BCLRB No. B80/2019
(Leave for Reconsideration of BCLRB No. B13/2019)

BRITISH COLUMBIA LABOUR RELATIONS BOARD

THE COLLEGE OF NEW CALEDONIA

(the "Employer")

-and-

FACULTY ASSOCIATION OF THE COLLEGE OF NEW CALEDONIA

(the "Union")

PANEL:	Jennifer Glougie, Associate Chair Koml Kandola, Vice-Chair and Registrar Brett Matthews, Vice-Chair
APPEARANCES:	Matthew Larsen, for the Employer Leo McGrady, Q.C., for the Union
CASE NO.:	72817
DATE OF DECISION:	June 17, 2019

DECISION OF THE BOARD

1 The Union applies under Section 141 of the *Labour Relations Code* (the "Code") for leave and reconsideration of BCLRB No. B13/2019 (the "Original Decision"). The Original Decision dismisses the Union's application under Section 99 of the Code for review of an arbitration award (the "Arbitration Award") issued by Mark J. Brown (the "Arbitrator").

2 The Union applies for leave and reconsideration on the basis the Original Decision is inconsistent with Code principles on two bases. First, it says the original panel applied the wrong standard of deference in assessing its allegation the Arbitrator denied it a fair hearing. Second, it says the original panel erred in refusing to impugne the Arbitrator's erroneous use of past practice evidence as an aid to interpreting the collective agreement.

I. BACKGROUND

3 The dispute before the Arbitrator was whether the Grievor, a sessional instructor, became entitled to professional development ("PD") benefits on his second sessional contract (as the Union argued) or on his third sessional contract (as the Employer argued) (Arbitration Award, p. 9).

4 The relevant collective agreement provisions are Article 10.18.2, which entitles faculty employees to PD benefits on "achieving eligibility" for the Non-Regular Seniority ("NRS") list, and Article 6.6.1, which sets out the three requirements for NRS status (Arbitration Award, p. 2). The parties agreed before the Arbitrator that the Grievor satisfied all three of the requirements for NRS status in Article 6.6.1. Therefore, the question before the Arbitrator was, having satisfied Article 6.6.1, when was the Grievor entitled to PD benefits under Article 10.18.2.

5 There was no dispute that the precursor to Article 10.18.2 entitled faculty employees to PD on their second sessional contract (Arbitration Award, p. 3). There was similarly no dispute that the previous language was eliminated and replaced in 1998 by what would become Article 10.18.2, which entitles faculty employees to PD benefits on "achieving eligibility for the [NRS list]" (Arbitration Award, p. 3). Finally, the Arbitration Award says, by 2006, the Employer had implemented a practice of providing PD benefits on the third sessional contract (Arbitration Award, p. 4), although the Arbitrator accepted that the Union was unaware of that practice prior to events giving rise to the grievance (Arbitration Award, p. 9).

6 The Arbitrator relied on the change in collective agreement language and the practice the Employer subsequently implemented of providing PD on the third sessional contract to determine that Article 10.18.2 was intended to apply differently than the previous language (Arbitration Award, p. 9). Specifically, the Arbitrator found:

> Article 5.2.2. under the pre 1998 Collective Agreement was clear that PD was provided in the second sessional contract. The 1998 LOA eliminated this Article and changed it to the current 10.18.2.
>
> Under Article 10.18.2., PD is provided to the faculty member "upon achieving eligibility". The parties have a mature collective bargaining relationship. The change in wording must be taken to mean something. If the parties had intended to leave the entitlement to PD the same, one would have expected the language to remain the same. It did not.
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> In another provision that provides faculty on the [NRS List] entitlement to benefits, Article 14.8.1, the trigger is being "on the [NRS list] who are presently on a contract of ten (10) weeks or more duration". Collective agreements must be read as a whole; and, different language may lead to a different conclusion.
>
> I do not find the 1998 collective bargaining notes, and Employer generated documents regarding the interpretation, to be persuasive as I have no direct evidence about the negotiations.
>
> However, when I consider the long standing practice of the Employer in conjunction with the amended Collective Agreement provisions, there is some doubt about the meaning of the language in question.
>
> While I accept the Union's evidence that it was unaware that PD was not being provided on the reappointment contract, that does not detract from the ambiguity created by the practice.
>
> The question before me is when does a faculty member achieve eligibility for the [NRS list]. When that occurs, the employee is entitled to PD.
>
> The Union argues that the employee is entitled to PD on the reappointment contract. The Employer argues that PD is included in the subsequent or third contract after the employee is placed on the [NRS list].
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> The change in language from the 1998 Article 5.2.2. to the current Article 10.18.2., in conjunction with the Employer's practice leads me to conclude that there was a change in the application of when PD was effective. (Arbitration Award, p. 9, emphasis added)

7 The Arbitrator interpreted Article 10.18.2 as entitling faculty employees to PD when they achieve eligibility for the NRS list. Therefore, he framed the question before

him as "when does the faculty member achieve eligibility for the ... [NRS list]" (Arbitration Award, p. 9). To answer that question, the Arbitrator relied on his interpretation of the third eligibility criterion in Article 6.6.1 - reappointment to a further position within eight calendar months from the completion of the last appointment (Arbitration Award, p. 10). Specifically, the Arbitrator concluded:

> The eligibility criteria are set out in Article 6.6.1.a. The third criteria is the one in question in the case at hand. The employee must be "given a reappointment to a further position within eight (8) calendar months of the last appointment". This reappointment contract can be for any length of time, a day or full-time.
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> When considering whether an employee achieves eligibility, it is not a prospective analysis. By that I mean the Employer does not plan to offer an employee a reappointment contract and include PD by determining that if the employee accepts the contract they will have achieved eligibility.
>
> I conclude that the employee must have accepted the reappointment contract in order to actually trigger the third criteria, and thereby achieve eligilbility. Meeting the third criteria is not triggered by the Employer planning to submit an offer letter to the employee. It is triggered by accepting the contract. Until it is accepted, the employee has not achieved eligibility.
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> I would go further and suggest that until the employee commences work under the contract, the employee has not achieved eligibility. If an employee accepts a contract and then resigns before commencing work under that contract, the contract would not be considered for collective agreement benefits. (Arbitration Award, p. 10, emphasis added)

The Arbitrator found the third eligibility criteria was satisfied on the employee's third sessional contract, not the second, and dismissed the grievance accordingly (Arbitration Award, p. 10).

8 The Union applied for review of the Arbitration Award under Section 99 of the Code, among other things, on the basis the Arbitrator denied it a fair hearing by interpreting the eligibility criteria in the manner he did, given the parties agreed the criteria were satisfied in this case (Original Decision, paras. 20-22). The original panel acknowledged the parties agreed that the Grievor satisfied the requirements for NRS status. However, it found that, in determining whether the Grievor was eligible for PD benefits under Article 10.18.2, the Arbitrator considered the parties' competing arguments and accepted the Employer's interpretation that the Grievor became entitled to PD as of the subsequent contract after he achieved eligibility for the NRS list (Original Decision, para. 39). The original panel dismissed the Union's fair hearing argument on that basis.

9 The Union also argued the Arbitration Award was inconsistent with Code principles because the Arbitrator misapplied the law governing the use of past practice evidence as an aid to interpreting collective agreements. The Union acknowledged the Arbitrator cited the correct legal test for the use of past practice evidence set out in *John Bertram & Sons Co.* (1967), 18 L.A.C. 362 ("*John Bertram*"), including the requirement that both parties be aware of the practice, but said the Arbitrator erred in applying that legal test in the circumstances. Specifically, it said, the Arbitrator erred in relying on the Employer's practice of paying out PD benefits on the third sessional contract as an aid to interpretation after expressly accepting that the Union was unaware of the practice (Original Decision, paras. 25-26).

10 The original panel found that the Arbitrator considered evidence relevant to the issue before him and arrived at a reasoned conclusion based on that evidence (Original Decision, para. 42). Specifically, the Original Decision concludes:

> ... the Arbitrator was aware of the arbitral approach expressed in [*John*] *Bertram*, and despite his finding that the Union was unaware of the Employer's practice, he nevertheless found that the practice in conjunction with the amended collective agreement language created ambiguity. The Union disputes the appropriateness of this outcome in light of the approach in [*John*] *Bertram*, but the Arbitrator's fact-based analysis does not fall within the focused grounds under which the Board will review and interfere with an award... (para. 42).

The original panel found the Arbitrator made a genuine effort to interpret the relevant collective agreement language and refused to interfere in the Arbitration Award accordingly (Original Decision, para. 42).

II. THE POSITIONS OF THE PARTIES

11 The parties agree that leave for reconsideration should be granted on the Union's fair hearing ground. The Union says and the Employer does not dispute that the standard of deference does not apply when determining whether a party has been denied a fair hearing. The parties disagree, however, about whether the Original Decision should be reconsidered on the merits.

12 The Union says the Original Decision is inconsistent with Code principles because it upholds the Arbitration Award, despite the fact the Arbitrator denied it a fair hearing in the circumstances. It says there was no dispute before the Arbitrator that the Grievor had met the three eligibility requirements for NRS status, as set out in Article 6.6.1 of the collective agreement. As a result, the Union says, it did not call evidence or make submissions about how the criteria were to be interpreted or to establish they were satisfied in the Grievor's case. It says the Arbitrator denied it a fair hearing by putting the third criteria in issue, despite the parties' agreement to the contrary, and by finding against the Union on a point that was not in dispute.

13 The Union also says the Original Decision is inconsistent with Code principles because it upholds the Arbitration Award despite the Arbitrator's failure to properly apply the law governing the use of past practice evidence as an aid to interpretation, specifically, the requirement of mutual intention. The Union says the Arbitrator correctly cited the arbitral case law, including *John Bertram*, all of which supports the proposition that past practice evidence is only useful as an aid to interpretation when both parties are aware of it. It says that, having accepted as a fact that it was unaware of the Employer's practice of providing PD benefits on the third sessional contract, the Arbitrator rendered a decision inconsistent with the law governing the use of past practice by relying on the Employer's practice as an aid to interpretation in the circumstances. The Union asks how it is possible that the Arbitrator accurately recited the correct legal principle and then in the next breath ignored that legal principle, and yet be said to have made a genuine effort to interpret the provision in dispute.

14 With respect to remedy, the Union asks that the reconsideration panel quash the Original Decision and the Arbitration Award and substitute its own judgment in favour of the Union's interpretation. It says the only prerequisite for PD benefits is "eligibility" for the NRS list and the parties agree the Grievor has met those prerequisites. Therefore, it says, the reconsideration panel is in as good a position as the Arbitrator to find in the Union's favour. Alternatively, the Union asks that the reconsideration panel remit the matter to the Arbitrator to decide the grievance, applying the correct principles of law.

15 The Employer says the Union is simply attempting to reargue its case before the original panel to achieve a better result. The Employer says both parties were aware the issue before the Arbitrator was whether the Grievor, being in his second sessional contract, was entitled to PD benefits, not whether he was entitled to NRS status. The original panel found the Union was afforded the opportunity to make submissions regarding the issue in dispute before the Arbitrator and that it did, in fact, make those submissions; it argued that the Grievor was entitled to PD on the second sessional contract. The Employer says the Union's quarrel is with the fact the Arbitrator did not accept its interpretation.

16 With respect to the Union's second ground for reconsideration, the Employer says the Arbitrator relied on extrinsic evidence, including the amended collective agreement provision and the Employer's practice, to determine there was some doubt about the meaning of the language in question. In resolving that ambiguity, he preferred the Employer's interpretation. The Employer says the Original Decision correctly found that the Arbitrator's fact-based analysis in this regard does not come within the focused ground under which the Board will review and interfere with an arbitration award.

17 The Employer says the Union's application should be dismissed. In the alternative, it says, the parties' agreement that the Grievor satisfied the requirements for NRS status in Article 6.6.1 is not determinative of the grievance, which involves an interpretation of Article 10.18.2. It says, if the application is not dismissed, the matter should be remitted to the Arbitrator.

III. ANALYSIS AND DECISION

18 An application under Section 141 of the Code must meet the Board's established test in order for leave for reconsideration to be granted. An applicant must establish a good, arguable case of sufficient merit such that it may succeed on one of the established grounds for reconsideration: *Brinco Coal Mining Corporation*, BCLRB No. B74/93 (Leave for Reconsideration of BCLRB No. B6/93), 20 C.L.R.B.R. (2d) 44 ("*Brinco*") at p. 53.

19 As the parties agree the original panel assessed the Union's fair hearing argument on a standard of deference, leave for reconsideration on this ground is granted.

20 The issue before the Arbitrator was when the Grievor became entitled to PD benefits, not when he became entitled to NRS status. These issues are not unrelated, however, given that entitlement to PD benefits is dependent on achieving eligibility for NRS status. The Arbitrator acknowledged Article 10.18.2 provides that faculty employees are entitled to PD benefits upon achieving eligibility for the NRS list (Arbitration Award, p. 9), the requirements for which are set out in Article 6.6.1 (Arbitration Award, p. 3). The parties agreed that the Grievor satisfied the requirements for NRS status in the present case (Arbitration Award, p. 3).

21 Despite this agreement, the Arbitrator determined the Grievor was not "eligible" for NRS status (and therefore not entitled to PD benefits) because he did not satisfy the third requirement of Article 6.6.1. He concluded that the third requirement for NRS status under Article 6.6.1 could only be achieved on the third sessional contract (Arbitration Award, p. 10). To this end, we agree with the Union that the Arbitrator put the third NRS eligibility criteria in issue despite the parties' agreement to the contrary.

22 If the Arbitrator intended to make a finding about the Grievor's eligibility for NRS status, which was not in dispute between the parties, it was incumbent on him to put the parties on notice and provide them with an opportunity to call evidence and make submissions on that issue: *Open Learning Agency*, BCLRB No. B320/2005; *Western Pulp Inc. Limited Partnership*, BCLRB No. B380/2004. Having failed to do so, we agree the Union was denied a fair hearing. To the extent it failed to overturn the Arbitration Award on that basis, we find the Original Decision is inconsistent with the principles expressed and implied in the Code. Reconsideration on this ground is granted accordingly.

23 We turn to the Union's second ground for reconsideration. We find, on the language of the Arbitration Award itself, that the Arbitrator accepted *John Bertram* as an accurate statement of law, but then relied on the practice evidence both to establish the existence of an ambiguity and to resolve that ambiguity in the Employer's favour, despite finding the Union was unaware of the practice. We find the Arbitration Award is inconsistent with that law, without providing a rationale for departing from it in the circumstances of this case. Accordingly, the Original Decision is inconsistent with Code

principles in this respect. Leave and reconsideration on the Union's second ground are granted in the circumstances.

24 For the reasons given, the Original Decision and the Arbitration Award are quashed on the basis they are inconsistent with principles expressed or implied in the Code.

25 Finally, we do not accept the Union's position that, by agreeing the Grievor satisfied the requirements of Article 6.6.1, the Employer conceded the grievance such that the reconsideration panel should substitute its own judgment. As noted, the grievance concerned the interpretation of Article 10.18.2, not Article 6.6.1. We decline to exercise our discretion to substitute our own decision in the circumstances but rather, remit the matter to the Arbitrator to decide the grievance applying the correct principles of law.

IV. CONCLUSION

26 The Union's application for leave and reconsideration is granted on both grounds.

27 We remit the grievance to the Arbitrator to interpret the collective agreement entitlement to PD benefits in a manner consistent with this decision and with the law governing the use of past practice evidence. In doing so, the Arbitrator's jurisdiction is revived and he may reach the same or a different conclusion on the merits of the Union's grievance.

LABOUR RELATIONS BOARD

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