IN THE MATTER OF AN ARBITRATION

BETWEEN

COLLEGE OF NEW CALEDONIA

(The “Employer”)

AND

FACULTY ASSOCIATION OF THE COLLEGE OF NEW CALEDONIA

(The “Union”)

RE: LAYOFF COMMITTEE SENIORITY INTERPRETATION

APPEARANCES:	David G. Wong, for the Employer
	Michael Shapiro, for the Union
ARBITRATOR:	Mark J. Brown
DATE WRITTEN SUBMISSIONS COMPLETED:	July 8, 2025
DATE OF AWARD:	July 21, 2025

I. ISSUE

The matter in dispute involves the interpretation of Article 6.4.2 of the Collective Agreement. Given the urgency of the matter, the Parties agreed to a written submission process with an Award to be issued by July 31, 2025; or, a bottom line decision with reasons to follow. This Award includes reasons.

II. RELEVANT COLLECTIVE AGREEMENT PROVISIONS

Article 6.4

6.4.2 For the purpose of this Article (6.4), no seniority shall be acquired by a member of the bargaining unit until the faculty employee is given a faculty appointment or has been regularized. Upon such appointment the seniority of the faculty employee shall be based upon the number of years of continuous employment immediately preceding the appointment. Continuous employment in this context includes consecutive sessional appointments, intermittent sessional appointments (exclusive of appointments under 5.2.2 for replacement purposes) and part-time service separated by a break in service of six (6) months or less.

…

6.4.7 Where the Board determines that an appointment will be terminated or not renewed for reasons given above, the Board shall give notice of non-renewal or lay-off by March 31 for faculty appointees or four (4) months prior to the date of lay-off for the non-renewal of a probationary appointee subject to the following:

a. The Board shall give notice to both the Faculty Association and the affected employee;

b. Upon the request of the Faculty Association the issue of the employee's layoff shall be referred to the Lay-off Committee referred to in Articles 6.4 of both the Common and Local Agreement.

…

6.4.9 The duties of the Committee shall be as follows:

…

c. To consider whether or not the faculty employee proposed to be laid-off is competent and/or qualified to instruct in other disciplines within the College in respect of which they may exercise their seniority;

…

e. To consider whether or not sessional appointments should be terminated to permit the laid-off employee to exercise their seniority to be retained;

f. To consider whether or not the seniority of the proposed employee to be laid-off permits them to exercise a right to seek an appointment elsewhere within the bargaining unit.

> Faculty appointees released under 6.4 shall receive severance pay in accordance with the following provisions:

Article 6.7.1 provides for severance pay for employees laid off pursuant to article 6.4, that increases based on the employee's seniority:

> Faculty appointees released under 6.4 shall receive severance pay in accordance with the following provisions:
>
> a. one (1) month's salary at the current salary rate for each year of a faculty appointee's seniority to a maximum of seven (7) months' salary;
>
> b. an additional two (2) months' salary at the current salary rate for faculty appointees with eleven years of seniority; and
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> c. an additional two (2) months' salary at the current salary rate for faculty employees with fifteen (15) years of seniority.
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> 6.6.1 a. A faculty employee who has completed twenty-five (25) cumulative weeks of appointment at the same campus, who has received no unsatisfactory evaluations, and who is given a reappointment to a further position within eight (8) calendar months from the completion of the last appointment shall be entitled to the recall rights established in 6.6. For the purposes of Article 6.6, appointment durations include preparation, professional development and vacation time. Both consecutive and intermittent positions (exclusive of sessional positions of four (4) weeks or less) separated by five (5) months or less must count towards this total. Any extension of four (4) weeks to an appointment constitutes a reappointment.
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> b. For the purposes of the calculations of cumulative service in 6.6.1a sessional appointments shall be expressed in weeks.
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> c. For the purposes of calculation of cumulative service in 6.6.1a. part-time appointments shall be converted to weeks as follows:
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> Type 1 $\frac{\text{Length of appointment in hours}}{\text{12 hours}}$ = weeks
>
> Type 2 $\frac{\text{Length of appointment in hours}}{\text{16 hours}}$ = weeks

Type 3, 4 $\frac{\text{Length of appointment in hours}}{\text{20 hours}}$ = weeks

III. BACKGROUND

Due to a decline in the enrolment of international students, faculty layoffs are set to occur on July 31, 2025. In its submission the Union set out the history of the Collective Agreement language in dispute. For purposes of this Award it is unnecessary to set out the history; suffice it to say the language has been in place for many years.

The Employer asserted that in 2002, in the context of layoffs, the Parties agreed to apply Article 6.6.1 for determining the time spent working in part-time and sessional positions prior to the employee becoming a regular or regularized employee. The Employer asserted that that approach has been consistently applied. In the spring of 2025, the Union changed its position and hence the current dispute. The Employer submitted various documents to support the above noted assertion.

IV. ARGUMENT

The Union argues that under Article 6.4.2, breaks in service of six months or less must be included in the calculation of seniority. Such breaks in service are expressly included in the definition of “continuous employment” in article 6.4.2.

The Union notes that the principles governing collective agreement interpretation are set out in *Pacific Press v. Graphic Communications International Union, Local 25-C*, [1995] B.C.C.A.A.A. No. 637. In determining rights under a collective agreement, the primary and natural meaning of the language the parties used to describe their bargain is of paramount importance: *Construction and General Workers' Local 1111 v. PCL Construction Ltd.*, [1982] A.G.A.A. No. 1.

The Union argues further that the language chosen by the parties is critical because arbitrators lack jurisdiction to amend the terms of the collective agreement. Section 82(2) of the *Labour Relations Code* requires arbitrators to have regard to the real substance of the matters in dispute under the terms of the collective agreement: *Simon Fraser University*, [1976] 2 Can. L.R.B.R. 54.

The Union argues that there is no particular onus on a union in an interpretation case: *Catalyst Paper (Elk Falls Mill) v. Communications, Energy and Paperworkers Union of Canada, Local 1123 (Grievance 2010-3 Retiree Benefits)*, [2012] B.C.C.A.A.A. No. 73.

With respect to the use of extrinsic evidence, the Union argues that the guiding principles are set out in *Nanaimo Times* Ltd., BCLRB No. B40/96.

Specific to the issue in dispute, the Union argues that Article 6.4.2 requires that regular seniority be calculated "based upon the number of years of continuous employment immediately preceding the appointment". Continuous employment is defined in article 6.4.2 to include appointments (except short-term appointments under article 5.2.2 for replacement purposes) "separated by a break in service of six (6) months or less". The Union argues that there is no ambiguity in the words chosen by the parties. Breaks in service of six months or less are part of "continuous employment" for the purposes of Article 6.4.2. Consequently, the calculation of seniority for the purposes of layoff and recall under Article 6.4.2 must include breaks in service of six months or less.

The Union argues that seniority rights are among the most important benefits that unions secure for their members: *Tung-Sol of Canada Ltd. v. United Electrical, Radio and Machine Workers of America, Local 512 (Collective Agreement Grievance) (Reville)*, [1964] O.L.A.A. No. 9.

The Union argues that in Article 6.4 of the Local Agreement the parties negotiated layoff protections in the form of Layoff Seniority "based upon the number of years of continuous employment immediately preceding the appointment" (Article 6.4.2 of the Local Agreement). The Union argues that the clear intent is that a higher number of years of "continuous employment" equals more seniority, which makes lay off less likely. The parties also clearly turned their mind to the reality that faculty employees sometimes have breaks in service between appointments. They expressly provided that breaks in service of six months or less are to be included in the definition of "continuous employment" for the purpose of the calculation of seniority in Article 6.4.2.

The Union argues further that the Employer's interpretation is inconsistent with the clear language in Article 6.4.2. If the parties intended to calculate Layoff Seniority based only on time spent in appointments, they could have easily said so. Instead, they chose to calculate Layoff Seniority "based upon the number of years of continuous employment immediately preceding the appointment" with breaks in service of six months or less expressly included in the definition of "continuous employment".

The Employer argues that the language in Article 6.4.2 for the determination of seniority is clear that time spent working on consecutive sessional appointments, intermittent sessional appointments (exclusive of appointments under 5.2.2 for replacement purposes) and part-time service separated by a break in service of six (6) months or less prior to becoming a regular employee, counts towards an employee's seniority. The breaks between those appointments do not. The Employer relies on extrinsic evidence to confirm that to be the case.

In the alternative, the Employer argues that the Union is estopped from requiring the Employer to change the approach to determining seniority for the purposes of the 2025 layoff committee process.

The Employer argues that Article 6.4.2 addresses how seniority is determined for those employees who work sessional or part-time contracts prior to receiving a regular appointment or being regularized. It provides that in those circumstances, their seniority will be based on "the number of years of continuous employment immediately preceding the appointment". Despite the language providing that seniority will be "the number of years", as that number will constantly be changing, as the historic evidence demonstrates and as illustrated by the position of both Parties, the Parties agreed to use a calculated seniority date, rather than number of years of continuous service, as the measure of seniority for employees.

The Employer argues further that the clear intent of the language of article 6.4.2 was for there to be some recognition for seniority purposes, for time spent working sessional or part-time work prior to becoming a regular employee that was different from how seniority is recognized once employees start their regular employment with the College. In other words, while seniority once an employee starts regular employment with the College is simply their length of service from that date (subject to a few specific exceptions), the time that an employee spent working on part-time and sessional contracts prior to that point is accounted for differently.

It is notable for these purposes that the Parties did not choose language providing that an employee's seniority date would be the employees' start date of employment with the College. Had the Parties intended the Union's interpretation of not distinguishing between work done as a part-time non-regular employee and as a full-time employee for seniority purposes and including breaks of 6 months or less between non-regular appointments, they would have included much simpler language that would not need to distinguish between regular and non-regular work, and instead simply provide an employee's seniority date as being the later of their start date with the College or their start date with the College after their latest break in service of six (6) months or more.

Article 6.4.2 references "continuous employment" and clarifies the meaning of continuous employment for this purpose as including "…consecutive sessional appointments, intermittent sessional appointments (exclusive of appointments under 5.2.2 for replacement purposes) and part-time service separated by a break in service of six (6) months or less". That language confirms which sessional and part-time appointments are to be included in determining seniority; it does not provide that the breaks in service are themselves to be counted towards an employee's seniority. Doing so would lead to illogical results that are inconsistent with the concept of seniority, whereby employees with significantly less service and later regular appointment dates would have greater seniority than other employees with longer service and earlier regular appointment dates.

The Employer argues that in 2002, the Parties were *ad idem* in applying the language of Article 6.6.1 (which sets out a process for determining the amount of cumulated service the time spent working sessional and part-time appointments will count for non-regular employees, for the purposes of their placement on the non-regular seniority list) to do so. This is reflected in the documentation from 2002 that the Employer included in its

submission. The Employer also included documents that demonstrated that that practice was continued subsequently.

In the alternative, the Employer argues that if the Union's interpretation is accepted, it should be estopped from applying that interpretation for the current layoffs. The Employer cites *Coast Mountain College v Academic Workers' Union, CUPE Local 2409 / FPSE Local 11*, 2022 CanLII 25753 (BC LA) for estoppel principles.

In reply the Union argues that the Employer's position applies the concepts of "cumulative service" and or "time worked" to the application of Article 6.4.2 when the provision clearly states that seniority is based on "continuous employment".

The Union argues further that the extrinsic evidence should not be used to assist in the interpretation of the article in question as Article 6.4.2 is clear and unambiguous.

The Union argues further that the elements of estoppel have not been met. The Employer has not proven that the Union was aware or that there is any detriment to the Employer's asserted reliance.

V. AWARD

I will first set out several cases that guide my analysis.

The seminal case regarding the principles to be used for interpretation of a collective agreement is *Pacific Press v. Graphic Communications International Union, Local 25-C*, [1995] B.C.C.A.A.A. No. 637. The principles are:

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 if agreement, being the written collective agreement itself) is only helpful when it reveals the mutual intention.

4. Extrinsic evidence may clarify but not contradict the 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 that places them in conflict.

7. All clauses and words in a collective agreement should be given meaning, if possible.

8. Where an agreement uses different words, one presumes that the parties intended different meanings.

9. Ordinary words in a collective agreement should be given their plain meaning.

10. Parties are presumed to know about relevant jurisprudence.

The Union does not bear the onus in an interpretive matter. In my view the current state of the law is set out in *The Board of Education of School District No. 36 (Surrey)/ BCPSEA -and-BCTF/Surrey Teachers' Association* (March 6, 2009), unreported (Korbin):

> With respect to the Employer's reliance on the Wire Rope and Noranda line of cases, arbitrators have not, in recent history, strictly adhered to the notion that the Union bears any additional onus or burden in cases such as this. It is my view that as this is a matter of interpretation, my role is to find the mutual intention of the parties within the competing interpretations put forward by the parties. In such an analysis, neither party bears any special onus of proof. (p. 13)

With respect to the use of extrinsic evidence, the seminal case is *Nanaimo Times Ltd*., BCLRB No. B40/96:

> 29 If the arbitrator decides, after considering both the collective agreement language and the extrinsic evidence, that there is no doubt about the proper meaning of the clause in question, the arbitrator then reaches an interpretive judgment without regard to the extrinsic evidence. See Pacific Press Ltd., BCLRB No. B97/94 (upheld on reconsideration BCLRB No. B427/94) where the Board concluded that after considering the extrinsic evidence and finding the language of the collective agreement to be clear, the arbitrator did not need to (and would not be entitled to) resort to extrinsic evidence as an aid to interpretation. This amounts to the arbitrator effectively concluding: "I have considered all of the evidence, both the collective agreement and that which is extrinsic to the agreement, and conclude that what the language means is what it appears to mean to me on first reading."
>
> 30 On the other hand, if an arbitrator concludes that when the language of the collective agreement is considered with the extrinsic evidence, there is some doubt about the meaning of the provision in dispute, the arbitrator is entitled to use extrinsic evidence to resolve the ambiguity or doubt, even in the face of collective

> agreement language that appeared clear when read in isolation: Finlay Forest Industries Ltd., BCLRB No. B137/94. However, even in these circumstances, an arbitrator is not bound to base his or her decision on the extrinsic evidence simply because the language is somewhat equivocal. The arbitrator is trying to decipher the meaning which the parties mutually intended for the disputed contract language, and should not forget the actual language in concentrating on a mass of extrinsic material: U.B.C.

The importance of seniority as a far reaching benefit is highlighted in *Tung-Sol of Canada Ltd. v. United Electrical, Radio and Machine Workers of America, Local 512 (Collective Agreement Grievance) (Reville)*, [1964] O.L.A.A. No. 9:

> 3 Seniority is one of the most important and far-reaching benefits which the trade union movement has been able to secure for its members by virtue of the collective bargaining process. An employee's seniority under the terms of a collective agreement gives rise to such important rights as relief from lay-off, right to recall to employment, vacations and vacation pay, and pension rights, to name only a few. It follows, therefore, that an employee's seniority should only be affected by very clear language in the collective agreement concerned and that arbitrators should construe the collective agreement with the utmost strictness wherever it is contended that an employee's seniority has been forfeited, truncated or abridged under the relevant sections of the collective agreement.

And lastly, *Coast Mountain College v Academic Workers' Union, CUPE Local 2409 / FPSE Local 11*, 2022 CanLII 25753 (BC LA) sets out the principles of estoppel:

> 1. There must be a representation, promise or assurance by the other party through words or conduct (including silence).
>
> 2. The representation was intended to be relied upon and was relied upon (intended to alter the legal relations between the parties).
>
> 3. There must have been a detriment or prejudice to the side who relied on the representation.

Applying these principles to the case at hand, seniority is obviously an important principle to the Union, and carries with it, obligations on the Employer.

Parties in general, use various triggering dates for seniority. For example, some collective agreements use the date of employment as the seniority date. Some will use other measurements such as, but not limited to, hours worked, time worked, or continuous service. Collective agreements may also use these factors to amend a seniority date based on length of absences or an employee's employment status vis a vis full-time versus part-time or casual.

An arbitrator's task is to interpret what the parties have agreed to; not what the arbitrator considers fair or reasonable in the context of the case.

In the case at hand, the Parties have a mature collective bargaining relationship. They have chosen different words in various sections of the Collective Agreement which must be taken to result in a different meaning.

I am not persuaded by the Employer's reliance on other provisions in the Collective Agreement, other than Article 6.4.2, to argue that "cumulative service" and or "time worked" should assist in the interpretation of continuous employment in Article 6.4.2. If the Parties had wanted those measurements to apply in Article 6.4.2, the use of "continuous employment" would not have been chosen.

The Parties chose "continuous employment" and included a definition of what was to be included in it, specifically "a break in service of six (6) months or less". Had the Parties wanted to include only the time worked and not the break time, they would have said so.

After considering both the collective agreement language in Article 6.4.2 and the extrinsic evidence presented by the Employer, I conclude that there is no doubt about the proper meaning of Article 6.4.2. The Article is clear and unambiguous. Therefore, I must conclude my interpretive task without regard to the extrinsic evidence.

Article 6.4.2 clearly uses "continuous employment" as the measurement for seniority in the article. Continuous employment includes " a break in service of six (6) months or less". Accordingly, the Union's interpretation prevails.

Having reached that conclusion, I must consider the Employer's estoppel argument.

I conclude that the elements of an estoppel have been met. First, the documents submitted by the Employer from 2002 and in subsequent years, demonstrate that the Parties reached an understanding on how to apply seniority to faculty reductions. Second, I am not persuaded by the Union's argument that the Union was not aware. The memos and other documents were directed to or copied to Union Officials. And thirdly, there is detriment or prejudice to the Employer with the Union's position in the case at hand.

Therefore, while I conclude that the Union's grievance succeeds with respect to the interpretation of Article 6.4.2, I conclude that the Union is estopped from relying on it for the current downsizing situation. The past practice will prevail for the situation at hand. Future situations like the case at hand will be governed by the Union's interpretation, unless the Parties address the situation in collective bargaining.

"Mark J. Brown"

Dated this 21st Day of July, 2025.