In the Matter of an Arbitration
pursuant to the Nova Scotia *Trade Union Act,* RSNA 1989, Chapt. 475
and the Nova Scotia *Labour Standards Code,* RSNA 1989, Chapt. 246

Between:

SAINT MARY'S UNIVERSITY
(the University or the Employer)

- and -

SAINT MARY'S UNIVERSITY FACULTY UNION
(SMUFU or the Union)

Re: Vacation Pay Grievance (#1) (2012-2015)

A W A R D

Paula Knopf - Arbitrator

Appearances:

Counsel for the Employer: **Tara Erskine and Leah Kutcher**

Counsel for the Union: **Gordon Forsyth and Bettina Quistgaard**

The hearing of this matter was held in Halifax on July 29 and 30, 2015.

This is a group grievance wherein the Union alleges that professors who were employed on the basis of "contractually limited term appointments" should have received 4% vacation pay pursuant to the Collective Agreement and the *Labour Standards Code*. The University challenges the claim, asserting that the salaries that were paid to those professors included vacation pay and conformed to the contract and the law. In the alternative, the University defends the grievance by saying that the Union is estopped from asserting this claim on account of the decades that have passed without seeking such a benefit. The resolution of this case turns on the interplay of the Collective Agreement with the Nova Scotia *Labour Standards Code* and the factual background that forms the context of the dispute.

At the outset of the hearing, the Employer raised a preliminary objection to the case, asserting that the grievance was untimely and ought to be dismissed. The determination of the preliminary objection required a consideration of the history of the grievance and the facts of the case. Since the objection has not been upheld, the submissions and rationale for the ruling will be found within the body of this Award.

To the parties' credit, they presented the case largely on the basis of the following Agreed Statement of Facts:

A. Nature of the Grievance

1. Saint Mary's University Faculty Union ("SMUFU" or the "Union") and Saint Mary's University are parties to a Collective Agreement effective September 1, 2012 to August 31, 2015. A copy of the Collective Agreement [was filed] as Exhibit "1".

2. On May 29, 2013, the Union filed a grievance under the Collective Agreement stating in part as follows:

> GRIEVOR'S NAME: Saint Mary's University Faculty Union, on its own behalf and on behalf of all current and former bargaining unit members on limited term contracts whose contracts terminated during the term of the September 1, 2012 to August 31, 2015 Collective Agreement and who have not been paid 4% vacation pay.
>
> DEPARTMENT: All affected Departments

…

1. Nature of Grievance:

   This is a grievance under the September 1, 2012 to August 31, 2015 Collective Agreement for all current and former bargaining unit members on limited term contracts to whom the Employer did not pay 4% vacation pay during the term of the Collective Agreement.

2. Section(s) of the September 1, 2012 to August 31, 2015 Collective Agreement Involved:

   General purpose of the Agreement, Article 16.1.10(f), the Salary Scales, and any other applicable and relevant provisions of the Collective Agreement, and sections 32 to 36 of the Nova Scotia *Labour Standards Code*, R.S.N.S. 1989, c. 246.

3. Facts of the Case:

   SMUFU has recently become aware that current and former bargaining unit members on limited term contracts (typically 4- or 9-month contracts) have not been paid the vacation pay they are entitled to. Section 34 of the Nova Scotia *Labour Standards Code* requires that employees working full time for less than 12 consecutive months without vacation are entitled to be paid 4% vacation pay at termination of their contracts. In a Memorandum dated May 3, 2013, the Employer confirmed its failure to pay 4% vacation pay to members on limited term contracts has continued for numerous years, and advised of its position that the stipend paid to members on limited term contracts is inclusive of vacation. The Saint Mary's University Faculty Union does not agree with this position. The failure to pay 4% vacation pay is in violation of the Collective Agreement and the *Labour Standards Code*.

4. Remedy Sought:

   (a) a declaration that the Employer is in violation of the Collective Agreement and the *Labour Standards Code*; and

   (b) full redress, including 4% vacation pay for all current and former bargaining unit members whose limited term contracts terminated during the term of the September 1, 2012 to August 31, 2015 Collective Agreement and interest thereon.

A copy of the grievance [was filed] as Exhibit "2".

3. By letter dated July 5, 2013, the University denied the grievance at Step 1 of the grievance procedure, stating in part as follows:

> Prior to providing a full response to the grievance, the University requires further particulars as to the names of the "current and former bargaining unit members" referred to in the grievance. As per Article 10.1.42, the Union is provided with a copy of each letter of appointment.
>
> In the interim, and reserving the right to make a further response on receipt of the names of the bargaining unit members, the University's response to the grievance is as follows:
>
> 1) There has been no violation of the Collective Agreement as alleged or at all.
>
> 2) Additional amounts for pay for vacation pay over and above the stipend are not required under the Collective Agreement as the stipend provided is inclusive of vacation.
>
> 3) In addition to the inclusion of vacation pay in the stipend, faculty members working under limited term contracts have been provided with a benefit that meets or exceeds the requirements of the Nova Scotia Labour *Standards Code*. This is because of the days, excluding statutory holidays, for which they are paid but not required to work, which includes periods each year such as Christmas Closure, Study Day, Winter Break, etc.
>
> 4) The Union has been in agreement with the practice of the University in the manner and amount of calculation of pay and this practice has continued for a number of years with the knowledge and agreement of the Union. Accordingly, the Union cannot now grieve this matter.
>
> 5) This grievance is out of time as per Article 22.3.1 of the Collective Agreement.

A copy of the University's response to the grievance [was filed] as Exhibit "3". By letter dated July 16, 2013, a copy of which [was filed] as Exhibit "4", the University denied the grievance at step 2 of the grievance procedure.

3. By Memorandum dated July 23, 2013, the Union advised the University that it was referring the grievance under the current Collective Agreement to arbitration. A copy of this Memorandum [was filed] as Exhibit "5".

4. By letter dated September 11, 2014, the University repeated its earlier request for particulars of the grievance, specifically, "the names of the current and former bargaining unit members" to which the grievance refers. A copy of this letter [was filed]

as Exhibit “6”. By email dated September 19, 2014, the Union provided the University with “the names and contracts for the employees for whom the Union is claiming… .” A copy of this email [was filed] as Exhibit “7”. The grievors are:

1. Regina Abott
2. Dr. Brian Barry
3. Angus Bonnyman
4. Donna Bourque
5. Janet Conrad
6. Glen Greencorn
7. Dr. Karla Henderson
8. Dr. Tatiana Hessami Pilehroc
9. Dr. Adam Hyatt
10. Abdul-Rahman Khokhar
11. Jody MacIntyre
12. Donald McIver
13. Dr. Susan Meek
14. Suzanne Milner
15. Vinita Mishra
16. Jennifer Nicholson
17. Dr. Marianne Parsons
18. Michelle Patriquin
19. Dr. Carlos Pessoa
20. Russell Prime
21. Dr. Jason Rhinelander
22. Dr. Diego Rojas
23. Milica Saagh
24. Eric Tanton
25. Dr. Mark Thomas
26. Dr. Daniel Wadden
27. Dr. Aldona Wiacek
28. Tanya Willis.

5. By email dated July 19, 2015, the Union provided the University with the following list of additional term appointees to which the grievance refers:

29. Neil Cody
30. Dr. Ramon Baltazar
31. Dr. Lynn Gunn
32. Dr. David Sable

B. The Collective Agreement

6. Article 10.1.10 of the Collective Agreement sets out seven classes of appointment of Faculty Members, including regular full-time appointments (both those

that confer tenure and probationary appointments), contractually limited term appointments, part-time appointments and Lecturer Stream Appointments.

7. Contractually limited term appointments, which are at issue in this grievance, are made under Article 10.1.10(c). Contractually limited term appointments are typically for a term of either 4 months or 9 months ("Term Appointees").

8. Article 15.1 of the Collective Agreement addresses working conditions for Faculty Members. Article 15.1.10(a) provides for a vacation period of one (1) month for full-time appointees. Article 15.1.10(a) states:

> A Faculty Member's appointment, except as provided for in 10.1.10(c) and (d), shall be on a full-time yearly basis from September 1 to August 31 of the following year inclusive. Although he/she shall not be obliged to be at the University outside the Academic Year, it is agreed that the Faculty Member, as a professional academic, will undertake research, study, or professional activities whenever he/she is not engaged in teaching or other administrative duties, whether during the Academic Year or outside it, excepting for a vacation period of one month.

9. Article 15.8 of the Collective Agreement lists the paid holidays for Faculty Members. It states:

> 15.8 HOLIDAYS – FACULTY
> The following shall be considered paid holidays for Faculty Members for the purpose of this Agreement:
>
> | | |
> |---|---|
> | New Year's Day | Labour Day |
> | Good Friday | Thanksgiving Day |
> | Easter Monday (Effective in the academic year 2010-2011) | |
> | Remembrance Day | |
> | Victoria Day | Christmas Eve (designated .5 day) |
> | Canada Day | Christmas Day |
> | Halifax Natal Day | Boxing Day |
>
> Or the day(s) officially proclaimed in lieu of such paid holidays and any holidays declared by the Employer in any year to be of general application throughout the University.

10. In addition to the Collective Agreement paid holidays, there are numerous days for which Faculty Members are paid but are not required to teach classes (that do not include weekends), including:

- Prior to September Start of Classes:
  - 2012: 1 day - September 4, 2012;
  - 2013: 1 day - September 3, 2013;

- Fall Term Study Day:
  - 2012: 1 day - November 29, 2012
  - 2013: 1 day - November 28, 2013
  - 2014: 1 day - November 28, 2014

- Patron Feast of the Immaculate Conception:
  - 2014: 1 day - December 8, 2014 (Monday) (The Feast Day was on a Saturday or Sunday in 2012 and 2013).

- Christmas Closure:
  - 2012: 7.5 days, - Closed at noon on December 21, 2012, classes resume January 7, 2013, December 21 (1/2), 24, 27, 28, 31, January 2,3,4;
  - 2013: 6.5 days, - Closed at noon on December 23, 2013, classes resume January 6, 2014, December 23 (1/2), 24, 27, 30, 31, January 2,3;
  - 2014: 5.5 days, Closed at 5:00 pm on December 23, 2014, classes resume January 5, 2015, December 23 (1/2), 24, 29, 30, 31, January 2.

- Winter Break:
  - 2013: 5 days - February 18-22, 2013;
  - 2014: 5 days - February 17-21, 2014;
  - 2015: 5 days - February 16-20, 2015.

- April:
  - Varies, depending on when classes end.

- May:
  - 2013: 22 days: May 1-3, 6-10, 13-17, 21-24,27-31, 2013;
  - 2014: 21 days: May 1-2, 5-9, 12-16, 20-23, 26-30, 2014;
  - 2015: 20 days: May 1, 4-8, 11-15, 19-22, 25-29, 2015.

11. Article 16.0 addresses salaries and allowances. Under Article 16.1.10(f), Faculty Members appointed on limited term contracts of less than one year receive a salary in accordance with the annual salary scales in Schedule “A 1” of the Collective Agreement, pro-rated for the term of the contract (e.g., typically 4 or 9 months). Article 16.1.10 states in part as follows:

> (a) Each full-time Faculty Member and Professional Librarian shall receive the annual salary applicable to his/her place on the Salary Scales attached and forming part of this Agreement as Schedule “A 1” for Faculty Members, Schedule “A 2” for Professional Librarians, and Schedule “A 3” for Lecturer Stream Faculty. …
>
> (f) A full-time Employee with an appointment for a period shorter than one (1) year shall receive a pro-rated annual salary for his/her appropriate place on the scale.

12. The grievance and arbitration procedure is set out in Article 22 of the Collective Agreement. The time limits for filing a grievance are set out in Article 22.3, which states in part as follows:

> [For clarification in this article, working days means Monday to Friday, September 1 to August 31 inclusive, excluding statutory holidays.]
>
> 22.3.1 (a) The Union shall file a grievance according to procedures outlined in 22.5.1 within twenty (20) working days after the occurrence of the incident giving rise to the grievance, or twenty working days from the date it became aware of the events giving rise to the grievance, whichever is later.
>
> (b) Should the incident giving rise to the grievance have occurred outside the academic year (as defined in this collective agreement), the grievor shall have thirty (30) working days from the start of the next academic year in which to initiate the grievance, or thirty (30) working days from the date the Union knew of the events giving rise to the grievance, whichever is later.

C. Negotiating History

13. Term Appointees at Saint Mary's University are represented by the Union. Term Appointees have been represented by the Union for forty (40) years, since April 25, 1974.

14. On April 25, 1974 the Labour Relations Board (Nova Scotia) issued Order 2056, certifying the Union as the Bargaining Unit for all academic faculty members employed by Saint Mary's University. Order 2056 was amended on the same day it was originally issued, the April 25, 1974 Order (Amended) states in part:

> The Labour Relations Board (Nova Scotia) does hereby certify the Saint Mary's University Faculty Union, Halifax, Nova Scotia, as the Bargaining Agent for a Bargaining Unit consisting of all regular part-time and full-time academic faculty members employed by Saint Mary's University, but excluding the President, the Academic Vice-President, the Registrar, and Deans, and all other persons excluded by Paragraphs (a) and (b) of Subsection (2) of Section 1 of the Trade Union Act.

A copy of the April 25 1974 Order and Order (Amended) [was filed] as Exhibit "8".

15. On June 24, 1974 the Labour Relations Board (Nova Scotia) issued Order 2076 certifying the Union as the Bargaining Agent for a Bargaining Unit consisting of all

Librarians employed by Saint Mary's University. A copy of the Order [was filed] as Exhibit "9".

16. On March 21, 1988 the Union applied to the Labour Relations Board (Nova Scotia), pursuant to Section 26 of the *Trade Union Act* to combine the Labour Relations Order 2056 (Faculty), dated April 25, 2974 and the Labour Relations Order 2076 (Librarians), dated June 24, 1974 into one certification order. On February 7, 1989 the Labour Relations Board Ordered that Labour Relations Order 2056 and Order 2076 be combined into one certification order. A copy of this Order [was filed] as Exhibit "10".

17. Since 1975, Saint Mary's University and the Union have successfully negotiated over sixteen (16) Collective Agreements. Copies of a number of these previous Collective Agreements are attached as Exhibit "11".

18. Language allowing for the appointment of Term Appointees has existed in each Collective Agreement between the Union and Saint Mary's University since at least 1981. Term Appointees at Saint Mary's University have typically been for a term of either 4 months or 9 months.

19. The language in the Collective Agreement regarding the annual salary applicable to faculty members has remained similar since 1975, with the exception of changes of monetary amounts.

20. Since at least 1984, Term Appointees have not received vacation pay over and above salary.

21. The issue of vacation pay for Term Appointees has not been raised either by the Union or the University in collective bargaining.

22. Two, and possibly more, Union executive members have held Term Contracts during the course of their employment with Saint Mary's University. For example, Douglas Strongman held a 9 month Term Contract from September 1, 1987 to May 30, 1987. Dr. Strongman served on the Union Executive as Vice-President for 1996-1997 and as Member at Large for 1997-1998. Michael Vance held a 9 month limited term appointment from September 1, 1990 to May 30, 1990. Dr. Vance served on the Union executive as Member at Large for 1999-2001, as President for 2003-2005, and as Past President for 2005-2006.

23. This is the first grievance brought by the Union claiming failure to pay 4% vacation pay for Term Appointees.

D. The *Labour Standards Code*

24. The following provisions of the *Labour Standards Code* are raised by the grievance:

2 In this Act,

(n) “pay” means wages due or paid to an employee and compensation paid or due to an employee under Sections 32, 33 and 34, but does not include deductions from wages that may lawfully be made by an employer;

…

(u) “wage” or “wages” includes salaries, commissions and compensation in any form for work or services measured by time, piece or otherwise, and includes compensation under Sections 37, 40, 41, 46, 50, 57, 58, 72 and 74, but does not include vacation pay and pay in lieu of vacation under Sections 32, 33 or 34 or gratuities;

…

6 This Act applies notwithstanding any other law or any custom, contract or arrangement, whether made before, on or after the first day of February, 1973, but nothing in this Act affects the rights or benefits of an employee under any law, custom, contract or arrangement that are more favourable to him than his rights or benefits under this Act.

…

15 (1) Every Employer shall keep and maintain at his principal place of business for at least three years after the work was performed records from which it may be ascertained whether or not he is complying with this Act, and shall produce the same or a certified true copy thereof to the Director upon request of the Minister or the Director, including

(a) a register of the names of all employees employed by him in which is noted the age, sex and last known residential address of each;

(b) a record of the rates of wages, hours of work, vacation periods, leaves of absence, pay and vacation pay of each of the employees;

…

Vacation Pay

32 (1) Where an employee works for an employer at any time during a continuous twelve-month period, the employer

(a) not later than ten months after the twelve-month period ends, shall give the employee an unbroken vacation of at least two weeks or, where the employee has been in the employ of the employer for more than eight years, an unbroken vacation of at least three weeks;

(b) at least one week in advance, shall notify the employee of the date his vacation begins; and

(c) at least one day before his vacation begins, shall pay the employee an amount at least equal to four per cent or, where the employee has been in the employ of the employer for more than eight years, an amount at least equal to six per cent, of the employee's wages for the twelve-month period during which the employee establishes his right to a vacation.

…

33 (1) An employee who works for an employer for less than ninety per cent of the regular working hours during a continuous twelve-month period may waive the entitlement set out in subsection (1) of Section 32 to a period of vacation leave.

(2) Where the employee notifies the employer in writing that the employee is exercising the option specified in subsection (1), Section 32 does not apply and the employer shall pay to the employee, not later than one month after the twelve-month period ends, an amount at least equal to four per cent or, where the employee has been in the employ of the employer for more than eight years, an amount at least equal to six per cent, of the wages of the employee for the twelve-month period.

34 Where an employee works for an employer and is not entitled to a vacation with pay or pay in lieu of a vacation as provided for in Sections 32 and 33, and his employment with that employer terminates, the employer shall pay to the employee within ten days after his employment terminates an amount at least equal to four percent or, where the employee has been in the employ of the employer for more than eight years, an amount at least equal to six percent, of the wages of the employee during the time he was employed.

…

25. Subsection 2(5) of the *General Labour Standards Code Regulations* stipulates that employees covered by a collective agreement are exempted from the application of certain provisions of the *Labour Standards Code*, but these exemptions do not include Sections 32 through 36, which provide for vacation and vacation pay.

E. Events Giving Rise to the Grievance

26. On or about February 8, 2013, Dr. Diego Rojas, a Faculty Member who was on his third limited term contract inquired about vacation pay. Dr. Rojas' first Term Contract commencing January 2011 [was filed] as Exhibit "12".

27. Term Appointees at Saint Mary's University are offered employment through letters called letters of appointment.

28. The Collective Agreement sets out what shall be included in a letter of appointment. Art. 10.1.40 provides:

The President shall provide to each new employee a letter of appointment which shall include the following:

(a) The effective date of the appointment, for appointments under 10.1.10(b) or 10.1.10(g) will normally be July 1. The effective date for all other appointments shall be September 1. Salary step increments for initial appointment at July 1 will be effective fourteen months from date of appointment. Salary step increments for initial appointments under 10.1.10(b) or 10.1.10(g) with an effective date of January 1 shall be effective the following September. Subsequent salary step increments for all appointees will be effective September 1 of each year in accordance with Article 16.1.10.

(b) The terminating date of the appointment.

(c) The class of the appointment, specifying the sub-clause of Article 10.1.10 under which the appointment is made.

(d) The rank, year in rank, and salary of the Faculty Members as of the effective date of the appointment as determined by placement on the effective salary scale plus an upward adjustment if any to that scale under Article 4.1(a) and/or through the application of market supplements (Article 16.8).

(e) The Department or Division to which the Faculty Member will be attached.

(f) Any special conditions (see 10.1.30(d) above).

(g) The number of years of credit for prior service, as reflected in the appointee's year in rank (see 10.1.40(d) above), that will count toward eligibility for promotion to the next higher rank (See 11.1.21).

29. Art. 10.1.42 provides:

(a) One copy of the letter of appointment shall be kept by the Employer, a second by the Faculty Member, a third by the Union and a fourth by the Department Chairperson, it being understood and agreed that the letter and the information provided therein will be held in confidence by the Department Chairperson and the Union.

(b) Each letter of appointment shall be accompanied by a copy of the Agreement and shall contain a statement that the appointment is subject to the terms and conditions of the Agreement.

30. The Union receives copies of all letters of appointment for limited term contracts; it does not receive copies of payroll information or Records of Employment for Faculty Members.

31. The Union Executive under the current Collective Agreement was not aware whether Term Appointees were being paid 4% vacation pay on the termination of their Term Contracts.

32. Dr. Marc Lamoureux, President of the Union advised Dr. David Gauthier, Vice-President, Academic and Research, of Dr. Rojas' inquiry and requested the University look into the matter.

33. The University responded to the inquiry from the Union and advised the Union of its position in a Memorandum dated May 3, 2013. The Memorandum, attached as Exhibit "13", states as follows:

> I have inquired into the issue you raised suggesting that Dr. Diego Rojas is entitled to additional amounts for vacation pay over and above the stipend he is paid for the nine-month contract. Upon review, it is my understanding that additional amounts of pay for vacation pay are not required in that the stipend provided is inclusive of vacation.
>
> An examination of the Nova Scotia *Labour Standards Code* indicates that it sets the "floor" for the basic terms and conditions for most Nova Scotia employees. Employees who are employed for less than twelve months have no right under the *Code* to vacation leave, but they are entitled to vacation pay.
>
> My understanding is that employees who are employed pursuant to a collective agreement, such as Dr. Rojas, are treated slightly differently under the *Code* than most other employees. The *General Labour Standards Code Regulations* provide that *Code* provisions respecting public holidays, overtime pay and notice of termination of employment do not apply to them. However, all other *Code* minimum employment standards will apply. An employer may provide a greater benefit to employees under a collective agreement but cannot provide than the *Code* minimum with respect to each separate type of benefit conferred by the *Code*, including vacation.
>
> Based on Dr. Rojas' stipend, 4% vacation pay is equivalent to 7.8 days. Dr. Rojas, and other employees who are similarly situated, receive a greater benefit than the 4% vacation pay under the *Code*. This is because of the number of days, excluding statutory holidays, for which he is paid but not required to work. For example, in the period of September 1, 2012 to May 31, 2013, this totals well over fifteen (15) days, and includes Thanksgiving Day (October 8, 2012), Study Day (November 29, 2012),

> Christmas closure (8 days from December 19 to December 31, 2012), Winter Break (5 days from February 18-23), Study Day (April 5, 2013), Easter Monday, (April 1, 2013), and so on.
>
> I have inquired into the past practice at Saint Mary's regarding pay for limited term appointees and understand that this method of calculation of pay has continued for numerous years without objection by the Union, i.e., there has been agreement on the practice.
>
> I trust this is the information that you require to answer Dr. Rojas' inquiry.

The Memorandum attaches two tables listing the days off (excluding Statutory Holidays) referred to by Dr. Gauthier for the 2011-2012 and 2012-2013 academic years, and a table setting out the number of days equivalent to 4% vacation pay.

34. Following receipt of the University's decision, as set out in the above Memorandum, the Union filed the grievance.

F. Limited Term Contract Appointments

35. A spreadsheet identifying all Faculty appointments under limited term contracts for the period September 1, 2012 to September 19, 2014 during the term of the Collective Agreement [was filed] as Exhibit "14".

36. Limited term contracts are offered to prospective Faculty Members by way of a letter from the President of the University setting out the terms of the offer of employment. To accept the offer, the prospective Faculty Member must sign and date the letter, and return it to the University within the stipulated time limit. At the end of the term of the contract, the Faculty Member's employment with the University is terminated, and the University issues a Record of Employment.

37. Copies of all of the letters of appointment for Term Appointees entered into between the University and Faculty Members during the term of the current Collective Agreement [were] attached as the following Exhibits (in the order in which they are listed in Exhibit "14"):

> Exhibit "15" – September 1, 2012 to May 31, 2013 – 9 month appointments
> Exhibit "16" – September 1, 2013 to May 31, 2014 – 9 month appointments
> Exhibit "17" – October 5, 2013 to May 31, 2014 – 8 month appointment
> Exhibit "18" – September 1, 2014 to May 31, 2015 – 9 month appointments
> Exhibit "19" – 2012 – 2013 – 4 month appointments
> Exhibit "20" – 2013 – 2014 – 4 month appointments
> Exhibit "21" – 2014 – 2015 – 4 month appointments

38. The letters of appointment sent by the University, and signed by the Faculty Members, effective September 1, 2012 up to contracts ending May 2013 contain no

reference to vacation or vacation pay. Most, but not all, letters of appointment for contracts from September 1, 2013 state that the pro-rated salary is "inclusive of vacation pay."

39. With respect to compensation, the letters are similarly worded and refer only to an annual salary that will be pro-rated for the 4 or 9 month term of the contract. By way of example, the first letter of appointment (Prof. Bonnyman) of July 2, 2014 in Exhibit "18" states in part as follows:

> The terms of the offer are as follows:
>
> 1. A limited term appointment under Article 10.1.10(c) of the *Collective Agreement* from September 1, 2014 to May 31, 2015. This appointment will be at the rank of Lecturer (Step 2).
>
> 2. The stipend for the rank of Lecturer, Step 2 is $62,713 (*Collective Agreement* dated September 1, 2012, Salary Scale 3; September 1, 2014) which will be pro-rated for the duration of the contract.
>
> 3. There is also an overscale of $25,000 per annum associated with this appointment, which will be pro-rated for the length of the contract.
>
> 4. Benefits:
>
>   - It is a compulsory condition of employment that you enroll in the Saint Mary's University Health and Wellness Trust Group Benefits Plan (Group Benefits Plan). This Group Benefits Plan is administered by the Saint Mary's Faculty Union Health and Wellness Trust (Trust). Information about benefits can be found at http://www.smufu.org/.
>
>   - To ensure salary implementation, in addition to the signed contract letter, please complete and return the following attachments: Employee Action Form, TD1NS (provincial), and TD1 (Federal).
>
> …

(Faculty Members on 4-month limited term contracts are not entitled to participate in the Group Benefits Plan.)

40. Starting on or about July 24, 2013, after the grievance was filed, the letters of appointment sent by the University to prospective Faculty Members contained the additional phrase "inclusive of vacation pay" in respect of the pro-rated salary. For example, the first letter of appointment in Exhibit "16" states in part as follows:

> 2. The stipend for the rank of Lecturer, Step 3 is $64,163 (Collective Agreement dated September 1, 2012, Salary Scale 2: September

1, 2013) which will be pro-rated for nine months inclusive of vacation pay. [emphasis added]

41. The Union grieved the addition of the words “inclusive of vacation pay” in the letters of appointment. This is not the subject of the present grievance.

42. The University has produced payroll records for two Faculty Members employed on successive limited term contracts, Professor Milica Saagh and Professor Angus Bonnyman. These are attached as Exhibit “22”.

43. Faculty Members continue to be hired by the University on limited term contracts, and the practice of the University regarding the amount paid to Term Appointees has not changed.

G. Term Appointee Duties and Schedules

44. Contractually limited term appointments, which are at issue in this grievance, are made under Article 10.1.10(c) of the Collective Agreement. The contractually limited term appointments are typically for a term of either 4 months or 9 months and are based on the academic year.

45. Examples of job postings for various Limited Term contract positions [were filed as Exhibit “23”].

46. Term Appointees teach. As outlined in Art. 15.1.13 (a): teaching includes:

> “student advising, academic counseling, supervision of tests and examinations, evaluation of student performance and grading.”

47. Term Appointees perform all of what is required for the curriculum, including: teaching classes, course and class preparation, preparing teaching materials, preparing and marking quizzes, exams and papers, holding office hours, being available to meet with students outside office hours, adjusting course work to accommodate weather closures and illness, and being available for students to discuss grades. If a student is unable to write an exam as scheduled, a Term Appointee may be required to set and mark a special examination, which may be done in the month of May. For example, a student of Dr. Rojas had an examination for MATH 1250 rescheduled to May 21, 2014.

48. Unlike other classes of full time Faculty Members who are required to do research, Term Appointees are not required to do research and are not eligible for research funding.

49. Under 8.4.12 of the Collective Agreement, Faculty Members, including Term Appointees, have the right and responsibility to participate in the functioning of their Departments, Faculties and the University. Term Appointees may attend Departmental meetings but are not required to do so. Term Appointees are not permitted to vote in

Departmental hiring decisions as per Art. 10.1.20(d). (Some Term Appointees have attended Departmental meetings in May. For example, Dr. Jason Rhinelander attended an Engineering Department meeting on May 12, 2014. On April 16, 2014, Dr. Rhinelander was offered a full-time, tenure track position with the University commencing July 1, 2014.

50. Before the commencement of a limited term contract (whether commencing in September or January), Term Appointees, like other Faculty Members, must prepare for their teaching duties. This preparation includes: ensuring that books and other teaching materials are ready and available; preparation of a course outline for each course being taught as required by Senate Policy 8-1012 (a copy of which [was filed] as Exhibit "24"); preparation of some lectures; office set-up, including setting up the computer system, obtaining an access card and keys; and answering any student inquiries about courses.

51. Term Appointees on their first contract are invited to an optional two-day orientation held by the University in August, which is provided for all new Faculty Members to familiarize them with the campus and resources.

9 Month Term Appointees

52. 9 month Term Appointees are paid from September 1st until May 31st of the following year.

53. During a 9 month term, Term Appointees teach classes from early September and complete teaching classes in early April.

54. Term Appointees may teach courses which require an exam, or they may teach courses that do not have an exam. If Term Appointees are teaching an exam course they are required to submit grades within seven (7) days after the exam, as per page 34 of the Undergraduate Academic Calendar. If Term Appointees are teaching a course which does not require an exam, they are required to submit grades within seven (7) days after the start of the exam period, as per page 34 of the Undergraduate Academic Calendar. This is true for full-time Faculty Members teaching courses in the same period. If there is no exam, marks must be submitted within seven (7) days of the start of the exam period.

55. Classes generally finish in mid to late April, depending on the course. Faculty members (including Term Appointees and Full-time Faculty), are required to mark and submit grades by mid to late April depending on the date of the exam. For example, in April 2014 the latest that grades were due for the affected Term Appointees was April 24, this was for Ms. Michelle Patriquin.

56. By way of example, in 2012, Dr. Diego Rojas was hired by Saint Mary's University for a 9 month term. His offer letter is included in Exhibit "15". The letter provides in part:

> …I am pleased to offer you a teaching position in the Department of Mathematics and Computing Science at Saint Mary's University, effective September 1, 2012.
>
> The terms of the offer are as follows:
>
> 1. A limited term appointment under Article 10.1.10(c)(i) of the *Collective Agreement* for a period of nine months, effective September 1, 2012. This appointment will be at the rank of Assistant Professor (Step 6).
>
> 2. The stipend for the rank of Assistant Professor, Step 6 is $78,304 (*Collective Agreement* dated September 1, 2009, Salary Scale 3: September 1, 2011) which will be pro-rated for nine months. …

57. During Dr. Rojas' 9 month term he taught eleven (11) courses. Five (5) in the fall term and six (6) in the winter term. The normal teaching load for a limited term appointment is five (5) courses under Article 15.1.12 of the Collective Agreement, but, if the Faculty Member agrees, he or she may teach six (6) courses.

58. In the Fall of 2012 Dr. Rojas taught one (1) course on Wednesday, one (1) course on Tuesday and Thursday and three (3) courses on Friday. He did not teach any courses on Mondays. In the fall of 2012, during a full week, Dr. Rojas taught classes for nine (9) hours and fifteen (15) minutes a week. Dr. Rojas fall 2012 courses were:

1. 6600 Graduate Seminar
2. 2311 Intermediate Calculus
3. REC A: Intermediate Calculus
4. REC B: Intermediate Calculus
5. REC C: Intermediate Calculus

59. In Winter 2013 Dr. Rojas taught two (2) classes on Mondays, three (3) classes on Wednesdays, one (1) class on Thursday and two (2) classes on Friday. In the winter of 2013, Dr. Rojas taught for a total of eleven (11) hours and forty-five (45) minutes a week. Dr. Rojas winter 2013 courses were:

1. 6600 Graduate Seminar
2. 1211 Introductory Calculus II
3. 1211 Introductory Calculus II
4. RECIT A Introductory Calculus
5. RECIT C Introductory Calculus
6. 4432 Elementary Topology

A list of courses Dr. Rojas taught in 2012 and 2013 are attached as Exhibit "25".

60. In the Fall term of 2012, Dr. Rojas had submitted all final marks to the Registrar's office by December 18, 2012. There were no student grade appeals in any of Dr. Rojas' Fall courses. In the Winter term of 2013, Dr. Rojas had submitted all final marks to the Registrar's office by April 27, 2013. There were no student grade appeals in any of Dr. Rojas' Winter courses.

61. In the 2012-2013 academic year, Dr. Rojas was paid $59,755.50, which is a 9 month pro-rated stipend for the annual amount in his salary scale of $78,304.00.

62. During his 9 month term, there were forty-seven (47) days when Dr. Rojas was not required to teach classes.

63. A spreadsheet identifying all of the days for which Dr. Rojas was paid, but was not required to teach classes during his 9 month limited term contract, [was filed] as Exhibit "26". The spreadsheet identified statutory holidays in yellow.

9 Month Term Appointees – April and May

64. The process of Academic Appeals is addressed on pg. 36 of the Undergraduate Academic Calendar Regulations, which [was filed] as Exhibit "27". The dates for appeals are determined by the last day of the semester in which the course was taken.

65. There were only two grade appeals involving the affected Term Appointees from September 2012 to present. One example is a grade appeal involving Professor Milica Saagh in course MGSC 1206B. The final exam in the course was on April 5, 2014 and Saagh met with the student to discuss the grade on April 11, 2014. The student paid the appeal fee on June 17, 2014. The Academic Appeal meeting was on Tuesday, July 29, 2014. Saagh did not attend the Academic Appeal meeting but did meet with a representative of the Appeal Committee sometime between June 1 and July 30, 2014. The grade appeal was resolved on November 24, 2014.

66. The second grade appeal involved Vinita Mishra.

67. Various Term Appointees accepted part-time contracts to teach courses in the Summer I session in May 2013, May 2014, and May 2015. Copies of various part-time teaching contracts held by Term Appointees are attached as Exhibit "28". These part-time contracts are governed by the collective agreement between Saint Mary's University and CUPE, Local 3912, which [was filed] as Exhibit "29".

68. The Term Appointees who were also Part-Time Instructors for Summer Session I 2013 which started on May 6, 2013 are:

- Dr. Donna Bourque (1 course);
- Janet Conrad (1 course);
- Vinita Mishra (2 courses);
- Dr. Daniel Wadden (2 courses).

69. The Term Appointees who were also Part-Time Instructors for Summer Session 1 2014, which started on May 5, 2014 are:

- Dr. Susan Meek (1 course);
- Milica Saagh (2 courses).

70. The Term Appointees who were also Part-Time Instructors for Summer Session I 2015, which started on May 4, 2015 are:

- Dr. Susan Meek (1 course);
- Milica Saagh (2 courses);
- Dr. Mark Thomas (2 courses).

71. An example of a course schedule for a Term Appointee teaching one course in the Summer I 2015 session is Dr. Susan Meek, who taught Biostatistics on Tuesdays and Thursdays from 9:30 am to 12:20 pm. She also taught the lab on Tuesdays and Thursdays from 1:30 pm to 4:30 pm.

72. An example of a course schedule for a Term Appointee teaching two courses in the Summer Session I 2015 is Milica Saagh, who taught two sections of Introduction to Statistics, one on Monday and Wednesday from 1:30 pm to 4:30 pm, the second on Monday and Wednesday from 5:30 pm to 8:30 pm.

73. Faculty Members at Saint Mary's University, both full-time Faculty and Term Appointees, are permitted to hold appointments at other universities provided that it does not conflict with their duties at Saint Mary's University. Various Term Employees also teach at other institutions. For example, Ms. Milica Saagh also taught at Dalhousie in May 2014.

4 Month Term Appointees

74. 4 month Term Appointees are also identified in the spreadsheet identifying all Faculty appointments under limited term contracts to-date during the term of the Collective Agreement, [filed] as Exhibit "14".

75. 4 month Term Appointees are generally employed either for the Fall Term or Winter Term.

76. 4 month Term Appointees appointed for the Fall Term are paid from September 1st until December 31st. 4 month Term Appointees appointed for the Winter Term are paid from January 1st until April 30th. Jennifer Nicholson was appointed for the period May 1, 2014 to August 31, 2014.

77. During the 4 month Fall Term, 4 month Term Appointees teach classes from early September and complete teaching classes near the end of November. During the

4 month Winter Term, 4 month Term Appointees teach classes from early January and complete teaching classes in early April.

78. Faculty Members, including Term Appointees, who teach in the Fall Term are required to submit any and all grades within seven (7) days after the exam (Academic Undergraduate Calendar). If Faculty Members, including Term Appointees, are teaching a course which does not require an exam, then they are required to submit grades within seven (7) days after the start of the exam period.

79. In the Fall Term, Faculty Members, including Term Appointees, have completed teaching duties and submitted final grades by mid to late December.

80. As outlined above, in the Winter Term, Faculty Members, including Term Appointees, have completed teaching duties and submitted final grades by early to mid April.

81. Fall Term Appointees are paid until December 31. Winter Term Appointees are paid until April 30.

82. By way of example, in 2012, Dr. Donald McIver was hired by Saint Mary's University for a 4 month term. His offer letter is included in Exhibit "19". The letter provides in part:

> …I am pleased to offer you a teaching position in the Department of Economics at Saint Mary's University, effective January 1, 2013.
>
> The terms of the offer are as follows:
>
> 1. A limited term appointment under Article 10.1.10(c)(i) of the *Collective Agreement* for a period of four months, effective January 1, 2013. This appointment will be at the rank of Lecturer (Step 1).
>
> 2. The stipend for the rank of Lecturer, Step 1 is $57,444 (*Collective Agreement* dated September 1, 2012, Salary Scale 1: September 1, 2012) which will be pro-rated for four months. …

83. During Dr. McIver's 4 month term he taught three (3) courses. Dr. McIver taught two (2) classes on Mondays, one (1) class on Tuesdays, two (2) classes on Wednesdays, and one (1) class on Thursdays. He did not teach any classes on Fridays. During a full week Dr. McIver taught classes for a total of seven (7) hours and thirty (30) minutes. Dr. McIver's taught the following courses:

1. 1201 Principles of Microeconomics
2. 1202 Principles of Microeconomics
3. 3307 Money & Banking

A list of courses Dr. McIver taught in the Winter 2013 term [were filed] as Exhibit "30".

84. In the 2013 Winter Term Dr. McIver was paid $19,000.71 which is a 4 month pro-rated stipend for the annual amount in his salary scale of $57,444.00. Four percent (4%) vacation pay on $19,000.71 equals $760.03. This amount is equivalent to 3.4 days off with pay.

85. During his 4 month term, there were seventeen (17) days in which Dr. McIver was not required to teach classes.

86. A spreadsheet identifying all of Dr. McIver's days paid but not required to teach classes during his 4 month limited term contract, [was filed] as Exhibit "31". The spreadsheet identified the statutory holidays. ..

In addition to these Agreed Facts, Professor Victor Catano testified on behalf of the Union to address the estoppel issue. Professor Catano has served almost continuously on the Executive of the Union in many capacities since 1985. Since 1988 he has been the Union's chief spokesperson in collective bargaining. He made a point of saying that the Union has had "good labour relations" with the University over the years. The University and this Union have achieved 16 Collective Agreements without either party having to resort to sanctions. The parties have also been able to resolve many contractual disputes without proceeding to arbitration. As an active and experienced Union Executive member, Professor Catano is familiar with the Union's system of receiving inquiries and complaints from members of the bargaining unit, the attempts that have been made to resolve and address them and the internal process that the Union uses to decide what will be referred to arbitration. He also explained that he makes a point of tracking issues and problems that are brought to the Union's attention for the purpose of determining what should be raised in contract talks for the renewal Collective Agreements. Based on that knowledge and background, Professor Catano testified that the Union never received any complaints about the issue of vacation pay for Limited Term Appointees until Professor Rojas's inquiry came to the Union's attention in early 2013. Professor Catano said that the Union was simply not aware that Limited Term Appointees were not receiving vacation pay. He testified, "It never crossed my mind that they weren't".

In cross-examination, the University's counsel had Professor Catano acknowledge that the parties are sophisticated and that the Union's bargaining team has the ability to draw upon members with expertise in many relevant areas, such as labour relations, management, Human Resources, accounting, and industrial psychology. He also agreed that the bargaining unit is composed of "very literate" members who are known to seek clarification of their rights from colleagues, Department Chairs, Human Resources, administrators and/or the Union Executive. He was also reminded that the Union raised the issue of vacation pay with the Administration twice in the past. However, he hastened to point out that one dispute involved a full-time professor and the other involved a librarian. Those cases were focused on the issue of payout of unused vacation and an unrelated claim for vacation pay that had been asserted, and then withdrawn. Professor Catano stressed that none of those situations involved the issue of Limited Term Appointees or their vacation pay. He also confirmed that the parties have never discussed the issue of vacation pay in negotiations for any group of employees, except with regard to attempts to increase Librarians' entitlement, which is not relevant to this case.

A. The Objection Regarding Timeliness

A(i) - The Employer's Submissions

The Employer asserted that the grievance should be dismissed because it was not filed within "twenty (20) days after the occurrence of the incident giving rise to the grievance, or twenty working days from the date [the Union] became aware of the events giving rise to the grievance, whichever is later." The Employer pointed out that the Union claims it became aware of the vacation pay issue in February 2013 when it was approached by Dr. Rojas, but it did not file the grievance until May 29, 2013. The Employer asserts that the word "shall" in Article 22.3.1 is mandatory. Further, it was pointed out that the Collective Agreement allows the Union to seek agreement for an extension of time for filing a grievance, yet it did not do so in this case. The University submitted that since the parties carefully negotiate the wording of their contract, they

should be held to its strict terms. Acknowledging that the *Trade Union Act* allows an arbitrator to extend time limits, it was submitted that the University would be prejudiced by such an extension because it could result in a significant liability that had never been contemplated. In support of these submissions, the University relied on *Nova Scotia (Department of Justice) v. Nova Scotia Government and General Employees Union (Jacobs Grievance),* (2006) N.S.L.A.A. No. 8, 85 C.L.A.S. 35 (Kydd); and *Nova Scotia Nurses' Union v. Board of Management of the Wolfville Nursing Home Ltd. (Policy Grievance),* (2006) N.S.L.A.A. No. 16 (Richardson).

A(ii) - The Union's Response

The Union responded to the timeliness objection by pointing out that the Agreed Facts indicate that while the Union receives copies of all letters of appointment for Limited Term contracts, it does not receive copies of payroll information or Records of Employment for Faculty Members. Further, relying on the evidence of Professor Catano and paragraph 31 of the Agreed Facts, the Union stressed that it was not aware that Term Appointees were not being paid 4% vacation pay upon the termination of their employment until the matter was brought to its attention by Professor Rojas. The Union pointed out that it immediately asked the University to look into the matter and then awaited a response. The University advised the Union of its position in a detailed Memorandum on May 3, 2013. The grievance was then filed on May 29, 2013. This was said to be timely because it was within 20 days of the Union "becoming aware" of the Employer's position and was consistent with good labour relations because it gave the University a chance to respond before a formal grievance was filed. Further, it was pointed out that under the *Code*, the Employer is required to pay the Term Appointees' vacation pay within ten days after their employment ends. Therefore it was asserted that the tenth day after the contracts expire should be considered as the "occurrence of the incident giving rise to the grievance". For those Limited Term Appointees whose contracts expired May 30, 2013 and thereafter and who claim they ought to have been paid out vacation pay no more than ten days later, this grievance was said to be clearly within time. The Union suggested that there is no need to resort to section 43D of the *Trade Union Act* to extend the time limits because the grievance was timely and it was

reasonable for the Union to await a response from the Employer about the issue before "firing off" a grievance. It was also pointed out that the cases relied upon by the Employer for purposes of refusing to extend any time limits were decided before the introduction of section 43D into the *Act.* In the alternative, if the grievance is found to be untimely, it was argued that the Employer has suffered no prejudice by any "delay" in the filing of the grievance and that there was good reason for any delay. Therefore this was said to be a good case for the extension of time limits.

A(iii) – The Decision with respect to Timeliness

The Employer has asserted that the grievance is time barred because it was filed more than twenty (20) working days after the occurrence of the incident giving rise to the grievance, contrary to 22.3.1 of the Collective Agreement. For several reasons this objection cannot be upheld. First, the grievance is about the failure to pay vacation pay. The basis of the grievance is found in the *Code* where it provides that vacation pay is payable within ten days after the termination of employment. Leaving aside for the moment the issue of different professors having different termination days and focusing instead on the essence of the grievance, this is a claim that comes to fruition or is triggered ten working days after the Limited Term Appointees' employment ends. For many appointees, their contracts expired the 30th day of May. Their entitlement to vacation pay would therefore crystalize ten working days later. The grievance was filed May 29th, probably because this was shortly after the Employer made it clear that it was denying any liability for vacation pay. Therefore, it must be seen that these facts reveal that the grievance was filed within, or actually before, the 20 working days after the "occurrence of the incident giving rise to the grievance", that being the alleged non-payment of vacation pay. Therefore, the grievance is timely with respect to such claims. Consideration should also be given to the fact that the grievance covers all the bargaining unit members on limited contracts whose contracts terminated during the September 1, 2012 - August 31, 2013 Academic year. For those with four-month appointments whose contracts terminated in December 2012, there is a better argument for the notion that the grievance is "late" for them. However, this is a group grievance.

The timing of their claims may be relevant to remedy, but it is not a bar to the hearing of the merits with regard to the real issue in dispute.

I have also considered whether the Union should have filed the claim within 20 working days of it becoming aware of the issue. That would suggest that the grievance should have been filed in March, after the Union was approached by Professor Rojas in February. However, Article 22.3.1 provides that the grievance shall be filed within 20 working days of the event giving rise to the grievance or the Union becoming aware of the events, whichever is later. Since the "later" date would be the date when the alleged entitlement to vacation pay crystalized, i.e., mid June 2013, then the grievance must still be considered timely.

However, even if this is technically a late grievance for some employees under the Collective Agreement, this would be an appropriate case to relieve against the time limits in the Collective Agreement. Section 43D of the *Trade Union Act* allows:

> An arbitrator or arbitration board may extend the time for the taking of any step in the grievance or arbitration procedure under a collective agreement notwithstanding the expiration of the time if the arbitrator or arbitration board is satisfied that there are reasonable grounds for the extension and that the opposite party will not be substantially prejudiced by the extension.

There is no evidence that this Employer has been "substantially prejudiced" by any delay in this case. The University has been able to marshal all the evidence it needs to defend the claim. There has been no inordinate delay, if any at all. It is true that the failure to raise this issue over decades of practice raises liability and budgetary concerns. But the liability cannot be the "prejudice" contemplated by section 43D because that would create a circular argument. By definition, there may always be potential liability with any grievance. The fact that the grievance might succeed cannot of itself be the kind of "prejudice" that section 43D contemplates. If that were the case, every grievance could be said to raise the threat of prejudice. The "prejudice" that is relevant under section 43D is with regard to the inability to properly defend against a claim, such as the loss of documentation, the lack of availability of witnesses or the

passage of time affecting people's ability to recall events. None of those problems have been suggested to be factors in this case. Further, the issue of extent of liability may be relevant to the scope of remedial relief, but not to whether a grievance should be heard. Finally, the reasons for the delay in processing this grievance have been adequately explained. The members of the current Union Executive were not aware of the issue until it was brought to their attention by Professor Rojas in February 2013. At that point the Union did what a proper Union should do. It looked into the matter internally and then asked the University to do the same, allowing for an informal and non-confrontational exploration of the issue. The grievance was filed only after a response was received from the University administration. It is better labour relations to allow the parties to explore a potential dispute informally before filing a grievance. It was appropriate to approach the University and invite a response. The grievance was filed within days of receiving the University's response. Giving the Employer a chance to address the matter is good labour relations. These facts provide a satisfactory reason for extending the time limits under the Collective Agreement for the filing of this grievance. However, as explained above, I do not consider this grievance to be untimely.

For all these reasons, the objection with respect to timeliness is not upheld. Nevertheless, the timing of the grievance has implications that shall be dealt with later with respect to remedy.

B. Submissions on the Merits of the Case

B(i) - The Union's Submissions

The grievance claims the Employer violated the *Labour Standards Code* and the Collective Agreement by failing to pay Limited Term Employees 4% vacation pay at the expiry of their contracts. The Union argued that the *Code* is implied into the Collective Agreement and enforceable through arbitration by virtue of section 82 and as affirmed in the following cases: *Parry Sound (District) Social Services Administration Board v. OPSEU,* Local 324, [2003] S.C.J. 2003 SCC 42*; Scott Maritimes Ltd. v. Conrad*, [1994]

N.S.J. No. 489, 135 N.S.R. (2d) 58*; Blair v. Alberta (Employment Standards Code, Officer*), [1995] A.J. No. 588, 125 D.L.R. (4th) 732; *Oland Breweries Ltd. v. UFCWU, Local 361,* [2001] N.S.L.A.A. No. 14 (Veniot). It was stressed that the University sets the length and conditions of the Limited Term Appointments and their salaries are pro-rated based on the salary scales for full-time professors. Yet neither their letters of appointment nor the Collective Agreement makes the full-time or the Limited Term Appointees' salaries inclusive of vacation pay. Full-time professors do not receive vacation pay. They receive their salary, plus one month of vacation. Article 15.1.10 of the Collective Agreement specifically precludes vacations for Limited Term Appointees. Therefore, the Union asserts that the full-time salary scales should not be read as being inclusive of vacation pay. Since the Collective Agreement excludes the concept of vacations for Term Appointees, the Union asserts that their right to vacation pay arises from the minimum benefit of 4% of salary based on section 34 of the *Labour Standards Code* [the *Code*] and section 2(5) of its Regulations, cited above in the Agreed Facts, paras. 24 and 25. Further, it was argued that the *Code* should be interpreted and applied to protect the interests of the employees by requiring the Employer to comply with its minimum standards; see *Morine v. L & J Parker Equipment Inc.,* [2001] N.S.J. No. 114.

Relying on sections 6, 15 and 32-34 of the *Code*, the Union stressed that the onus is on the University to produce records that verify compliance, including proof that vacation pay has been paid or that salaries are inclusive of vacation pay. However, it was stressed that the University's records reveal nothing that identifies the payment of vacation pay, or that salary is inclusive of vacation pay or that there has been time off in lieu of vacation for these professors. Reliance was placed on *Chao v. Mary Tay Foods Limited,* L.S.T. #1610, January 28, 2000 (Mozvic); *Burke v. Catherine Alexander, c.o.b. The Ivy Deck,* L.S.T. #1630, March 23, 2000 (Mozvic); *Codrington v. Wine Kitz Atlantic Limited,* L.S.T. #2005, March 22, 2006 (Mozvic); *Eisener v. LaHave Manor Corporation,* L.S.T. #787, December 11, 2990 (Mont); *Campbell v. George c.o.b. Pleasant Street Irving,* L.S.T. #640, September 6, 1988 (Mont); *Hunter v. Masood*, L.S.T. #620, August 15, 1988 (Mont); *MacArthur v. Modern Dental Laboratories Limited,* L.S.T. #972, June

4, 1993 (Mont); *Colville v. A.G. Colville Limited,* L.S.T. #326, April 28, 1983 (Ruck); *Anderson v. Ziebart Auto-Truck Rustproofing (Moncton) Limited,* L.S.T. #345, September 8, 1983 (Ruck); *Gauvin and Reardon v. Prime Design Print Ltd.,* L.S.T. #403, August 15, 1984 (Mont); *Fougere v. Scotia Fuels Limited,* L.S.T. #450, May 17, 1985 (Mont); *Stark v. Gillis*, L.S.T. #543, May 28, 1987 (Mont).

Anticipating the Employer's claim that the Term Appointees have received a vacation benefit that meets or exceeds the provisions of the *Code*, the Union argued even though there are a number of days when these professors do not have classes or are not "required" to work, they were never put on notice that these would be considered as "vacation days". Further, it was said that it is inconsistent for the University to claim that such days are vacation days when the letter of appointments prescribe a period of "work" for which they are being paid "to teach" and makes no mention of salary including vacation pay. In addition, it was submitted that under Article 15.1.10(a) of the Collective Agreement, the Term Appointees are not entitled to vacation. The Union also pointed to paragraph 33 of the Agreed Facts to argue that the University has acknowledged that the Term Appointees are not entitled to vacation leave, but are entitled to the minimum standards set by the *Code.* Further, it was submitted that the fact that Limited Term Appointees are not required to teach on certain days does not equate to vacation under the *Code*. It was said that the time must be clearly designated as vacation before it can be considered as an equal or better vacation benefit under the Collective Agreement than is available under the *Code*. Reliance was placed on *White Pass Transportation Ltd. v. Canada (Attorney General),* [1986] B.C.J. No. 1182, 33 D.L.R. (4th) 371. It was submitted that since the Collective Agreement provides no vacation pay for the Limited Term Appointees, it should not be concluded that they receive a "greater benefit" than that provided under the *Code.*

Dealing in advance with the University's contention that the month of May is a time when Term Appointees have little or no specific responsibilities, yet are paid, the Union stressed that the Employer has chosen to make nine appointments that extend beyond when marks are due and to pay pro-rated salaries based on that duration, despite the

lack of assigned duties. It was said that the Employer cannot simply designate the days in May as “vacation” in retrospect.

The Union also stressed that the Academic Calendar is set by the University, prescribing closure days, study days, March break and the special “Patron Feast day” when all Faculty members are paid, but not required to teach classes. It was asserted that the University cannot claim that these days are “vacation days” for the Limited Term Appointees when those days are not considered as such for other Faculty members. It was suggested that if the University successfully argues that those days should be considered as vacation days for purposes of the Limited Term Appointees, those days would also have to be counted towards the days constituting the full-time professors’ one-month vacation. The Union emphasized that Term Appointees are paid a “salary,” not paid by the hour or the day, and they are responsible for all aspects of the delivery of curriculum. Therefore, the Union argued that the University should not be able to assert that the Limited Term Appointees are not performing work or that they are “on vacation” during the days when there are no classes or assigned duties. Further, it was pointed out that under Article 15.1.14(b), Term Appointees are allowed to do outside work during their term and many have overlapping teaching appointments with this University under the CUPE Collective Agreement. This was said to buttress the argument that Term Appointees should not be viewed as being on vacation on the days they are not scheduled to teach classes.

Anticipating the Employer’s claim of estoppel, the Union submitted that an estoppel defence can only be sustained against a contractual claim, not a substantive statutory right. Acknowledging that there have been decades of contract renewals for these parties without any claim being made for vacation pay for Limited Term Appointees, it was submitted that the protections of the *Code* apply notwithstanding “any custom, contract or arrangement,” [section 6]. Further, or in the alternative, the Union emphasized that in order for a claim of estoppel to succeed, there has to be knowledge of a practice to establish intent to waive a contractual right. However, the Union relied on the Agreed Facts and evidence of Professor Catano to assert that the Union had no

actual or implied knowledge of the fact that no vacation pay was being issued to Limited Term Appointees. Emphasis was put on the fact that the individual professors' pay stubs do not have a line item for vacation pay and the Union does not receive any copies of the compensation records. Therefore, it was said that it is understandable that the Union officials and Term Appointees would not have appreciated that no vacation pay was being issued. To support its arguments against estoppel, the Union relied on *G4S Cash Solutions (Canada) Ltd. v. Western Canada Council of Teamsters,* [2012] 223 L.A.C. (4th) 164 (Graham); *Kenora (Town) Hydro Electric Commission v. Vacationland Dairy Co-operative Ltd.,* [1994] 1 S.C.J. No. 3, [1994] 1 S.C.R. 80; *Toronto Police Services Board and Toronto Police Association,* [2002] 104 L.A.C. (4th) 422 (Knopf).

Finally, the Union stressed that where this University wanted to stipulate that vacation pay is included in the compensation, it has done so clearly in another situation. The Union pointed to this University's Collective Agreement with CUPE, where the stipend for part-time professors is specifically said to be "inclusive of vacation pay", section 23.01. No such language exists in the Collective Agreement with SMUFU. Also, since this grievance was filed, the University has amended its offer letter to Limited Term Appointees in this bargaining unit by explicitly describing the stipend as being inclusive of vacation pay. While that too has been grieved and is not before me, the Union asserts that the new letters highlight the lack of such notice for the professors covered by this grievance.

For all these reasons, the Union asked for a declaration that all Limited Term Professors whose contracts terminated during the term of the 2012-2015 Collective Agreement be awarded 4% vacation pay.

B(ii) - The University's Submissions

The University asserted that the salaries of the Limited Appointees should be held to be inclusive of vacation pay. It was stressed that the parties are very sophisticated and have successfully concluded 16 Collective Agreements without there ever being a

complaint about vacation pay for Limited Term Appointees. This was said to be because “everyone has known and accepted that the salaries are inclusive of vacation pay.” Since there is no mention of vacation pay for the Limited Term Appointees in the Collective Agreement, the Employer asserted that there is nothing in the contract to serve as a foundation for this claim. Further, it was said that there is nothing to support the notion that vacation pay should be owed in addition to the prescribed salaries. It was also suggested that it would now be “unfair” for the Union to claim an additional 4% compensation for the Limited Term Appointees because that would amount to a benefit that was not sought or achieved during collective bargaining and would also give those professors proportionately greater compensation than the full-time professors. It was stressed that the language regarding Limited Term Appointees’ salaries has remained unchanged since 1975. It was suggested that if the Union succeeds with this claim, this Arbitrator would essentially be “re-writing” the Collective Agreement by increasing the agreed-upon salaries by 4% for this group of employees. The University submitted that this Collective Agreement should not be interpreted or applied in a way that would augment any of the specific provisions that were negotiated by the parties. Reliance was placed upon *Service Union, Sarnia General Hospital,* [1973] 1 OR 240-45 (Ont. Div. Ct); Palmer & Snyder, *Collective Agreement Arbitration in Canada,* 5th Edition (LexisNexis: 2013); *Arthur v. Salesboom Incorporated,* 2010 NSLST 17 (Morvik Chair).

It was also stressed that although the parties have carefully negotiated and addressed the format and contents of the offer letter sent to Limited Term Appointees in Article 10.1.4.40(a), the issue of vacation pay was never raised. The University suggests that the reason for this is that “there was always an understanding” that their pro-rated salaries included vacation pay. This was said to be supported by the fact that several professors who have held Union executive positions also worked as Limited Term Appointees without ever raising a complaint about being owed vacation pay when their terms ended. Further, it was pointed out that numerous Limited Term Faculty members also teach under the CUPE Collective Agreement as contemplated by Article 16.3.10. This fact was said to indicate a “familiarity” with the issue of vacation pay and to support the notion that the parties have accepted or should be deemed to have agreed that

vacation pay is included in the salaries of Limited Term Appointees. The Employer relied upon the following cases to argue that the Agreed Facts should lead to the conclusion that the pro-rated salaries should be seen to be inclusive of vacation pay and should not now be "inflated" by awarding these professors an additional 4%: *Canoe Lake First Nation v. McNeil,* [2002] C.L.A.D No. 19 (Hood); *Paul v. Maliseet First Nation,* [2002] C.L.A.D. No. 539 (Deshenes); *Prince Albert School Division No. 3 v. Saskatchewan (Minister of Human Resources, Labour and Employment),* [1991] S.J. No. 413 (Wedge); *Hollett v. Air Atlantic Ltd.* [1994] C.L.A.D. No. 668 (Alcock).

Further, the University submitted that the Limited Term Appointees receive benefits that far exceed the minimum standards prescribed by the *Code.* The University stressed that the ordinary meaning of the word "vacation" is "a time away from work." It was pointed out that someone with the salary equal to that of Professor Rojas, who was appointed on a nine-month contract, would be entitled under the *Code* to the equivalent of eight days' vacation. Yet there were far more than eight days during the nine-month period when he was paid, but not required to teach classes, even if the statutory and holiday periods are discounted. It was stressed that Limited Term Appointees are hired to teach; they are not required to do research or attend departmental meetings, and their attendance on campus is optional, especially after their marks are submitted. Emphasis was put on the fact that term professors teaching in the Spring semester have little or no responsibilities for the whole of the month of May, yet they are paid for that month. While they may be called upon if there is a grade appeal or the need for a supplementary exam, that happened only twice in the time periods covered by this grievance and can take up very little time. Therefore, it was submitted that after grades are submitted, theses professors have fulfilled their duties under their contracts and then virtually all of the month of May is a period when they are paid, but not required to work. This was said to total up to 34 days when these professors are not required to teach classes, not counting the University's "study days." Accordingly, the University characterized this as "vacation" within the ordinary meaning of the word and argued that this creates a far greater benefit than the eight days that might be available under the *Code*. It was also pointed out that some of the Term Appointees accepted other

teaching jobs during the month of May under the CUPE Collective Agreement and thereby received additional salaries that are inclusive of vacation pay.

Taking these paid days into consideration when there is no requirement to teach classes, it was argued that the Collective Agreement should be administered as has been done by the University in the past, that is, by considering some or all of those days as paid vacation days and amounting to much more than the *Code* prescribes as a minimum. It was suggested that these parties would never have negotiated or accepted terms of employment that did not comply with the province's minimum labour standards, yet the Union's argument suggests that the parties have been in violation of the *Code* for decades. Therefore, it was submitted that the Collective Agreement should be interpreted as being in compliance with the *Code* by accepting that salaries are inclusive of vacation pay or that the vacation days are being taken in lieu of pay during the term. Reliance was placed on the previous cases, as well as *Pelly v. A & J MacKenzie Brothers Construction Limited,* March 8, 1984 (Ruck); *Stark v, Gillis c.o.b. C.B. Enterprises,* May 28, 1987 (Mont); *Canada Safeway Limited v. Director, Labour Standards Branch,* (1993) SK, Q.B. No. 324; *Sheppard Village Inc. v. S.E.I.U. Local 1,* [2008] O.L.A.A. No. 185 (Burkett); *Re Queen's University and Fraser et al.* (1985) 51 O.R. (2d) 140 (Ont. Div. Ct.).

Further, or in the alternative, the University asserted that the Union is estopped from claiming vacation pay for these professors because of the very longstanding practice establishing an implied agreement to accept their stipend as being inclusive of vacation pay. The University submitted that the Union had to have known that vacation pay was being considered as being included in the salaries of the Limited Term Appointees or the Union officials were willfully blind about the fact that 4% vacation pay was not being issued at the end of each of these professors' appointments. It was stressed that with the level of intelligence and sophistication of the Union executives and members of the bargaining unit and their history of being vocal about any complaints, it should be concluded that the parties have effectively agreed to include vacation pay in the stipend. Further, it was pointed out that Dr. Rojas was in his third limited term appointment when

he raised the issue of vacation pay, even though he, and all the other Limited Term Appointees, had received numerous bi-weekly pay stubs with clear statements of earning that had made no mention of vacation pay. It was said that no one should be able to turn a blind eye to the situation for so long and then claim amounts retroactively. The University also repeated its emphasis on the fact that at least two Union officials had held Limited Term appointments in the past without claiming vacation pay in addition to their stipends. All this was said to amount to knowledge and/or acceptance of the practice that their salaries included vacation pay. Further, the arbitrator was asked to rely on this practice as an aid to the interpretation of the Collective Agreement. Reliance was placed on *Toronto Transit Commission v. ATU, Local 113 (1999) 78 L.A.C. (4th) 364 (Davie); Atlantic Provinces Special Education Authority v. New Brunswick Union of Public and Private Employees,* [2012] N.B.L.A.A. No. 10 (Filliter); *Agassiz School Division No. 13,* [1997] M.G.A.D. No. 61, 50 C.L.A.S. 309 (Graham); Brown & Beatty, *Canadian Labour Arbitration,* 4th Edition, para. 3:4430; *Simon Fraser University v. C.U.P.E., Local 3338,* [2004] BCCAAA No. 224 (Hall); *The Providence of Manitoba v. C.U.P.E.,* unreported, dated May 18, 2005 (Petltz); *Corporation of the County of Simcoe v. S.E.I.U., Local 1 Canada,* March 5, 2009 (Knopf).

In the alternative, it was suggested that the Union may have been "willfully blind" about the issue of vacation pay and is now seeking to obtain a benefit that it failed to pursue in bargaining. The University stated that it does not accept the idea that this issue was never considered by the Union and that it would be unfair to allow the Union to "hide in the weeds" and seek such additional compensation now. It was also said that the reason this Collective Agreement does not contain a clear reference to the inclusion of vacation pay in salaries such as is found in the University's contract with CUPE is because no one thought that the way the University was paying this bargaining unit was ever wrong. It was stressed that "everyone" knew what the practice was and accepted it. The University also argued that it would be severely prejudiced by the Union being able to claim vacation pay now on top of the stipend because it would deprive the Employer of the ability to address this compensation issue until the next round of bargaining. For all those reasons, the University argued that the Union ought to be

estopped from resiling on the practice in place for decades that effectively accepted that Term Appointment salaries included vacation pay or that they had many more vacation days off than are required by the *Code*. In support of this position the University relied upon the following cases: Brown & Beatty, *supra,* para. 2:2210; *Re Avon Foods Inc. and B.C.T. Loc. 466,* unreported, February 8, 2001 (Ashley); *Re City of Kitchener and Kitchener Fire Fighters' Assn., I.A.F.F., Loc. 457* (1983), 11 L.A.C. (3d) 47 (Saltman); *Curtis Products Corp. v. IWA-Canada, Local 500* (2002), 110 L.A.C. (4th) 193, 70 CLAS 202 (Langille chair); *Atlantic Communications & Technical Workers Union v. Maritime Telegraph and Telephone Co.* (1991), 108 N.S.R. (2d) 30 (N.S.S.C., T.D.); *Toronto Transit Commission v. ATU, Local 113,* [1992] OLAA No. 61 (Barrett, Majesky, Hetz); *University College of Cape Breton v. N.S.G.E.U., Local 18,* [1998] NSLAA No. 1; *C.U.P.E., Local 21 v. Regina (City), 1996 CanLII 11466 (SK LA); Hermes Electronics Ltd. and IBEW, Local 1651,* 1990 CarswellNS 640, [1990] SN.S.L.A.A. No. 21, 14 L.A.C. (4th) 289 (Darby).

As a result, the University asked that the grievance be dismissed. Further, in the alternative, if there is a finding that the Collective Agreement or the *Code* has been violated, and/or that the estoppel defence is rejected, the Employer stressed that no remedy should be forthcoming for any period prior to the 20 days before the grievance was filed. Therefore, it was submitted that if there is any liability for vacation pay for any of the named Professors, retroactive vacation pay should only be awarded for Professors whose entitlement crystalized within 20 working days prior to the May 29th filing of the grievance. Reliance was placed on *Union Drawn Steel II Ltd. v. United Steelworkers of America, Local 2308,* 1998 OLAA, CanLII 19056; *Oland Breweries v. U.F.C.W., Local 361* [2001] N.S.L.A.A. No. 14 (Veniot).

B(iii) - The Union's Reply Submissions

Responding to the Employer's suggestion that the Union should be deemed to have accepted the notion that Term Appointees' salaries include vacation pay, the Union pointed to paragraph 31 of the Agreed Facts indicating that the members of the Union Executive under the current Collective Agreement were not aware whether Term

Appointees were being paid 4% vacation pay on the termination of their Term contracts and the issue was never raised in bargaining. It was suggested that the Union always "assumed" that these professors were being paid in compliance with the law. It was also said that it was unreasonable to "impute" knowledge to the Union executives on the basis of two of them having had term appointments over nine years ago. The Union also asserted that none of the Limited Term Appointees might have realized that they were not getting vacation pay because their pay stubs make no reference to vacation pay, contrary to the Code. Further it was stressed that the Code's requirement to identify vacation pay is meant to make people aware of how their pay is being calculated. Because the Union is not privy to the pay stubs and because they do not indicate anything about vacation pay, it was said that the longstanding "practice" that the University is relying upon should not be considered to be open or clear enough to support a defence of estoppel. The Union submitted that there is insufficient evidence to conclude that there was any agreement, acquiescence or meeting of the minds between the parties about whether or not vacation pay is included in Term Appointees' salaries.

Turning to the "greater benefit" assertions of the University, the Union stressed that professors do not have "9 to 5" jobs or set hours. Instead they are salaried employees with the freedom that is required to facilitate the nature of their work. The Union relied on the fact that nothing in the Collective Agreement identifies non-teaching days as "days off from work" or identifies any of the days during the academic year as "vacation." Stressing that the *Code* requires vacations to be designated as such, it was said that the Employer should not be able to characterize those days as vacation days. Therefore, it was said to be wrong in the context of a university setting to consider all the days that a professor is not required to teach or provide other duties as "days off" or vacation days.

Addressing the Employer's claim that the Union is seeking 4% more than the pro-rated salary of a full-time professor for the Term Appointees, the Union countered by saying

its claim would equalize the proportionality by giving them an appropriate equivalent to the full-timer's 30 days of vacation on top of their salaries.

Turning to the University's appeal to "fairness" and the claim of detrimental reliance with regard to the estoppel defence, the Union responded by arguing that the University has had the benefit of saving 4% of the salaries of Limited Term Appointees for decades. Further, it was said that because of section 6 of the *Code*, the Employer cannot rely on past practice or "custom" to protect itself from having to pay the vacation pay required by the *Code*. Finally, the Union suggested that many of the cases that the University relies upon are distinguishable on their facts and/or were decided before the *Parry Sound* case and therefore do not properly recognize that the Collective Agreement must be interpreted and applied as if the *Code* were incorporated into its terms.

C. The Decision

This Arbitrator's jurisdiction to hear and determine the issue of vacation pay entitlement is accepted by the parties and is based upon both the Nova Scotia *Labour Standards Code* and *Trade Union Act*:

> *The Labour Standards Code:*
>
> s. 82 Subject to Section 83A [not applicable to this case], where the Director has received a complaint from an employee and the Director is satisfied
> (a) that the employee is proceeding with or has commenced or was successful in an action for the recovery of the unpaid pay; or
> (b) that the employee is bound by a collective agreement, as defined in the Trade Union Act, and that the employee could file a grievance under that agreement for the recovery of unpaid pay,
> he shall not entertain the application.
>
> *The Trade Union Act*
>
> s. 43B(2) An arbitrator ….. may
> (h) treat as part of the collective agreement the provisions of any statute of the Province governing the relations between the parties to the collective agreement

Accordingly, if a person's employment is governed by a collective agreement, the assertion of a substantive right under the *Code* must be taken to an arbitrator for validation. That is the situation in this case. As a result, the *Code* and the *Act* join together to form the same foundation that the Supreme Court of Canada relied upon when concluding that substantive rights and obligations in employment related statutes are incorporated into collective agreements; see *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324,* SCC 42.

Therefore there is a clear jurisdictional basis for this Arbitrator to determine the rights and obligations of these parties under the *Code* and their Collective Agreement with regard to vacation pay. As pointed out in the Agreed Facts, the *Labour Standards Code* contains some very explicit provisions with respect to employees' entitlements to vacation pay and employers' obligations with respect to record keeping and payments. Section 15(1) requires an employer to maintain records that show whether it is complying with the *Code*. Those records must include employees' names, rates of pay, pay, vacation periods and/or the amounts of vacation pay. The entitlement for the Limited Term Employees that is relevant to this case is set out in section 34 of the *Code* prescribing that within ten day after the termination of the duration of the contract the employer shall pay the employee an amount equal to four percent of his/her salary. Section 2(5) of the *General Labour Standards Code Regulations* then provides that while employees covered by a collective agreement are exempted from the application of certain provisions of the *Labour Standards Code*, those exemptions do not include section 34's prescription for vacation and vacation pay; see *Scott Maritimes Ltd. v. Conrad* [1994] N.S.J. No. 489 (N.S.C.A.). Finally, section 6 of the *Code* mandates that it applies notwithstanding any other law or any custom, contract or arrangement, however, nothing in the *Code* affects the rights or benefits of an employee under any law, custom, contract or arrangement that are more favourable to him/her than the benefits under the *Code*. In other words, an employee in a bargaining unit has a right to receive the *Code's* minimum vacation pay or time in lieu, unless his/her contract, custom or arrangement gives him/her a greater benefit. Therefore, employees, unions

and employers cannot ignore or contract out of their substantive rights and obligations under the *Code.* They can only agree to equal or greater terms.

Accordingly, the first question that has to be addressed is whether the Limited Term Appointees' salaries can be said to be inclusive of vacation pay. If they are, the grievance would fail. In *Canoe Lake First Nation v. McNeil, supra,* a teacher's salary was said to include vacation pay because she was paid for 12 months but not required to work Christmas, Easter and during the summer holidays lasting from the end of June to the end of August. Those periods were deemed to be "vacation" because she was not required to work. But it must be noted that this case was decided under the *Canada Labour Code* that does not require that the vacation pay had to be specifically earmarked as "vacation pay," see para. 17. Similarly, under the same federal statute, a group of employees claimed vacation pay after being paid over 12 months while they were only required to teach for ten. Their claim was allowed because even though the vacation pay was not paid as a separate item, the longstanding practice was that all employees continued to be paid when they were not working. That practice was deemed to amount to acceptance of the money in lieu of vacation pay or as including vacation pay; see *Paul v. Maliseet First Nation*, *supra,* at para. 20. It must also be noted that where an employment standards statute does not prohibit "all inclusive" payment schemes, as in the case for Nova Scotia, it has been held that where the facts establish that a person was paid for many days where they were not required to work, their salaries can be deemed to be "all inclusive" of benefits, such as vacation pay; see *Prince Albert School Division No. 3 v. Saskatchewan (Minister of Human Resources, Labour and Employment, supra).* It has also been said that an employee's "total salary would normally include vacation pay," see *Hollett v. Air Atlantic Ltd., supra,* at para. 27. Therefore, it is clear from these cases that an entitlement to vacation pay can be met by including the vacation pay within one's salary. Further, the parties to this case agree that it need not be paid out at the end of a contract if the salary is inclusive of the requisite amount of vacation pay as part of the compensation package.

However, all these cases were decided in jurisdictions outside of the scope of the Nova Scotia legislature and without reference to any of the explicit provisions of the Nova Scotia *Code*. Nor do those cases make reference to equivalent of section 6 of the Nova Scotia *Labour Standards Code*. Therefore, it is important to see how those provisions have affected claims under the statute that is applicable to this case. Nova Scotia adjudicators hearing complaints have held that despite non-compliance with the recordkeeping provisions of the *Code*, an employer will not be required to pay additional amounts by way of vacation pay where someone was told at the time of hire that their salary would be inclusive of vacation pay; see *Pelly v. A & J MacKenzie Brothers Construction Limited, and Pelly v. A & J MacKenzie Brothers Construction Limited,* and *Stark v. Gillis c.o.b. C.B. Enterprises, supra.* That case is consistent with the following line of cases that hold that where an employer wishes to include vacation pay in the regular salary payments or have compensation deemed to be inclusive of vacation pay, there must be clear evidence of that intention, either in the employer's records and/or by way of transparent communication to the employees that their salaries are inclusive of vacation pay. This can be done in the employees' pay stubs with a separate entry and/or at the time of hire. Unless an employer can satisfy the onus of showing such communication, documentation or agreement by the employee, vacation pay will not be deemed to be inclusive of salary; see *Chao v. Mary Tay Foods Limited*; *Burke v. Catherine Alexander, c.o.b. The Ivy Deck; Codrington v. Wine Kitz Atlantic Limited*; *Eisener v. LaHave Manor Corporation, Campbell v. George c.o.b. Pleasant Street Irving; Hunter v. Masood*, *MacArthur v. Modern Dental Laboratories Limited, supra*. Further, even when an employee has enjoyed paid "time off", this will not be considered "vacation" under the *Code* unless the employer has given the employee notice in advance that such time will be treated as vacation or the employee consents; see *Colville v. A.G. Colville Limited*; *Anderson v. Ziebart Auto-Truck Rustproofing (Moncton) Limited*; *Gauvin and Reardon v. Prime Design Print Ltd.*; *Fougere v. Scotia Fuels Limited, supra*.

Accordingly, if an employer cannot meet the onus of establishing agreement or notification that a salary payment will be inclusive of vacation pay, Nova Scotia

adjudicators under the *Code* have held consistently that the amounts paid cannot be held to include vacation pay.

In the case at hand, the parties have filed volumes of evidence including payroll records, letters of appointments and representative individual Limited Term contracts. Nowhere in any of these documents issued prior to September 2013 is there anything that states that the Limited Term Appointees' salaries will be inclusive of vacation pay. Nowhere in the Agreed Facts is there a statement that indicates that any of the Term Appointees agreed that their salaries would include vacation pay. The offer letters to these professors refer only to a stipend that is calculated on the basis of the professorial salary scale and then pro-rated according to the number of months of the contract. Nowhere is there any clear notice to the Limited Term Appointees that any of the days during the course of their term would be considered as "vacation days".

Further, under the *Code*, while "wages" includes 'salaries, commissions and compensation', "wages" do not include vacation pay or pay in lieu, section 2(6). Accordingly, one cannot assume the payment of wages or salary includes vacation pay.

Therefore, starting with the premise that the provisions of the *Labour Standards Code* have been incorporated into the parties' Collective Agreement, the following conclusions are inescapable:

- the evidence does not establish any record of vacation pay being issued to Limited Term Appointees
- the evidence does not reveal that the Limited Term Appointees were given any notice that their stipends included vacation pay
- the evidence does not establish that any of the Limited Term Appointees were ever put on notice that any days during the term of their contracts would be treated as "vacation"

Therefore, it must be concluded that no time within the duration of the Limited Term contracts can be considered to be "vacation" within the meaning of the *Code* and no

vacation pay was ever paid to these employees. Nor can their salaries be found to be inclusive of vacation pay because the Agreed Facts fail to reveal any of the indicia that would support such a finding under the *Code*.

This conclusion will clearly come as a surprise to the Employer that has obviously operated in good faith with the intention of complying with the *Code.* However, these conclusions are consistent with the principles of contract and statutory interpretation. This is despite the Employer's contention that its unchallenged and consistent practice of not paying out vacation pay should be used as a "aid in interpretation" leading to the conclusion that vacation pay is inclusive of the stipend that has been paid. That submission was based on the well-established principle that an arbitrator can use the conduct of the parties as an aid to clarify any ambiguity in their collective agreement. However, the application of that principle requires that there be an ambiguity that needs clarification. While an ambiguity can be latent or patent, unless there is an ambiguity, the words of a collective agreement are what must govern. Absent an ambiguity, the past practice or conduct of the parties has no relevance, unless it provides the foundation for an estoppel. Estoppel is a different concept and will be discussed below. However, for purposes of using the past practice of the parties to interpret this Collective Agreement, the problem with the Employer's submission is that this contract itself is actually silent with respect to vacation pay for Limited Term Appointees. The entitlement, if any, arises from the incorporation of the *Code* into the contract and there has been no suggestion that the *Code* is ambiguous. Indeed, the *Code* is very clear with respect to the requirements to keep records (in section 15) and the entitlement (under section 34). Therefore, there is no ambiguity that would justify the use of past practice to interpret the respective rights of these parties. Further, section 6 of the *Code* must be applied. It provides that "notwithstanding any other law or any custom, contract or arrangement" (emphasis added), the provisions of the *Code* must be applied. Section 2(5) of the *General Labour Standards Code Regulations* does not allow bargaining unit members to be exempted from the vacation entitlements in section 34 of the *Code.* Therefore, even if there was any ambiguity and the general principles of interpretation

might have suggested that the past practice is relevant, the *Code* prescribes that the practices will not prevent the enforcement of its rights and obligations.

Ironically, if any other "practice" or aid to interpretation is used, it leads to a result that does not favour this Employer. One cannot ignore the fact that this University also has a Collective Agreement with CUPE, Local 3912 that covers part-time Faculty. It provides in Article 23.01:

> All members of the bargaining unit will be entitled to 4% of salary as vacation pay. The stipend paid to employees is inclusive of vacation pay, but at the request of the employee vacation pay will be identified separately.

This language indicates that this Employer has negotiated the equivalent of the *Code's* vacation pay entitlement for its part-time Faculty members and adopted language in that Collective Agreement that makes the entitlement clearly a part of the stipend. That provision satisfies the *Code's* expectation that there be agreement and/or that employees are put on notice that their salaries are inclusive of vacation pay. The absence of such language in the Collective Agreement with this bargaining unit is very significant. Because the SMUFU Collective Agreement does not stipulate that the Limited Term Appointees' stipends are "inclusive" of vacation pay, there is neither notice, nor agreement, about that significant factor. Therefore, one has no basis upon which to conclude that the Limited Term Appointees' salaries are inclusive of vacation pay.

If this conclusion is wrong or if the Limited Term Professors actually received more "vacation days" off than the equivalent of 4% pay, then the second portion of section 6 of the *Code* would apply. It prescribes, ". . . . nothing in this Act affects the rights or benefits of an employee under any law, custom, contract or arrangement that are *more favourable* to him than his rights or benefits under this Act," [emphasis added]. Therefore, the question becomes whether the Limited Term Appointees actually receive a greater vacation benefit than the *Code* provides. If the Limited Term Appointees do receive more "vacation" days under the Collective Agreement than are equal to the value of the 4% minimum prescribed by the *Code*, then this grievance would be

dismissed. Accordingly, one has to ask again how many, if any, days within the term of a Limited Appointee's engagement with the University can be considered to be "vacation" days. The parties agree that the Employer bears the onus of demonstrating that the vacation was either paid out or taken in lieu thereof; see *Arthur v. Salesboom Incorporated, supra,* at para. 47. From the conclusions reached above it is clear that the University has not provided any "record" that the vacation was paid out or documented as being included in the salary. Yet it is still important to determine whether these professors can be said to have the benefit of any vacation days.

From the Agreed Facts it was established that Term Appointees are hired "to teach." Under the Collective Agreement teaching encompasses the preparation for and delivery of classes and course materials, student advising, academic counseling, supervision of tests and examinations, and the evaluation and grading of the students, Article 15.1.13(a). Further, these professors are responsible for being available to meet with students outside office hours, adjusting course work to accommodate weather closures and illness, and being available for students to discuss grades. When a student is unable to write an exam as scheduled, or if there is a grade appeal, a Limited Term Appointee may be required to address the issues and/or to set and mark a special examination. This may have to be done after final marks have been submitted. However, this happens very infrequently. Many nine-month Term Appointees have to file their grades before the end of April. If there is no special examination to be set or grade appeal, there are no specific duties or required attendance at work for the duration of April and all of May. Someone unfamiliar with the employment of academics might be surprised by the evidence that demonstrated that there are many days in the academic term where there is no requirement for a Limited Term Professor to teach a class, conduct a lab or have office hours. Nor are they required to conduct research or attend Department meetings. Therefore, the unscheduled days may create the appearance of being vacation days. Yet one has to take into consideration the fact that the Limited Term Professors' teaching responsibilities take up more than the classroom hours. Time is needed for class preparation, for the preparations of materials, for the setting of examinations and for the marking of assignments and exams. Time is also

required to remain current and evolve intellectually in one's field in order to be an effective teacher. Nevertheless, there still may be many days when these professors are not "required to be at work." The University's counsel pointed out that the equivalent of 4% Labour Standards vacation pay on a nine-month contract is 7.8 or 8 days of vacation. Yet there are 39 days when some professors are "not required to teach classes." If one were to deduct the days off for Study Days, Winter Break, Christmas and Holiday closures and the time after formal exam periods end, that still leaves 25 days when a nine-month appointee is not scheduled to teach. Assuming some or many of those days would actually be used for office hours, student counseling, as well as for the preparation and evaluation of classes and assignments, that still leaves almost the whole month of May when classes are done, marks are submitted and there are no formal expectations placed on these professors. For the four-month appointees, the equivalent of 4% would be 3.4 vacation days. Yet there are 12 days when they are not required to teach, including Christmas closure and the formal exam period, without counting statutory holidays. Therefore, should it be said that these days in excess of the Labour Standards minimum are "vacation days"? If they are, they certainly add up to more than the *Code* requires.

However, the task of determining whether a contract affords a more favourable benefit than the *Code* is not purely mathematical. The exact nature of the benefit must be kept in mind. One has to compare the entirety of the vacation benefits under the Collective Agreement with the vacation benefits accorded by the *Code*; see *Canada Safeway Ltd. v. Saskatchewan (Director of Labour Standards), supra.* That case instructs that an arbitrator must compare or balance the specific rights under the collective agreement that relate to "vacation" with the vacation standard in the *Code*. Where the parties to a collective agreement bargain a greater benefit, the employment standard does not apply. Therefore one must compare the full employment standard with all the provisions under the comparable heading within the collective agreement; see *Queen's University and Fraser, et al.; Shepherd Village Inc. and S.E.I.U., supra.* This does not involve a consideration of the benefits of the collective agreement as a whole. The inquiry about whether rights and benefits are "more favourable" must be a "focused"

inquiry, requiring a comparison of benefits falling within the precise issue under consideration; see *Oland Breweries Ltd. and Brewery & Soft Drink Workers, Local 361, U.F.C.W., supra.*

In the case at hand, we are dealing with a claim for "vacation pay." The parties' Collective Agreement deals with "vacations." Full-time professors are accorded a "vacation period of one month" per year in Article 15.1.10(a). That same Article specifically exempts its application from Limited Term Appointees. The Collective Agreement then provides "Holidays" to all Faculty under Article 15.8. The Limited Term Appointees enjoy that benefit. Also, as the parties set out in paragraph 10 of the Agreed Facts above, there are numerous days when all Faculty Members are paid but not required to teach classes. These are clearly not treated as "vacation" days for the full-time Faculty under the Collective Agreement because they are entitled to their one-month vacation in addition to those days when they are also not required to "teach." Therefore, the Collective Agreement treats holidays, vacation and other paid days differently. Salaries are expressed as an "annual salary" in Article 16. Limited Term Appointees' salaries are pro-rated in accordance with the length of their term. The only other mention of "vacation" or "vacation pay" in the Collective Agreement is with respect to the exemption of any vacation entitlement for Limited Term Appointees under Article 15.1.10(a). Therefore, if the comparative exercise requires a comparative analysis of the entirety of the vacation benefits under the Collective Agreement for Limited Term Appointees with the vacation benefits accorded by the *Code*, this leads to the conclusion that the parties' contract simply denies "vacation" benefits for these professors. It is true that there are many days when they are not required to teach or even be on campus. There are also many days when they do not appear to have any specific teaching responsibilities, particularly in May. But the Collective Agreement does not designate those periods as "vacation" time. Instead, the Collective Agreement simply does not provide a vacation entitlement to the Limited Term Appointees. These are salaried employees. They are not paid by the hour or by the day. The Employer/University sets the period of their engagement. It decides whether to offer a 4, 8 or 9 month contract. The contracts are for these people to "teach" and teaching

involves far more than being in a classroom. The full-time professors who also do not have to be on campus for many of the non-teaching days are not expected to consider those days as vacation. Further, the "holiday", "study", "closure" and "break" days are not equated with "vacation" under the Collective Agreement. If they were, this would impact the full-time professors' one-month vacation as well. In addition, the world of academia provides its professors with freedom and flexibility to do their non-classroom work when and where they choose. While the full-time professors are required to do research and attend to Departmental business, the lack of those responsibilities for Term Appointees does not necessarily mean that they have so little to do for the non-classroom hours that they can or must be considered as being on "vacation."

Frankly, it also makes sense that there are not any "vacation" days under the Collective Agreement for Term Appointees. Their period of employment is less than a year. While vacation entitlement usually accrues with each month of service, time off is not usually granted until many months have passed. All this is consistent with the vacation provisions under the *Code's* sections 32 and 33 that speak to when an employee is entitled to time off. For example, time off must be given no later than 10 months after 12 months of service has accumulated; section 32(1). Under the *Code*, employees who are employed for less than 12 months have no right to vacation leave, but they are entitled to vacation pay. Section 34 of the *Code* then addresses employees who are not entitled to vacation with pay or pay in lieu because of their limited period of service. It mandates that they be paid four percent of the wages they earned within ten days of the termination of their employment. This is clearly designed to ensure that employees who have not provided sufficient service to gain the right to take time off will be guaranteed compensation in lieu thereof. All this combines to demonstrate that both the Collective Agreement and the *Code* respect the difference between vacation pay, vacation time and holiday periods.

Therefore, returning to the exercise of determining whether the Collective Agreement provides a more favourable vacation entitlement than the *Code* for Limited Term Appointees, one must conclude that the Collective Agreement on its own provides them

no vacation entitlement and no vacation pay. They may have “holiday” and other days off, but these are not “vacation” days under the Collective Agreement or the *Code*. The fact that the Collective Agreement may give Limited Term professors more favourable working conditions with respect to holidays has no bearing on whether the provisions of section 34 and vacation pay apply at the expiry of the Limited Term Appointments; see *White Pass Transportation Ltd. v. Canada (Attorney General), supra,* at para. 12. Therefore, the Collective Agreement cannot be said to provide a greater benefit than the *Code* to these professors in terms of vacation pay.

This takes us to the issue of estoppel. It was stressed that for as long as there is any institutional memory available, the Employer/University has operated on the assumption and understanding that there was no problem with the way that Limited Term Appointees were being paid. If any thought were put to the issue from the Employer’s perspective, it seems to have simply assumed that the salaries being paid included vacation pay and that the Union and professors assumed the same thing. Further, it was assumed that the parties have applied and administered their Collective Agreement in compliance with the *Code.* Until Dr. Rojas raised the issue, vacation pay had never been discussed in negotiations or raised as a problem by the Union with regard to Limited Term Appointees. The topic of vacations for full-time professors and the duration of vacations for librarians had been issues for the parties, but none of those discussions touched on the issue at stake in this case. The University stressed that the language that stipulates the rates of pay for the Limited Term Appointees has been in place for decades and that if this grievance succeeds, it will mean a 4% increase in pay that was never sought or achieved through collective bargaining. From the University’s perspective, this would create a significant financial liability arising from its detrimental reliance on the lack of any complaints until this grievance was filed. This is why the University has raised the defence of estoppel, making the fundamental assertion that it is simply not fair to claim the vacation pay now when no such claim has ever been made before.

The doctrine of estoppel is one of fairness. It provides that when a party to a contract makes a promise, either directly or through its conduct, that leads the other to believe that there will be no insistence on a legal right arising from the contract, the party making that promise cannot then turn around and insist on the enforcement of such a right. There are several elements to the concept of estoppel. They have been ably set out in the following extract:

> An estoppel may arise where: (a) intentionally or not, one party has unequivocally represented that it will not rely on its legal rights; (b) the second party has relied on the representation; and (c) the second party would suffer real harm or detriment if the first party were allowed to change its position. The requirement of an unequivocal representation or conduct is a question of fact, and may arise from silence where the circumstances create an obligation to speak out. The notion of reliance must be assessed from the perspective of the party raising the estoppel. In the labour relations context, the element of detriment may be satisfied by a last opportunity to negotiate.
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> *Simon Fraser University v. CUPE, Local 3338, supra,* at para. 43

Many of the estoppel cases cited above by the parties were situations where the party trying to assert a right knew or ought to have known about a situation and did nothing to enforce its rights for many years. In those situations, it was considered inappropriate or unfair to enforce a claim that was neglected for so long because the other party was led to believe that the status quo was acceptable and thereby lost the chance to remedy the situation in bargaining. For example, in *Atlantic Provinces Special Education Authority v. New Brunswick Union of Public and Private Employees,* [2012] N.B.L.A.A. No. 10 (Filliter), union executives received pay statements over a number of years that clearly indicated that no amounts were being paid for vacation pay or pay in lieu of benefits for overtime pay. No complaint was raised and so the Union was held to have acquiesced in the practice. Arbitrator Filliter applied the Supreme Court of Canada's directive[1] with regard to the application of estoppel in the labour relations context by quoting from its

[1] Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals, [2011] 3 SCR 616, 2011 SCC 59 (CanLII), at para. 56

reliance on the wisdom of Harvard Professor Paul Weiler who was also a noted arbitrator and former Chair of the British Columbia Labour Relations Board when he wrote:

> . . . .The union and the employer deal with each other for years and years through successive agreements and renewals. They must deal with a wide variety of problems arising on a day-to-day basis across the entire spectrum of employment conditions in the workplace, and often under quite general and ambiguous contract language. By and large, it is the employer which takes the initiative in making operational decisions within the framework of the collective agreement. If the union leadership does not like certain management actions, then it will object to them and will carry a grievance forward about the matter. The other side of that coin is that if management does take action, and the union officials are fully aware of it, and no objection is forthcoming, then the only reasonable inference the employer can draw is that its position is acceptable. Suppose the employer commits itself on that assumption. But the union later on takes a second look and feels that it might have a good argument under the collective agreement, and the union now asks the arbitrator to enforce its strict legal rights for events that have already occurred. It is apparent on its face that it would be inequitable and unfair to permit such a sudden reversal to the detriment of the other side. In the words of the Board in [*Corporation of the District of Burnaby and Canadian Union of Public Employees, Local 23*, [1978] 2 C.L.R.B.R. 99, at p. 103], "It is hard to imagine a better recipe for eroding the atmosphere of trust and co-operation which is required for good labour management relations, ultimately breeding industrial unrest in the relationship — all contrary to the objectives of the Labour Code". . . .
>
> (*Re Corporation of the City of Penticton and Canadian Union of Public Employees, Local 608* (1978), 18 L.A.C. (2d) 307 (B.C.L.R.B.), at p. 320)

These quotations indicate the need to protect the notion that the Collective Agreement is designed to articulate the whole of the parties' bargain and that while the Union is free to complain about management practices, a failure to lodge a complaint over a long period of time can result in a loss of strict contractual rights for the duration of that contract. This is especially true if the situation is one where the practice is transparent

and any due diligence could have revealed the problem if anyone had bothered to look into the matter.

That is exemplified in *Agassiz School Division No. 13 and Agassiz Teachers' Association of the Manitoba Teachers' Society, supra.* That was a case where the parties' collective agreement provided for the payment of administrative allowances on the basis of "per teacher supervised." For decades the employer paid the administrative allowances on the basis of the equivalent number of full-time teaching positions. This resulted in paying less than what would have been paid if the calculation was based on the actual number of teachers being supervised. No one questioned this for over 25 years. The evidence indicated that neither the Teachers nor the Administrators' Associations were aware of the method of the employer's calculations of the allowances until the complaint giving rise to the grievance was filed. However, the arbitrator noted that a significant number of administrators would have received "hundreds of statements enabling them to determine the basis upon which the Division was calculating administrative allowances," (para. 36). In light of that situation, the arbitrator imputed knowledge of the practice to the union. Relying on previous authorities, it was concluded that estoppel can operate where the one party may not have had actual knowledge of the practice, but had the means of becoming aware of the practice or could have become aware of the practice upon reasonable inquiry:

> 40 Pragmatism and fairness must be considered in these circumstances. The Division has followed its practice with respect to administrative allowances openly and consistently for 25 years. The Division is entitled to conclude that the Association knew of the practice, and had accepted it,
>
> 41 It would be both unfair and impractical if the Association were able to insist that the basis of the payment of administrative allowances be immediately changed, or changed retroactively. . .
>
> 44 . . . . In essence, I am ruling that the Association had constructive notice of the Division's practice, and their acquiescence in the practice has had the effect of altering the legal relations between the parties with respect to [the application of the Article in question.] In my view this sufficiently fulfills the intention requirement.

Accordingly, the issue in this case becomes whether the Union had actual knowledge that vacation pay was not being paid to Limited Term Appointees or whether the Union should be deemed to have had such knowledge. The Agreed Facts reveal that two Union executive members held Limited Term contracts during their earlier employment with this University. Those appointments were in 1987-1988 and 1990-1991, many years before this grievance was filed. Professor Catano essentially revealed that the Union never turned its mind to the issue. From the evidence presented it is possible to assume that no one actually thought about the issue. Further, while the Union receives copies of all the letters of appointment for Limited Term contracts, it does not receive copies of payroll information or records of employment. The payroll records for representative Faculty members employed on Limited Term contracts that were filed in evidence reveal no line item or reference to vacation pay. Therefore, while the Union and/or individuals might not have realized what was happening, it must be said that the non-payment of vacation pay was discernable from every pay stub due to the absence of any reference to it. It would also have been very easy for any Limited Term Appointee to tell from their contracts and the amounts they were being paid that they were receiving the exact pro-rated amount from the salary scales and they were not receiving an extra 4% at the end of their term of employment. Therefore, while the Union may not have actually been aware of what was happening, it would have been very easy for any one of the many Limited Term Appointees over the years to have noticed that they were not receiving vacation pay. It has been held that where a practice is consistent and pervasive and has been applied to union officials, a union can be deemed to have knowledge of the situation; see *Corporation of the County of Simcoe and SEIU, Local 1, supra.* Arbitrators have also imposed an expectation on unions to challenge pay shortages when it is possible to compute the correct amounts owing with little difficulty. It has been said, "…. Silence by the Union on a direct pocket book issue would reasonably lead management to conclude that there was no problem," see *Province of Manitoba, Department of Family Services and Housing v. CUPE, Local 2153, supra.* Accordingly, adopting Mr. Weiler's pragmatic application of the doctrine of estoppel to this situation, it is possible to conclude that this Union can be deemed to have had

constructive knowledge of the situation and that the University was entitled to assume that the Union accepted the amounts that these professors were being paid. With such conclusions, it would then suggest that the Union should be estopped from asserting this claim now because the University lost its chance to negotiate a rate of pay that would be inclusive of vacation pay for these professors or that would keep their compensation within the confines of the costing that would have been anticipated for these appointments.

However, while that might be an expected result according to the doctrine of estoppel, section 6 of the *Code* compels a different result. Section 6 prescribes that the minimum employment standards apply "notwithstanding any other law or any custom, contract or arrangement, whether made before, on or after the first day of February, 1973". In other words, despite any practice or arrangement that may have arisen over time regarding the non-payment of the minimum amount of vacation pay, the entitlement to the payment remains enforceable through the *Code*, and by incorporation into the Collective Agreement, though arbitration. While estoppel is a concept of fairness, it applies only to contractual rights that may be waived. Substantive statutory rights under the *Code* have a different treatment, by virtue of section 6 and by the law in general. The minimum substantive rights under the *Code* cannot be waived. Estoppel cannot be used as a defence to a substantive statutory right that reflects the public policy of the province.

I acknowledge that this issue has had some different treatment by the courts and arbitrators. Beginning with *Kenora (Town) Hydro Electric Commission v. Vacationland Dairy Co-operative Ltd., supra*, Kenora Hydro had inadvertently undercharged Vacationland Dairy for power. When Kenora Hydro sought to collect the amount Vacationland Dairy had been under charged, Vacationland Dairy asserted that it was estopped from doing so. Kenora Hydro responded by maintaining that it could not be estopped because it was obliged by statute to collect the arrears. The facts would have supported an estoppel defence to a claim for repayment of money that had been under-

billed. The Supreme Court concluded that Kenora Hydro could not have been estopped if the application of the doctrine would have relieved it of a statutory obligation. Major J., writing for the majority of the Court, stated that:

> A statute can only…bar the defence of estoppel or change of position where there exists a clear positive duty on the public utility which is incompatible with the operation of those principles… (para. 55)

The majority decision of the Supreme Court concluded that Kenora Hydro was estopped because it did not accept that the statute in issue obliged Kenora Hydro to collect arrears from a customer it had inadvertently undercharged: "…in these circumstances [estoppel] does not relieve Kenora Hydro of its [statutory] obligation… (para. 57)". However, the case did establish that a plea of estoppel cannot negate a positive and substantive statutory obligation.

This issue was also canvassed with regard to Employment Standards in *Curtis Products Corp. v. IWA-Canada, Local 500, supra.* That case involved the relationship between statutory rights under the Ontario *Employment Standards Act* and the administration of the collective agreement. Estoppel was discussed in the context of layoffs because the Union had never claimed that previous multiple layoffs were "terminations" that would trigger rights under the *Employment Standards Act*. When the Union became aware that it might be able to claim that the layoff of 66 employees might trigger the "mass termination" benefits under that statute, it launched a grievance under the Collective Agreement claiming such payments. The Employer defended by asserting an estoppel. Arbitrator Langille considered the application of the *Employment Standards Act* where it prescribes:

> s. 64.5 If an employer enters into a collective agreement, the Act is enforceable against the employer with respect to the following matters as if it were part of the collective agreement:
>
> (1) A contravention or failure to comply with the Act that occurs when the collective agreement is in force.

This led to the conclusion that the Act was instructing arbitrators to adopt "an inclusion" model whereby the provisions of the Act are to be treated as part of the collective agreement, thereby resulting in the application of the "normal apparatus of contract administration," including the application of estoppel with regard to enforcement of rights; see para. 49. It was concluded that the employer could defend itself against the claim of the union under the statute because of the union's failure to assert such a claim in the past. However, that case does not stand for the proposition that there can be an estoppel defence with regard to a substantive statutory claim. Instead, that case treated the *Employment Standards Act* provisions "as if" they were incorporated in the collective agreement as the Ontario statute commands. This led to the conclusion:

> . . . the employment standards entitlements are put on the same footing as collective agreement entitlements….The issue is not estoppel against the statute, but estoppel in the context of enforcing the collective agreement. [para. 49]

Estoppel was therefore treated as a matter of "contract administration" that compelled Arbitrator Langille to enforce the collective agreement' grievance timelines with regard to the scope of enforcement of the union's claim. That led to the principle finding that the grievance was untimely and it was dismissed on that basis; see para. 52. Finally, it must be noted that this decision was rendered before the Supreme Court of Canada released the decision in *Parry Sound, supra.* That case dealt with the relationship between the application of a collective agreement and Ontario's *Human Rights Code* and Employment Standards Legislation. In that context, the Court was also dealing with section 48(12)(j) of the Ontario *Labour Relations Act* that provides that an arbitrator has the power "to interpret and apply human rights and other employment-related statutes, despite any conflict between those statutes and the terms of the collective agreement". The Supreme Court said that this means: "The power to interpret and apply a particular statute would . . . ordinarily be understood to include the power to implement and enforce the *substantive rights* and obligations contained therein," para. 43, [emphasis added].

This is applicable to the legislative context in Nova Scotia where, as outlined above, the *Trade Union Act,* section 43B(2), gives an arbitrator the jurisdiction to treat as part of the collective agreement the provisions of any statute of the Province governing the relations between the parties to the collective agreement, including the *Labour Standards Code*. This results in the notion that the right of an employer to manage operations and direct the work force is subject not only to the express provisions of the collective agreement, but also to its employees' statutory rights. This is applicable to the Supreme Court's ruling in *Parry Sound, supra:*

> As a practical matter, this means that the substantive rights and obligations of employment-related statutes are implicit in each collective agreement over which an arbitrator has jurisdiction. A collective agreement might extend to an employer a broad right to manage the enterprise as it sees fit, but this right is circumscribed by the employee's statutory rights. The absence of an express provision that prohibits the violation of a particular statutory right is insufficient to conclude that a violation of that right does not constitute a violation of the collective agreement. *Rather, human rights and other employment-related statutes establish a floor beneath which an employer and union cannot contract.* [Emphasis added]
>
> As a result, the substantive rights and obligations of the parties to a collective agreement cannot be determined solely by reference to the mutual intentions of the contracting parties as expressed in that agreement. Under *McLeod,* there are certain terms and conditions that are implicit in the agreement, irrespective of the mutual intentions of the contracting parties. More specifically, a collective agreement cannot be used to reserve the right of an employer to manage operations and direct the workforce otherwise than in accordance with its employees' statutory rights, either expressly or by failing to stipulate constraints on what some arbitrators regard as management's inherent right to manage the enterprise as it sees fit. The statutory rights of employees constitute a bundle of rights to which the parties can add but from which they cannot derogate. [paragraphs 28 & 29]

Since the directions given by the Supreme Court in the *Parry Sound* case, it has been clear that an arbitrator has the power and the responsibility to enforce both the terms of a collective agreement and the substantive provisions of employment related statutes. Where they might conflict, the provisions of the statute cannot be ignored, even if they impact on the administration of the collective agreement.

Applying all this to the issue of estoppel and employment standards for these parties, it has to be concluded that when a union acquiesces or allows a well-established and/or easily discernable practice to continue without question for decades, the principles of promissory estoppel will normally prevent the union from suddenly enforcing its strict contractual rights. However, when an employer's actions are inconsistent with the substantive rights under an employment related statute, the defence of estoppel will not protect the employer. The doctrine of estoppel applies to contractual rights. It has no application to a breach of legislation that establishes social policy and substantive employment rights. The *Labour Standards Code* establishes a mechanism to ensure minimum benefits and standards to protect the interests of employees and impose responsibilities upon employers. As such, it is a benefits-conferring statute and must be interpreted in a broad and generous manner to protect those benefits; see *Morine v. L & J Parker Equipment Inc., supra*. Further, section 6 of the *Code* enshrines the concept that its rights cannot be waived by saying that its protections apply regardless of custom, contract, arrangements or practice. This must be recognized as being the public policy of the Province. Therefore, any "custom, contract, arrangement or practice" that might have seemed to exempt an employer from the *Code's* requirements must be held to be of no effect because it would be contrary to public policy. Therefore, the doctrine of estoppel cannot be used as a defence to non-compliance with the *Code* in this case.

None of this is meant to suggest that this Employer has deliberately or intentionally attempted to avoid any public duty or statutory responsibility. To the contrary, as Professor Catano said in his testimony, this University is an employer who can be counted on for good labour relations. Further, it is clear that the parties would never have knowingly allowed their contract to be administered in a way that did not comply with the *Code* or the provincial law. The situation in this case is simply one that went unnoticed for decades without causing anyone any concern, including the many very intelligent Limited Term Appointees who did not question whether or not they were receiving vacation pay. However, the situation remains such that the Limited Term Appointees' rights have not and cannot be waived.

Finally, it is important to address the University's concern that these conclusions will lead to the Limited Term Appointees receiving more than what was bargained for and more than the pro-rated amount of the professorial salary scale. These are legitimate issues. However, as set out above, the 4% entitlement arises from the operation of the substantive rights under the *Code.* That statute and the application of social policy mandate the payment. The situation is analogous to many collective bargaining relationships where collective agreements were negotiated without a complete understanding of the implications of a *Human Rights Code* that created statutory rights that impacted on the terms of the contract. The conclusions in this Aware are not a re-writing of the Collective Agreement or a granting of a benefit that augments the contract, as the University suggests. Instead, the substantive provisions of the *Code* must be recognized as being incorporated into the Collective Agreement. Accordingly, they are part of the Collective Agreement and enforceable as such. Further, with regard to the suggestion that the Limited Term Appointees will get a proportionately higher compensation than the full-time professors, that proposition does not have resonance. The Limited Term Appointees' stipends are pro-rated from the full-time scale according to the duration of their contracts. For example, a nine-month appointee would receive 3/4 of the full time rate. It must be remembered that the full-time salary is for a full year and those professors also have one month of vacation. However, the Limited Term Employees do not get any vacation under the Collective Agreement. Therefore, the 4% vacation pay can be viewed as the proportionate value of vacation time, not as extra compensation.

For all these reasons it must be concluded that this grievance is allowed. The Limited Term Appointees' stipends are not inclusive of vacation pay. Therefore, under the *Code,* as incorporated into the Collective Agreement, they are entitled to 4% of their salary upon the termination of their contracts. This leads to the issue of the scope of remedial relief available under this grievance.

D. Remedy

The grievance asks for vacation pay for all current and former bargaining unit members on limited term contracts whose contracts terminated during the term of the September 1, 2012 - August 31, 2015 Collective Agreement. While I have not concluded that the longstanding practice of not paying vacation pay serves as a defence to the claim, the fact that no objection to the practice surfaced until the Winter term in 2013 cannot be ignored. The substantive rights under the *Code* have to be enforced. However, as a matter of remedial discretion and Collective Agreement administration, the timing of the grievance is very important. The most common remedial approach is to award compensation starting only from the period covering the time for filing of grievances. This is done to prevent a party from being saddled with a liability for something it did not contemplate, did not realize was a problem and had no chance to correct. There are many exceptions to that formula. However, what is important in this case is that the University was not put on notice of any problems with regard to vacation pay until the issue was raised in the Winter term of 2013. Under the Collective Agreement, grievances must be filed within 20 working days of the event giving rise to the grievance. Since vacation pay is payable within 10 days after the expiry of the Limited Term professors' contracts, a grievance on their behalf would have to have been filed on or before 20 days after the time for payment passed. For Limited Term contracts that ended December 31, 2012, a grievance filed on May 29, 2013 would be out of time procedurally. That does not make this group grievance untimely or inarbitrable as a whole because it covers a number of other employees in different circumstances. However, it is late notice to the Employer of potential liability with regard to some of the employees. Given the long period of when vacation pay was not raised as an issue, I can see no reason why not to apply the normal rules of procedure and remedial scope by ordering that compensation should be available for Faculty members whose entitlement to vacation pay arose on or after the 20 working days prior to the filing of this grievance, taking into consideration the fact that the entitlement is to be paid within ten (10) days of the termination of employment. Therefore, the key date is ten days after the termination of the contract. Accordingly, I order the Employer to compensate those

Limited Term professors whose contracts expired within or after 20 days prior to the filing of this grievance for the vacation pay that has been determined to be owing.

This approach is also consistent with the findings in *Curtis Products Corp., supra,* by giving respect to the procedure in the Collective Agreement and allowing enforcement of rights that are filed in a timely manner.

I recognize that complaints can be filed for six months under the *Code.* By limiting remedial relief to professors whose entitlements crystalized on or after the 20 working days prior to the filing of this grievance, I am excluding recovery for appointments that expired earlier. This is because while the principles of contract interpretation require that the substantive rights under the *Code* must be protected, they do not prevent respect being given to the procedural agreements of the parties under their grievance and arbitration provisions. It is simply unfair to the Employer to hold it liable for a situation that was not brought to its attention for so long. The Grievance Procedure in the Collective Agreement signals a mutual acceptance of the notion that issues should be addressed without being allowed to fester, escalate or drift along *ad infinitum*.

I make no comment on the situation of professors who were appointed after the filing of this grievance whose letters of appointment have been worded differently and were thereby put on notice that their stipends are inclusive of vacation pay when they are appointed. Their situation is the subject of a separate grievance that will be based on a different set of facts. The scope of this Award is limited to the professors named in the Agreed Facts and whose employment was governed by those Facts.

I remain seized with regard to any issues arising out of these conclusion should the parties require further assistance.

Dated at Toronto this 22nd day of September, 2015

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Paula Knopf - Arbitrator