IN THE MATTER OF AN ARBITRATION

BETWEEN:

LAURENTIAN UNIVERSITY

("the University")

AND:

LAURENTIAN UNIVERSITY FACULTY ASSOCIATION

("the Association")

IN THE MATTER OF:

GRIEVANCE: # 2018-01

SOLE ARBITRATOR:

Kevin M. Burkett

APPEARING FOR THE UNIVERSITY:

Michael Kennedy - Counsel

APPEARING FOR THE ASSOCIATION:

David Wright - Counsel

AWARD

This is an Association claim for damages arising out of an alleged representation made by the University in connection with the Return-To-Work Protocol entered into between the parties on October 5, 2017 to end an eight-day strike. Specifically, the Association claims that the University's chief negotiator represented to it during the course of return-to-work bargaining (sometime between October 2 and October 5) that "the question as to whether or not the term would be extended had not yet been determined and that this would be determined by Senate…through a collegial process." It is the contention of the Association that it relied on this representation in agreeing to the University position that faculty members would not receive additional remuneration should the 2017 academic fall term be adjusted, i.e. the workload compressed or the term extended to make up for the class/instruction time lost because of the strike.

Paragraph 13 of the October 5, 2017 Return-To-Work Protocol stipulates as follows:

> In the event the work associated with 2017 academic fall term is adjusted to fit within the existing term (i.e. ending December 23, 2017) or an extended term, the adjustment(s) shall not attract any additional remuneration for any employee.

There is no dispute that the alleged representation was made, and then reiterated, by the University's chief negotiator nor that the Association relied upon this representation in agreeing to paragraph 13.

In fact, it was decided by the Executive Committee of the Senate (SENEX) on October 11, 2017 that the fall 2017 academic term would be extended by one week. SENEX acted because it believed that it was in the best interests of both faculty and students to know as soon as possible what the changes would be to the academic schedule. There were no Association members of SENEX at the time. The full Senate (comprised of a majority, by one, of Association members) was then asked on October 17, 2017 to endorse "the decision made by SENEX" on October 11, 2017. It was made clear that the full Senate would not be considering the question of whether or not the term would be extended but, rather, whether to endorse the decision already made by SENEX. The members of the Senate had been told that regardless of whether or not they voted to endorse the decision of SENEX, the decision to extend the term would not be changed and that any motion to revisit the question would be ruled out of order. The SENEX decision to extend the term was endorsed by a 19-13 vote of the full Senate.

Pursuant to paragraph 13 of the Return-To-Work Protocol, as reproduced above, the Association members were not paid for the work performed during the one-week extension to the term.

To repeat, the evidence establishes that a representation was made by the University's chief negotiator that the decision as to whether or not to adjust the academic term would be made by the Senate in a collegial process and that the Association relied upon this representation in agreeing to paragraph 13 of the Return-To-Work Protocol. Given that the effect of its agreement to paragraph 13 was to end the strike and thereby

conclude the bargaining, it must be found that the Association relied on this representation to its detriment. It could no longer bargain a different result. The Association concedes that it cannot assert that the decision to extend the term would have been different if decided by the Senate as a whole, but does assert that it might have been different.

While it acknowledges that it cannot have the decision undone, the Association argues that it lost the opportunity to achieve a different result, i.e. to have the Senate vote not to adjust the academic term and, thereby, not to have faculty members perform additional work without pay. The Association suggests that three days' pay for each affected member would constitute an appropriate damage award for its lost opportunity. The Association relies upon the following authority in support of its position:

- *Hallmark Containers and Paperworkers Union (1983) 8 LAC (3^{d}) 117 (Burkett)*
- *Ontario Public Service Employees Union and The Crown (2003) CanLII 52872 (ON GSB) (Leighton)*
- *Ontario Public Service Employees Union and The Crown (2004) CanLII 55303 (ON GSB) (Leighton)*
- *Ontario Ministry of Community & Social Services v. Ontario (2005) CarswellOnt 738, 137 LAC (4th) 1*
- *Nipissing-Parry Sound Catholic District School Board and The Ontario English Catholic Teachers' Association (2018) CarswellOnt 5236, 135 CLAS 49*

- *North Bay Regional Health Centre and Ontario Nurses' Association (2016) CarswellOnt 14138, CLAS 193 (Bendel)*
- *OPSEU v. Ontario (St. Lawrence Parks Commission) (2010) CarswellOnt 8125, 194 LAC (4th) 381 (Herlich)*

The University asserts, firstly, that in the context of a bicameral governance structure (with the Board responsible for administrative matters and the Senate responsible for academic matters), within which the University's chief negotiator represented the Board (as distinct from the Senate) at the bargaining table, he had no authority to speak on behalf of the Senate nor to in any way bind the Senate (reference is made to the judgement of the British Columbia Court of Appeal in *re: Faculty Association of British Columbia and University of British Columbia (2010) BCCA 189* in support of this contention). Accordingly, the University argues that the Association is seeking to enforce an unenforceable right and to have awarded as a remedy that which it agreed to forego at paragraph 13 of the Return-To-Work Protocol, i.e. payment for the work necessitated by an extension of the academic term. Reference is made to *Carleton University and Carleton University Faculty Association, Policy Grievance 14-P-00009, Workload (unreported) June 11, 2015 (Knopf)* in support of the proposition that the clear language of the agreement governs, i.e. paragraph 13.

In any event, it is argued that because the University's chief negotiator had not represented that the matter would not proceed to SENEX and because the Association was "alive" to that possibility and never raised the issue with the chief negotiator, it

cannot now argue for damages on the basis that the matter went to SENEX for decision. This is especially so, it is argued, in light of the fact that SENEX acted within the scope of it's authority in deciding to extend the term and in light of the fact that the full Senate then endorsed the decision of SENEX by majority vote.

The University cites the following awards in support of the contention that because, as SENEX knew, it was in the best interests of both faculty and students to know of the changes to the academic schedule as soon as possible and because the Association had already agreed that no additional remuneration would be paid for work during the extended term, the lost opportunity was of negligible, if any, value. See:

- *Bruce Power LP v. Society of Energy Professionals (2017) CanLII94612 (ON LA) (Surdykowski)*
- *Service Employees International Union, Local 1 Canada v. Bluewater Health (2019) CanLII 25975 (ON LA) (Nyman)*
- *Lakehead University v. Lakehead University Faculty Association (2014) CanLII 62421 (ON LA) (Surdykowski)*
- *United Steelworkers of America v. Nelson Quarry Company (1995) CanLII 9923 (ON LRB)*

In this regard, my attention is directed to the caution of arbitrator Surdykowski at paragraph 69 of the *Bruce Power* award *(supra)* wherein he cautioned that an assessment of the quality of any lost opportunity must be undertaken in determining an appropriate remedy based on a lost opportunity. He states, "Not all lost opportunities

have the same value. Some probably have no value at all and a loss of opportunity which has no or *de minimus* value can hardly be said to be detrimental." It is argued that if this was a lost opportunity, it was a lost opportunity of minimal value.

The Association makes a number of points in reply: firstly, that it was within the authority of the chief negotiator to make the representation that he did because as the representative of the Board, which has the authority to decide the process question, he could bind the University to a process, i.e. debate *de novo* at full Senate, without infringing upon the exclusive right of Senate to decide whether or not to compress or extend the academic term; secondly, that the Association did not agree that the academic term would be extended but rather that its members would not be remunerated should the academic term be extended such that the University cannot argue that it had agreed to forego any remedy for the lost opportunity to argue before full Senate that the academic term should be neither compressed nor extended; thirdly, that the email exchange between the University and the Association representative following the October 11, 2017 SENEX decision to extend the academic term confirms that the Association understood the representation to have been, as it was, that the matter would go to full Senate for collegial consideration; and finally, that a clear and unequivocal representation was made upon which the Association relied to its detriment, thereby establishing the requirements for promissory estoppel. In this regard, reference is made to the principle articulated by arbitrator Knopf at paragraph 27, *Carleton (supra)* that, "where there is clear and cogent evidence that a promise was made in order to induce a

party into foregoing a right or accepting certain language, that may form the basis of estoppel if all the other elements of the concept are established." These elements exist here, it is argued, and must be given effect, including the awarding of an appropriate remedy for the lost opportunity.

DECISION

I start by confirming the importance of the written word. It is the written agreement that governs the relationship between these parties. In this case, the Association agreed to paragraph 13 of the Return-To-Work Protocol. Paragraph 13 stipulates that "in the event the work associated with the 2017 academic fall term is adjusted to fit within the existing term, i.e. ending December 23, 2017, or an extended term the adjustments shall not attract any additional remuneration for any employee." (emphasis added) It is important to understand that consistent with the bicameral organizational structure the question as to whether the workload would be adjusted was left open. The Association did not agree that the fall term would be extended only that there would be no additional remuneration should the full term be extended. It is in light of this understanding of what was and was not agreed under paragraph 13 that the issue before me can be addressed.

It is not disputed that the representation alleged to have been made by the University's chief negotiator was in fact made.

The University challenges the Association's reliance upon the representation made by its chief negotiator on the basis, firstly, that he had no authority to make the representation that he did such that the Association is seeking to enforce an unenforceable right; secondly, that in any event the decision by SENEX as endorsed by the full Senate satisfied the representation; and, thirdly, that, again in any event, the lost opportunity was of negligible value given that the Association had agreed that no additional remuneration would attach should the workload be adjusted.

In any collective bargaining exercise, each side reasonably assumes that the other side's chief negotiator is acting within the scope of his/her authority and governs itself accordingly. The ordered structure and progress of the bargaining process depend upon this. It follows that any attempt by a party to disavow the undertakings or representations of its chief negotiator must be carefully scrutinized. In this case, the University's chief negotiator, representing the Board, committed to a process to be followed in deciding whether or not to adjust the workload. It was always understood that the Senate would act within the scope of its authority to actually decide the issue. I have not been convinced that in committing to a process that did not interfere with the decision-making authority of the Senate over academic matters that he somehow exceeded his jurisdiction as the representative of the Board at the bargaining table. He made a representation that was within his scope of authority that the Association was

entitled and did rely upon. Accordingly, I reject the argument that the Association is seeking to enforce an unenforceable right.

The representation, made in the context of the return-to-work discussions, was that the decision to adjust the workload would be made by the Senate in a collegial fashion. In the University setting, the reference to collegiality underscores the reality of faculty input into the academic decision-making process through membership on Senate as a whole. Absent any faculty membership on SENEX and having regard to the fact that SENEX made the decision and that the full Senate was not permitted to debate the merits, it must be found that the decision was not made in a collegial manner, as promised. Indeed, it was made clear that the Senate would not be permitted to debate the merits or in any way alter the SENEX decision. It follows that the Association was not given the opportunity to influence the decision-making as contemplated by the representation made to it.

The agreement of the Association at paragraph 13 of the Return-To-Work Protocol to forego any additional remuneration should the workload for the fall 2017 term be adjusted is not relevant to the question of whether or not it lost the opportunity to influence the decision. Nor is it relevant to any question regarding the value of the lost opportunity. This is so because on the clear language of paragraph 13, the question as to whether or not to adjust was left open and the representation upon which the Association now relies was that the decision would be made collegially at Senate. The clear implication was that the faculty, who comprised a majority of Senate, would have

an opportunity to influence the ultimate decision and thereby avoid the extension of the term and the need to work without pay. This was the opportunity that was lost.

To summarize, it is not disputed that in the context of the return-to-work negotiation the University's chief negotiator confirmed to the Association that the question as to whether or not the 2017 fall term work would be adjusted would be decided by the Senate in a collegial process. This could only mean that the matter would be referred to the full Senate where the faculty comprised the majority (by one). This representation gave rise to an Association belief, reasonably held because of its majority on Senate, that it might be able to avert a work adjustment by having the Senate decide otherwise. The Association relied on this representation and its consequent belief when it agreed to paragraph 13 of the Return-To-Work Protocol and it did so to its detriment because its agreement ended the bargaining. Accordingly, the required elements necessary to found an estoppel have been made out; that is a clear representation, relied upon by the Association to its detriment. When SENEX made the decision to extend the term and the Senate was not permitted to consider the merits, the Association lost the opportunity that it had been promised.

While I must engage in some measure of speculation as to the precise value of this lost opportunity, the case law makes it clear that the difficulty in assessing the quantum of damages should not deter an arbitrator from fashioning the remedy that best reflects the circumstances. In this case there existed, on the one hand, the possibility that the decision of the full Senate, if permitted to debate the merits, would have been

that faculty not be required to perform additional work without remuneration. However, on the other hand, it can reasonably be surmised that the primary objective of the Senate would have been to ameliorate to the fullest extent possible the academic impact of the strike upon the students. This, of necessity, would have required a workload adjustment. The paramountcy of this objective is reflected in the 19-13 Senate vote in favour of endorsing the decision of SENEX to extend the term by one week. Even with a majority of faculty members, the full Senate nevertheless endorsed the extension of the 2017 fall term. It follows that even if given the opportunity to debate the merits, the full Senate would more likely than not have acted in the best interest of the students by adjusting the faculty workload.

Notwithstanding that it was more likely than not that the full Senate would have adjusted faculty workload if allowed to decide the issue, the possibility nevertheless existed that it may not have done so. It is this possibility that attaches value to the lost opportunity to have influenced the decision making; a value reflective of the faculty members comprised a majority of Senate. When the foregoing is taken into account it is the arbitrator's view that the appropriate value to be placed on the lost opportunity as a damage award is one day's pay (at the October 2017 rate) for each affected faculty member. Accordingly, I hereby direct that each faculty member be paid this amount as damages and that payment be made within sixty (60) days of the date hereof.

I remain seized.

Dated this 12th day of September 2019 in the City of Toronto.

Kevin Burkett

KEVIN M. BURKETT