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: 2014 Layoff Grievance

APPEARANCES:	Bruce R. Grist, for the Employer Leo McGrady, Q.C., for the Union
ARBITRATOR:	Mark J. Brown
DATES OF HEARING:	August 7, 8 and 29 2014
DATE OF AWARD:	September 5, 2014

I. ISSUE

1 The grievance relates to layoff notices given to Pete Krauseneck and Darren Lowrie in the spring of 2014. The Union argues that the Employer violated several provisions of the Collective Agreement by extending the layoff notice and did not explore alternatives to layoff pursuant to the Collective Agreement.

2 The Employer argues that the Union and the Grievors agreed to the extension of layoff and that it is an option under the terms of the Collective Agreement.

II. COLLECTIVE AGREEMENT PROVISIONS

3 The parties are covered by provisions in a common agreement covering several post secondary institutions; and, provisions of a local agreement.

4 Provisions in issue in the case at hand are as follows:

> **COMMON AGREEMENT**
>
> **6.4 Targeted Labour Adjustment**
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> **6.4.1 Employer Commitments**
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> It is agreed that the institution will make every reasonable attempt to minimize the impact of funding shortfalls and reductions on the work force.
>
> It is incumbent upon institutions to communicate effectively with their employees and the unions representing those employees as soon as the impact of any funding reduction or shortfall or profile change has been assessed.
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> If a work force reduction is necessary, the Joint Labour Management Committee will canvas employees in a targeted area or other areas over a fourteen (14) day period, or such longer time as the Joint Labour Management Committee agrees, to find volunteer solutions that provide as many viable options as possible and minimize potential layoffs. Subject to any agreement that the Joint Labour Management Committee may make to extend the period of a canvass, such canvasses shall take place either:
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> - prior to the issuance of lay-off notice to employees under the local agreement, or

- by no later than fourteen (14) calendar days following the annual deadline for notice of non-renewal or layoff where a local provision provides for such a deadline,

whichever date is later.

The union shall be provided with a copy of each final plan for employee labour adjustment.

6.4.2 Menu of Labour Adjustment Strategies

Where a work force reduction is necessary, the following labour adjustment strategies will be considered, as applicable.

6.4.2.1 Labour Adjustment Strategies: Workplace Organization

Subject to the institution's operational considerations, excluding the availability of funding, the following menu of work place organization labour adjustment strategies will be offered by institutions to minimize layoffs and at the appropriate time in the employee reduction process set out in the local provisions:

(a) Job sharing.

(b) Reduced hours of work through partial leaves.

(c) Transfers to other areas within the bargaining unit subject to available work and to meeting qualifications, with minimal training required where such training can be scheduled within the employee's professional development and other non-instructional time.

(d) Unpaid leaves of absence for use to seek alternate employment, retirement adjustment, retraining, etc.

(e) Workload averaging that does not incur a net increase in compensation cost.

(f) Combined pension earnings and reduced workload to equal one hundred percent (100%) of regular salary subject to compliance with the regulations of the College Pension Plan.

(g) Agreed secondment.

(h) Combinations and variations of the above or other workplace organization alternatives.

LOCAL AGREEMENT

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.

6.4.8 A Lay-off Committee shall be instituted upon the execution of this collective agreement and shall consist of four persons, two appointed by the Faculty Association and two appointed by the College and may be increased or decreased as mutually agreed to from time to time.

6.4.9 The duties of the Committee shall be as follows:

a. To consider the reasons for the lay-off;

b. To consider the alternatives to the lay-off;

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 he or she may exercise his or her seniority;

d. To consider whether or not part-time faculty appointments may be terminated to permit the laid-off employee to be retained. If the reason for lay-off is a demonstrated shortage of funds (6.4.6), this provision shall not apply;

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

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

6.4.10 The Committee shall have the authority to indicate its approval or disagreement with the decision of the College to effect the lay-off notice where a majority of the members so agree. In the event that the Committee is unable to agree on a recommendation, either party may refer to the areas of disagreement to one of the named arbitrators 3.6 for final and binding decision. The arbitrator shall have full authority, including the right to rescind the lay-off, to resolve the areas of disagreement as specified in this article.

III. BACKGROUND

5 In a letter dated February 28, 2014, the Employer advised the Union that it anticipated layoffs for the 2014/2015 academic year which runs August to July. It was investigating the impact on six employees.

6 In a letter dated March 4, 2014, the Union requested the formation of the Lay Off Committee (the "Committee") under Article 6.4.7.b.

7 The Committee met approximately seven times. At the end of the day four employees were removed from the layoff list. The two outstanding employees on the list are the subject of this Award: Krauseneck and Lowrie.

8 The balance of the background and Committee discussions will relate to Krauseneck and Lowrie only.

9 During two Committee meetings in March the Union suggested a partial leave for Krauseneck. The Employer had fulltime work for Krauseneck but only up to May of 2015. With respect to Lowrie, the Employer had fulltime work up to January of 2015. The Employer was canvassing senior employees in Lowrie's department to see if either of them would accept voluntary severance.

10 While an extension of layoff was discussed, the Union never clearly stated they were opposed to extensions. However, the Union did specifically pursue partial leaves as a mandatory option.

11 In a meeting with Lowrie and Jan Mastromatteo, the Union's VP Chief Steward and Contract Negotiations, Cathe Wishart, Vice President, Community and Student Services, gave Lowrie a letter dated March 25, 2014 advising him of layoff effective July 31, 2014. At the same time she gave him a letter which stated in part:

> The College is pleased to inform you that we are extending your notice of layoff effective from July 31, 2014 to January 12, 2015.

12 According to Wishart, Mastromatteo asked if the extension was an offer. Wishart advised yes. Lowrie testified that he thought he was being informed of the extension, did not know of other options; but in any event wanted to keep working.

13 Krauseneck received the same letters dated March 27, 2014. Wishart stated that even though the extension letter was worded the same way, she proactively advised Krauseneck that the extension was an offer.

14 Krauseneck testified that he did not see it as a choice.

15 In an email dated March 28, 2014 from Wishart to Mastromatteo and David Rourke, Union President, Wishart addressed the partial leave issue. She stated in part:

> Hi Jon and David. Further to our preliminary discussions at Layoff Committee, the College has discussed the idea of partial leave for employees who in a layoff situation, but who have a full-time workload for an extended period (Darren and Pete, for example).
>
> The College will not be agreeing to a partial leave in this circumstance due to the additional costs of benefits and the risk of LTD claims during a period when there is no actual continued attachment to the employer.
>
> If an employee on layoff has a partial workload available, we will continue to be open to a partial leave option. However if there is no workload available for an extended period of time, we can't support the partial leave.

16 Mastromatteo responded in an email on the same date:

> Pursuant to Article 6.4.2.1, and irrespective of the availability of funding, the Employer shall offer (a) through (h) in order to mitigate

> layoffs. Partial leaves are (b) on that list. Please confirm that the College has decided not to adhere to this collective agreement provision.
>
> Further, a partial leave occurs within the confines of one College year. As a consequence, you will need to clarify what you mean by "extended period".

17 Wishart testified that she viewed partial leave to be part of a work week. The Employer did not foresee any work in the foreseeable future for either Lowrie or Krauseneck and therefore did not view the partial leave as an option. In previous years partial leaves had been offered as there was an expectation of future work. Wishart stated that the Employer did not calculate benefit costs if a leave had been granted.

18 In an email dated April 10, 2014, Wishart advised Mastromatteo and Rourke that Lowrie and Krauseneck accepted the extension of layoff.

19 Mastromatteo responded in an email on the same date that following the April 8th Committee meeting she was confirming that the Committee would continue to look for work for the two employees. She confirmed that the Union believed that Krauseneck had a fulltime workload. She also noted that other outstanding issues would be discussed at the next meeting.

20 In the April 8th Committee meeting Mastromatteo had advised the Employer that the Union thought Krauseneck's workload equated to a fulltime job and therefore the layoff should be rescinded. She also stated the Collective Agreement required partial leaves. She also wanted confirmation that Lowrie was not going to be offered a partial leave.

21 In the April 28th Committee meeting, Mastromatteo confirmed that one of the issues for arbitration was whether partial leaves were optional irrespective of funding.

IV. ARGUMENT

22 Briefly stated, the Union argues that the language of the Collective Agreement is clear. The Union argues partial leaves are a mandatory option under the Collective Agreement. The Employer's rationale for not granting a leave, because there was no expectation of ongoing work, is not a prerequisite for offering a partial leave. The Union argues that Krausereck's combination of work and a leave would bring him to 100% and therefore his layoff should be rescinded. The same can be argued for Lowrie.

23 The Union argues further that there is only one date for layoff in the Collective Agreement which is July 31st. Therefore the extensions to a different date are illegal.

24 The Union argues further that the Employer violated the Collective Agreement by negotiating directly with the employees regarding the extension.

25 The Union argues further that if extensions are allowed then partial leaves can be struck off the list in the Collective Agreement. They would never be granted.

26 The Union cites the following cases to support its arguments: *BCIT –and- BCIT Staff Society,* [1998] BCCAAA No. 542, Award No. A-312/98 (V. Ready); *College of New Caledonia v. College of New Caledonia Faculty Association*, [1983] BCCAAA No. 349, Award No. A-152/83 (R. Bird); *College of New Caledonia v. Faculty Association of College of New Caledonia*, [1009] BCCAAA No. 79, Award No. A-059/09 (D. Munroe); *Northwest Community College –and- CUPE Local 2409 and FPSE Local 11*, December 30, 2013 (R. Germaine); *Kwantlen College –and- Douglas and Kwantlen Faculty Association*, [1982] BCCAAA No. 207, Award No. A-327/82; (1982), 12 LAC (3d) 115 (P. Fraser); *Simon Fraser University –and- Association of University and College Employees, Local 6 and Teaching Support Staff Union*, [1983] BCLRBD No. 169 (A. Black); *The Canadian Oxford Dictionary*, 1998 (excerpts); *Ainscough v. McGavin Toastmaster Ltd.,* [1976] 1 SCR 718; *IKEA Canada Ltd. Partnership –and- Teamsters Local Union No. 213*, BCLRB Decision No. B136/2014 (B. Wilkins); and *University of BC v. University of BC Faculty Association*, [2004] BCCAAA No. 39, Award No. X-008/04; (2004), 125 LAC (4th) 1 (J. Dorsey).

27 The Employer argues that the obligation under Article 6.4.9 is to consider alternatives to layoff. Continuing the employee's status for the period of an extended layoff notice is an alternative which the Employer believes benefits the employee.

28 The Employer argues further that there is no provision in the Collective Agreement that requires the granting of an unpaid leave of absence. In the alternative, it was raised in the Committee process, considered by the Employer and denied as there was no foreseeable workload beyond the extended date of layoff.

29 The Employer argues further that the Union accepted the extensions as an alternative, as did the two employees. If the Union now says that it is taking the position that it never agreed to the extensions, the Union did not clearly communicate that position.

30 The Employer argues that the use of a partial leave or unpaid leave to prolong the employees' employment status is not mandated under Article 6.4.2 and therefore there was no obligation to consider them. In any event the Employer considered a leave but reasonably decided against it.

31 The Employer cites the following cases to support its position: *Cariboo College Board v. Cariboo College Faculty Association,* (August 7, 2981) Investigator Mervin Chertkow; *College of New Caledonia v. Faculty Association of the College of New*

Caledonia (Layoff Arbitration), (July 24, 2013) (Nichols); *The College of New Caledonia v. The College of New Caledonia Faculty Association (Layoff Arbitration)*, (July 7, 1984) (Foley); *College of New Caledonia and College of New Caledonia Faculty Association (Lay-offs of Instructors Burgess, Langley, Reaugh, Snaychuk, Thorsen and Watters)*, (May 2, 1983) (Bird, Q.C.); *College of New Caledonia and Federation of Post-Secondary Educators of BC on behalf of Faculty Association of College of New Caledonia (Effect of Leave of Absence on Layoff Notice)*, (August 11, 2009) (Munroe).

V. AWARD

32 I will deal with three arguments before I address Collective Agreement language.

33 First, I will deal with the Employer's argument that the Union agreed with extensions for both Krauseneck and Lowrie.

34 While I agree with the Employer that the Union never stated specifically that it did not agree with the extensions, questioned whether the extensions were "offers", and asked in Committee meetings whether the employees had accepted the extensions, the Union was also clear that it took the position that partial leaves were mandatory. It did so in more than one Committee meeting and in emails. By clearly stating that view, I conclude that the Union did not specifically agree to the extensions.

35 Second, I acknowledge that the employees agreed to the extensions. I conclude they did so as they believed there were no other options other than accepting layoff as of July 31, 2014. I conclude their agreement does not preclude the Union from pursuing the grievance.

36 And third, I am not persuaded by the Union that the Employer bargained directly with the employees regarding the extensions. Extensions were discussed at the Committee and the Union was in attendance at layoff meetings. The Union was aware of the discussions.

37 Turning to the language of the Collective Agreement, Article 6.4.1 states that the "institution will make ever reasonable attempt to minimize the impact of funding shortfalls and reductions on the work force". There is no disagreement between the parties that the layoffs were necessary.

38 Accordingly, the parties turned their minds, via the Committee, to consider the "menu of work place organization labour adjustment strategies" under Article 6.4.2.1.

39 The preamble to the menu states that the "menu of work place organization labour adjustment strategies will be offered by institutions to minimize layoffs" (emphasis added). A caveat is that it is "subject to the institution's operational

considerations, excluding the availability of funding". The language does not address what would happen if there was more than one option that could be utilized to minimize the layoffs. Hopefully the Committee would resolve the matter and implement the one that was best for the employee and the Employer.

40 Two of the menu items are "(b) Reduced hours of work through partial leaves" and "(d) Unpaid leaves of absence for use to seek alternate employment, retirement adjustment, retraining, etc.".

41 The parties portrayed the facts of this case as involving a partial leave for the most part, but also referenced unpaid leave of absence.

42 By including both partial leaves and unpaid leave of absence on the menu of strategies, the parties must have intended the terms to relate to different situations.

43 I conclude that the circumstances of the case at hand do not fall within the scope of partial leave. Partial leaves occur when an employee is working "reduced hours". I take that to mean reduced hours in a week (or other period of time) and a partial leave for the balance of the week (or other period of time) in order to maintain previous employment status. In that scenario the reduced hours of work and partial leave operate in conjunction with one another.

44 An unpaid leave of absence would occur when the employee is granted unpaid time away from work for a block of time, not in conjunction with reduced hours of work. While (d) above sets out some uses for the unpaid leave of absence, the list is not exhaustive.

45 The Employer's reason for not granting an unpaid leave of absence was because there was no prospect of future work and therefore no employment relationship after the extension date. While that makes sense under normal circumstances, in the case at hand the unpaid leave of absence option is listed as one of the strategies to minimize layoffs. The Collective Agreement does not state that an unpaid leave of absence cannot be applied towards the end of an academic year so that employees can seek "alternate employment, retirement adjustment, retraining, etc.". Someone engaged in those types of activities has no real prospect of future work with the Employer.

46 Another reason for not considering the unpaid leave of absence according to Wishart was the cost of benefits. However, Wishart never costed the benefits, and the preamble to the menu of options excludes the availability of funding. The Employer did not state that an unpaid leave of absence was an issue with respect to "operational considerations".

47 Furthermore, the Employer argues that the layoff extension falls within the scope of "(h) Combinations and variations of the above or other workplace organization

alternatives". I conclude that it does not. The extension simply pushes the layoff date to a future date during the academic year but it does not minimize layoffs. The layoff still occurs.

48 I conclude that the Employer violated the Collective Agreement by not offering an unpaid leave of absence from the date work ceased for Krauseneck and Lowrie, to the end of the 2014/2015 academic year.

49 While the Union suggested I retain jurisdiction for the purpose of remedy, I conclude it is not necessary to do so.

50 As a remedy, I conclude that Krauseneck and Lowrie should now be offered the options that should have been offered originally:

(a) Accept lay off now with severance based on entitlement as of July 31, 2014, and any other Collective Agreement entitlements that go along with that choice on a go forward basis. I note that other entitlements should be on a go forward basis as both employees have mitigated any losses by accepting the extension until now; or,

(b) Accept the work related to the extension offer and an unpaid leave of absence to July 31, 2015.

Furthermore, I conclude that they should be given the option of

(c) Accepting the extension and layoff at the end of the extension pursuant to Collective Agreement provisions. I have listed this as an option as the employees may view the extension option as a better option for them personally as they may have already made plans based on the current situation.

51 In my view it is unnecessary for purposes of this Award to address what was referred to as the "80% issue". If I am wrong, I retain jurisdiction to do so if the parties so request.

52 I will also comment on the option of extensions in the future. If the Committee cannot agree on an option set out in the menu of strategies in Article 6.4.2.1, the Employer could offer an extension. The Union and employee may accept such an offer, and if so, such an agreement would not violate the Collective Agreement.

"***MARK J. BROWN***"

Dated this 5th day of September, 2014.