seek a remedy with respect to Townley and the Roaster, the Employer requests a determination that roasting work does not fall within the scope of Article 4.01 as others may perform that work in the future.

The Employer also argues that the sushi department at the FSF store does not fall under the jurisdiction of the Union or UFCW Local 247 and there is no evidence that it is part

of the meat department. Given that it has been running in the FSF store since its opening, there is past practice of food preparation work done by non-bargaining unit members which supports a finding that the parties accepted Article 4.01 does not restrict contracting out or, in the alternative, does not protect food production work (see *Vancouver Shipyards, supra* at p. 12).

Finally, in the further alternative, should the grievance succeed, the Employer submits no damages should be awarded given that Union cannot point to individuals in the bargaining unit who have suffered identifiable losses (see *Hayes Forest Services Ltd. -and- IWA-Canada, Local 1-85*, [1997] BCCAAA No. 385 (Ready); *Park Inn and Suites -and- CAW, Local 3000* (2012), 112 CLAS 5 (Larson); *Miracle Food Mart of Canada -and- UFCW, Local 175/633* (1994), 37 CLAS 238 (Hinnegan)). Further, it notes that there was insufficient work for a full-time cashier. It distinguishes *TFL Forest Limited, supra* where the employer employed persons outside of the bargaining unit and was able to quantify individuals' damages. In the event that damages are awarded, it submits that the difference between what Roastery staff earned and what they would have received at the bargaining unit rate of $11 per hour, plus union dues, would be the appropriate amount (estimated at $626).

Union's Reply

With respect to past practice, the Union submits a small number of instances will seldom establish a practice, even assuming the other required elements to support a particular interpretation have been met (see *Eurocan Pulp and Paper -and- CEP, Local 298*, [2005] BCCAAA No. 208 (Germaine); *Lakes District Maintenance Ltd. -and- BCGEU*, [2012] BCCAAA No. 91 (Keras)). It notes that, in Archibald's view, the sushi operation fell within the jurisdiction of UFCW Local 247 and the Union has made no assertion or representation that the sushi operation related to its work. It says the Employer's arguments relating to past practice do not assist with the interpretation of Article 4.01.

The Union says Article 4.01 is broader than a contracting out clause in that it prohibits any identified work from being performed outside the bargaining unit. It says the reference to salespersons and vendor representatives (who do have contractual

arrangements with the Employer) was made to protect work assignments from other employees and third parties. Rather than being interpreted narrowly, it should be interpreted in a manner that makes sense and the Employer should be held to the full scope of the limitation bargained (see *Alcan, supra* at p. 363).

In relation the Employer's authorities, the Union distinguishes cases that follow the *Russelsteel, supra* analysis and cases which deal with terms relating to work "normally performed" by the bargaining unit, given that Article 4.01 does not contain the same language or restrictions and the unique bargaining history does not apply here. It notes in *Westfair Foods, supra* there was no protection in the Collective Agreement and, here, it is asserting rights found in Article 4.01. It says the *Canada Safeway* authorities recognize similar clauses prohibited contracting out and cannot be undermined by the assertion that a party did not dispute the characterization of the clause. Those clauses have been interpreted through arbitration and the parties are taken to be aware that the provisions address contracting out.

The Union says that it is sufficient that goods are physically handled to fall within the term "handling" as interpreted by the authorities. The skill and knowledge required of Roastery baristas do not support the conclusion that they would be excluded from the bargaining unit or that the work falls outside the scope of "handling and selling". It notes that Coburn never testified that salespersons or vendors could do anything more than stock product and indicated that "sales and vendor representatives" meant the same thing. It says Fresh Cup does not fall within the vendor exception under Article 4.01, as it applies to sales, not production work. Further, the exception does not apply since the roasting and coffee production occurs on-site such that it cannot be said the roasted coffee beans and coffee products were delivered directly to the store. The language does not permit a third party to operate a business within the confines of the store, where the work meets the physical requirements of "handling".

In terms of remedy, the Union submits that it has shown that the hours of bargaining unit employees were not maximized and individuals were available to work. In the context of a 10 month violation, it should not be required to unscramble the "mess" created by the

Employer's unlawful conduct. In submits that the Employer's proposed remedy should not be accepted as it does not compensate the members of the bargaining unit who were harmed, only reflects the lowest wage rate without all applicable benefits, and would not result in the appropriate individuals being made whole.

Decision

This matter turns on the interpretation of the Collective Agreement and Article 4.01, in particular. The general principles that apply to contract interpretation were articulated by Arbitrator Bird in *Pacific Press* as cited in *College of New Caledonia, supra* at para. 28 and *Southern Railway, supra* at p. 289:

1. The object of interpretation is to discover the mutual intention of the parties.
2. The primary resource for an interpretation is the collective agreement.
3. Extrinsic evidence (evidence outside the official record of agreement, being the written collective agreement itself) is only helpful when it reveals the mutual intention.
4. Extrinsic evidence may clarify but not contradict a collective agreement.
5. A very important promise is likely to be clearly and unequivocally expressed.
6. In construing two provisions a harmonious interpretation is preferred rather than one which places them in conflict.
7. All clauses and words in a collective agreement should be giving meaning, if possible.
8. Where an agreement uses different words one presumes that the parties intended different meanings.
9. Ordinarily words in a collective agreement should be given their plain meaning.
10. Parties are presumed to know about relevant jurisprudence.

The Union takes the position that there is no burden of proof given that this is an interpretation case. I agree that the Union faces no special or more onerous burden and the case must be decided by determining the mutual intention of the parties with respect to the language they chose (see *Catalyst Paper, supra*).

At the center of this dispute is job security for the Union's members juxtaposed against the right of the Employer to run its business. The nature of these conflicting interests and

how parties may address them was aptly described in *Sodexho, supra* at paras. 19, 20 and 22:

> Job security is a significant benefit of unionization. Preserving the integrity of the bargaining unit is essential to job security. Indeed, reserving the right to perform certain work to bargaining unit employees is fundamental to the interests of unions and the employees they represent because without some reservation of the right to perform bargaining unit work to bargaining unit employees the effect of the collective agreement could easily be avoided and job security would be lost…. …The extent to which bargaining unit work has been reserved to bargaining unit employees depends on what the parties have bargained in that respect, as reflected in the collective agreement between them.
>
> … an employer begins with a virtually unfettered right to conduct its business and assign work as it considers appropriate…. ...That is, in the absence of a collective agreement prohibition, express or implied, assigning work to non-bargaining unit employees or subcontracting work out is presumptively allowed. Accordingly, much of the collective bargaining struggle involves a contest in which the union fights to restrict or fetter the employer's fights [*sic*] in that respect in order to protect the integrity of the bargaining unit while the employer seeks to retain as much flexibility and freedom as possible. The collective agreement that the parties sign contains the result of that contest.
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> …
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> …If a collective agreement does not restrict an employer from doing so, it is free to transfer or assign work to persons who are not bargaining unit employees, regardless of its motivation, so long as it does not act in bad faith or in a manner that is arbitrary or discriminatory… …On the other hand, if the collective agreement prohibits an employer from having bargaining unit work performed by other than bargaining unit employees it cannot do so, regardless of how good or bona fide its reasons for doing so.

The staring point of the analysis is the language of the Collective Agreement. To begin, I have considered Article 16 which addresses the Employer's management rights. Read as a whole, it provides that the Employer may "plan, direct and control the Store operations", subject to any specific provisions in the Collective Agreement (Article 16.01 and 16.04). This is consistent with the notion expressed above that the Employer may transfer or assign work as it sees fit, subject to restrictions in the Collective Agreement.

I accept that the intention to restrict contracting out must be clear and that, if there are restrictions, any exceptions to those restrictions must also be clear (*Alcan Smelters, supra*). Some of the authorities cited by the parties show an arbitral trend, following *Russelsteel, supra,* where it has been concluded that unless there is an express prohibition, an employer is free to contract out as part of its management rights. Yet, it has also been recognized that parties do not have to expressly use the words "contracting

out" to bar that transfer of work (see *Voice Construction, supra*; *Regina Exhibition, supra*). Further, that arbitral trend does not mean that an arbitrator must abandon the search for parties' intentions in terms of the language they have bargained. This principle was described by Arbitrator Pritchard (as cited in *Canada Safeway* (Sims)*, supra* at p. 6):

> Having said that, it is important to recognize what Russellsteel, supra, and the cases which have followed it hold and what they do not hold. They do hold that implied terms are not sufficient to bar contracting out. They also hold that "specific language" in the collective agreement is required to bar contracting out. What they do not hold, however, is that specific words must be used in order to bar contracting out. That is, the cases do not hold that the words "contracting out" must be used in order to create a bar. This is far from surprising. The collective agreement is a product of the parties' drafting and represents their way of phrasing their agreement. It would be highly inappropriate if arbitrators were to focus on the words per se as opposed to the intentions of the parties as expressed through words. The post-Russellsteel line of cases have merely said that arbitrators will not find an intention to bar contracting out unless there is an actual clause in the collective agreement which, properly interpreted, expresses the parties' intention to bar or limit contracting out. Indeed, in the Russellsteel case itself, Professor Arthurs spent half the award struggling with the proper interpretation of the clause in that agreement which did not use the words "contracting out".

Arbitrators have looked to uncover the intentions of the parties not only on the basis of the express words used, but also after considering bargaining history and other extrinsic evidence when applicable, to determine whether the parties meant to restrict contracting out or not and to what extent (see *Canada Safeway* (Sims)*, supra; Canada Safeway* (Tettensor)*, supra*). As Arbitrator Sims stated in *Canada Safeway, supra* at p. 10:

> I do not go so far as accepting the suggestion that the words "no contracting out" must always be used, since it is possible parties will use other clear language that achieve that result. I simply find they have not done so in this case.

In this case, the parties disagree on the interpretation of Article 4.01 and whether it is simply a work jurisdiction clause or a broader restriction, which would prohibit the transfer of work at issue here. The distinction in terms of purpose and effect between work jurisdiction clauses and contracting out restrictions was explained in *Sodexho, supra* at para. 23:

> It is important to remember that a no contracting out clause is not the same thing as a bargaining unit work clause. Their purpose and effect are different. A bargaining unit work clause is intended to reserve certain work (often described only as work "normally performed by employees covered by the collective agreement", or words to that effect) to bargaining unit employees by restricting the employer's right to assign such work to managerial personnel or other (i.e., non-bargaining unit) of its own employees at the work locations covered by the collective agreement. In the labour relations sense of the

> term, "contracting out" is the transferring of work which has been performed by bargaining unit employees to an independent third-party contractor by means of a commercial contract, which third-party employer then has its employees perform the work.

The parties have addressed the protection of bargaining unit work in Article 4.01, which for convenience, provides:

> Section 4 – CLERKS WORKS CLAUSE
>
> 4.01 With the exception of excluded personnel listed in Section 1 of this Agreement and salespersons or vendor representatives whose product is delivered directly to the store and Specialist personnel of the Employer all work in the handling and selling of merchandise in the retail stores of the Employer shall be performed only by employees of the bargaining unit who are members of UFCW Local 1518.

The provision does not contain the same language as work jurisdiction clauses that refer to "persons" etc. which have been interpreted to protect bargaining unit work from non-bargaining unit personnel employed by the employer. Nor, does it refer to the work "normally done" by the bargaining unit. On its plain language, subject to three exceptions, Article 4.01 provides that "all work in the handling and selling of merchandise in the retail stores of the Employer" will be done "only" by bargaining unit employees. There is no express reference to "contracting out" in the language. The question is whether or not the parties intended to bar contracting out when all of the relevant aspects of the Collective Agreement are considered and the words of their bargain are given meaning.

The most critical indication of the parties' intention on the clear words of the provision is the inclusion of the reference to "salespersons or vendor representatives whose product is delivered directly to the store". I note that the reference does not specify any form of contractual or commercial arrangements with salespersons or vendors. Coburn agreed it meant third parties who bring products into the store. Thus, in my view, when the provision is considered as a whole, the Employer's interpretation would require me to ignore this express exception. If Article 4.01 was intended to protect bargaining unit work only from other employees of the Employer, this reference would be superfluous. I conclude that, on the language itself, the parties must have intended to protect the identified work not only from other employees of the Employer, but also from third

parties, subject to three exceptions. Any other conclusion would fail to give effect to all of the words used by the parties in their bargain.

I find additional support for this conclusion from the jurisprudence in the industry in which similar clauses have been characterized as restricting contracting out to third parties (see *Canada Safeway* (Tettensor)*, supra; Canada Safeway* (Jolliffe)*, supra*). It is well-established that the parties are deemed to be aware of jurisprudence that is relevant to their collective agreement. There is no dispute that Article 4.01 is industry specific, with its origins in the PriceSmart Foods agreement, and that other similar clerks works clauses (with more and further particularized exceptions) have been reviewed at arbitration. Coburn's evidence was other such clauses are more restrictive because they include more specific exceptions in terms of who can do the work. Yet, he also noted that some of those more specific exceptions (e.g., rack jobbers) would fall within the more general vendor exception in Article 4.01. While the relevant authorities may have addressed whether the work in question falls within the scope of "handling and selling", these parties must be taken to be aware of the characterization with respect to restrictions on contracting out. Accordingly, I find that it is more likely than not that, if another interpretation or characterization of the provision was intended here, that intention would have been reflected in the language of Article 4.01.

In my view, the meaning of Article 4.01 can be discerned from the plain language of the provision. It is not ambiguous and consideration of past practice is not necessary. Even if it was necessary, I do not find that the evidence relating to the sushi bar is sufficient to establish a consistent practice or to support any conclusions relating to the interpretation of the provision (*Vancouver Shipyards, supra*).

Thus, on the face of the provision, when it is given its plain and ordinary meaning, I conclude that, unless one of the three exceptions apply, the parties intended to prohibit "all work in the handling and selling of merchandise in the retail stores of the Employer" from being performed by non-bargaining unit employees and third parties and have clearly specified it shall "only" be performed by bargaining unit employees. Accordingly, the performance of the protected work by Fresh Cup employees constitutes

a violation of the Collective Agreement, unless one of the exceptions apply or the work does not fall within the scope of the clause.

I have considered both of the Employer's alternative arguments: first, that the Roastery operation falls within the vendor exception; and, second, that the work performed in the Roastery is not "handling and selling of merchandise". I conclude that neither one provides a sustainable defence to the grievance.

With respect to the Employer's first alternative argument, as noted above, to be assisted by exceptions to contracting out restrictions, the Employer must bring itself within the clear exception (see *Alcan, supra*; *Times-Colonist* (Ladner)*, supra*). The vendor exception does not specify the type of work (i.e., sales, rather than production) that falls within its scope. However, a determination of the type of work covered by the vendor exception is unnecessary because I find it does not apply for other reasons. On the plain and ordinary meaning of Article 4.01, I cannot conclude that the Roastery "delivers" roasted coffee and coffee products directly to the FSF store. The evidence is that the vendor exception applies to third parties who bring products from outside into the store. Unroasted coffee beans and Related Products are delivered to the Roastery and the roasted beans and coffee drinks, which Townley testified is the main focus of Fresh Cup's business, are produced in the store. Even though the coffee beans and coffee drinks are not delivered from the warehouse, in my view, it is unlikely that the parties intended the exception to apply when the coffee products that are sold are, in fact, made on-site. Further, such an interpretation could, potentially, undermine the protection negotiated in Article 4.01 as, taken to its extreme, it could apply to any products supplied from the confines of a rented space within the FSF store. In my view, if the parties intended such a broad exception, which would require an expansion of the ordinary meaning of the words used in Article 4.01, they would have used different language.

Turning to the second alternative argument, I conclude that work of the baristas, when all of their duties are considered, falls comfortably with ambit of "handling and selling of merchandise in the retail stores of the Employer". The Employer characterized these activities as food and beverage preparation. That characterization cannot reasonably

apply to the stocking and sale of roasted coffee beans, Bakery Items (which are already prepared) and Related Products, when the physical actions involved in accessing product, packaging and labelling them, stocking them, handing them over to the customer, processing them and other FSF products for payment are considered. Further, I note that, on the evidence, there is no significant difference between those activities and similar duties performed by bakery clerks and cashiers.

I recognize that there is a difference between barista duties and the examples of handling described in the *Canada Safeway* authorities (e.g., breaking down pallets of merchandise etc.), in terms of the duties themselves. Yet, bakery staff finish baking, decorate and package "ready to go" bakery product, which I find is similar in nature to transforming or finishing a beverage product. The evidence was that, in the Tober corporate stores, which are covered by a collective agreement which contains a similar clerk works clause (but with more specific exceptions that are not at issue here), Union members prepare drip and specialty coffee. In any event, while the making of beverages at the Roastery, as described by Townley, requires some skill which is obtained through minimal training and, then, shadowing on the job, I do not find the skill required or the work involved, even if specialized and handcrafted, is of such a complex nature that those duties (along with the other duties performed by Roastery baristas) fall outside the ambit of "handling and selling". All of the duties involve the "physically and manually handling" and the sale of merchandise. Given the specific nature of the work, there is no concern that its inclusion in the scope of Article 4.01 would result in capturing all of the work in the store (see *Canada Safeway* (Tettensor)*, supra* at p. 8; *Canada Safeway* (Jolliffe)*, supra* at p. 11-12).

The Employer requested a ruling with respect to whether roasting work falls within the scope of Article 4.01. The Union has specifically limited its case to baristas and does not seek relief with respect to roasting work, given it is likely performed by excluded personnel. I note that Archibald testified that he was not aware of any Union members performing roasting work. Yet, given that evidence and argument with respect to that issue were not fully developed at the hearing, I decline to make a ruling on that aspect of the Roastery operations.

In light of the conclusions I have reached above, the grievance succeeds.

Remedy

In terms of remedy, I declare that the Employer's arrangements with Fresh Cup as they relate to the performance of work by baristas in the Roastery as described above constitutes a breach of Article 4.01 and should be discontinued. I am not prepared to order the Employer to offer Fresh Cup staff employment in the bargaining unit, but I note that it is within the Employer's ability to do so, if it so wishes.

The Union seeks monetary compensation to be paid to individual bargaining unit employees as it directs, not to the Union itself. The Employer's primary submission is that the Union has shown no identifiable losses and no damages should be awarded. There are authorities that support both positions. The competing principles in cases of this nature are: on one hand, the notion that damages should only be awarded to compensate (not punish) for identifiable monetary losses that have actually occurred; and, on the other hand, the principle that a remedy should be available where an employer has violated the collective agreement, otherwise the agreement would be undermined and such violations could continue undeterred.

Although the facts are distinguishable in *TFL Forest Limited, supra*, Arbitrator Dorsey made the following comments that assist here (at p. 63-64):

> Arbitrators have used their power and authority to quantify and award damages for assignments of work contrary to the collective agreement when there have been identifiable bargaining unit or union members who would have benefited had the work been properly assigned in accordance with the collective agreement. The damages are paid to specific grievors or to the union to be dispersed among the affected employees or union members. (E.g., *Blouin Drywall Contractors Limited v. C.J.A. Local 2486* (1975), 75 CCLC ¶14,295 (Ont. C.A.); *Golf Canada Products Co., Clarkson Refinery* (1982), 6 LAC (3d) 189 (Palmer); *British Columbia Forest Products (MacKenzie Pulp Division)* (1983), LAC (3d) 43 (Hope)).
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> …
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> In circumstances where there has been no identified individual to whom damages for lost wages are to be paid, arbitrators have quantified an amount of damages payable to the union that reinforces the union's rights, gives reparation for the collective agreement breach and discourages its repetition. I am in agreement with this approach and not the approach in *Miracle Food Mart Canada*, above, which has not attracted support from British Columbia arbitrators.

It has also been recognized that an award of damages is discretionary and any remedy must be fashioned in the labour relations context to reflect the specific circumstances of the case and the fact that the parties share an ongoing relationship.

This is not a case of a breach that occurred on one single occasion. The Employer's breach was continuous over a 10 month period. The violation has impacted the job security protections negotiated on behalf of the bargaining unit and has resulted in lost opportunities to perform the work in the Roastery. The evidence is that approximately 2400 hours of protected work was performed in the Roastery (excluding those worked by the Roaster) from December 2013 to mid-June 2014. The Union, through the two week Front-End schedule, has provided evidence that, at least for certain periods, a number of employees had capacity to work (in terms of hours), were available to work and were not assigned hours. As such, there is support for the conclusion that, had Article 4.01 been complied with, some bargaining unit employees would have received at least some of the Roastery work along with the resulting benefits. While the individuals who have lost the opportunity to work specific shifts have not been identified, I am satisfied that some bargaining unit employees have suffered a loss as a result of the Employer's breach, which distinguishes this case from the authorities relied upon by the Employer.

I also accept that the Employer benefitted from its arrangements with Fresh Cup. On the evidence, the Roastery was a "draw" to the FSF store. In terms of financial benefit, while FSF provided certain facilities and utilities at its expense, it received a percentage of Fresh Cup's sales, with little risk and no labour costs. Recognizing that the evidence is that business was increasing, it appears that, by September, the Employer was receiving between approximately $400 and $500 per week from Fresh Cup.

Having said that, the Employer's breach cannot be characterized as a deliberate, flagrant or repetitive attempt to undermine the bargaining unit. There are no prior awards between these parties that address the application of Article 4.01 in relation to facts similar to this case. Rather, the parties joined issue over the interpretation and application of the provision in these circumstances, sought to have those issues

determined, and attempted to find a resolution within the workplace. The violation was the result of an honest disagreement over rights under the Collective Agreement.

Further, there are also a number of contingencies and unknown factors that must be considered when attempting to recreate a situation (i.e., who would have worked had Article 4.01 been properly adhered to) in order to assess whether damages should be awarded and, if so, to what extent. Among those contingencies are: the lack of evidence of how the Roastery would have been operated and staffed by the Employer; whether some of the work would have been absorbed by existing staff who were already scheduled (such as the trial cashier); and, which employees would actually have worked and what their wage rate would have been. These and other factors are simply unclear at this point.

In my view, the amount that the Employer received under the License Agreement to date has no correlation to the loss of opportunity for bargaining unit members. Nor, does the difference between the amounts paid to Roastery staff and bargaining unit wage rates. The Union submits that damages should be awarded based on the total amount employees in the bargaining unit would have been earned, based on the hours worked by the Roastery baristas. On the Employer's documents, there was approximately 2400 hours worked in the first six months of the Roastery's operation. Using that number as a guide, that translates to approximately 4000 hours over the 10 month period. In round figures, at the wage rate of $11 per hour identified by the parties, that amounts to $44,000, plus other benefits. While there is some merit to that calculation, it does not take into consideration the contingencies discussed above.

Considering all of the circumstances, particularly given the evidence that bargaining unit employees were available to do the work and were not assigned work, I conclude that it is appropriate to award damages to compensate for the ongoing violation that has impacted the bargaining unit and to encourage healthy labour relations by providing an incentive for compliance with the rights and protections that have been negotiated by the parties. In my opinion, a damage award is appropriate, even though there has been a bona fide

disagreement over collective agreement rights. The award must be compensatory, not punitive, as well as sufficient enough to have some significance to the parties.

Any calculation in these circumstances suffers from the limitations involved in assessing unknown factors and is, at its core, an educated approximation of the impact of the violation, taking into account all of the considerations described above. Recognizing this reality, I award $7,000.00, to be paid by the Employer to bargaining unit employees as directed by the Union. This amount reflects the nature of the breach as well as the contingencies in this case. It is not a nominal amount and is intended to provide a meaningful remedy.

I retain jurisdiction to deal with any matters arising out of the interpretation or implementation of this Award.

DATED: October 14, 2014 in Vancouver, BC

JULIE NICHOLS, ARBITRATOR