IN THE MATTER OF:

AN ARBITRATION

BETWEEN:

Winnipeg Regional Health Authority – (HSC),
("the WRHA" or "the Employer")

- and –

Physicians and Clinical Assistants of Manitoba Inc.
("PCAM")

DECISION

Policy Greivance

Sole Arbitrator: Kristin L. Gibson

Appearances:

KRISTA KLASSEN……Legal counsel for WRHA
MICHAEL MERNER……Legal counsel for WRHA
CLARA WEISS……Advisor

KEN DOLINSKY/PETER MUELLER……Legal counsel, PCAM
VICTOR DUARTE……PCAM President
SEAN JARDINE……PCAM Vice President

BACKGROUND AND GENERAL COMMENTS

This policy grievance was originally filed pursuant to the expedited arbitration provisions of the *Labour Relations Act* in the early months of the COVID-19 pandemic in our province. For reasons relating primarily to the effects of the pandemic and governmental efforts to control those effects in our community, the hearings commenced as 'in person', were adjourned on several occasions and ultimately proceeded substantially as a remote hearing with evidence and argument being given virtually. An agreed statement of facts and documents set out the framework of the case and was supplemented by oral testimony.

As will be set out below, the parties are in a relatively new collective bargaining relationship, with the collective agreement at issue being the first agreement between them. PCAM was certified on July 14, 2014 and the agreement originally covered the time period from April 5, 2015 to March 31, 2019. While the term has expired, the collective agreement remains in force and effect.

PCAM is a bargaining unit made up of a group of employees with specialized expertise who practice as "physician extenders" under the scope of practice and authority of a physician. There are approximately 153 members in the unit, comprised of both Physician Assistants ("PA"s) and Clinical Assistants ("CA"s). There was no dispute whatsoever that this bargaining unit is an essential part of the delivery of quality health care in Winnipeg.

The policy grievance, which was filed on January 30, 2020, relates to the failure to post a term position which the employer filled with a candidate external to the bargaining unit by an offer dated January 16, 2020.

EVIDENCE

As noted above, although ultimately I heard oral evidence from three witnesses over several days of hearing, the agreed statement of facts and documents was

quite comprehensive on the basic facts underlying the legal issues that arose between the parties. The oral evidence informed those basic facts, in particular the context of the employer's decision making in this situation, but other than in three quite discrete areas it did not contradict or challenge them.

In early January of 2020 the Medicine Program at St. Boniface General Hospital ("the Program") was experiencing a surge in operational demand requiring additional PAs/CAs on a temporary basis to provide service for day shifts seven days per week"[1]. Dr. Dixon, the Chief Medical Officer with the WRHA testified that in late December of 2019 and early January of 2020 three respiratory viruses were peaking which caused unusually high demand in the emergency and medical units, that the hospital was 100 beds over capacity and had significant numbers of patients awaiting admission. As of January 3, 2020 Critical Incident Command had been activated by Dr. Dixon across the region.

At that point in time the Program was operating with three permanent full time PA/CA positions. Two of the three permanent incumbents were scheduled to begin maternity leave, the first leave was to commence on January 27, 2020 and the second in April of 2020 on a date yet to be decided. A term position to fill the first maternity leave had been posted and filled in November of 2019 with the successful applicant scheduled to start on January 27, 2020. The term required to fill the second leave had not yet been posted.

On January 8, 2020 Dr. Dixon was asked if additional PA/CA coverage could be found for the Program through redeployment from other facilities. She reached out to other programs by email on the following day. The body of that email, which was Tab 8 to the Agreed Facts, read:

> **We are currently looking for Physician and Clinical Assistants to provide service to the medicine program at St. Boniface Hospital. Re-assignment would be on a temporary basis, and time commitment will be dependent**

[1] Agreed Facts paragraph 13

> **on number of employees available.** Additional staff will be required for day shifts, seven days per week.
>
> This request is in response to the current surge in system demands. Additional PA/CAs are needed to complement physician coverage. By drawing support from multiple programs, we will bolster the service on medicine without significantly impairing other programs. (Emphasis in the original).

By the end of the day on January 10th, which was a Friday, a number of other programs had responded to Dr. Dixon's request in the negative. The Employer also unsuccessfully tried to convince the individual who was to be starting maternity leave coverage on January 27th to start early.

Denise Langendorfer, Human Resources Consultant, suggested to Dr. Dixon and Dr. Hajidiacos (the Medical Director of the Program) on Friday January 10th that consideration be given to hiring an external candidate who had been interviewed for the first maternity leave in November of 2019, if creating a temporary position was an option.

On Monday January 13, 2020 the incumbent who was anticipating a maternity leave starting in April 2020 advised the Employer that she required a medical leave of indefinite duration commencing immediately. This situation obviously exacerbated the coverage problem that had already developed in the Program. That same morning Ms. Langendorfer called Mr. Duarte, the President of PCAM, about the situation. Paragraphs 20 and 21 of the Agreed Facts sets out the request made of PCAM by the Employer when Ms. Langendorfer and Mr. Duarte spoke later in the day:

> Ms. Langendorfer asked for PCAM's agreement to waive the posting requirement under Article 19 of the CBA so that the Employer could fill the position which had become temporarily vacant due to the medical leave and anticipated maternity leave. The Employer stated that it wished to engage a specific person who was not then employed by the Employer for an approximately 15 month period.

> Specifically, Ms. Langendorfer advised Mr. Duarte that the Employer wanted to hire an external person who had applied (but was not selected) for the term position … that had been previously posted in November 2019. …

On January 14, 2020 Mr. Duarte advised Ms. Langendorfer that PCAM would not consent to waiver of the posting as requested the previous day. Internal emails from Ms. Langendorfer suggest that either on the 13th or the 14th of January – in any event prior to the receipt of PCAM's denial of the waiver request – the Employer was formulating a "Plan B" in the event of that denial. Plan B was to offer an eight week term position to the external candidate already under discussion which would start on January 20, 2020 if she accepted the offer. In addition, the medical and maternity leave term created by the early departure on medical leave of the second permanent incumbent on January 13th would be posted in the normal course. Tab 30 of the Agreed Facts (an internal email from Ms. Langendorfer dated January 14, 2020) suggested that the maternity leave position be posted for a term of up to eighteen months as the length of leave intended by the incumbent was at that point unclear.

On January 15, 2020 a number of things occurred as set out in paragraph 27 of the Agreed Facts. Ms. Langendorfer posted the Term position intended to cover the anticipated vacancy created by the early departure of the second incumbent. That incumbent then advised the Employer that she wished to resign immediately. This resignation was later rescinded, then finally confirmed by the incumbent on January 20, 2020.

Ms. Langendorfer contacted the external PA candidate and offered her the eight week term position to commence on January 20, 2020. Ms. Langendorfer then advised Mr. Duarte of the latter piece of information in a telephone call. Mr. Duarte was understandably concerned about the series of events and expressed

that concern both in the call and in an email sent the following day. The email[2] read in part:

> I am quite concerned about the employer's position and actions in this matter. After both email and phone consultation with PCAM the employer is choosing to proceed with the hiring of an employee while deliberately disregarding article 19 of the CBA.
>
> These actions place the employer in deliberate contempt of the CBA.
>
> While PCAM understands the urgency to hire into this position non-competitive hiring undermines the spirit and intent of the bargained contract. And places the employer into preferential treatment of an individual over existing PCAM members and employees of WRHA.

The external candidate accepted the offer from Ms. Langendorfer and started the eight week term position on Monday January 20, 2020. On January 27, 2020 the eighteen month term position posting was rescinded, and a permanent full time position was posted in the Program due to the fact that the incumbent had finalized her resignation on the 20th. That full time permanent position was filled in the normal course by an existing PCAM member and the position was not awarded to the individual who was brought in on the eight week term.

The parties, in the form of Ms. Langendorfer, Ms. Clara Weiss (a Director with the WRHA), Mr. Duarte and the vice-president of PCAM Sean Jardine had a joint labour-management meeting on January 21, 2020. A number of issues were on the agenda, one of them being the request to waive the posting process as set out above, and the resulting actions taken by the employer. Mr. Duarte's recollection was that Mr. Jardine 'accused Denise (Ms. Langendorfer) of deliberately flouting the collective agreement' and that she did not refute this accusation but said in response "our actions suited our needs better". Mr.

[2] Agreed facts tab 21

Duarte's contemporaneous notes of the meeting[3] contain this statement in quotes.

Ms. Langendorfer testified in both direct and cross examination that she did not recall making such a statement, however she agreed with the suggestion from Mr. Dolinsky that it was possible that she made it given that lack of recall, and further that it was consistent with the employer's position on the issue. Dr. Dixon's evidence in cross examination respecting the decision made to hire into the eight week term without posting is also consistent with that position. In response to a question from Mr. Dolinsky about why the eight week term was not posted she stated "in those specific circumstances and with the intent to hire this specific PA into a short term I decided that we needed to do it to fill our needs." Neither Mr. Jardine nor Ms. Weiss testified.

The relevance of this statement made in a joint committee meeting shortly after the series of events described above, and with knowledge on the part of the employer that PCAM was very concerned about how the events unfolded goes to the union's argument about bad faith on the part of the employer. Certainly the discussion at the joint committee meeting drove the decision to file the instant grievance, which alleges bad faith and requests, among other remedies, damages on that basis. It is my view that on the balance of probabilities, Ms. Langendorfer did make the statement as alleged by Mr. Duarte.

The second area of evidence that was somewhat in dispute – both as to characterization and as to relevance to this grievance – was that of past practice relating to requests to waive the posting process. While there was some confusion over what had happened and what PCAM was aware of at the time, at best the evidence boiled down to three prior requests for waiver of which two had been clearly refused. In those two cases the employer respected that refusal and engaged the posting process. The third case is an example, in my mind, of

[3] Agreed facts tab 25

miscommunication and the assumptions that arose as a result compounded by delay over the summer months on the part of both parties. The employer felt that it had at least a tentative agreement with PCAM and hired on that basis, while in hindsight it ought to have waited until that agreement was finalized. The agreement was never finalized, and as pointed out by Mr. Dolinsky the terms under which the individual was hired varied from even the tentative agreement. All of that said, I cannot find that the third example was a deliberate flouting of the collective agreement.

I was invited by Mr. Dolinsky to draw a conclusion from these past examples that the employer was cavalier in its' attitude to the posting obligations in the collective agreement with PCAM and that this attitude was consistent with a bad faith approach as advanced in this grievance. While I confess that I find asking for a waiver of posting requirements to be an unorthodox approach to solving emergent staffing issues which an employer of this level of sophistication ought to have known would be unsuccessful, I do not see the history as one of bad faith dealing.

The final area of contention in the evidence is the employer's characterization of whether there was a vacancy in relation to the eight week term. PCAM takes the position that this term was a vacancy both in fact and as perceived and acted on by the employer. Mr. Dolinsky argued that the employer and its' witnesses either conceded that a 'vacancy' existed, or were evasive on that point and improperly changed position on the issue of whether a vacancy existed at the commencement of the hearing. It is true that in the grievance reply[4] the employer stated that in hindsight a casual employee ought to have been hired to supplement the staffing in the Program, while the vacancy created by the individual who resigned in January should have been (and ultimately was) posted in the normal course. Ms. Langendorfer essentially said the same thing in her

[4] Agreed Facts Tab 3

testimony, and was also of the view that a casual hire was not covered by the posting language of article 19.

It is also correct that at the outset of the hearing, and in argument, Ms. Klassen submitted that the eight week term position ultimately filled with the external candidate was not a vacancy as that term is understood by the parties in the context of the collective agreement as a whole. Mr. Dolinsky is right that the employer's witnesses did not take this same position in giving their evidence. While I understand the frustration of PCAM and agree that at best considerable confusion existed about the characterization of the situation I do not think that Dr. Dixon's assessment of whether a vacancy existed as that term is understood in labour relations law should be binding, or frankly even instructive. Ultimately that assessment is something that I will determine based on the evidence.

It must be remembered as well that when addressing this situation as a whole the facts around the permanent incumbent who ultimately resigned were changing on almost a daily basis until she confirmed her resignation on January 20th. The scope and nature of the vacancy initially created by that individual's abrupt departure on medical leave was difficult to characterize, and although it exacerbated the shortage of coverage which already existed in the Program realistically it couldn't have subsumed that shortage. That is, the shortage of coverage existed independently of the early departure of the incumbent in the third permanent position but the two issues seem to have been blurred at the time. This is not a criticism, rather an attempt to convey the fact that it was not easily discernable during the compressed time frame in the second week of January where the vacancy, or vacancies, existed.

The facts are clear that the request for waiver made to PCAM on January 13, 2020 was at least *primarily* in relation to the term vacancy created by the early departure on medical leave of the third permanent incumbent who was also about to commence a maternity leave of at least twelve months in duration.

That vacancy was posted – first as a term[5] with a closing date of January 22, 2020 and shortly after as a permanent opportunity[6] with a closing date of February 3, 2020. What is also clear, at least in hindsight, is that the eight week term that is the subject of this grievance was not directly the subject of the waiver request. My observation about the blurring of the existing shortage and the medical\maternity leave vacancy comes from the fact that the eight week term was discussed by the employer and apparently formulated as a "Plan B" to the waiver request. It seems to me that some form of coping with the shortage of coverage identified prior to the unexpected early departure of the third full time incumbent in the Program would have continued to be required regardless of PCAM's response to the waiver request. So, even if "Plan A", which was identified by Ms. Langendorfer as the optimal response, was agreed to by PCAM I would have thought some form of "Plan B" would have been necessary in any event. At least initially the term posting for the medical\maternity leave may have been able to supplement the short term problem however as that posting had to be cancelled and re-posted likely the assistance was postponed. While the Agreed Facts confirm that the permanent posting was filled, I do not know when that occurred, however the earliest would have been mid to late February given the evidence on the posting process generally.

Mr. Dolinsky vigorously submitted that the existence and implementation of "Plan B" without any communication with PCAM, and indeed prior to receiving PCAM's rejection of the waiver request, was further evidence of bad faith on the part of the employer. It is somewhat difficult to determine when Plan B crystallized in the form that the employer took action on January 15th. The concept of hiring an external applicant from the pool who had been interviewed in November 2019 to address the short term coverage deficiency was certainly in play prior to PCAM turning down the waiver request. The final form of Plan B likely came into being

[5] Agreed Facts Tab 17
[6] Agreed Facts Tab 28

roughly contemporaneously with the waiver discussions between Ms. Langendorfer and Mr. Duarte, which spanned two days. There was also some difficulty in Ms. Langendorfer and Mr. Duarte being able to connect as Mr. Duarte was on shift as a Clinical Assistant during those days.

I think the evidence does show that there was minimal communication with PCAM, and that most of communication which did occur was adversarial or positional as opposed to genuinely consultative in nature. I do not agree with Ms. Klassen's submission that the employer 'engaged with PCAM throughout'. It struck me that the range of possible solutions touched on in evidence from both parties was similar and had that consultation occurred it might have resulted in an approach that would have been beneficial to the Program.

DECISION

The first question that must be answered is whether the employer has violated article 19 of the collective agreement by reason of not posting the eight week term that was awarded externally and which commenced providing coverage as of January 20, 2020. PCAM's primarily focus in the hearing was on the allegations of bad faith and deliberate flouting of the collective agreement arising from the hiring of the external applicant without posting. At the risk of stating the obvious, if the employer did not violate the collective agreement there is no action on which to ground the union's arguments in this regard.

In determining whether this indeed was a vacancy that required posting, as strongly argued by the union, it is necessary to characterize the position. That character is difficult to pin down, even in hindsight. Given that it was apparently conceived as an alternative to "Plan A" (waiver of posting of a 15 month term to span the medical\maternity leave) it must at least in part have been to provide

coverage during the unexpected medical leave that the employer learned of on January 13th. As mentioned above this seems to have blurred with the initial need to provide additional support to the Program due to the capacity issues testified to by Dr. Dixon. Certainly capacity and patient care concerns are what drove the employer's decision making throughout.

Ms. Klassen submitted that she was not suggesting this was a casual position, rather that in retrospect the external candidate ought to have been hired as casual, which would not have attracted the requirement to post. The definition of casual employee[7] in Article 1.01 certainly could have included the situation which was being discussed amongst the employer representatives in the week of January 8th in my view. Article 30 of the collective agreement, which deals with casual employees, states at the outset that "The terms of this Collective Agreement shall not apply to Casual Employees except as provided below…". Seniority rights in article 30 are quite minimal, and there is no inclusion of posting language.

I agree with Ms. Klassen that a true casual hiring would not require posting under the existing language of the collective agreement. That does not however lead me to conclude that because this situation could have been handled that way in retrospect what did happen was in compliance with the collective agreement. As concluded in my review of the evidence from the employer's witnesses I also do not think that their views on whether or not this was a vacancy are determinative of the legal issue that must be decided in relation to the posting requirement.

There really is no dispute that what was offered to and accepted by the external applicant was a term position. Ms. Klassen submitted that the employer is not required to post term positions and that the fact that they have done so

[7] "… an employee called in occasionally by the Employer to replace a Full-Time or Part-Time Employee or to supplement regular staff coverage in situations of unforeseen staff shortage."

historically is not binding, in other words the employer can choose to post despite not being compelled to do so by the collective agreement. She further argued that because article 19 does not mention term positions, they are not included in the obligation to post. Article 19 reads:

> All vacancies and new positions which fall within the scope of this agreement shall be posted for a minimum of seven (7) calendar days.

Term positions are contemplated in the collective agreement and "Term Employee" is defined as follows in article 1.01:

> … an Employee engaged for a fixed period of time or until completion of a particular assignment or occurrence or event. A Term Employee shall not be engaged for a period greater than fifty-four (54) weeks unless mutually agreed by PCAM and the Employer. No Employee shall be terminated and re-engaged contiguous to the previous term employment for the purpose of extending the period of term employment. If an Employee goes from term to regular full-time or part-time status without a break in service, his/her seniority shall be back-dated to include the length of Term Employee service. A Term Employee is covered by the terms of this Agreement.

The parties were in agreement with the general principle that the employer has the right to determine if a vacancy exists. Ms. Klassen also submitted that if an absence is temporary there is no requirement to post unless the collective agreement specifically provides for such postings. In support of this argument Ms. Klassen cited *Disabled & Aged Regional Transit System v. C.U.P.E. Local 839*[8] which involved workload created by reason of the absence due to illness of a number of full time operators. The collective agreement in that case provided that posting was necessary "when a vacancy occurs, or a new position is created…".

[8] 1985 CarswellOnt 2640

In denying the grievance, Arbitrator Solomatenko stated at paragraphs 10 – 12 of that decision:

> Having reviewed these cases … it is my view that they do in fact support the general proposition that there is no "vacancy" where there is only a temporary absence of the employee who normally fills that position. Inasmuch as job posting provisions usually refer only to the posting of a "vacancy" it follows logically that if a temporary absence is not a "vacancy" there can be no requirement to post it. ….
>
> It is open to the parties to provide expressly in a collective agreement that any vacancy be posted, regardless of whether there is merely a temporary absence for reasons of vacation or illness. But that is not the language of the instant collective agreement. I have no difficulty in finding that the collective agreement language in this instance deals with and refers to posting of permanent vacancies only. One must regard article 16 in its' entirety and it is quite evident that it is intended to provide a procedure for those circumstances only, not for temporary absences.
>
> The parties simply have not spelled out any procedure for cases of temporary absences such as for reasons of illness or vacation. However that does not mean that the posting provisions of article 16 apply by default. …

Ms. Klassen argued that both the wording of article 19, and the collective agreement as a whole informs the meaning of what is a vacancy. She pointed out that article 9, which governs hours of work, expressly contemplates the employer's ability to "… change the schedule to address heavy workload issues or vacancies due to illnesses, vacations, holidays and leaves of absence…"[9].

The precise terms of the collective agreement in question are critical to a determination on the application of posting requirements. Here article 19 stipulates that "**all vacancies** and new positions **which fall within the scope of this agreement**" (emphasis added) will be posted. In *Brant Halimand Norfolk*

[9] Article 9.03

Catholic District School Board and OSSTF[10] , provided by Mr. Dolinsky, the arbitrator considered almost identical language in the context of a vacancy that was known to be for a short period of time given the upcoming closure of a particular school. The posting clause in that case said that "All vacancies and new positions within the bargaining unit shall be posted…". At paragraph 21 of that decision Arbitrator Hayes stated:

> Under the explicit terms of Article 18.01 *all* vacancies must be posted. The unmistakable language of Article 18 must prevail over the general management rights reservation found in article 3.01. It cannot be that such a specific requirement may be superseded by a unilateral employer decision not to post such a vacancy and to substitute an employee transfer for a posting that would otherwise be required.

In the instant case the parties have defined "Term Employees" in some detail and have expressly stipulated that such employees are covered by the terms of the collective agreement. It is my opinion that article 19 does include term positions in the requirement to post based on that definition read in concert with the wording of Article 19.

This finding can, in my view be reconciled with the caselaw on the issue of temporary absences. That law addresses situations where, as determined by Arbitrator Solomatenko in the above quote, there is "… only a temporary absence of the employee who normally fills that position." I think that in a true temporary absence the employer here would have options other than creating a term position and posting that term position. One of those options is contemplated by the parties in article 9.03 where schedules can be adjusted – employees may be required, on specified notice, to either change or work additional shifts. Another option would be to utilize a casual employee – as described by the definition in article 1.01 referenced above.

[10] 2014 CarswellOnt 11149

In the facts of this case, I think that the temporary absence created by the permanent incumbent's original absence on medical leave could have been addressed through schedule changes under article 9.03 or through the hiring of a casual employee. The shortage of coverage in the Program that preexisted that medical leave could have been addressed through schedule changes, the hiring of a casual employee or, as was done, through the creation of a term position. The employer has discretion to organize the workplace within the parameters of the collective agreement, however, having decided to create a term position such a position must be posted as provided for in Article 19.

It therefore follows that I have determined that the employer violated Article 19 in failing to post the eight week term position. The next question becomes the issue of remedy. As stated above considerable evidence and argument was devoted to this issue. The policy grievance asks for declarations that the employer has acted unreasonably, unfairly and in bad faith in deliberately breaching the collective agreement with the intention of undermining PCAM and interfering in PCAM's ability to represent its' members. In addition, the grievance asks for payment of damages to both PCAM and its' individual members. At the hearing Mr. Dolinsky advised that PCAM was not pursuing a claim for punitive or aggravated damages, both of which were included in the grievance.

The factual allegations upon which form the basis for the requests for these remedies can be summarized as follows:

1) Deliberately filling the eight week term position without posting despite knowing, or at least believing, that posting was required;
2) Not advising PCAM in advance of the offer being made to the external applicant that the eight week term would be so offered particularly in circumstances when it was known that this would be done if the waiver request was denied;

3) Taking the position with PCAM that the employer would operate in a manner that "suited its needs better" regardless of PCAM's views or the existence of relevant collective agreement provisions;

4) Historically being "selectively compliant" with the posting provisions of the agreement;

5) Changing its' position on whether a vacancy existed at the hearing.

I will deal with points 4 and 5 first. As determined in my analysis of the evidence, I do not find that there has been a history of being selectively compliant with the posting article. That said, it is troubling that requests for waiver of the posting article as a whole are being advanced repeatedly by the employer as a manner of dealing with staffing issues. If there are concerns about the length of the process or its' application in urgent or short term situations, that should be addressed in collective bargaining.

PCAM argued forcefully that the practice of changing position – here on the issue of whether there was a vacancy – does mischief to the grievance process and ought to be strongly discouraged. The caselaw provided by Mr. Dolinsky on this point essentially holds the party trying to advance a new position to the original reason for the decision or action. In *Fuller Austin Insulation Inc. v. C.J.A., Local 2103*[11] the arbitrator stated, at paragraph 52:

> To paraphrase the language of the Supreme Court in the *Zeller's (Western) Ltd.* decision, we must direct our attention to what was in fact done (laid off for lack of work) and not to what might have been done by the Company in bringing an end to … employment (dismissal). The Company made its election as to the manner in which it was gong to sever the employment relationship electing to lay-off for lack of work. … It was only at the commencement of the arbitration hearing that the Company raised the issue of dismissal without just cause. Having made its election with respect to the

[11] 2002 CarswellAlta 1731, 107 L.A.C. (4th) 421

> manner of termination I find that the Company is prevented at this stage from taking the alternative position…

Re Beaver Lumber Co. Ltd (Beaver Homes Division) and International Woodworkers, Local 1-184[12] is to the same effect on the issue of making an election as to how to defend a posting grievance. In *Ottawa Humane Society v. Ottawa-Carleton Public Employees Union*[13] Arbitrator Picher said at paragraph 10:

> As the jurisprudence reflects, parties must conduct themselves during the course of the grievance procedure in such a way as to respect the process. That process is intended to narrow and define the issues which will ultimately proceed before a board of arbitration if full settlement is not achieved. During the course of that process they are bound by those partial settlements which may be made, and so should not lightly make such partial settlements unless they are willing to be bound by them. If a party which withdraws a position or makes a partial settlement is allowed thereafter to resile from its position, the integrity of the grievance process is substantially undermined. Additionally, the scope and course of the arbitration hearing itself is made substantially less certain, with resulting inefficiencies and potential prejudice to the parties themselves.

In the instant case the employer's grievance reply[14] makes no reference to an assertion that the eight week term was not a vacancy. Instead the position is advanced that the management rights clause in article 3 governed the situation where quality of patient care was being impacted. While it is not stated in so many words, the grievance reply suggests that the management rights clause can override the posting obligation. This argument was ultimately not advanced at the hearing.

Mr. Dolinsky did not ask for the employer to be barred from advancing its' argument on whether a vacancy existed, but rather submitted that this change

[12] 1976 CarswellSask 199, 14 L.A.C. (2d) 93
[13] 2005 CarswellOnt 3489, 137 L.A.C. (4th) 337
[14] Tab 3, Agreed Facts

of position was further evidence of bad faith towards PCAM, so I will assess it in that light in my consideration of remedy. I have already determined that the employer is bound by its' creation and offering of a term position in deciding that posting was required.

As for points 1 – 3 my findings on the evidence are set out in more detail above, however in summary I agree that the WRHA did deliberately choose to violate the posting requirements in Article 19 of the agreement. As indicated in my analysis the nature and scope of the vacancy or vacancies that existed during the second and third week of January was a moving target and the exigencies of providing patient care were real and immediate. However, while these facts provide some context they do not excuse a choice to violate important collective rights, particularly in the face of significant concern being voiced by PCAM. Whether in hindsight the need for coverage could have been handled in a different way that would not have attracted the need for posting, it was clear to me from the evidence as a whole that the employer believed at the time that it was in violation of Article 19 in filling the eight week term and proceeded anyway.

While it is not entirely evident at what point in relation to the discussions between Ms. Langendorfer and Mr. Duarte on January 13th and 14th Plan B crystallized, there is no doubt Plan B was acted upon before it was mentioned to PCAM. As Dr. Dixon candidly stated, it was felt that if PCAM would not agree to the initial waiver request, it was unlikely to agree to waiver in the shorter term.

The comment made by Ms. Langendorfer at the joint committee meeting on January 21st was unfortunate to say the least and doubtless inflamed the existing and valid concerns on the part of the union. As mentioned above, it appears that the communication around this situation, which included the discussion at the joint committee meeting, was positional and not consultative, particularly on the part of the employer. While Ms. Langendorfer did not recall making the comment and thus could not offer an explanation for it, it seems likely that she

was on the defensive at the time given the fact she was being confronted by Mr. Jardine about what had happened. It should also be kept in mind that the parties were in the bridging period of the collective agreement, it had expired but had not yet been renegotiated, which can encourage positional behavior.

In summary on the evidence, with the important exception of historical compliance with the posting article, the allegations made by PCAM in support of the request for damages are substantially proven. I appreciate that one does not usually see the proverbial "smoking gun", however I did not get the impression from the evidence that the manner in which the employer proceeded was planned as an intentional assault upon, or constituted a reckless disregard for the union's relationship with its' members. I think what happened was that the employer felt it needed to proceed in the way it did to protect patient care first and foremost, and that the process decisions around the staffing piece became secondary to that objective. Accordingly I am not prepared to make a finding of bad faith in all of the circumstances.

Both parties cited *The City of Winnipeg and The Winnipeg Police Association et al.*[15] a 2020 decision of Arbitrator Werier which sets out a list of the major principles on damages at paragraph 255:

1. There is acceptance that arbitrators have jurisdiction to award general damages to both Unions and their members for breaches of a collective agreement and in instances where their rights are infringed.
2. Damages will be awarded when a declaration is considered insufficient and the purpose of the damages is to discourage such conduct in the future, and to indicate the rights which have been interfered with.
3. It is not necessary for a union or its members to prove a specific monetary loss where a declaration is not sufficient and harm has been caused.
4. A finding of bad faith, which is a factor to be taken into account in determining quantum of damages, does not preclude the

[15] 2020 CarswellMan 204

awarding of damages when there have been breaches of the collective agreement.

5. A case of first instance does not preclude an award of damages in a particular case. It is not necessary to prove a history of breaches. Each case must be assessed on its' own particular facts. …
6. If liability is established, the quantum of damages payable to a union will vary depending on the facts of each case. Factors to be considered include the seriousness of the misconduct, the nature of the harm caused to the Union, and the quantum which is necessary to give an employer a meaningful incentive to comply with the collective agreement. …
7. The quantum of damage awards to individual members will depend, as well, on the facts of each case. Damage awards vary from hundreds of dollars per member to thousands of dollars per member depending on the harm suffered and whether individuals suffered specific harm due to individual circumstances.

The facts in the *City of Winnipeg* case reflect a situation where the employer decided to unilaterally alter the terms of the police pension plan in significant respects, and essentially took the position after historically bargaining the plan for many years that it was not required to do so. The City passed a by-law incorporating the unilateral changes, which if implemented would have materially detrimentally affected the pensions of union members. Arbitrator Werier determined that the employer did not have the unilateral right that was being exercised, and that changes to the pension plan had to be collectively bargained. While he did not make a finding of bad faith, Arbitrator Werier also did not accept the employer's arguments that there was a legitimate disagreement over the interpretation of the Agreement and the by-law, stating at paragraph 264:

> I find that the City's arguments are not persuasive and fail to take into account the history of dealings between the parties. In light of the long history of bargaining over pension benefits, the City's conduct and breach has to be considered more egregious and is one of the reasons a declaration is not sufficient in the circumstances of this case.

Both parties also relied upon *West Park Healthcare v. S.E.I.U. Local 1.on*[16] which involved the employer's decision to restructure its' workforce without involving the union, in the face of collective agreement language which stated in part: "with respect to the development of any operating or restructuring plan which may affect the bargaining unit, the Union shall be involved in the planning process as soon as practicable…"[17]. At paragraphs 10 and 11 of that decision, the Board stated:

> … The action of the hospital amounted to a deliberate violation of Article 10.01, taken with full knowledge that it was a violation, at a time when it was cautioned by the union and could still have complied with its obligations. The hospital's action was clearly not a "mistake". As counsel for the hospital acknowledges, the hospital knew what its obligations under the collective agreement were. Over a number of months, it developed plans which affected a significant number of employees in the bargaining unit, discussed them with the Ministry of Health, and sought and obtained approval for its plans without at any time apprising or involving the union. When it announced its decision the hospital notified virtually everyone – residents, patients, family members, staff and volunteers – except the union. And, when the union secured a meeting of the Staff Planning Committee at which it urged the hospital to defer action until it complied with Article 10.01, it refused to do so. Instead, it moved within days to implement its decision.
>
> In these circumstances, although we are not persuaded that restoration of the existing *status quo* is possible at this time, a declaration is not a sufficient remedy. While the monetary loss is not specific, the union and the employees are entitled to damages: the employees for denial of the benefit of union representation, and the union for the denial of its right to represent the employees pursuant to Article 10.01, as well as for the injury to its reputation as an effective bargaining agent in administering the terms of the collective agreement. The union was not only marginalized; to all intents and purposes, it was ignored. …

[16] 2005 CarswellOnt 4150; 138 L.A.C. (4th) 213
[17] Supra note 16 at paragraph 2

As noted, both parties relied on the above two cases which awarded damages to both the union and its members, however to different ends. Mr. Dolinsky submitted that the principles contained in these decisions were applicable to the instant case and supported an award of significant damages as a declaration would not be a sufficient deterrent to future purposeful violations of the agreement. Ms. Klassen argued that these cases were examples of the level of egregious behavior which is necessary to find damages a necessary remedy, and that even if a breach of Article 19 was found to have occurred, the circumstances were entirely distinguishable. Ms. Klassen also relied on *Algoma Steel and USW Local 2251*[18] , a decision involving an employer incentive program to unionized employees which was not negotiated with the union. At paragraph 46 of that decision Arbitrator Craven stated:

> In general arbitrators have considered that a declaration (and in cases of ongoing breach a cease and desist order) provides appropriate relief for a breach of a Union's representation rights absent evidence of specific monetary losses, repeated breaches, or other significant aggravating circumstances. One often-cited reason for this preference is the ongoing character of long-standing collective bargaining relationships: …

The *Algoma Steel* case contains some important distinguishing features from the present case, including that individual remedies to union members were ordered, as well as some delay on the part of the union in enforcing its' rights, and fact that the employer suspended the program once the union complained. However, I agree with and adopt Arbitrator Craven's views on the care with which an order of damages must be considered in the context of an ongoing relationship.

Here the aggravating factors are as cited by Mr. Dolinsky – the deliberate breach, the failure to include PCAM in the Plan B discussion, the dismissive attitude towards PCAM demonstrated in the January 21st joint committee meeting, and the change of position on the characterization of the vacancy. While each of these

[18] 2020 CarswellOnt 4265

factors are quite concerning, as indicated above I am not making a finding of bad faith given the context in this situation.

There also mitigating factors which must be taken into account. Those include the fact that this is the first collective bargaining agreement between the parties so the relationship is in its' infancy, that I have not found there to be prior breaches under the agreement, and that the circumstances resulting in the violation unfolded very quickly and not in a linear manner. As pointed out by Ms. Klassen and as seen in the evidence as a whole there was *some* attempt to consult with PCAM as those circumstances were developing. The attempts were rendered less effective by the urgency and timing of the need and the reality that PCAM's executive are all working members of the bargaining unit and thus not immediately available for discussion.

I am making a declaration that the collective agreement was violated by the failure to post the eight week term position. I am declining to award damages despite what I have found to be a deliberate violation primarily on the basis of those mitigating factors. Unlike a number of the cases where damages were awarded this situation arose and needed to be addressed quickly under less than ideal circumstances, and did not reflect a carefully thought through assault on PCAM's representational rights. In saying this, I do not mean to suggest that a failure to post and an accompanying external hire are trivial incursions on those rights, or on the reputation of the union in the eyes of its members. Posting of opportunities and the ability to challenge selection are significant matters regardless of the length of the term or the speculation that internal applicants would not have been interested.

One of the main reasons for an award of damages – which is an unusual remedy in a collective bargaining relationship – is to deter repeat conduct. If this violation had arisen in a mature bargaining relationship with a longstanding collective agreement and accompanying practice I would have been much more inclined

to make such an award. The employer would be well advised in future to treat the relationship as one where meaningful consultation with PCAM on issues such as this one has value in the shared goal of appropriate patient care.

In summary I am allowing the grievance and issuing a declaration that the WHRA was in violation of Article 19 of the collective agreement when it failed to post the eight (8) week term position that was offered to a candidate external to the bargaining unit. I am declining to award the other remedies advanced in the grievance.

Dated at Winnipeg, this 10th day of December, 2020

KRISTIN L. GIBSON, SOLE ARBITRATOR