As issued 8 January 2019

THE SASKATCHEWAN EMPLOYMENT ACT

PROVINCE OF SASKATCHEWAN

IN THE MATTER OF AN ARBITRATION UNDER A COLLECTIVE BARGAINING AGREEMENT RESPECTING THE GRIEVANCES OF CERTAIN EMPLOYEES

BETWEEN:

UNITE HERE! UNION LOCAL 41 ("Union") on behalf of all the members of the Union and on behalf of the Grievor Cornwall

UNION

– and –

CHELTON SUITES HOTEL (1968 LIMITED) doing business for the account of HOLIDAY INN EXPRESS & SUITES ("Employer")

EMPLOYER

FINAL AWARD

Before

John Comrie QC, FCIArb **Acting as a Single Arbitrator**

Heard by telephone conference call on December 3, 2018

For the Employer: **Esther Ang, Edmund Leung**

For the Union: **Garry Whalen**

INTRODUCTION

[1] The parties to this arbitration are firstly, Chelton Suites Hotel (1968) Limited doing business in Saskatchewan for the account of Holiday Inn Express & Suites ("Employer" or the "Company" or the "Hotel" or "Holiday Inn"), a body corporate and secondly, Unite Here! Local 41("Unite Here!" or the "Union"), acting on behalf of all its members (the "Members"), including without limitation Ms. Christina Cornwell ("Grievor" or "Ms. Cornwell), all of which Members and individuals are collectively sometimes referred to as the "Grievors".

[2] This final award ("Final Award") is a supplement to the initial award in this arbitration which was issued on September 4, 2018 and again on September 17, 2018 with minor revisions ("Initial Award"). The capitalized terms in this Final Award that were defined in the Initial Award have the meaning ascribed to them in that document, unless such terms are also defined in this document, in which case the latter prevails.

[3] Evidence and argument relevant to the Initial Award were submitted at hearings held in Regina, Saskatchewan in March 2018. For ease of reference the Initial Award is attached to this Final Award as "Exhibit A". Prior to issuance of the Initial Award, at the request of Arbitrator Comrie, additional submissions were solicited and received from both the Union and the Employer relative to the legal doctrine of rectification which had not been addressed at the hearings.

(This document is therefore a supplement to a much longer Initial Award issued originally on September 4, 2018. To best follow this Final Award, it is necessary to have first read and understood the Initial Award, which is attached to this document as Exhibit A.)

MATTERS IN DISPUTE AND RELATED JUR7 ISDICTION

[4] The original jurisdiction of the Board in the Interim Award was to rule on two grievances that were defined in the Initial Award as the "Cornwell Grievance" and the "Members' Grievance". The actual grievance forms were respectively identified as Exhibit U3 and on their face are labelled "HIE 6" and "HIE 7."[1]

[1] Parties should note the confusion that was created in correspondence and submissions made to the Board between September 4th and December 3rd, 2018. For clarification, the Cornwall Grievance is HIE 6 and not HIE 7. The Members' Grievance was HIE 7 and was settled by mutual agreement between the parties between issuance of the Interim and Final Awards.

[5] Following the issuance of the Initial Award, but prior to the date of this Final Award, HIE 7 was resolved and settled.

[6] After the hearings on HIE 6 and 7 in March 2018, Mr. Don Morgan QC, the Minister of Labour Relations and Workplace Safety for the Government of Saskatchewan, appointed Arbitrator Comrie to arbitrate a new dispute between the parties identified as HIE 11.

[7] Similar to HIE 7, HIE 11 was resolved and settled following the issuance of the Initial Award, but prior to the date of this Final Award.

[8] Additionally, the Union filed new grievances with the Employer identified as a new Cornwell grievance alleging Ms. Cornwell was illegally terminated by the Employer in May 2018 ("HIE 13") and another new grievance disputing whether the Employer was responsible to pay the Union's share of Arbitrator Comrie's legal fees flowing from the Initial Award ("JD 3").

[9] On December 3, 2018 prior to the consideration of any other issues, Arbitrator Comrie advised the parties that he was obviously not a neutral arbitrator with respect to JD3 regarding the payment of his account issued following the Initial Award.

[10] For that reason, he advised he had a conflict relative to JD3 and wished to insure they understood the nature of the conflict and their options prior to proceeding further. He spent some time to explain the conflict and encouraged the parties to ask any questions they had about this matter. He also reviewed the option of appointing another arbitrator to hear JD3 independent from all other issues. The parties then each agreed that they wanted Arbitrator Comrie to hear their arguments on JD3 and agreed he should proceed to then rule on the matter as soon as possible.

[11] At the hearing on December 3, 2018 the parties also unanimously agreed to appoint Arbitrator Comrie to hear arguments relative to HIE 13 and that he had jurisdiction to rule on that dispute as well as JD3.

[12] Accordingly the issues before the Board which everyone agreed Arbitrator Comrie had jurisdiction to rule on were, as of the conference call on December 3, 2018, the following:

a) HIE 6 – the Cornwall Grievance as defined in the Initial Award

b) HIE 13 – the second Cornwall Grievance relative to her termination in May 2018

c) JD3 – the issue of responsibility for Arbitrator Comrie's September account plus any other charges related to matters since that interim account.

[13] The parties also agreed to waive compliance with Section 6-50(1) of The Saskatchewan Employment Act with respect to all issues dealt with in this Final Award.

CHRONOLOGY OF EVENTS

Issuance of the Initial Award on September 4, 2018

[14] After a lengthy review of the facts and the applicable law, the Initial Award determined the MoA as executed by the parties did not include all the language that had been agreed to and which was to have been inserted into the MoA and therefore, concluded the doctrine of "rectification" was available and could be used to remedy the situation.

[15] The Board also acknowledged that neither party had considered the doctrine of rectification until recently nor considered what would be an appropriate remedy in the circumstances. The Initial Award therefore concluded the Board would remain seized of all issues before it, and recommended that the parties attempt to settle all outstanding issues, bearing in mind the new landscape that existed by virtue of the findings in the Initial Award.

[16] It is helpful to remember that the parties had been operating from the date of execution of the MoA on September 28, 2017 until September 4, 2018 as if the MoA was in effect without any of the changes that would have been incorporated by the application of the doctrine of rectification.

[17] In particular, the provisions of sections 5, 6 and 7 of the MoA failed to limit the new provisions of Section 4.02 d), e) and f) to new employees. The Initial Award described the actual clause that should have been inserted into the MoA when it was originally signed.

[18] As a consequence, during the 11 months from September 28, 2017 until the issuance of the Initial Award on September 4, 2018 all Union members assumed the original MoA was in effect and managed their lives accordingly, including for example finding alternative employment when the shifts they had prior to the strike were no longer available.

[19] The Board therefore concluded it would be best for it not to reach any firm conclusions relative to the remedies available in light of the fact the parties had had no time to consider their positions on the various issues left to be resolved, in light of the application of the remedy of rectification.

[20] The Board also recommended that the parties consider all settlement options, including an agreement that would leave the MoA in place as it was signed on September 28, 2017 without any of the changes that would be incorporated by rectification. If the parties were able to agree upon the damages payable to union members if any, in lieu of rectifiying the MoA, then that might be a more sustainable model going forward, bearing in mind the financial evidence presented by Mr. Leung.

[21] The Initial Award also specified that if the parties had not reached a satisfactory mutual agreement by November 1st, either party could contact Arbitrator Comrie before November 15, 2018 and request the resumption of hearings to rule on any outstanding issues.

Negotiations Between the Parties from September 4, 2018 to December 3, 2018

[22] The Original Collective Agreement had a term of 3 years from May 1, 2012 to and including April 30, 2015. Following April 30, 2015 by operation of law, the Original Collective Agreement remained in place on a year to year basis while the parties negotiated an extension and modifications of the Original Collective Agreement.

[23] Unfortunately, those negotiations did not go well and the Union went on strike in August of 2017 which led to the execution of the original MoA at the end of September.

[24] The MoA extended the Original Collective Agreement a further 5 years, with the result that it is now agreed to be in place until September 27, 2022.

[25] Negotiations between the parties in September, October and November 2018 resulted in an agreement to settle HIE 7 by certain payments to specific individuals whose status had not been resolved at the time of Initial Award, including without limitation, Amy Dae, Brenda Pelletier, Twinkle Cote and Sheri Lasko. Payments in specific amounts to those 4 individuals were agreed to settle all issues arising out of HIE 7 in a final and conclusive manner.

[26] Similarly, the parties agreed to settle HIE 11 relative to the determination of the amount, timing and conditions of bonuses for employees hired before October 1, 2017 and different amounts for employees hired after that date. Again, the agreed settlement is intended to resolve all matters arising out of HIE 11 in a final and conclusive manner.

[27] It was also agreed that apart from the remaining matters of HIE 6 and 13 and JD3, there were no other issues outstanding between the parties requiring an independent dispute resolution process.

THE ARGUMENTS RELATIVE TO HIE 6 AND 13

The Union's Submissions

[28] The Union's position relative to Ms. Cornwell was that as a long standing employee of 17 years (13 of which were part-time weekend shifts), she was entitled to $9,780 dollars resulting from approximately 544 hours that she could have worked from October 7, 2017 to August 26th 2018 if she had been permitted to work the shifts after the strike that she had been working prior to the strike, and which would have been available to her had the correct MoA been in place originally.

[29] The Union acknowledged Ms. Cornwell had an obligation to find alternative employment to replace these hours and submitted evidence to confirm she had looked for work and managed to find some part-time employment elsewhere during the 11 months from September 28, 2017 to August 31, 2018, but it did not replace the work she would have been able to perform for the Employer.

[30] Documents were submitted by the Union to establish the hours and dollar amount of the part-time work Ms. Cornwell did find during those 11 months which was approximately $1600.

[31] The Union therefore argued that Ms. Cornwell was entitled to the full amount of $9,780 that she lost by virtue of the Employer failing to honor the language in agreed to between the parties relative to employees working prior to the strike.

[32] The Union also indicated that Ms. Cornwell would be willing to work the shifts she had prior to October 2017 if they were offered to her again and the Employer indicated they would be willing to hire Ms. Cornwell, without however clarifying whether the same shifts would be available as she had prior to the strike or only some other shift work would be made available to her

The Employer's Submissions

[33] The Employer did not submit any argument relative to hours lost by Ms. Cornwell prior to May 2018 (other than submissions made in March prior to the issuance of the Initial Award which were therefore no longer applicable).

[34] Even though Ms. Cornwell had been a long time employee of the Holiday Inn in Regina, and even though she had not been given any of her original shifts after the strike, the Employer proceeded to terminate Ms. Cornwell on May 18, 2018.

[35] The grounds given for the termination at the time (ie. May 2018) were that she had refused to accept two different offers of shift work made to her earlier in May. This refusal contravened the terms in the originl MoA without the rectification language. At that time in May 2018, the Employer did not know that this Board would rule that the MoA they were operating under was not enforceable because it did not include language that had been agreed between the parties.

[36] The Employer therefore felt in May 2018 that they were entitled to keep managing the hotel in the same manner as they had been all year, namely in accordance with the terms of the MoA without any of the limitations about the applicability of the new language to new employees only. The hotel therefore terminated her employment under Article 4.02 (iv) as if that language applied to Ms. Cornwell, which the Board has now ruled (in September 2018) it was not.

[37] The Employer also argued that because Ms. Cornwell had testified in the March hearings that she would accept any offer of shift work, that she was therefore bound to accept any offer two months

later, regardless whether such an offer conflicted with her other employment obligations or regardless whether she simply changed her mind.

THE ARGUMENTS RELATIVE TO JD3

The Union Submissions on JD3

[38] Article 16.02 of the Collective Agreement contains 5 paragraphs, the fourth of which reads as follows:

> "Each party shall bear the expenses of its representatives, participants, and witnesses and of the preparation of its own case. Each party shall present its own case without the use of a Barrister or Solicitor. The losing party shall bear the fees and expenses of the Chairperson or single Arbitrator. The hearing room and other expenses incidental to the Arbitration hearing shall be borne equally by the parties. The parties agree to use Union facilities wherever possible."

[39] The Union position throughout HIE 6 and HIE 7 was that the Grievors were entitled to "full redress and pay" because of the "unfair and unjust" management and scheduling of employees by the Employer after September 28, 2017, the date of execution of the original MoA.

[40] The Union position throughout HIE 6 and 7 was that the Grievors were entitled to "full redress and pay" because of the "unfair and unjust management and scheduling of employees" by the hotel after September 28, 2017 (the date of execution of the MoA), and because they were now entitled to some form of compensation, they had "won".

[41] Accordingly, in its opinion, the Employer was clearly obliged to honor the above quoted provisions of the Collective Agreement.

The Employer position on JD3

[42] The Employer's position on the proper interpretation of Article !6.02 was more nuanced. It argued that the language was vague because almost all arbitrations include more than one issue and accordingly, it can be difficult to determine which issue should determine whether one party or the other has "won" or "lost".

[43] In the particulars of this case, the Employer acknowledged its "loss" on the issue of rectification, but argued Arbitrator Comrie had recognized the financially precarious position of the

Holiday Inn leading to a recommendation that the MoA not be rectified, because the hotel could not be sustainably operated under the terms of a rectified MoA.

[44] In the view of the Employer, they had "won" on this issue.

THE DECISION

Part A: HIE 13

[45] From the above information, it is clear that the Employer justified its termination of Ms. Cornwell on the understanding that it was entitled to do so under the terms of the MoA as they existed prior to any rectification. The Board has determined it was not entitled to act on that basis for the reasons outlined in the Initial Award.

[46] That being the case, the termination of Ms. Cornwell was therefore unjustified and illegal.

[47] Accordingly, the termination of Ms. Cornwell should be ignored in the consideration of whatever she may be entitled to under HIE 7.

Part B: HIE 7

> **"Arbitrator Weatherill elaborated on the basic principles which guide the awarding of damages. He reiterated that the purpose of damages is to place the aggrieved person as nearly as possible in the position that he or she would have been in had the collective agreement not been breached. Compensation should therefore cover any loss of opportunity to earn incentive or overtime pay. At the same time, however, Arbitrator Weatherill noted that a "make-whole" remedy is subject to the normal duty to mitigate and applies only to *actual* loss, not notional loss."** (Mitchnick and Etherington, *Labour Arbitration in Canada,* 3rd ed, Lancaster House 2018 at 190)

[48] A starting point in the analysis would be to acknowledge that according to the ruling in the Interim Award, the Collective Agreement actually agreed to between the parties included language described in that Award as New Paragraph 16, which would have limited the provisions of Article 4.02 (d), (e) and (f) in paragraphs 5,6 and 7 of the MoA to new employees only, hired after September 28, 2017.

[49] Accordingly, the Grievor should have been given the opportunity to work the shifts she had been working prior to the strike for 13 years. Had she been given that opportunity she would have worked most weekends from September 28, 2017 to the date of the Interim Award.

[50] Evidence submitted by the Grievor during their recent negotiations and substantially accepted as accurate by the Employer substantiated Ms. Cornwell would have earned approximately $9,600 had she worked all of these shifts. From that amount should be deducted an allowance for the income she received from alternative employment in the amount of approximately $1,600.

[51] Additionally, there is no way to determine with the evidence before the Board whether for example, there was work on each of those shifts and whether Ms. Cornwell would have been available to work on every such weekend. Was she sick on any of these weekends?

[52] Accordingly, the Board determines that an approximation of $1,000 should be assessed as an estimate of time and related income she may not have been available to earn for personal reasons or because there was no work from September 28, 2017 to September 4, 2018.

[53] On that basis, the Board holds that Ms. Cornwell is entitled to $7,000 for damages to place her as nearly as possible in the position she would have been had the Employer honored its obligation to recognize the Grievor's rights as accumulated prior to the strike.

Part C: JD3

[54] The resolution of this issue calls for an interpretation of the fourth paragraph of Article 16.02 of the Collective Agreement quoted above. That interpretation simply requires some meaning be given to what it means to "lose" HIE 6 and 7.

[55] The Union's argument is relatively straight-forward as it says it "won" the main issue in both grievances and the Employer "lost" with the result that all the costs and expenses of the Arbitrator's accounts for these two grievances, and for the related grievances of HIE 13 and JD3, should be paid by the Employer.

[56] The Employer argues it has already paid its one-half share of the total fees and expenses of the Arbitrator and that it is unfair in the circumstances to require it to also pay the other half sent to the Union by Arbitrator Comrie as originally arranged by the parties, without consideration of Article 16.02.

[57] Moreover, the Employer argues that its main argument at the hearing was that the overall financial situation of the hotel was such that the operation of the business was simply not sustainable with the arrangements as they existed in the Collective Agreement prior to the strike. Arbitrator

Comrie acknowledged the importance of this consideration and commented positively on the evidence of Mr. Leung relating to this issue.

[58] The Employer therefore argues that it "won" the main point it advanced at the hearing, namely that the unsustainability of the hotel operations was accepted as a fact as long as the Union wanted the "Rectified" MoA to be put into effect.

[59] For that reason, Arbitrator Comrie recommended that when the parties attempted to negotiate a resolution of all outstanding issues after the issuance of the Interim Award, they should attempt to reach a consensus that appropriately compensated the Grievors, but allowed the original MoA to stay in place without being "rectified". To the full credit of the Union and its employees, they recognized the value of this recommendation and agreed to proceed on that basis.

[60] Having carefully considered the original intent of the language in Article 16.02 and the facts in all these grievances, the Board has determined that each party on this issue is partially correct and that accordingly, the one half of the Arbitrator's accounts for fees and expenses originally submitted to the Union for payment should be split equally between the Union and the Employer.

[61] This account came to a total of approximately $14,500 up to September 3, 2018. This original account and the subsequent account of Arbitrator Comrie in the approximate amount of $3000 (to be submitted soon) for all work completed up to the date of this Final Award should be paid equally by the Union and the Employer. This results in an outstanding financial obligation of each party of approximately $8,800 plus incidental expenses and GST, less any amount already paid to date on behalf of the Union.

CONCLUSION

[62] In summary, based on the review outlined above, the Board holds as follows and hereby orders:

a) HIE 13: The Grievor Ms. Cornwell was terminated illegally in May 2018.

b) HIE 7: The Grievor Ms. Cornwell is entitled to damages in the amount of $7,000 to account for loss of shiftwork from September 28, 2017 to September 4, 2018 (the date of the Interim Award) resulting from the Employer's attempt to enforce the MoA without recognition of the rights of employees accrued prior to the strike.

c) JD3: The Employer will be responsible for its one-half share of all Arbitrator Comrie's accounts for fees and expenses submitted in respect of the Initial Award and this Final Award. Responsibility for the other half of Arbitrator Comrie's accounts originally submitted to the Union or any future Union accounts shall be split equally between the

Union and the Employer. The net result is that the Employer will pay three-quarters of all accounts so submitted and the Union will pay one-quarter of such accounts.

d) <u>All other issues between the parties that arose and were resolved prior to the date of this Final Award:</u> All issues that have arisen and were resolved shall be implemented in accordance with the agreements made between the parties to settle such matters. At the December 3, 2018 the parties agreed that with the exception of the matters at issue in this Final Award, all issues between the parties had been resolved. The parties agreed that this Final Award should include a statement to this effect on the understanding that if any disputes arise relative to matters at issue between the parties prior to the date of this Final Award, this Board would resolve any such dispute after further submissions from the parties. Accordingly, if any dispute does arise in the future about any matters at issue prior to the date of this Final Award, the Board shall remain seized of jurisdiction to rule on any interpretive disputes between the parties regarding such settlements.

John Comrie, QC, FCIArb Dated January 8, 2019

EXHIBIT A: INTERIM AWARD BETWEEN THE SAME PARTIES – 17 September 2018

REVISED Final Award - As issued 17 September 2018

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CHELTON SUITES HOTEL (1968 LIMITED) doing business for the account of HOLIDAY INN EXPRESS & SUITES ("Employer")

EMPLOYER

AWARD

Before

John Comrie QC, FCIArb **Acting as a Single Arbitrator**

Heard in Regina, Saskatchewan on March 7, 8 and 9, 2018

For the Employer: **Esther Ang, Edmund Leung**

For the Union: **Garry Whalen, Christine Fiedler**

INTRODUCTION

[63] The parties to this arbitration are firstly, Chelton Suites Hotel (1968) Limited doing business in Saskatchewan for the account of Holiday Inn Express & Suites ("Employer" or the "Company" or the "Hotel" or "Holiday Inn"), a body corporate and secondly, Unite Here! Local 41("Unite Here!" or the "Union"), acting on behalf of all its members (the "Members"), including without limitation Ms. Christina Cornwell ("Grievor" or "Ms. Cornwell) and Ms. Brenda Passmore ("Grievor" or "Ms. Passmore"), all of which Members and individuals are collectively sometimes referred to as the "Grievors".

[64] This arbitration arises pursuant to two Grievances (collectively the "Grievances") prepared by the Union on October 3, 2017 (the "Cornwell Grievance") and on October 4, 2017 (the "Members' Grievance") regarding the alleged "unfair and unjust management and scheduling" of all Union employees of the Employer, including the Grievors in contravention of Article 5 (and any other applicable Articles) of the Collective Agreement between the Employer and the Union for the time period from May 1, 2012 to April 30, 2015 (the "Original Collective Agreement") as modified by the Memorandum of Agreement (the "MoA") signed by the parties on September 28, 2017 (which Original Collective Agreement as so modified is called the "Amended Collective Agreement").

[65] The Grievances asked for "Full redress and pay any monies and/or benefits lost to the grievor due to management's unfair and unjust actions" and "any other remedy deemed just and equitable". It was explained by the Union at the hearing that the Cornwell Grievance was intended to be representative of similar claims by all Members relative to the issues between the Employer and the Union, which led the following day to the filing of the Members' Grievance.

[66] The hearing of the Grievances was carried out in sequence with the Cornwell Grievance being heard first followed by the Members' Grievance. It was agreed by the parties that all evidence heard at the hearing relative to the first Grievance would be applicable to the second Grievance and vice versa. Accordingly, this Award combines all the evidence presented at both grievance hearings into one document and combines the award ruling from both grievances in this one award.

[67] The parties also agreed that Mr. Comrie (the "Board" or the "Arbitrator") had jurisdiction to deal with the Dispute and waived compliance with section 6-50(1) of The Saskatchewan Employment Act and Article 4.18.1.4 of the Collective Agreement. The parties also confirmed their previous agreement to share equally the Arbitrator's fees and incidental expenses, notwithstanding the provisions of Article 16.02 of the Collective Agreement.

FACTUAL CHRONOLOGY

History of Negotiations

[68] The Original Collective Agreement expired according to its terms and the Employer and the Union continued negotiations unsuccessfully from 2015 to September 2017. Although some information of this history is helpful background, much of the detail is immaterial to this arbitration other than the fact the negotiations were not successful.

[69] Mr. Whalen testified that after many meetings over the course of more than one year, he was told the individual they had been negotiating with had no authority due to structural changes in the Company.

[70] He then began negotiations with the current management and it became necessary to start negotiations all over again, as their proposals were very different. Those negotiations proved to be very difficult as all offers from management included a series of "takeaways" and no offer of any new benefits. This included proposals to remove the shoe allowance, remove bonuses, no paid sick days and increased costs to employees for health benefits.

[71] In due course, Mr. Whalen spent considerable time preparing the Union members to understand what they could expect from bargaining was a series of "cutbacks" in benefits. Mr. Whalen also testified he and the Union members did understand the Regina hotel had financial problems and they were prepared to give up some benefits, but not their whole seniority system.

[72] By the spring of 2017, the Union decided that further negotiations did not make sense and its members voted to go on strike. This was followed by government imposed mediation that was unsuccessful. By August 28, 2017 the Union was in a position to commence the strike and they gave notice to do so. The strike continued until 6pm on the night of September 28, 2017 when the MoA was voted on and approved.

Sequence of Events leading up to the execution of the MoA

[73] During the strike, previous grievances were filed for non-payment of overtime and dates of October 3 and 4, 2017 were set to hear the matter.

[74] On September 19, 2017 the negotiations reached a new stage when Mr. Whalen sent Mr. Giri Saravanamuttu, the Corporate Controller of the Employer (based in Toronto) a letter (Exhibit U4) in which the Union offered to meet with the Company to "discuss the withdrawal of the grievances and settling the strike".

[75] The letter contained references to what the Union considered the most important issues between the parties and indicated it was willing "to discuss" all of them prior to the scheduled arbitration for October 3 and 4. The letter did not however contain any reference to the manner in which so-called "regular" and "restricted" employees would be treated and have their hours scheduled. That subject did not appear in the negotiations until the written proposal from the Employer on September 25, 2017.

[76] There then followed an extensive series of phone calls and emails between the parties (Exhibit U5) including discussions about all the issues referred to by Mr. Whalen in his September 19th letter.

[77] On September 25, following discussions with Mr. Whalen the previous week and the Company owners, the Employer submitted the first draft of the MoA (Exhibit U6) that dealt with all the issues they had been discussing with the Union in the previous week plus completely new proposals in paragraphs 5, 6 and 7 of the Memorandum. These new proposals were to add new subsections (d), (e) and (f) to Article 4.02 of the Original Collective Agreement (the "New Proposals"). They read as follows:

"5. Article 4.02 add (d) Regular and Restricted Employees (For the purpose of Scheduling)

i) Regular employee - is an employee who remains available for work on a continuous basis with no restriction on his or her availability. A Regular employee shall at all times be regarded as senior.

ii) Restricted employee – is an employee who restricts his or her availability in terms of days or hours. The Employer shall determine if the requested restrictions are reasonable and possible based on operational requirements.

iii) An employee must declare in writing the specifics of their availability in days of the week, shifts or hours which they are available for work. Restrictions can be revised only if the Employer determines it is reasonable to do so based on operational requirements.

iv) Once availability has been declared, if the Restricted Employee refuses four (4) scheduled shifts (other than for legitimate absences approved by the company) within a thirty (30) day period, the employee may have his services terminated.

"6. Article 4.2 add (e) Scheduling

i) Regular employees will be scheduled their hours of work on the basis of seniority in their classification and department and Restricted employees will then be scheduled the remaining hours of work on the basis of seniority in their classification and department. It is agreed the senior employee in each category of Regular or Restricted employees will be scheduled hours of work equal to or more than junior employees in that category.

ii) Notwithstanding the foregoing, a Restricted employee who has been scheduled a specific shift based on his or her restrictions will not lose that shift in the circumstances where a more senior Restricted employee has altered his or her restrictions.

"7. Article 4.02 add (f) Change of Status

i) Regular employee - If a regular employee wishes to restrict his hours and become a Restricted employee they must apply, in writing to their department head, one month prior to the commencement of the restriction. Such notice may be less than one (1) month in extenuating circumstances.

ii) If a Restricted employee wishes to remove all of his or her restrictions and become a Regular employee, he must wait until a position becomes vacant and apply to the posted position in accordance with the provisions of the Agreement. If a Restricted employee becomes a Regular employee under this clause, they will move to the bottom of the seniority list for the purposes of scheduling and their department seniority date shall be the date they became a regular employee

iii) An employee may change their restrictions on availability to a maximum of three (3) times per year, except in extenuating circumstances. Restrictions can be revised only if the Employer determines it is reasonable to do so based on operational requirements."

[78] This was the first time Mr. Whalen had seen the New Proposals and from the beginning he said he was "shocked" by them and testified he told the Employer they would be unacceptable.

[79] To this point, Mr. Whalen testified that seniority had always been recognized by the Employer based purely on an employee's start date and had nothing to do with whether a person worked full-time or part-time.

[80] It was true he said, that the "Letter of Understanding #3" in the Original Collective Agreement created the definition of "Restricted employee" and prescribed the obligation for every part-time employee to complete an "availability schedule" to indicate what hours such a part-time employee could work. The evidence suggested this obligation was not widely enforced.

[81] Regardless, part-time and full-time employees all had their seniority recognized based on their original start date without any attention being paid to whether the employee was "regular" or "restricted" or "part-time" or "full time". All full time and part-time employees were on the same seniority list. This evidence was uncontroverted at the hearing.

[82] Mr. Whalen made particular reference to the new sub-section (e) to be added to Article 4.02 which provided in part as follows:

> "Regular employees will be scheduled their hours of work on the basis of seniority in their classification and department and Restricted employees **will then be** scheduled the remaining hours of work on the basis of seniority in their classification and department." (emphasis added)

[83] The significance of the bolded words was that all Regular employees would have their work schedules completed first without regard to anyone in the Restricted category, even if there were Restricted employees with greater seniority than the Regular employees who were being assigned work shifts.

[84] At this point Mr. Whalen elaborated that the Hotel had an unusually high number of employees with many in the 17-18 years category. He said the history of good labour practice had led to the development of a number of loyal employees.

[85] By the end of the day on Monday, September 25th, the Union had responded to the first draft of the MoA with its own document indicating 12 of the 15 paragraphs were either "not agreed" or needed clarification. In particular, the New Proposals in paragraphs 5, 6 and 7 of the draft MoA were shown to be "not agreed" and the Letter of Understanding #3 was shown to be renewed, as opposed to being cancelled under the draft MoA from the Employer.

[86] Discussions renewed again on September 26 and 27, 2017 when Mr. Saravanamuttu called Mr. Whalen. They then resumed negotiations and went through all outstanding issues. In due course, they agreed to a number of matters, including minimum wages, Christmas bonuses, healthcare premiums, sick days, the number of hours that defined full-time (agreed to be reduced) and section 3 of the MoA was agreed, with some changes.

[87] However, there continued to be disagreement about the New Proposals in paragraphs 5, 6 and 7 of the draft MoA. Mr. Saravanamuttu could not understand why the Union was upset by these provisions as they only applied to part-time employees. He asked Mr. Whalen "What do you want to make you happy?" Mr. Whalen explained that these proposed provisions negatively affected so many of the existing employees that they were just not going to ever be acceptable to the current members of the Union.

[88] Mr. Whalen explained to the Board that in his opinion, cost was the main reason that motivated the Employer to organize the scheduling so the long standing employees with long seniority would not be able to compete with the new employees who made themselves "regular employees".

[89] The relative cost of a senior employee compared to a new employee showed a 41% increase to hire the senior employee when a new one would be willing to work. To make this point he presented a comparison showing the costs associated with the Grievor Cornwell and the new employee Jennifer Macwan who had been getting the shifts after the strike that the Grievor used to get.

[90] The comparison Mr. Whalen presented to the hearing resulted in the conclusion that that on an annual basis, the cost of employing Christina Cornwell for 9 days a month was $17, 512.14 per year versus costs of $12,447.11 to employ Jennifer Macwan for a similar amount of time. That was approximately a 41% increase in costs resulting just from one employee.

[91] The calculation of the costs was made assuming

a) For Christina – an hourly rate of $17.55 x 72 hours = $1263.60 plus an allowance of $1,263.60 for 5 weeks vacation at 10% plus $800 Christmas bonus plus $32.50 for shoe allowance and an extra 25 cents per hour for being a shop steward all added up to **$17,512.14.**

b) For Jennifer – an hourly rate of $13.58 x 72 hours = $977.76 plus an allowance of $703 for 3 weeks vacation at 6% plus a $10 Christmas bonus plus no shoe allowance and no extras for union work all added up to **$12, 447.11.**

[92] For this reason, it was clear in the view of Mr. Whalen that the New Proposals in paragraphs 5, 6 and 7 were designed to reduce costs by making it easier to reduce the use of employees with longer seniority, especially when the employees did not understand the effect of signing restrictive availability forms that now under the new provisions, prevented them from becoming regular employees without giving up all their seniority.

[93] He stated the Union would never have agreed to make these provisions effective against current members, especially when there were so many employees with long seniority who worked less than a full time shift. This was particularly true because the Union had "given back" benefits in virtually every other area of negotiations.

[94] By the end of their verbal negotiations, Mr. Whalen testified they had agreed that these contentious provisions would remain in the MoA, but a clause would be added to state that the New Proposals in these three paragraphs 5, 6 and 7 "would not apply to the existing employees of the Hotel", but only to new employees.

[95] With that agreement in place, the parties then agreed the Union would organize a vote on the MoA as amended by these discussions and if approved, the Union members would return to work three days after the vote, namely Monday morning, October 2, 2017.

[96] Mr. Whalen testified he then returned to his office on Thursday morning and advised his executive assistant, Ms. Christine Fiedler, what the agreement was that had been reached and the need to organize a vote for that evening. He also instructed her to make the changes to the MoA that had been agreed to with the Employer and how they should be described in the written document.

[97] He also described that Thursday, the 28th as a very busy day because the International Reps of the Union were in town and he had prearranged meetings with them. He and Ms. Fiedler outlined the work that had to be done that day and agreed on how to split it up.

[98] That included getting strike pay from the international office for the employees and a large number of other matters. He left the office at 10am and went to the picket line to inform the Union members that it was to come down at 4pm and the general meeting would commence at 5:30pm.

[99] The last item Mr. Whalen attended to in the office was to sign the back page of the MoA and give it to Ms. Fiedler so she would have it available should the document be approved at the general meeting.

The evidence of Mr. Giri Saravanamuttu regarding the negotiations of September 25- 27, 2017

[100] Mr. Saravanamuttu also testified about the whole history of negotiations between the parties, including those that occurred between delivery of his initial draft of the MoA on September 25th and the conclusion of his verbal discussions with Mr. Whalen at the end of Wednesday, September 27th.

[101] Mr. Saravanamuttu testified he is the Corporate Controller of the Employer and has held that position with the Employer's group of companies for 15 years. He had made an extra effort to attend the hearing due to travel difficulties and the Board thanked him for his efforts in this regard. He also confirmed the Company manages 15 hotels, 10 of which are unionized, and 4 of which are in Canada.

[102] He testified that the Employer is doing poorly financially, losing about $250,000 - $300,000 per year and that the owner of the Company was considering turning the facility into a retirement home. Later in the hearing, Mr. Edward Leung testified with considerable more detail about the financial condition of the hotel and confirmed these losses were an accurate annual estimate of what the facility was experiencing year to year.

[103] Mr. Saravanamuttu testified that on the 26th and the 27th there were telephone calls between him and Mr. Whalen and he confirmed much of the same information provided by Mr. Whalen relative to negotiations with one exception. That exception is the important issue of what was agreed relative to his New Proposals in paragraphs 5, 6 and 7 of the MoA designed to add new sub-sections 4.02 (d), (e) and (f) relative to restricted employees and the operation of seniority.

[104] On that issue, Mr. Saravanamuttu denied that he and Mr. Whalen had engaged in any discussion related to the New Proposals in the draft MoA he had sent on the 25th. He specifically denied having agreed to the addition of a new provision in the MoA that would limit the effect of paragraphs 5, 6 and 7 by making them applicable only to new employees as Mr. Whalen had testified previously.

[105] On questioning from the Board as to why Mr. Whalen would have gone to the vote and told Union members about the inapplicability of the New Proposals to existing employees, Mr. Saravanamuttu said he could not explain that and said Mr. Whalen should have cancelled the meeting and prepared the MoA in a form he thought acceptable and discussed that with the Members.

[106] On questioning from Mr. Whalen, Mr. Saravanamuttu confirmed that the proposals the Employer had made in the negotiations, particularly the New Proposals in paragraphs 5, 6 and 7, were ones which had the effect of reducing costs to the Employer and reducing benefits to employees, which the Employer testified only made sense considering the financial condition of the facility.

[107] Finally, Mr. Saravanamuttu confirmed the Union's understanding of the operation of the New Proposals in paragraphs 5, 6 and 7, particularly the additions to new Article 4.02 (e). Under questioning from Mr. Whalen, he stated that the Union had signed the document the way it was and it was now a legal document and could not at this point be changed and the Union would have to live with it.

The events of Thursday, September 28, 2017

[108] Ms. Fiedler testified that indeed the work that day was very burdensome and she was juggling a lot of balls as the day went on. She confirmed Mr. Whalen had asked her to make a number of changes to the draft MoA provided by the Employer.

[109] She testified she made the changes Mr. Whalen had asked her to make, but unfortunately, she did not insert the qualification that would restrict the operation of the New Proposals to new employees only. At 10:43 am on the morning of Thursday, September 28th she sent Mr. Saravanamuttu this revised copy that now included the last page that Mr. Whalen had previously signed that morning and told him "This is the document that we will be voting on."

[110] Two hours later she realized she had made some mistakes in this document and she sent Mr. Saravanamuttu another revised copy with changes to a section dealing with the carryover of sick days at the end of the year, but again without the missing language that would restrict paragraphs 5, 6 and 7 to new employees. Ultimately, this was the document that was prepared and taken to the general meeting of the Union that evening.

[111] When Mr. Whalen got to the general meeting and reviewed the document that had been sent to the Employer and which would be presented to the Union members to ratify, he realized that Ms. Fiedler had not inserted the language that would limit the effect of the New Proposals in paragraphs 5, 6 and 7 of the MoA to new employees and specifically state that the new provisions did not apply to the existing employees.

[112] He then decided to proceed with the meeting regardless of the mistakes in the draft MoA. He presented the document to the membership and stated that he stood up in front of all 12 members and went through the document paragraph by paragraph. He explained to them that there were words missing from the draft document. He asked the membership to vote on the MoA as if the missing words had been inserted and he promised them he would insure the words were in fact inserted before the MoA was made effective and returned to the Employer.

[113] The meeting carried on as planned and in due course the membership voted 10-2 in favour of of making the changes to the Original Collective Agreement as outlined in the MoA presented to the meeting on the understanding they were approving a document that was missing certain language and that their approval was subject to Mr. Whalen inserting the language he had described to the members before it was signed and returned to the Employer.

[114] Ms. Fiedler then proceeded to record the vote and signed Exhibit U12 to document that the membership had voted to ratify the return to work by a margin of 10-2.

[115] Mr. Whalen testified he thought he had made it clear to Ms. Fiedler that she was only to return the MoA to the Employer with the insertions he had asked her to make to the document earlier on Thursday. Ms. Fiedler testified that she was asked by Mr. Whalen to make these changes and she simply forgot due to all the activity on Thursday.

[116] Under questioning from the Employer as to why she had allowed this to happen, she explained she was human and due to all the activity on Thursday, she had simply forgot to make these changes.

[117] On the morning of Friday, September 29th at 11:20 am, Ms. Fiedler testified that not realizing she was sending the wrong document – that is, the MoA which did **not** contain the qualification to paragraphs 5, 6 and 7 relative to existing employees - she emailed Mr. Saravanamuttu advising him the Union had ratified the MoA and the Amended Collective Agreement and she then attached the wrong document.

[118] In her mind, she was referring to the agreement that been reached between him and Mr. Whalen with the limiting language. She testified that unfortunately, she mistakenly attached to her email the actual pdf of the document that been presented to the meeting the previous evening, which of course did not contain any of the missing language qualifying the application of the New Proposals in paragraphs 5, 6 and 7 to new employees only and preventing their application to the existing employees.

The Union learns of its mistaken approval of the wrong MoA

[119] On the morning of Friday September 29th following notification of the results of the vote, Mr. Saravanamuttu requested Ms. Fiedler to have all members of the Union to "send their availability to you or Esther ASAP so we can schedule them back to work".

[120] Ms. Fiedler did not have any "availability forms" and asked how she could get them. She was advised to get them from the Regina manager, Ms. Esther Ang. At the same time she was advised that the forms had to be returned to Esther no later than 5pm local time on Monday, October 2nd and

any employee who did not submit the forms on time would be considered to be a "Regular" employee and available for work without any restriction.

[121] This request to submit availability forms then began a very confused set of interactions between Mr. Whelan, the Members and the Employer. Most employees had never filled in such forms and they did not know what they were for. They mistakenly thought in light of what they had been told by Mr. Whelan about the new provisions not applying to existing employees, that there would be no need to complete the forms.

[122] Moreover, it took a few days before Mr. Whalen realized the MoA had been returned to the Employer without the additional language, which made the whole issue of why "availability forms" were being requested and signed all the more confused.

[123] In the end, Mr. Whelan was also very confused by this request and he ended up going over to certain Union members' homes to help them complete the form. He testified, as did several other Union members, that he told them that the forms did not matter because the new provisions of the MoA imposed by paragraphs 5, 6 and 7 of the document did not apply to existing employees.

[124] At this point, he still had not realized the wrong document had been returned to the Employer. He therefore advised the employees to simply complete the forms to describe their availability to perform shift work on the same schedules they had been working before the strike.

[125] Mr. Whalen testified the Union did not realize until early in the week of October 2nd what had happened relative to the MoU being returned to the Employer without the qualifying language in it. They had been having trouble understanding the schedules being prepared by the Employer because they did not match their understanding of what had been agreed to in the September 27th phone call.

[126] By October 3rd, what had happened was clear and they filed the grievance of Grievor Cornwell. The response of the Employer was outlined in Exhibit U15, a letter signed by the Employer's local manager, Ms. Esther Ang which makes it clear for the first time in writing that the Employer was ignoring the verbal agreement that had been made relative to the inapplicability of the New Proposals in paragraphs 5, 6 and 7 to existing employees.

[127] In due course, the Union members and Mr. Whelan realized the Employer was firm in its position that there would be no consideration of the discussions they had had on September 27th and the second grievance, the Members' Grievance was prepared on October 4th.

[128] In U15, the Employer quotes new Article 4.02 (e) which is a provision that stipulates that seniority of existing employees will only be recognized within the class of "restricted employees" if that is what any employee has become. Completing the availability forms with anything other than unrestricted availability converted every such employee to such a "restricted employee".

[129] As so many of the senior employees only worked part-time and did not understand the process, most of them completed availability forms with some restrictions and thereby became unable

to compete with "regular employees" whose shifts were all going to be scheduled with priority over everyone. Seniority would forthwith only matter in competition with people who worked part-time, and these shifts were disappearing quickly as the Employer tried to schedule as many full time "regular employees" as possible.

[130] Following receipt of the Employer's letter (U15), Mr. Whelan continued to think perhaps some kind of telephone conversation would resolve the issues. However, that did not happen and by October 6th, he wrote U17 to Mr. Saravanamuttu in which he outlined the position of the Union. It reads in part as follows:

> "As you know, on September 25, 2017 UniteHere! Local 41 advised that it was not in agreement with a number of sections of the employer's proposed MOA, which included parts 5 to 8. We had discussions regarding the scheduling provisions and Letter of Understanding #3. On behalf of the employer, you advised that changes would not apply to current employees. It was specifically stated that current employees would continue to be treated the same as before job action occurred. It was on that basis the MOA was ratified.
>
> …
>
> Since the return to work following the labour dispute, the employer has made changes to the schedules of current employees and, it appears, is applying the agreed to language in a way that negatively affects current employees. This is contrary to the promise made by the employer that current employees would not be affected. This promise was relied upon by UniteHere! Local 41 in ratifying the MOA. For the employer to retract its promise constitutes bargaining in bad faith and UniteHere! Local 41 takes the position that the doctrine of promissory estoppel applies.
>
> "Therefore, it is the Union's position that employees should be put back to work on the same shifts/schedule they had prior to the strike. A failure to do so can only be seen as members being punished due to their involvement with the strike."

[131] Mr. Whalen further referred to his letter of October 6, 2017 quoted above and asked Mr. Saravanamuttu why he had not responded, either in October or any time since. Mr. Saravanamuttu replied that he had become so frustrated with the Union that he did not want to engage in any further discussions with them.

[132] However, once the availability forms had been signed, and when signed describing anything other than unrestricted availability, each such employee was to become a "Restricted Employee" under the MoA and the Amended Collective Agreement. This was in accordance with the New Proposals in paragraphs 5, 6 and 7 of the MoU that now were incorporated into the collective agreement that governed Union members at the Employer.

[133] Once a person became a "Restricted Employee" that person's long standing seniority only applied within the category of Restricted Employees and if a person wished to revise their availability

form, according to the new provisions, they would lose all their existing seniority in the Regular Employee category and go the bottom of the seniority list for that category of employee.

The evidence of Ms. Christina Cornwell

[134] Ms. Cornwell was sworn and gave evidence to describe her experience with these issues. Her evidence was typical of the confusion amongst staff following the vote. She is a long standing employee with 17 years of seniority and is more senior than most other employees. She began work on March 4, 2001.

[135] For the first 3 years, she worked a full time shift. Following the birth of her child, she started working the night audit shift on Saturday and Sunday for 8 months and then when a day shift became available, she worked a Saturday and Sunday shift in the same position from 7am to 3pm each day.

[136] She testified that prior to September 28th, she had never been asked to complete an availability form. She confirmed Mr. Whelan's and Ms. Fiedler's evidence about what transpired at the general meeting of the Union membership on September 28th, particularly as to how Mr. Whelan had gone to some elaborate efforts to explain to the membership each paragraph of the MoA.

[137] In particular, she confirmed that Mr. Whelan had told everyone that the New Proposals contained in paragraphs 5, 6 and 7 would not apply to existing employees and that is the agreement she approved. She had no concern that she would not simply return to her old shift work working the Saturday and Sunday day shifts in the same manner as she had done prior to the strike.

[138] She also testified that no one had told her anything about the availability forms at the general meeting. Later on in the parking lot there was some discussion about the topic, but she had to leave early. As a result Mr. Whelan came to her home the next day and she filled in the form as she had been instructed by her Front Desk Manager, Joanne.

[139] She then confirmed that she only subsequently learned that filling in the form with restricted availability "cemented" her status as a restricted employee. She said that if she had known how the system worked, she would have filled in the form showing unrestricted availability. "I would rather have worked too much than not at all!"

[140] During her time in the Union she testified that she was supportive of the Union's work and that she had completed training for Level I Shop Steward and her certificate confirming same was entered as Exhibit U24.

[141] She testified that the days following the vote were extremely stressful as she could not understand why she was not being brought back to work for that first weekend, and why another employee who had much less seniority would be working that weekend.

[142] She testified that since the strike she had not worked any shifts with the exception of one shift on October 1st. She also stated that during that first weekend she had texted the Front Desk Manager Joanne to ask when she would be scheduled to come back to work.

[143] Subsequent to her testimony, she was asked if the text message to Joanne would still be on her phone and whether it could be made available and she agreed to work on it over the break. When she returned and was resworn, she produced her phone and paper copies of the text exchanges between her and Joanne. They too are instructive and read as follows:

> (**Fri, Sep 29, 3:51 PM**- Grievor): "Hi Joanne, I have a question about the availability forms we need to sign. Are we all just keeping the shifts we had cause that's what Gary says. Or is it if we put in restricted availability we lose our shifts? The wording in the contract is confusing. I don't know what's going on.
>
> (Joanne): "I have no knowledge at this time of the new contract. I would put down whatever u had the last time, unless ur availability has changed? That's the best I can advise you.
>
> (Grievor): "Okay. Thanks. So is there a chance we can lose our shifts?
>
> (**Fri, Sep 29, 5:48 PM** - Joanne): "I don't know all the details of the new contract, so I am not in a position at the moment to answer that. I don't think it has been signed off on yet. I would direct your questions to your union rep. That's why you pay him. I have no knowledge at this point of the terms and conditions.
>
> (Grievor): "He said we shouldn't lose the shifts we had. The wording is weird in the contract though. Will you let me know when I'm supposed to come back to work? He said we shouldn't lose the shifts we had. The wording is weird in the contract though. Will you let me know when I'm supposed to come back to work?
>
> (Joanne): "Of course. I am assuming u would be back by next weekend but I will confirm that.
>
> (Grievor): "Okay thanks. I miss being there.
>
> (**Mon, Oct 2, 2:34 PM** - Joanne): "Everyone is back to work tomorrow Christina. You are scheduled to work tomorrow Christina. You are scheduled Sunday am shift this weekend.
>
> (Grievor): "Not Saturday
>
> (Joanne): "In the new agreement unrestricted employees receive seniority first I am told.
>
> (Grievor): "So are our shifts going to vary or what?

(Joanne): "Accept for night audit there will be no set shifts like mon to fri or weekends. The more available you r the more senior and more hours. Also Impark has taken over the parking lot so staff can't park in there unless we pay their fees.

…….

(**Tue, Dec 5, 1:58 PM** – Grievor): "Hey Joanne, just wondering if I'm going to have any more shifts anytime soon?

(Tue, Dec 5, 1:58 PM – Joanne): " Hi Christina, Sorry there is no available hours at this time. I will advise when there are hours. Also, there is a Xmas lunch for Dec 18th at 12:30pm.

(Grievor): "Okay. Thanks"

[144] The Grievor Christina Cornwell testified in summary that she feels like she was a loyal employee for 17 years and "they are forcing me out and I am disappointed in their behavior".

The evidence of Ms. Brenda Passmore

[145] Ms. Brenda Passmore gave evidence regarding the ratification of the MoA and subsequent events. Prior to the strike she had worked for the Employer for 2 years as an alternate supervisor. Typically she worked every Saturday and Sunday and also on days when Helen Teetart took days off.

[146] Ms. Passmore testified as to what transpired at the general meeting of the Union on the evening of Thursday, September 28th. Her evidence confirmed previous evidence of the Union employees.

[147] In particular, she confirmed that Mr. Whelan had carefully reviewed every clause in the MoA and all the changes that the Union had agreed to give up to reach agreement and bring the strike to an end. She testified that Mr. Whelan had said the changes proposed to be made to Article 4.02 of the collective agreement relative to restricted employees "won't affect the people that are here now".

[148] She also testified that she had been very concerned about the language in the New Proposals contained in paragraphs 5, 6 and 7 which on their face were not difficult to understand and which led to her being anxious about their meaning. She therefore said she had paid very careful attention to what "Garry" said on these clauses.

[149] As a result, she said that she was a bit out of the loop after the meeting and because she thought what was expected was very straight forward, she did not look at the schedule and simply showed up for work on her next work usual work day prior to the strike which was Saturday October 7th.

[150] She was very surprised to learn that on the new schedule, Mary would be working the following Saturday and Sunday (October 15 and 16) and so she asked Helen "What's going on?"

[151] Other employees like Brenda Pelletier came up to her and asked her to speak to the local General Manager, Ms. Esther Ang which she did. When she asked her what was going on, Ms. Passmore said that "Esther threw up her hands and said we were giving her a headache".

[152] As a result, in due course Ester did speak to a few of the employees, but when Ms. Passmore asked "Why am I not getting any shifts?" Esther response was "You are new – you don't know anything – I don't want to talk to you".

[153] She also testified that Esther told her if she tried to fill in a new availability form, it would take a month to process and when she moved to the "regular employee" list, she would be at the bottom.

[154] As a result of all the stress at work, Ms. Passmore found she was getting headaches all the time as she continually worried about getting hours. She was already working 5 days a week at another job and needed the 2 days at the Employer to make up the hours she needed to makes ends meet in her home.

[155] She testified that she had always enjoyed working at the Company, but by February 2018 she could not take it anymore and she took a job at the Ramada Inn.

The evidence of Shari Lasko and Brenda Pelletier

[156] These two other Member employees testified about several apsects of their work, including their difficulties in getting hours after the Amended Collective Agreement had been ratified. Ms. Pelletier in particular was very forceful as her seniority date was February 2000 and prior to the strike, she had worked 4 shifts per week on a very regular basis for many many years.

[157] Each of Ms. Pelletier and Ms. Lasko confirmed the events described by previous witnesses above relative to their understanding that Mr. Whelan had assured them the New Proposals in paragraphs 5, 6 and 7 of the MoA would not apply to any existing employees, only new ones, notwithstanding the written words in the document presented at the general meeting.

[158] After the strike, Ms. Pelletier testified she never got enough hours. She used to always get 32 hours per week. Now, when when other employees went on vacation and she asked to fill in for some of their hours, she was never given any of their time. She felt demeaned because she had to sit by the phone waiting just to see if she could get 4 hours.

[159] Since the resumption of work and the ratification, she testified the Holiday Inn was not a good place to work as everyone was bickering all the time and she felt she was being punished for supporting the strike.

[160] Ms. Pelletier also testified that working at the Holiday Inn was a "nightmare". The poor working conditions included a lot of "bullying" which had caused her medical problems leading to her being on stress leave. She said she believed other employees were also suffering medical issues resulting from the working conditions, but she could not provide first hand direct evidence about that.

The evidence of Esther Ang and Edmund Leung on behalf of the Employer

[161] Mr. Sanavanamuttu was called as a witness and his evidence is summarized above. He was the main negotiator for the Employer during the critical few weeks, particularly the last 10 days before the ratification vote and his evidence was critical to describe, the Employer's perspective on all the issues, particularly the question of what had been agreed orally between he and Mr. Whalen on September 27th.

[162] However, in addition to Mr. Sanavanamuttu, the Employer called two other witnesses to speak to the current situation at the Holiday Inn. The first was Ms. Esther Ang, the local manager of the Holiday Inn.

[163] She testified that she received 17 availability forms from most of the previous employees on October 2nd. She then summarized who was categorized as "regular" and who was categorized as "restricted". Only 8 employees was categorized as "regular" and the balance were all "restricted". Of the "restricted" balance 8 had seniority dates in 2010 or earlier, 4 were between 2011 and 2015 and the balance were 2016 or 2017.

[164] Ms. Ang also testified that she was aware of the difficulties some of the staff had with respect to the changes at the hotel, and she said she had done her best to help them work through the issues. She said she meant them no harm, although she had become frustrated at times

[165] Mr. Edmund Leung testified after Ms. Ang. He was an impressive witness.

[166] Mr. Leung stated he had a total of 30 years in hotel management, starting in Switzerland and Hong Kong where he received much of his early training, and then the balance of 27 years in Canada in both union and non-union hotels.

[167] He testified that prior to the commencement of negotiations in early 2017, he had undertaken a careful analysis of the entire Holiday Inn operation because the owner wanted to shut it down. He testified he was looking to see if changes could be made that would make that choice less attractive and keep the current operation alive as a hotel.

[168] He testified the Hotel had 78 rooms with 29 staff and 4 managers. The majority of the staff – namely about 20-25 or 80-90% - were part-time which in his experience was very unusual and very inefficient and expensive.

[169] The Employer's fringe benefit obligations alone for people who only worked a couple of days a week was very unusual and expensive. This included sick days, health care plans, shoe allowance, Christmas bonus and uniform and cleaning costs, all of which would be more normal for full time employees, but not for part-time employees as was the case at the Employer's facility.

[170] Finally, Mr Leung presented a chart that showed the staff costs for a 1 week period in 2017 when the Employer had a 41% occupancy, which he said was a typical average for the year. That chart demonstrated that using the staff costs that would have been incurred for that week prior to the strike, as compared to the staff costs incurred under the Amended Collective Agreement, each of the following categories showed the following savings:

a) Front Desk – Costs for 1 week would have been $2,476.21 prior to the MoA and $2,195.96 after the MoA for a saving of $280.25 per week, or $14,572.96 in one year;

b) Housekeeping – Costs for 1 week would have been $3,506.32 prior to the MoA and $2,676.59 after the MoA for a saving of $829.74 per week, or $43, 146.23 in one year; and

c) Night Auditor – Costs for 1 week would have been $1,312.68 prior to the MoA and $1,374 after the MoA for a saving of $60.85 per week, or $3, 164.12 in one year.

d) Miscellaneous Other – about $3,000 for the year for each of the breakfast operation and maintenance using similar numbers from the night auditor for a total saving in 1 year of $6,000

e) **Total Staff Cost Savings for the year under the MoA: $66,883.30**

[171] The evidence of Mr. Leung as to the financial condition of the Employer was very persuasive and left little doubt that the motivation for the changes proposed in the MoA were to reduce the operational staff costs of the Hotel with a view to making it a more viable and reliable operation.

[172] Previously, Mr. Saravanamuttu had testified that the Employer lost on average between $250,000 - $300,000 per year and these numbers were never seriously questioned by the Union. Mr. Saravanamuttu offered to provide audited statements for the Hotel operation to confirm these numbers, but because the financial information already presented to the Board, including the analysis of Mr. Leung was very clear and unchallenged by the Union, the Board advised there was no need to

provide any further data of this kind. Indeed the Union presented its own calculations to show the significant cost savings obtained under the MoA. (see above)

THE ARGUMENTS

[173] The respective arguments and submissions of the parties are summarized below in the order they were presented. At the hearing, neither party used legal counsel to assist in the presentation of their case and no written briefs were submitted at the conclusion of the hearing to summarize each party's understanding of the relevant facts and the applicable law.

[174] In the process of writing this award, the Board realized that the legal doctrine of "rectification" may have some applicability to this case and was concerned that the issue had not been discussed at the hearing and neither party had given any thought to if or how it might apply.

[175] As a result, the Board wrote to each party in early August to advise them that it was considering the application of the remedy of "rectification" to the facts of this case and enclosed copies of the leading cases and some textbook analysis of the doctrine to help each party understand it. The Board then solicited input from each party on this issue, and any other issues considered relevant

[176] As a result, each party submitted a written brief addressing this issue and some related matters. The summaries below include input from both the hearing and each party's briefs, which were very helpful.

The Union's Submissions

[177] The main argument of the Union at the hearing was that the management of employees as described in the factual chronology above contravened the general provisions of ARTICLE 5 of the Amended Collective Agreement, the relevant provisions of which read as follows:

> "**5.01** …In the exercise of management rights, the Employer agrees not to treat any Employee in an unfair or discriminatory manner and will observe the provisions of this Agreement."

Mr. Whalen suggested that the Employer was "punishing" long term employees to reduce costs by refusing to acknowledge and implement the agreement that the new provisions of Article 4.02 should not apply to the existing employees, all in contravention of the above clause.

[178] The Union acknowledged the management rights clause in Article 5 which permits the Employer to manage its business "as it sees fit", but insists it must do this fairly and for good reasons.

[179] The impact of applying the new provisions of Article 4.02 against existing employees, particularly the two Grievors, was the whole union structure was "being dismantled" by undermining the seniority rights of the long standing employees.

[180] The Union also argued that the Employer was breaching Sections 6-37 (1) and (2) of *The Saskatchewan Employment Act* by not scheduling the Grievors and other employees back into the regular shifts they worked prior to the strike. Those provisions read as follows:

> "**6-37** (1) Following the conclusion of a strike or lockout, if an employer and a union have not reached an agreement for reinstating striking or locked-out employees, the employer shall reinstate striking or locked-out employees in accordance with this section.
>
> (2) Subject to subsection (3), an employer shall reinstate each striking or locked-out employee to the position that the employee held when the strike or lock-out began."

[181] The Union also made an argument relying on the doctrine of promissory estoppel as it might apply to Mr. Whalen's contention that the Employer had agreed or "promised" that a clause excluding existing employees from the operation of new paragraphs 5, 6 and 7 of the MoA would be agreeable and were not honoring that promise.

[182] The Union's written brief requested the doctrine of rectification be applied in this case and focused on satisfaction of the four demanding preconditions outlined by the Supreme Court of Canada in *Performance Industries Ltd. v. Sylvan Lake Golf and Tennis Club Ltd.*

[183] The Union reiterated its understanding of the facts leading up to what it stated was the verbal agreement to limit the applicability of the New Proposals to new employees and argued that all four of the *Performance Industries* preconditions had been met and satisfied and described the precise form of language that should be inserted to reflect that agreement.

The Employer's Submissions

[184] The primary argument of the Employer was that the MoA was a legally valid, binding and enforceable agreement executed by the Union and the Employer, duly ratified by the members of the Union at a ratification vote all done in accordance the relevant provisions of *The Saskatchewan Employment Act*. As such, the document spoke for itself. The provisions of paragraphs 5, 6 and 7 of the MoA, when incorporated into the Original Collective Agreement and became the Amended Collective Agreement were very clear. There was no argument from the Union about their meaning or interpretation.

[185] Furthermore, the last paragraph of Article 16.02 of both the Original and Amended Collective Agreement clearly provides as follows:

"The Board of Arbitration or single Arbitrator shall have no authority to add to, subtract from, modify, change, alter or ignore in any way the provisions of this Agreement or any expressly written amendment or supplement thereto or to extend its duration, unless the parties have expressly agreed, in writing, to give it."

[186] This provision supplements the strength of the first argument all to the effect that the Amended Collective Agreement must be read and interpreted on its own, unless some express written agreement exists to so modify the document and no such agreement was put in evidence at the hearing.

[187] In its written brief, the Employer outlined a restatement of the facts as it understood them and provided a thoughtful argument on the applicability of the doctrine of rectification and concluded the Grievances should be dismissed.

[188] The main argument in this connection was to restate its position that Mr. Giri Saravanamuttu had testified there was no verbal agreement to limit the applicability of the New Proposals to new employees and that the Union simply had to live with the written agreement in the form they had signed.

[189] The Employer also argued that in light of the evidence about the extra cost of part-time employees that Mr. Saravanamuttu would not have agreed to limit the New Proposals to new employees because of that extra cost and also because administration of such a scheme would present "logistical concerns".

[190] The Employer also presented supplemental arguments regarding the interpretation of collective agreements under Canadian law which provide that the "parties are presumed to have intended what they have said, and that the meaning of the collective agreement is to be sought in its express provisions". There was it argued, no ambiguity in the language used in the New Proposals and it is clear and unequivocal and clearly is not limited to new hires only.

[191] The Employer also acknowledged the existence of the doctrine of "rectification", but argued that analysis could only be used where for example, there was ambiguity in the language of the collective agreement and there was contemporaneous extrinsic evidence which supported the witnesses who were seeking rectification. In this case it argued, those facts were not presented.

[192] The Employer also argued there was no evidence of fraud or misconduct equivalent to fraud by taking advantage of the other party's ignorance of its own error which would in its opinion be fatal to a claim for rectification.

[193] The Employer also presented arguments around the issue of promissory estoppel which are not considered here because of the conclusions reached relative to rectification.

THE DECISION

Part A: The Legal Doctrine of "Rectification" of Collective Agreements

"Rectification is a remedy that enables an arbitrator to correct a mutual mistake in the language of a collective agreement. Where it can be established that the terms of the written agreement do not reflect the parties' real agreement (because, for example, certain language was incorrectly typed or inadvertently omitted from the final draft), arbitrators have long claimed the power to bring the written agreement into line with the true bargain." (Mitchnik and Etherington, *Labour Arbitration in Canada,* 3rd ed (2018) at 204)

The Doctrine of "Mistake" and the Remedy of "Rectification"

[194] The quote above from Mitchnik and Etherington is a clear statement of how the doctrine of rectification applies to mutual mistake. However, the quote only refers to "mutual" mistake. As will be seen below however, the Canadian courts now allow the use of this remedy for both unilateral and mutual or what is sometimes called "common" mistake.

[195] Summary of the same principle and confirmation of its applicability in Canadian labour law to both mutual and unilateral mistake is found in *Metrolinx v. Amalgamated Transit Union, Local 1587*, a decision of the Ontario Divisional Court in 2015 (2015 ONSC 4466-CanLII).

[196] The doctrine has historically been very confusing and is difficult to explain without some analysis of this history. It grew out of the English Chancery Courts, commonly referred to as "Equity" who typically never systematized its "equitable" jurisdiction with the kinds of rules and procedures their "Common Law" contemporaries were used to doing in their Courts. Throughout the 19th century the doctrine finds many confusing explanations and that confusion carries through to the present day. (see Irit Samet, "Equity as Vehicle for Law Reform: The Case of Unilateral Mistake", *Canadian Journal of Comparative and Contemporary Law,* vol. 2(2), 2016 at 537)

[197] Canadian legal scholars like S.M. Waddams 4th ed., (Toronto: Canada Law Book, 1999) "…cautions that the use of phrases such as "mutual mistake" or "unilateral mistake" can be irrelevant or ambiguous" (Justice John Klebuc, Sask Q.B quoting Waddams in *Saskatchewan Wheat Pool v. Grain Services Union et al*, 2003 SKQB 323).

[198] The concept of mistake is often broken down into the three following kinds of mistake:

a) Common Mistake – This is a situation where both parties make the same mistake. Each party is mistaken about some underlying important fact- such as the subject

matter of the contract has perished. Importantly, however, there is typically a complete agreement between the parties.

b) Mutual Mistake – This is typically a situation where both parties make a mistake, but not the same one. For example, A intends to offer his Ford Sierra for sale, but B believes the offer relates to A's Ford Granada. In this situation, there normally has never been a contract formed, because no agreement was reached.

c) Unilateral Mistake – This is a situation where only one party is mistaken. Under these circumstances, there is typically only a remedy when the party that is not mistaken (A), knows or must be taken to know of the mistaken party's (B) mistake and tries to take advantage of B's error.

(taken from the *Law of Contract*, Cheshire, Fifoot and Furmston, 15th ed., Oxford University Press, 2007)

[199] There is a long story about how Canadian law came to provide the remedy of "rectification" in certain defined circumstances for each of the above categories of mistake and then how that came to be used in Canadian labour law, including Saskatchewan. The remedy simply refers to the process of correcting the mistake in the written document so that it reflects the agreement between the parties and then provides a process to deal with the consequences of correction.

[200] Traditionally the remedy of rectification was only available in equity and to correct a "common" or "mutual" mistake in circumstances where fairness seemed to require such a conclusion. In time however, Canadian Courts have come to accept the notion that "…rectification is now available for unilateral mistake, provided certain demanding preconditions are met." (see *Performance Industries Ltd. v. Sylvan Lake Golf and Tennis Club Ltd.* (2002 SCC 19 at 692)

The Development of the Doctrine of Mistake in Canadian Labour Law

[201] The current state of Canadian law relative to this doctrine is best summarized in this last-mentioned decision of the Supreme Court of Canada, namely *Performance Industries Ltd. v. Sylvan Lake Golf and Tennis Club Ltd.* In that case the Court described four preconditions to the application of the remedy of rectification:

a) The existence and content of a prior oral agreement between the parties that is inconsistent with a written agreement;

b) The party seeking rectification must show that the written document does not correspond with the prior oral agreement, and that permitting the other party to take advantage of the mistake in the written document would be fraud or equivalent to fraud;

c) The party must show the precise form in which the written document can be made to express the prior intention of the parties; and

d) The party must establish all of the requirements on a standard of convincing proof.

[202] The *Performance Industries* case involved a commercial real estate joint venture where the mistake involved land development. Some argued that this kind of analysis was not appropriate in the setting of collective agreements and disputes between employers and their unions. However, that was not to be.

[203] Shortly following the decision of the Supreme Court of Canada in *Performance Industries*, the Ontario Court of Appeal issued its decision in *NAV Canada v. PSAC*. This case concerned the decision of Arbitrator Richard Brown who had granted an employer's request for rectification, by changing the terms of the pay scale appended to the collective agreement to reflect the terms of the parties' oral agreement. The remedy he imposed was to retroactively pay all employees the proper wages under the "rectified" collective agreement.

[204] The case includes a long analysis of how and why Canadian arbitrators now had the power and the jurisdiction to impose the remedy of "rectification" in appropriate circumstances. The Ontario Court of Appeal quoted the long list of Supreme Court of Canada cases that had increasingly broadened the remedial powers of arbitrators.

[205] An arbitrator can now apply the remedy of rectification in appropriate circumstances, guided by the directions of the Supreme Court of Canada in *Performance Industries*.

> "There is no longer any serious dispute that arbitrators have the jurisdiction to apply the doctrine of rectification. Arbitrators may apply this doctrine where the collective agreement executed by the parties does not accurately reflect the true agreement of the parties. When applied in the labour relations context, rectification results in the alteration of the written terms of a collective agreement." (see*Toronto Police Association v. Toronto Police Services Board,* 2008 CanLII 14935 (ON LA)

[206] In due course, this analysis has been accepted in all the Canadian courts. In particular, it has been accepted on several occasions in Saskatchewan. For a list of Saskatchewan jurisprudence accepting the remedy for unilateral and common or mutual mistake, see Mr. Justice Klebuc (as he then was) in Sask Wheat Pool quoted above. See also the decision of Arbitrator Ken Norman in *Potash Corporation of Saskatchewan Inc. v. Communication, Energy and Paperworkers Union of Canada,* Local 922 at

2003 CanLII 71213 (SK LA) who imposes the remedy of rectification of a set of facts he deemed to be a unilateral mistake.

Part B: Findings of Fact Relevant to the Application of the Remedy of Rectification

[207] It is helpful to recall certain facts relative to the bargaining history between the parties in the last 10 days prior to the ratification vote, particularly those which describe the new stage reached with Mr. Whalen's letter of September 19th (Exhibit U4), culminating with the Employer's proposals in U6 sent by email on Monday September 25th and the Union's immediate response that same day (Exhibit U7).

[208] These factors take on new meaning when looked at in the context of the remedy of rectification. Exhibit U6 was the first time the Employer had suggested the changes contained in the New Proposals of paragraphs 5, 6 and 7 of the Original MoA and the first time it was seen in written form.

[209] The Union was so upset by the proposals in U6 that its response in U7 was sent back that very same day. Of the 15 paragraphs in the Employers document, 12 were rejected by the Union and identified in the U7 as "not agreed" or otherwise changed to show what would be acceptable.

[210] The Union President, Mr. Gary Whalen, told Mr. Giri Saravanamuttu that although the Union was willing to accept many of the other reduced benefit changes in the MoA, its members would never accept the New Proposals because they were so devastating to the Union and undermined its very purpose. He stated they effectively eliminated the value of seniority for part-time members and testified they were like agreeing to "commit suicide". As such they would never work.

[211] Mr. Saravanamuttu, the chief negotiator for the Employer, clearly understood this fact by September 27th and likely earlier. Accordingly, in light of the attention already drawn to the New Proposals by that date (such as the Union's written rejection of them on September 25th in U7), his testimony that the parties never even discussed these provisions in their communications on the 26th and 27th is simply not believable.

[212] Likewise, his testimony that he never agreed to a provision limiting the application of the New Proposals in paragraphs 5, 6 and 7 to new employees is similarly not believable and the Board therefore holds that where the testimony of Mr. Saravanamuttu differs from that of Mr. Whalen, the latter is accepted.

[213] The Board further holds, that in their telephone conversations on September 26th and 27th, the parties discussed the New Proposals in paragraphs 5, 6 and 7 and agreed that those provisions would only apply to new employees of the employer and would not apply to existing employees and that Mr. Whalen was to insert language to that effect into the MoA.

[214] The following language inserted at the end of the MoA as new paragraph 16 ("New Paragraph 16") would have the effect agreed to in the conversations between the parties on September 26th and 27th:

> "16. The parties agree that the provisions of paragraphs 5, 6 and 7 above will only apply to new employees hired after ratification of this Agreement and will not apply to the existing employees of the employer."

[215] The Board therefore concludes that the parties reached an enforceable verbal agreement on all the terms of the MoA on September 27th and the document which was ultimately signed and exchanged between them reflected that agreement, except for the qualification referred to in New Paragraph 16, which was intended to be included in the signed document.

[216] It was unclear from the evidence whether Mr. Saravanamuttu was aware that when he signed the MoA on September 28th, he realized he was signing a document that did not contain the New Paragraph 16, the qualifications relative to existing employees. He simply insisted there had not been any discussion on this issue prior to his execution.

[217] However, this is an either-or choice. On the one hand, either Mr. Saravanamuttu knew when he signed the document that the agreed qualifications were not in the document and he said nothing about it because he hoped Mr. Whalen would not see the error until it was too late for Mr. Whalen. (In this case, the facts create would have created a unilateral mistake- that is, a mistake by Mr. Whalen only.)

[218] Or on the other hand, he did not know when he signed the MoA that the agreed qualification was not in the document. (These facts would then create a common mistake, sometimes referred to as a mutual mistake – namely, both parties had agreed to include the qualification and thought it was in the document, but were mistaken about that fact and both parties only discovered the error afterwards. In this case an enforceable contract is formed.)

[219] If the MoA were "rectified" with the addition of New Paragraph 16 as outlined above (in paragraph 152), the resulting MoA ("Rectified MoA") would represent the complete agreement between the parties that was intended to be voted upon at the Union general meeting on the evening of September 28th.

[220] The written MoA, after addition of the revised page 1 on the afternoon of Thursday September 28th, which was signed by the Union that afternoon, presented at the Union general meeting that night and returned the next morning by Ms. Fiedler, now including the signatures of both Mr. Whalen and Mr. Saravanamuttu (Exhibit U2), was incorrect as it did not include the New Paragraph 16, which should have been inserted into the document, but was not.

[221] The New Proposals (in paragraphs 5, 6 and 7 of the MoA) had the effect of reducing or eliminating shift work for many members of the Union. That is why the members were so concerned

when they read the document and why Mr. Whalen assured them at the ratification vote that these provisions would not apply to existing employees.

[222] When the Union voted at its general meeting to ratify the MoA, they clearly voted to ratify what is defined in this award as the Rectified MoA. The fact the wrong document was returned by email the next day to the Employer does not change what was agreed to between the parties nor what was ratified by the members.

[223] Trying to make out that the MoA as executed and exchanged between the parties represented their agreement was something that clearly inured to the financial benefit of the Employer because it allowed the Employer to limit the use of existing Union employees with significant seniority who according to the evidence were significantly more costly to the employer. That is the obvious motivation for the Employer to fail to acknowledge what was the verbal agreement between the parties.

Part C: Application of the Doctrine of Rectification to the Facts of this Case

Do the facts above allow for and satisfy the four preconditions to use of the remedy of "rectification" outlined in the *Performance Industries* decision of the Supreme Court of Canada?

Precondition #1: There must exist a previous oral agreement that is inconsistent with the written agreement.

[224] The facts as found to exist in this case and described above clearly satisfy this precondition. The previous oral agreement to limit the applicability of new paragraphs 5, 6 and 7 only to new employees is clearly inconsistent with the current written MoA which contains no such limitation.

Precondition #2: The party seeking rectification must show that permitting the other party to take advantage of the mistake in the written document would be duplicitous and equivalent to fraud. *(Note that this precondition is only necessary if Mr. Whalen had made a unilateral mistake. If both he and Mr. Saravanamuttu had made a common mistake, this precondition is not a requirement—see paragraphs 152, 153 and 154 above.)*

[225] Based on the findings of fact described above, there is no question that the Employer was trying to take advantage of the fact Ms. Fiedler had failed to insert qualifying language into the MoA as she had been instructed to do by Mr. Whalen.

[226] The evidence confirms that the parties had verbally agreed to insert the qualifying language. Nonetheless, after the wrong document was returned by Ms. Fiedler, the Employer refused to even acknowledge there had ever been a discussion on this issue. It then proceeded to implement the terms

of the wrong document, notwithstanding the Employer knew immediately upon its receipt of Exhibit U7 on September 25th that the New Proposals were not acceptable, undoubtedly amplified considerably by the Union in the verbal discussions between the parties on the 26th and 27th.

[227] Knowingly proceeding to implement the terms of the wrong document is equivalent to fraud. The effect of the implementation is to knowingly and with malicious intent, take away significant amounts of money from the Union and its members with seniority who were induced to sign availability forms without understanding the consequences of such action.

[228] Mr. Whalen testified he had told Mr. Saravanamuttu that the New Proposals in the contentious paragraphs 5, 6 and 7 would never be accepted by the members. Both parties also acknowledged there were significant savings to the Employer because the paragraphs were considered to be part of the MoA and implemented by the Employer.

[229] It was not until early in the week of October 2nd that the Union realized the Employer was not honoring the shift schedules of long time employees that had existed prior to the strike.

[230] When the Union finally came to realize that the Employer was steadfastly refusing to honour, let alone even acknowledge, the existence of the verbal commitment made on September 27th regarding existing employees, it filed the Grievances of Ms. Cornwell and Passmore and outlined their position in U15, the letter from Mr. Whalen to the Employer.

[231] The effect of the Employer insisting on the strict written terms of the MoA and refusing to acknowledge the existence of the verbal agreement of September 27th was clearly motivated to save money for the Employer and thereby breach its commitment to the Union. Such action is both duplicitous and equivalent to fraud, being done as it were with full knowledge of the impact on the Union and the losses that would accrue to individual long-term employees like the Grievors.

Precondition #3: The party seeking rectification must prove the exact form in which the written document can be made to express the actual oral agreement between the parties.

[232] The finding of facts (see for example paragraph 152 above) describe in clear terms both what the parties agreed to and precise wording that could be used to amend the MoA to make it accurately represent the actual agreement between the parties.

Precondition #4: The above three preconditions must be proven on a standard of convincing proof.

[233] Only two people participated in the telephone call between the parties on September 27th. What is the reason that Mr. Whalen's version of what happened should be accepted over that of Mr. Saravanamuttu? There are several reasons.

[234] The first reason simply is that in describing what happened during that call, Mr. Whalen's recollection of what transpired that day had the ring of truth involving considerable detail about the conversation. In contrast Mr. Saravanamuttu did not speak freely or in a relaxed manner at all about the conversation and provided no context or detail about the nature of the conversation in the version relayed by him. He simply denied there was any discussion about the New Proposals (which on its own seems highly implausible). It therefore followed that since there was not even any discussion about the topic, no agreement could ever have been reached.

[235] When asked about the conflict in their respective stories, the Employer denied even discussing the matter of the New Proposals with the Union. It might have been more believable had the Employer acknowledged some discussion between the parties on this point which no doubt occurred. Having misrepresented what happened on this point, it undermines Mr. Saravanamuttu's credibility on the rest of his testimony.

[236] Second, it makes no sense that Mr. Whalen would have agreed to the inclusion of paragraphs 5, 6 and 7 without some limiting language, as it effectively otherwise "guts" the protection of all his Union members who he knew would never approve such a provision.

[237] The Employer makes a similar argument that because of the financial and logistical issues from its perspective, they would never have agreed to this. However, that argument is not accepted and for whatever reason, it is determined that the Employer agreed to incorporate this limitation for existing employees.

[238] Presumably they did so because it hoped over time more of the existing employees would leave and/or it wanted the strike to come to an end and/or they had already won all the other "takeaways" in the negotiations which would give them some relief on financial issues in any event.

[239] Thirdly, apart from Mr. Whalen, six witnesses attended the hearing and testified that they were present at the Union's general meeting for the ratification vote. Every one of them testified in the same manner with similar detail about the fact that when Mr. Whalen presented the terms of the MoA to the meeting, he clearly indicated to the meeting that the written MoA before the meeting was incorrect. He stated the New Proposals did not contain the limiting language which the Employer had agreed to insert to the effect that those paragraphs would not apply to existing employees and assured the members that language would be part of the final signed collective agreement.

[240] The Board did carefully consider the possibility that this whole nexus of testimony about what happened at the ratification meeting could have been prepared in advance for the purpose of misleading this hearing about what happened. All likelihood of that being the case was removed when someone questioned at the hearing whether the Grievor, Ms. Cornwell had any evidence of the texts she testified she had sent to her supervisor.

[241] It was obvious to the Board this question was not pre-planned and when the Grievor was able to produce the phone and paper copies of her text exchange with her supervisor (see paragraph 81

above), it became crystal clear and beyond all doubt that Mr. Whelan had clearly indicated to the employees at the general meeting on September 27th that the new provisions in paragraphs 5, 6 and 7 of the MoA would not apply to existing employees.

[242] That conclusion is therefore supported not just by the verbal testimony of 7 witnesses and their recollections of the meeting, but it is confirmed by contemporaneous text communications put into evidence as Exhibit U25.

Part D: Analysis of the term "Convincing Proof"

[243] As indicated above, there is no doubt about what happened at the ratification vote on Thursday, September 28, 2017. Mr. Whalen did in fact tell the members present that the collective agreement they were being asked to ratify was one that would contain the limitation on the legal effect of the New Proposals, before it was returned to the Employer.

[244] The details of Mr. Whalen's presentation to the general meeting, in addition of course to his own testimony, is therefore the basis for concluding that a verbal agreement to include that language was actually agreed in the telephone discussions between Mr. Whalen and Mr. Saravanamuttu on September 26 and 27. The verbal and contemporaneous written confirmation of these details clearly meets the standard of "convincing proof". But does the fact he made these assurances at the ratification vote also justify the conclusion there was in fact such an agreement between the parties, using the same standard of convincing proof? This is the most important issue in this award as everything else turns on this question.

[245] Standing back from all the evidence in this case and the chronology of events throughout the relevant time period, it is inconceivable to the Board that Mr. Whelan might have gone to the members' general meeting and advised his Union "brothers and sisters" that they should give up their strike and go back to work, unless he had in fact reached a reasonable compromise he thought the members should accept: namely the compromise he said had been agreed to – the compromise which allowed the Employer to impose the New Proposals over time on new employees, while at the same time preserving the existing seniority status for current Union members.

[246] If he had not previously come to this agreement with the Employer, he would almost certainly be making himself out to look completely foolish in the eyes of the Union members and would have been setting himself up to effectively allow management to break the Union and even to threaten his own leadership and position within the organization on the grounds of incompetence.

[247] That being the case, the Board is convinced on a "standard of convincing proof" both that Mr. Whelan told the Union members on the evening of September 27th that the contentious provisions of the MoA would not apply to existing employees and that he made that statement to the

employees, because he had in fact made that agreement the previous day with Mr. Saravanamuttu on behalf of the Employer.

[248] Does the case law support an arbitration board reaching this kind of important determination on the basis of this sequence of facts? The case law declares the whole intent of the *Performance Industries* decision was to make it clear that the Supreme Court of Canada was imposing "high hurdles…in the way of a businessperson who relies on his or her own unilateral mistake to resile from the written terms of a document which he or she has signed and which, on its face, seems perfectly clear. The law is determined not to open the proverbial floodgates to dissatisfied contract makers who want to extricate themselves from a poor bargain" (at 694).

[249] What is necessary to impose such "high hurdles" is that all four of the preconditions "…must be established by proof which this Court has variously described as 'beyond all reasonable doubt'… or 'evidence which leaves no fair and reasonable doubt'…The modern approach, I think, is captured by the expression 'convincing proof', ie.proof that may fall well short of the criminal standard, but which goes beyond the sort of proof that only reluctantly and with hesitation scrapes over the low end of the civil 'more probable than not' standard"(at 696-97).

[250] That makes the "standard" clear, but what is the nature of the facts that must be adduced or found as facts that will support the conclusion that the 'convincing proof' standard has been met? Again, the Supreme Court of Canada is helpful:

> "It was formerly held that it was not sufficient if the evidence merely comes from the party seeking rectification…Modern practice has moved away from insistence on documentary corroboration …In some situation, documentary corroboration is simply not available, but if the parol evidence is corroborated by the conduct of the parties or other proof, rectification may, in the discretion of the court, be available." (at 697) (emphasis added-ed)

[251] This quote clearly applies to the facts of this case. Indeed, it is the conduct after the verbal telephone agreement that in fact establishes the conclusion that an agreement had been reached. That is enough to remove any doubt from whether the Board is justified in concluding that Mr. Whalen's testimony should be accepted in the above circumstances and the doctrine of rectification should be applied to this case.

[252] It is worth mentioning one final issue that was not raised by either party but is relevant: that is the obvious fact that the wrong document was signed results from the lack of due diligence of the Union. That argument is however undermined again by the Supreme Court in the same case:

> "It is undoubtedly true that courts ought to hold commercial entities to a reasonable level of due diligence in documenting their transactions. Otherwise written agreements will lose their utility and commercial life will suffer…On the other hand, most cases of unilateral mistake involve a degree of carelessness on the part of the plaintiff…The mistaken party will often have failed to read the document entirely, or may have read it too hastily or without parsing each word…One reason why the defence of contributory negligence or want of due diligence

is not persuasive in a rectification case is because the plaintiff seeks no more than the enforcement of the prior oral agreement to which the defendant has already bound itself" (at 703-04).

[253] Finally, the Employer's brief on these issues deserves some comment. The Employer did not acknowledge or had forgotten the evidence in the case regarding the contemporaneous documents outlining the bargaining history (U6 and U7) and the print-out of the text exchanges between the Union member and her supervisor (U25).

[254] The Employer therefore tried to distinguish Arbitrator Norman's decision in *Potash Corporation of Saskatchewan Inc, v. Communication, Energy and Paperworkers Union of Canada, Local 922 (2003 CanLII 71213 (SK LA)* on the basis that he was rectifying an agreement primarily because there were contemporaneous notes, which the Employer argued was not the case here. In its view, there was no such "cogent evidence" in this case.

[255] However, as outlined above, the Board thinks otherwise – that the above summary of evidence is indeed "cogent" and persuasive and convincing – there were contemporaneous notes and a course of conduct which together justified the conclusion reached in this award.

[256] Similarly, the Employer's argument that there was no fraud to satisfy the second precondition does not hold up once one accepts the facts as found in this case: namely, that Employer did verbally agree to limit the applicability of the New Proposals only to new employees, but once it discovered the wrong document had been returned, it tried to hold the Union to a bargain it knew had not been agreed to and therefore, substantially help itself financially and injure the Union and its members. This constitutes the fraud equivalence required by the second precondition.

Part D: Promissory Estoppel

[257] The Union presented an argument relative to the application of the doctrine of promissory estoppel to the facts of this case, without any analysis or reference to applicable case law.

[258] In light of the rectification analysis above, it is unnecessary to consider this argument.

Part E: Remedy

[259] The doctrine of rectification provides that an arbitrator may "rectify" a written agreement by amending it to make it reflect the true and accurate agreement between the parties. Alternatively, the Union, on behalf of its members, may be entitled to damages in lieu of rectification.

[260] At the hearing neither party had the benefit of counsel and the doctrine of rectification was not discussed by either party. Subsequent to the hearing, the Board advised the parties that this doctrine might be applicable to the facts in this case and sent them materials to describe the law in this area. Input was solicited and written briefs were received from each party.

[261] The Board is mindful of the fact that the Employer has experienced financial difficulties with the Regina Hotel and incurred financial losses for that facility alone in the range of $250-300,000 per year and for that reason acknowledges that provision of additional financial compensation such as cash payments as damages for shift work lost in the past year would impose an additional burden on the hotel.

[262] However, at the same time a rectification order requiring the insertion of the appropriate amendment into the Collective Agreement would create difficulties referred to in the Employer's written brief:

> "…the Employer's witness…led evidence about the financial reasons behind the Employer's desire to change the scheduling practices. Moreover, because the prospect of imposing two different types and manners of shift scheduling on employees would likely result in a logistical challenge for all involved, it does not make rational sense to have agreed to limit the application of articles 4.02 (d), (e) and (f) to only new employees. With two different ways of determining schedule priority as the Union suggests (one for existing employees based on seniority and another based on availability) there would be no easy and obvious way to reconcile the two systems and actually be able to schedule workers.

During the hearing, the witness Edmund Leung testified to the above facts and provided a convincing analysis of why this was the case.

[263] There is also the additional consideration that several employees who were entitled to shift work under the Collective Agreement had it been followed on October 2, 2017 as it had been agreed are no longer available for work and have in fact taken jobs elsewhere.

[264] Finally, there is the consideration that neither party has had an opportunity to address the issue of what an appropriate remedy should be in light of the analysis in this Award.

[265] Accordingly, the Board holds that it remains seized of this dispute and requests the parties to engage in discussions on the issue of remedy, with a view to settling the remaining issues between them relative to this dispute.

[266] In light of the financial condition of the Employer's operation at the Regina hotel, the financial and logistical issues related to inserting New Paragraph 16 back into the Collective Agreement and the

unavailability of several employees, the Board suggests that the most practical remedy would be to not insert the New Paragraph 16 and to allow the Employer to continue managing its Regina operation as it is presently and provide damages to the Union and its members in lieu of rectification.

[267] The Board would not however want to limit any ideas the parties may have as to a practical settlement of this issue. Such a settlement could include for example some combination of providing additional shift work for employees who can be fitted back into the Employer's operation without "rectifying" the Collective Agreement and at the same time provide monetary damages in respect of employees who are not available for work.

[268] A starting point would be for the Union to provide its calculation of the number of shifts and hours lost by each employee in the past year and then make a formal proposal to the Employer about how to compensate such employees.

[269] Where and if practical, some of such employees might be offered an opportunity to perform additional work for the Employer for a number of hours roughly equivalent to the number of hours they lost since September 28, 2017 as a result of the implementation of the New Proposals.

[270] For other employees who have moved on and no longer wish to work for the Employer, damages in the form of a cash payment might be appropriate. Any such calculation should take account of the hours worked and money earned at other jobs during the past 11 months.

[271] In any event, the parties are directed to engage in discussions with a view to coming to some agreement as to damages in lieu of rectification along the lines outlined above.

[272] The Board also reminds the parties that if an appropriate reasonable agreement is not reached between the parties and the Board is required to convene another hearing to hear submissions on these issues, it may simply order the rectification of the Collective Agreement without any other remedy all on terms that are not satisfactory to either party. For that reason, it would best if they can independently resolve these issues on their own.

CONCLUSION

[273] In summary, based on the review outlined above, the Board holds as follows:

a) The MoA was executed under either a common or a unilateral mistake in that the parties had agreed to include a paragraph in it that would limit the application of the New

Proposals in paragraphs 5, 6 and 7 to new employees and the Union and its members are entitled to have the MoA "rectified" or be paid damages in lieu of rectification.

b) After consideration of all the relevant factors, particularly the logistical and operational inefficiencies of trying to force the Employer at this point to implement the provisions of the New Proposals, the Board is of the view that making a "rectification order" to amend the MoA with the insertion of New Paragraph 16 is a less desirable remedy than an agreement between the parties for damages in lieu of rectification

c) The parties are further ordered to engage in discussions with a view to reaching:

    i. a reasonable mutual agreement relative to the calculation of damages in lieu of rectification for those members who are no longer willing or available to work for the Employer; and

    ii. a second reasonable mutual agreement for those employees who want to keep working for the Employer that would compensate such employees for the net hours and net income lost by virtue of the incorrect MoA being implemented by giving them either a) increased shift work in the future or b) damages in lieu of rectification or some combination of both that is acceptable to each employee.

d) The Union is directed to submit to the Employer a schedule showing the shifts and total hours lost and net income lost as a result (since September 28, 2017 to the date of this Award by all current or former employees separated into two categories:

    i. current or former members of Local 41 who are not available or willing to work for the Employer in a manner similar to how they worked prior to the strike; and

    ii. current members of Local 41 who are still available and eligible to work for the Employer in a manner similar to how they worked prior to the strike;

e) Upon receipt of the schedule, the Union and the Employer are requested to firstly attempt to agree on the data contained in such schedule of lost shifts, hours and net income and then discuss whether for each such employee some accommodation can be made by the Employer along the lines suggested here, or any other manner mutually acceptable to the parties.

[274] Bearing in mind that the parties have not had an opportunity to consider many of the practicalities of the above order, the Board will remain seized of this Arbitration until the parties have informed the Arbitrator that they have reached a mutual agreement as to all the matters arising out of this Award.

[275] If such a mutual agreement is not reached by November 1, 2018, either party may so advise the Board on or before November 15, 2018 and an additional hearing will be scheduled thereafter to permit each party to make submissions on any outstanding issues arising out of this arbitration, to present any additional evidence required to support such submissions and to permit the Board to make whatever order it considers appropriate to resolve all outstanding matters related to this arbitration.

John Comrie, QC, FCIArb Dated September 4, 2018