IN THE MATTER OF AN ARBITRATION PURSUANT TO
THE *LABOUR RELATIONS CODE,* R.S.B.C. 1996 c. 244

BETWEEN:

SRI HOMES

(the "Employer" or the "Company")

AND:

UNITED STEELWORKERS, LOCAL 1-423

(the "Union")

Unilateral Wage Increase Grievance

AWARD

ARBITRATOR: Randall J Noonan

APPEARANCES: Sean T. Pihl, K.C., and Kara R. Ellison, for the Employer

Will Clements and Shirin Kiamanesh, for the Union

HEARING DATES: August 3, 4, and 8, 2023
Written Submissions September 7. 21, and 27, 2023

DATE OF THE AWARD: January 2, 2024

Introduction

1. The Employer is a company that manufactures prefabricated homes, that is, modular homes for the single-family residential market. It receives its orders for new homes through a network of retail sellers. The Union represents a bargaining unit of workers employed by the Employer. The parties agreed that this arbitration board has jurisdiction to determine the issue in dispute.

2. On February 23, 2022, the Union filed the current grievance. The grievance form alleges that, "Shortly after ratification the Employer unilaterally changed [the] wage scale without authorization or agreement of the Local Union causing morale issues on the floor, etc."

3. The Employer admits that it violated the collective agreement. The dispute between the parties relates to the appropriate remedy. The parties characterized the reason for the breach quite differently, and the remedy will largely turn on a finding of fact as to why it occurred. Was the breach an innocent error based on a misunderstanding (as the Employer argues), or was it a deliberate flaunting of the collective bargaining process (as the Union argues)?

4. The Employer submits that the only remedy necessary is a declaration that it violated the collective agreement. The Union, on the other hand, submits that a significant sanction is called for. It asks that all hourly workers be given a raise in pay for a prescribed period and also argues that the breach has contributed to a lack of confidence in the Union by shop floor workers. As a result, the Union claims that it is also entitled to a monetary remedy.

5. During the hearing, the parties presented an Agreed Statement of Facts ("ASOF") and each side called two witnesses. The Union called Troy Cook, a maintenance employee and member of the Union's bargaining team, and Pat McGregor, the

president of the local Union. The Employer called Darren Bassett, the General Manager, and Janice Pellerin, its Human Resources Manager.

The Agreed Statement of Facts

6. I will recount the ASOF starting at paragraph 3:

> 3. On December 15, 2021, the Employer and the Union concluded bargaining the current collective agreement. That agreement is attached as Appendix A.
>
> 4. Under the collective agreement, employees are categorized into different groups which determine their rate of pay, depending on how long they have been employed under the agreement and whether they have a ticketed trade ("Schedule A – Rates of Pay", at page 27):

Schedule A – Rates of Pay

Groups	1-Jul-21	1-Jul-22	1-Jul-23
Group One – 1st 60 working days	$18.27	$19.00	$19.76
Group Two – 61 to 120 working days	$19.26	$20.03	$20.83
Group Two (a) – 121 to 240 working days	$20.89	$21.73	$22.59
Group Two (b) - 241 to 360 working days	$22.54	$23.44	$24.38
Group Two (c) - 361 to 480 working days	$24.19	$25.16	$26.17
Group Three – 481 and thereafter	$27.93	$29.05	$30.21
Group Four (CURRENT Ticketed Trades only)	$30.65	$31.88	$33.15

> 5. During collective bargaining of the current agreement, the Employer proposed increasing the starting wage rate for new employees by collapsing Group One and Group Two together, so that Group One would cover the first 120 working days but would be paid at the Group Two rate.
>
> 6. The Union rejected this. The Union stated to the Employer that it would be problematic to increase wages for some positions if the same increase was not being applied to more senior employees.

7. The Employer did not make any proposal that would offer commensurate wage increases for more senior employees and withdrew its proposal to change the starting wage.

8. The collective agreement that the parties ultimately entered does not include wage increases specific to new employees or to one group of employees.

9. On February 23, 2022, the Union filed the current grievance. A copy of the grievance form is attached as Appendix B.

10. On March 23, 2022, the parties engaged in mediation with the Labour Relations Board related to this dispute.

11. Subsequent to the mediation, the Employer ceased recruiting and hiring employees at a rate above what the collective agreement provides. The Employer did not decrease the wage rate for any employees already hired at the rate above what the collective agreement provides.

The Employer's backlog and recruitment problems

7. The building of prefabricated homes is a time-sensitive and competitive industry. One of the advantages of prefabricated homes over more traditional home building is that prefab homes can be built more quickly.

8. According to Darren Bassett, it takes between 10 to 15 days to produce a home and ideally the Company could complete three modular units per day over two shifts, that is, a day and night shift. If incoming orders exceed production rates, it can create an unacceptable backlog resulting in retailers having difficulty selling new homes. If the backlog becomes too great, then the Company cannot build homes to order within a reasonable period and business is lost to competitors. The "sweet spot" turnaround time between the order of a home and its completion is six to eight weeks.

9. The year 2021, however, saw a dramatic 220% increase in backlog time for the Employer ultimately resulting in an approximate 36-week backlog period, far outside the ideal. The Company lost business to other modular companies.

10. One of the key factors leading to the 2021 backlog was the difficulty the Employer was having in recruiting new employees. In January 2021, the Employer had 140 FTE employees and that number had fallen to 118 by December 2021. The Employer determined that it needed to hire 50-60 new employees to get to the manufacturing level it required.

11. In early 2021, the Employer tried several recruitment strategies. It contracted with a third-party recruiter because, at the time, the Employer did not have a human resources director (that changed in October 2021 when the Employer hired Janice Pellerin as its Human Resources Manager). It tried to recruit staff from another company that had recently shut down. The Employer drew up pamphlets, did open houses, put up roadside billboards, and put in an application for the federal Temporary Foreign Workers Program ("TFWP") in the summer of 2021. That program had been successfully used by another of the Company's plants in Saskatchewan for several years.

12. In relation to TFWP, the Employer arranged for its third-party recruiter to talk with the general manager of the Saskatchewan plant and to work with an immigration company called Cando Canadian Immigration Services to advance the Employer's application. Mr. Bassett understood that the TFWP was a "long and painful process with lots of hoops to jump through." Mr. Bassett had been told that it could take 12 months from the filing of the application, to approval, to hiring the first foreign worker under the program. He said that the Company did not expect the TFWP to be a short-term fix.

13. One of the requisites for the TFWP was that the Employer had to show that it could not hire the staff it needed locally. To do that, it was required to advertise locally for

at least 30 days and such advertisements had to show an "appropriate" wage rate. The "appropriate" wage rate is determined by the TFWP which lists several categories of employees and the wage rate that must be offered for employees in that category. After the Employer selected a category which it thought would fit within the TFWP descriptions, the minimum appropriate rate that had to be advertised was $20 per hour.

14. The Employer advertised jobs with a starting rate at or exceeding $20 per hour at local job banks, Indigenous centres, and "Spider" using their third-party recruiter to do the "leg work." Although no one was able to provide a specific date that the advertising started, it is clear that the Employer was advertising jobs at the plant with a starting range exceeding $20 per hour by early December 2021. A picture of a sign on a gate was entered as an exhibit. It read, "SRI Kelowna – Hiring Production Positions – STARTING at $21.89 per hour – Apply at ApplySRIHomes@gmail.com.

15. As can be seen from the pay chart above, $20 per hour was above the starting rate set out in the collective agreement.

16. According to Ms. Pellerin's testimony in cross-examination, advertising for new employees at a rate higher than what is set out in the collective agreement was happening early in December 2021. She knew that by December 20, 2021, the Employer had already committed, through the TFWP, to offer starting rates that had not been agreed to by the Union.

17. It is clear from the Employers' representations to the TFWP that it was committed to paying a starting rate of at least $20 per hour to new employees before the new collective agreement was ratified on December 15, 2021.

The 2021 round of bargaining

18. 2021 was also the year that collective bargaining took place for the negotiation of the current collective agreement, the term of which is July 1, 2021, to June 30, 2024.

19. Witnesses for both parties testified that the 2021 round of bargaining was very difficult. The bargaining took place over an almost seven-month period from June to December. There were 34 bargaining meetings during which the Employer put forward 74 proposals for changing the collective agreement, the Union put forward 60 to 70 proposals. Darren Bassett was the lead bargainer for the Employer and Pat McGregor was the lead for the Union.

20. For many years the pay rates for hourly employees have been determined on the tier system reflected in the wage chart shown above. As can be seen, there is a pay scale that lists seven pay grades for seven different groups of hourly workers. The seventh pay grade relates only to what is called "Group Four (CURRENT Ticketed Trades only)." The pay rates for the first six categories listed are based solely on the number of days the workers in each category have worked for the Employer. Those categories are:

    - Group One - 1st 60 working days
    - Group Two - 61-120 working days
    - Group Two (a) - 121-240 working days
    - Group Two (b) - 241-360 working days
    - Group Two (c) - 361-480 working days
    - Group Three - 481 and thereafter

21. The pay rates for Groups One and Two as of July 2020 (the applicable rate before the current agreement was struck) were $17.48 per hour and $18.43 per hour respectively.

22. During the last week of August 2021, bargaining proposals on wages were exchanged. August 26, 2021, Mr. Bassett brought forward an Employer wage proposal to deal with the employee recruitment issue. Under that proposal, the Group One rate would be eliminated altogether so that all new employees (except ticketed trades people) would start at the 61–120-day level, that is, the Group Two level. That proposal appeared in the next three Employer wage proposals over the following few days.

23. The Union unequivocally rejected the proposal. Its bargainers indicated to the Employer that its membership would not approve of such a change as it would be unfair to more senior employees. The Union suggested that if the Employer wanted to raise the starting wage, then it would have to raise the rates in each of the subsequent categories by a similar amount.

24. The Employer considered the Union's idea of raising the rates for all categories and concluded that it would be too costly to do so. Rather than counter the Union's suggestion, however, the Employer withdrew its proposal to eliminate the group One rate and ultimately agreed to the wage rates set out in the chart.

25. After the Employer's August 26, 2021, proposal, the contentious round of bargaining continued without any further proposals to start new employees above the Group One rate. One of the Union's witnesses recalled that Mr. Bassett, in early December, mentioned the possibility of all new employees starting at the Group 2(a) rate. Mr. Bassett could not recall that but did not deny that he might have done so. At any rate, no further proposals were tabled regarding effectively eliminating the first two pay rates.

26. As the talks faltered in the late fall of 2021, the Union conducted a strike vote and obtained a strike mandate. However, before any strike action was taken, the bargaining committees reached a tentative deal. That tentative deal was put to a

ratification vote but was rejected by the Union membership in early December. Further bargaining ensued and a new deal was agreed to and ratified by the membership on December 15, 2021.

27. Right after the ratification of the agreement, Mr. McGregor, the Union's chief bargainer, went on vacation, as he had advised the Employer he would do.

28. During bargaining, the Employer did not advise the Union that it was attempting to hire employees through the TFWP or that it was required to advertise and, in fact, already had advertised starting rates exceeding $20 per hour. As part of the TFWP process, the Employer was required to fill in a Labour Market Impact Assessment Application, a document from Employment and Social Development Canada. Although it was not possible to ascertain the date the document was submitted (and it is possible that different parts of the form were submitted at different times), the response to one of the questions set out in the form is helpful. The question was: "Is there a labour dispute in progress at any of the job offer work locations?" The Employer's answer was, "Currently in Union Negotiations – Strike Notice Issued but contract expected to be ratified before job action." This statement indicates that the form was filled in before collective bargaining had concluded. In responding to the question of what the wage range was, the Employer responded, "Lowest Wage $20.89."

The email exchanges

29. As set out earlier, the Employer admits that it violated the collective agreement in this case but claims that it did so based on an honest misunderstanding. The misunderstanding claimed by the Employer arose out of several email exchanges that took place very shortly after the new collective agreement was ratified. As they are key to the Employer's explanation, I will recount them in some detail.

30. Janice Pellerin was hired as the Human Resources Manager for the Employer in October of 2021. She did not take part in the bargaining that was happening at the

time of her hiring. However, immediately after the bargaining concluded with the Union's ratification, she became involved in an effort to obtain the Union's agreement to change the agreement's terms to allow for the elimination of both the Group One and Group Two rates so that new employees could be recruited at the Group 2(a) rate, that is, a rate in excess of $20 per hour.

31. On December 21, 2021, at 2:32 pm, Ms. Pellerin wrote an email addressed to Pat McGregor (who, at that time, was away on vacation) and to Katie Crane. Ms. Crane is another United Steelworkers representative. She had been at many, though not all, of the bargaining sessions leading to the current agreement. She had not been the lead negotiator and was not assigned the duty of being the Union's representative for SRI. Mr. McGregor had that responsibility.

32. The Subject of the email from Ms. Pellerin was "Production Recruiting" and it read:

> Good day Katie and Pat,
> As a result of recent government changes to the foreign worker program for minimum starting wages, and an effort to recruit new Canadian hires, we will be putting out an advertising campaign for Production positions in January and continuing most likely into late spring/summer, depending on responses.
>
> As it is a challenge to recruit in our current climate, we would like to advertise our starting wage to be at Group 2 a) level for a temporary period of time.
>
> In doing this, we realize the equity difference that would occur to current employees and will make affected employees whole.

33. When Ms. Pellerin received no reply to her email by the end of the next day, on December 23 at 8:47 am, she sent a follow-up email addressed to the same Union officials and this time copied to Mr. Bassett:

> Good day Katie and Pat,
>
> As we have not heard back from you on the below [the December 21 email] – we will move forward with our campaign and equity changes to current affected employees.

34. Ms. Crane was in the Union office that day and responded to the email at 8:58 a.m., just 11 minutes later. She asked a number of questions and Mr. Basset responded to her on behalf of the Employer. Mr. Bassett's responses to her questions are shown in italics below immediately beside each question (in the original, Mr. Bassett set out his response in red font where italics now appear). Those questions and answers are:

> So just for my clarification, anyone currently getting less than the Group 2 rate would be bumped to group 2? *Correct* starting when? *The day the first hire starts at group 2a*. And you say it's temporary, so when your campaign ends, would the employees revert back to the lower rate? *No, all employees starting at the new rate would remain and follow the group increases as per the CBA going forward.*

35. At 12:07 p.m., Ms. Crane responded:

> Thanks Darren,
> I should say that other operations that I deal with have done something similar but they bumped up all their rates, maybe not practical in your case. I do predict the employees that are in one group higher than the 2a might be a bit disgruntled.

36. Mr. Bassett responded at 1:10 p.m.:

> I realize some current employees may frown on the idea but the reality is they are not losing any pay or benefits as a result of this.
>
> Also, we see this as a temporary measure for a recruitment drive so we are in a better position to attract new employees.

37. In an internal email dated December 22, 2021, that is, following Ms. Pellerin's first email and before the following day's exchange with Ms. Crane, Mr. Bassett wrote to Ms. Pellerin and other Company executives (as well as to the third-party recruiter they were using):

> If we move our starting rate to group 2a immediately, 6 current employees will get a raise. Very minimal...
>
> Advertising language
>
> Starting at $21.89 moving to $22.73 July 1st.
>
> We can't start advertising these new rates soon enough.

38. The Employer put its plan into operation in early January 2022 and new employees began at the Group 2(a) rate on January 12. This is evident from an email exchange between the Employer's payroll clerk, Jenny Bennett, and Mr. Bassett on that date:

> [from Ms. Bennett]
>
> Are the new hires that started today starting at a different rate, other than the $18.27 (Group 1 – 1-60 Days)?
>
> [Mr. Bassett response]

> From this day forward all new hires start at Group 2a until further notice.
>
> Current employees will need to be adjusted also starting today.

39. Another group of internal Company emails on January 12 dealt with attempting to clear up confusion over what was happening. Coralie Nairn, the Employer's Health and Safety Advisor wrote an email at 8:54 a.m. with the Subject "RE: New Hire:"

> Can I get a breakdown for this please? I am not in the loop and it is something I cover in orientation.

40. Ms. Pellerin responded:

> Start Rate: $20.89
> We are hiring for night shift so added $1.00/hour
> Total Start Rate: $21.89
> They are looking at a Group A rate if they are looking at the CA.

41. Neither the Union nor any of its officers were copied on any of the above Company internal emails. The Employer did not advise the Union that it had put its plan into operation.

42. The next interaction between the Employer and the Union on this issue occurred on January 26, 2022, when Janice Pellerin again wrote to Katie Crane and Pat McGregor (who had returned from his vacation):

> As indicated earlier, we are now going to be bringing on new hires (temporarily) at the Group 2 a) level, there are interviews currently being conducted for hires.

> As a result, the following employees will be receiving a letter this week with their pay stub indicating that they will be bumped up to the Group 2 a) level due to this temporary measure and in agreement with the union:
>
> [six employees then listed]
>
> The letter will indicate:
> Due to recruitment events taking place, a onetime agreed upon rate increase to your hourly wage rate which will put your new rate at $20.89 effective this pay period.

43. That same day, the Employer wrote letters to each of the listed employees advising them in accordance with the wording of Ms. Pellerin's email. The letters clearly indicated that the pay increase was being done with the Union's agreement.

44. The Employer did not indicate in its January 26 email to the Union that it had already hired and started new employees under the new rates by January 12, 2022.

45. Neither Mr. McGregor nor Ms. Crane responded to Ms. Pellerin's email until February 14, 2022. On that day, Mr. McGregor wrote back to Ms. Pellerin (copied to Mr. Bassett). Referring to Ms. Pellerin's earlier December 23, 2021, email (in which Ms. Pellerin stated, "As we have not heard back from you...we will move forward with our campaign," he said, "FYI. For future reference. This is not consent in any manner or form."

46. Ms. Pellerin wrote back to Mr. McGregor:

> Hi Pat,
> As the process for foreign workers takes quite a bit of time and the need for workers is high in demand right now everywhere. To update

> you, we have applied to the government and current status is the application is still in process (and this has been since December). A lengthy process.
> If you have any questions or concerns on this please let us know.

47. Mr. McGregor responded almost immediately:

> So no rate changes have happened?

48. It does not appear that the Employer responded to Mr. McGregor's question. The next day, February 15, 2021, Mr. McGregor again wrote to Ms. Pellerin:

> You should cancel the [TFWP] application as we have not agreed to any special wage increases for anyone. Until we get some of these issues cleared up, SRI can keep to the terms of the CA. There is no LOU, no agreement to do any increases and no consent from the Union.

49. Mr. McGregor was asked about why he did not make his objections to the Employer's wage plan known earlier than February 14th. He stated that after he got back from his vacation in early January, there were many issues to deal with in relation to the implementation of the collective agreement and that this did not seem to him to be "high on the agenda" because he thought that there was no way the Employer could introduce the plan to bypass the first two steps of the wage scale without meeting with the Union and formally obtaining agreement.

50. The Union filed its grievance on February 23, 2022. The Employer and the Union agreed to attempt to resolve this issue along with a number of other issues that had arisen in relation to implementation of the collective agreement with a facilitator from the Labour Relations Board, but no agreement was reached.

51. Notwithstanding the Union's clear and unequivocal notice on February 15, 2022, that it did not agree to any wage increases beyond those set out in the collective agreement, the Employer continued to employ new employees at rates higher than set out in the collective agreement.

52. In cross-examination, it was suggested to Ms. Pellerin that the Employer could have stopped the program as soon as she knew that the Union did not agree with it. She responded that, "We could have, but that would have hurt the Company. There were offers on the table" and "it was proving successful."

53. Documents presented at the hearing show that the Employer hired some 40 workers at the Group 2(a) starting rate. Of those, it appears that about 30 were hired between February 15 (the date of Mr. McGregor's unequivocal letter) and May 12, 2022, after which it apparently reverted to the rates set out in the collective agreement.

The Union's Argument

54. The Union argues that the Employer significantly undermined the Union and the collective bargaining process by unilaterally enacting the change to the wage structure. It submits that an award of damages is appropriate in this case and that the award must be enough to have a meaningful deterrent effect on the Employer. Any award that is less costly to the Employer than the Employer believed it would have been to pursue the issue through bargaining would simply confirm the Employer's decision and fail to recognize the seriousness of the breach.

55. The Union submits that it has suffered a reputational loss both itself and to its representatives who were at the bargaining table in 2021. In this regard, Mr. Cook testified that there were rumours circulating that the Union had been bought off and was not fighting for the more senior employees.

56. The Union argues that the facts give rise to the conclusion that the Employer's breach was not based on an innocent misunderstanding, but rather on a deliberate plan that undermined the Union and deprived its members of the right to bargain an improvement to their wages.

57. The Union seeks a declaration that the Employer has breached the collective agreement and an award of general damages payable to the Union for undermining its bargaining rights. It also seeks damages for each employee in the bargaining unit at the time of the breach who did not receive the benefit the Employer awarded to newer employees. It claims that each of those employees should receive as damages an amount equivalent to $2.62 per hour worked for 60 working days and $1.63 per hour for a further 60 working days. That is the same benefit new employees obtained. The Union calculates that this would amount to $2550 per employee.

58. The Union claims that such an award would compensate individual members for their "loss of ability to be meaningfully represented in the collective bargaining process", and to restore their trust in their bargaining agent and confidence in the labour relations system.

59. The Union cites the following authorities: *Winnipeg (City) and WPA, Re,* (2020), 314 LA.C. (4th) 111 (Werier); *CKF Inc. v. Teamsters, Local 213 (Hiring Incentive Grievance),* [2022] BCCAAA No. 82 (Noonan); *R. v. K-Mart Canada Limited,*1982 CarswellOnt 73 (Ont. C.A.); and *Westpark Health Centre v. S.E.I.U. Local 1* (2005), 138 L.A.C. (4th) 213 (Charney, Filion, Sack).

The Employer's Argument

60. The Employer acknowledges that the increase in the starting wage was a breach of the collective agreement but says that it was based on its honest but mistaken belief that the Union had agreed to the increase on a temporary basis, and that when it learned otherwise, the Employer voluntarily discontinued the breach.

61. The Employer argues that no monetary loss occurred and that remedies for non-monetary losses are exceptional and must be commensurate with the wrong.

62. The Employer argues that its conduct was neither malicious nor carried out with the intention to deceive the Union or undermine its position as the bargaining agent. Rather, the Employer sought permission and input and continuously updated the Union on the progress of the wage rate increase throughout the duration of the program. It was not a situation in which the Employer, being unsuccessful in obtaining a wage increase at the bargaining table, simply agreed to a collective bargaining agreement to avoid a strike and then proceeded with its original plan to increase starting wages.

63. The Employer highlights the difference between its proposal at the bargaining table and the program it ultimately enacted. It points out that the bargaining proposal was for a permanent melding of the first two steps of the salary grid whereas the program it ultimately enacted was just a temporary increase to deal with its labour shortage. It argues that the parties had not turned their minds to alternative compromises during the bargaining process (such as enacting the increase on a temporary basis).

64. The Employer places heavy reliance on the email exchanges which commenced on December 21, 2021, by Ms. Pellerin. It argues that the email exchanges show that the Employer was not engaged in subterfuge but rather was seeking agreement from the Union.

65. The Employer acknowledges that Mr. Bassett knew that Mr. McGregor was on vacation after the bargaining was completed, but that both Mr. Bassett and Ms. Pellerin believed that Ms. Crane had authority to act on behalf of the Union. When Ms. Crane responded to the December 21 email, she did not express disagreement, but rather asked questions about how the program would work. Based on that, both Mr. Bassett and Ms. Pellerin believed that the response from the Union was positive and that the Union was open to moving ahead with the program.

66. The Employer places significance on the fact that Mr. McGregor did not respond to the issue in January after he returned from his vacation. The Employer acknowledges Mr. McGregor's evidence that he was "swamped and was working on a stack of grievances, as well as the language of the collective agreement," but notes that Mr. McGregor communicated with the Employer on other issues during January. The Employer notes that even after Mr. McGregor received an email on January 26, 2022, advising that the Employer would bring on new hires at the Group 2(a) level, that interviews were being conducted, and that a communication would be going out to certain employees indicating Union agreement, Mr. McGregor did not immediately respond indicating his disapproval.

67. In short, the Employer argues that it communicated with the Union and did not receive any indication that the Union was opposed to the program or that further discussion was needed.

68. The Employer concedes that, by mid-February 2022, Mr. McGregor had unequivocally advised that there was no Union agreement to the program. It claims that it was surprised and sought a facilitation meeting to address the issue, which occurred on March 23, 2022. Subsequent to that meeting, the Employer submits that it voluntarily ceased recruiting and hiring employees at the increased rate after sometime in March or April. It acknowledges, however, that it did continue to honour offers of employment at the higher rate to new hires into May 2022.

69. In relation to remedy, the Employer submits that an arbitrator's authority to make an order setting the monetary value of an injury or loss pursuant to s. 89 of the *Labour Relations Code* "ought generally be used to compensate rather than punish and remedies must bear a relation to the breach." The Employer cites *Unifor VCTA v. AHEER Transportation Ltd., Sunlover Holding Co. Ltd.,* 2017 CanLii 61761 (Dorsey). In that case, at para. 260, Arbitrator Dorsey quoted *Toronto Police Board*, [2008] OLAA No. 479 (Tacon), at para 27:

> The redress must be commensurate with the wrong and the purpose of relief is remedial not punitive. Monetary damages may be warranted for non-monetary losses if such is appropriate to ensure the breach of the collective agreement is adequately addressed and other remedies are insufficient. In some instances, where there have been persistent breaches of a particular provision of the collective agreement, damages may be suitable as a deterrent against future violations. Damages may be awarded to the union for violation of its rights under the collective agreement, independent of any contravention of the rights accruing to individual employees.

70. The Employer submits that the breach in this case was neither persistent nor ongoing and was not malicious such that it is worthy of punishment. As a result, the Employer argues that damages are not appropriate in this case.

71. In the alternative, the Employer argues that if I find that an award for non-monetary losses is appropriate, any such award should be limited in proportion to the breach: *CKF Inc. v. Teamsters, Local 213*, *supra.*

Analysis and Decision

72. The key to determining the appropriate remedy in this matter lies within the motive and reasons for the Employer's admitted breach of the collective agreement. As stated earlier, the contest is between what the Employer urges me to accept – that the breach was inadvertent and done only as a result of its legitimate belief that the Union had agreed to its plan – and what the Union submits is a deliberate undermining of the Union and of the collective bargaining process.

73. In my view, the evidence discloses that it is simply not reasonable or credible to ascribe the Employer's breach to an innocent misunderstanding.

74. Further, I fully recognize the Employer's plight when it found itself short of employees in 2021 in a marketplace in which it was difficult to attract new

employees. Failure to recruit a considerable number of new employees for 2022 would have resulted in an even greater loss of work than what the Employer had experienced in 2021.

75. It is crystal clear that the Employer planned for ways to attract new employees and began to put its plans into operation before the 2021 round of collective bargaining concluded. It worked with a third-party recruiter and an immigration firm to facilitate its application for temporary foreign workers.

76. To be eligible for the TFWP, the Employer was required to advertise locally for employees at a starting wage of $20 per hour or more. Further, it had to attest to the TFWP that its starting rate was at that level. The Employer began advertising as the latest by early December 2021. Neither at that time nor by the time of the conclusion of the bargaining on December 15 did the collective agreement provide for a starting rate of $20 or more. The Employer neither sought nor obtained the agreement of the Union to advertise for starting positions that exceeded the rate set out in the collective agreement.

77. The Employer urges me to accept that its "misunderstanding" arose out of the email exchange between Ms. Pellerin and Ms. Crane on December 21 and 23, 2021.

78. There are several things that come to mind in relation to the email exchange:

- The first is the timing. The exchange started on December 21, just days after the conclusion of the ratification of the new collective agreement. I do not accept that the scheme the Employer proposed was some kind of new idea that could not have been proposed to the Union during the bargaining session which had just concluded.

- It was at a time when Mr. McGregor, who was known by the Employer to be both the chief negotiator for the Union and the Union representative assigned

to SRI bargaining unit, was away on vacation. Ms. Pellerin testified that she did not know he was away, but her Company superior with whom she was in contact (Mr. Bassett) did know.

- The exchange was just before Christmas - a time when it could be reasonably assumed, particularly after months of difficult bargaining had just concluded, that the Union would be unlikely to have immediate time available to seriously deal with a proposal to effectively amend the agreement. Indeed, one would reasonably *not* expect any response until after the holiday break.

- Ms. Pellerin's second email, issued less than 48 hours later when the Union had not responded to the December 21 email, advised that the Employer would proceed with its "campaign" as it had not heard back from the Union. In other words, the Employer was prepared to assume the Union's concurrence to effectively amend the newly concluded collective agreement on the basis of a non-response.

- The December 23 email did, however, elicit responses from Katie Crane:

    - Ms. Crane's first response just asked a number of clarifying questions about what the Employer wanted to do. Her later response to Mr. Bassett expressed her experience that with similar plans, namely; the employers involved had raised wages for all (the very proposal the Union had put forth in bargaining). She additionally stated that senior employees would be disgruntled (the very concern raised by Mr. McGregor at the bargaining table).

    - While it is true that Ms. Crane did not unequivocally say that the Union disagreed, she certainly did not say that the Union agreed. It could be expected that such a momentous decision would almost certainly have to be discussed with the Union agent assigned to the

> bargaining unit, Mr. McGregor. I conclude that there is no reasonable way that Ms. Crane's questions and comments could be interpreted as Union agreement to the proposal.

79. None of the emails from the Employer to the Union included a request for a meeting with the Union, specifically requested the Union's position, or proposed to negotiate a written agreement on a wage increase.

80. Another notable feature of the email exchange is the lack of candour on the part of the Employer. It did not tell the Union the full story. The idea to advertise a starting rate at the Group 2(a) level was expressed as something the Employer would like to do as part of a recruitment campaign to start in January. It did not disclose that it was already advertising starting rates above those set out in the collective agreement and had been involved in planning such a campaign for months as part of its requirements to be eligible for the TFWP.

81. The Employer then seeks justification for putting its plan into action on the basis of its January 26, 2022, email to Mr. McGregor in which it indicated that "we are now going to be bringing on new hires (temporarily) at the Group 2(a) level, there are interviews currently being conducted for hires." Mr. McGregor did not immediately respond to that email. Again, however, I note the lack of complete candour. It will be recalled that Mr. Bassett instructed payroll on January 12 that, from that day forward, the new hires were to be paid at the Group 2(a) rate. From the wording of the January 26 email, one would assume that it was going to start at that time, not that it had started two weeks earlier. Again, there was no indication to the Union that the Employer was already paying new hires at the enhanced rate.

82. By February 15, 2022, Mr. McGregor left no doubt that the Union firmly opposed the Employer's plan. It is true that the Union could have made its opposition to the Employer's plan known earlier than February 15, 2022. Whether that would have made any difference is entirely speculative. Certainly, by February 15, the Employer

knew of the Union's opposition, yet it continued to recruit and pay employees at rates higher than those set out in the collective agreement until May 2022. Indeed, the documents indicate that the considerable majority of the new hires under the Employer's plan began work after February 15. In short, the Union's clear opposition did not deter the Employer from continuing.

83. The reality was that the Employer had committed itself, through its attestations to the TFWP, that it was hiring new employees at more than $20 per hour. In the end, it treated the issue of the Union's lack of agreement as little more than an obstacle. It faced a difficult recruiting situation and, ultimately, decided to pursue the plan to start new hires at the Group 2(a) rate without any clear indication that the Union agreed to do so. It continued the plan long after the Union advised that it did not agree and even after the Union filed a grievance in relation to it.

84. Once again, Ms. Pellerin's December 23 email indicated that the Employer would go ahead with its plan as it had not heard back from the Union in response to her email of two days prior. I find that to be illustrative of the Employer's determination to put the recruiting plan into effect. As set out earlier, the Employer now argues that it assumed the Union's agreement to the plan based on the email exchanges between Ms. Crane, Ms. Pellerin, and Mr. Bassett. However, the December 23 email makes clear that the Employer was prepared to proceed on the basis of no response (in less than a 48-hour period just before Christmas). The subsequent email exchanges did not indicate Union agreement and there was no meeting with the Union to discuss the alteration of the collective agreement as may have been expected.

85. For these reasons, I do not accept that the breach was an innocent one based on a misunderstanding. The question then, is how to address what I find to be a deliberate breach.

86. I find the breach in this case to be particularly serious. In my view, it strikes at core principles of collective bargaining. Key to collective bargaining is the honest

exchange of proposals that are considered, accepted, modified, or rejected. Although the parties to a collective agreement approach the negotiations with different goals and hopes, one must not lose sight of the very purpose of the exercise, that is, to come to an agreement as to the terms and working conditions that both sides can live with and honour. Fundamental to the integrity of the collective bargaining process is that each party must be able to trust that the other intends to abide by what they have agreed to at the bargaining table.

87. In this case, the Employer came to the bargaining table in August with an earlier version of what it ultimately implemented. It told the Union at the table that it wanted to increase starting rates to make recruiting easier. The Union gave its response, which was that it did not view the Employer proposal to be fair to more senior employees and that the Union would only agree if those more senior employees got similar pay increases. That was the cost the Union sought for its agreement.

88. Rather than counter the Union's proposal and bargain the issue to its conclusion, whatever that may have been, the Employer simply withdrew its proposal, a clear indication to the Union that it would not pursue the change it had sought. The bargained conclusion was that the Company would abide by the rates set out in the renewed collective agreement and not increase rates for new hires.

89. Yet as soon as the bargaining was completed, in the manner discussed earlier, the Employer essentially implemented the scheme it had earlier proposed and subsequently withdrawn in bargaining.

90. The Employer submits that there is a difference between what was proposed at the table and what it ultimately implemented. It argues that the bargaining proposal it tabled was for a permanent change to the starting wage structure, whereas what it brought to pass was temporary in nature. The simple answer to that is that if the Employer did not think that it could convince the Union to agree to a permanent

change, then it could have revised its proposal to be temporary. It did not do that; instead it withdrew the proposal in its entirety.

91. I find that what the Employer did was to work around the Union as best it could, to not involve the Union in its plans to use the TFWP, not advise the Union that it was committed to paying a higher rate than that agreed to in bargaining and was already advertising at higher rates. It marginalized the Union and denuded its bargaining authority in relation to one of the most central issues in a collective agreement – wage rates.

92. There is also little doubt that the Employer's actions undermined the Union. It seems that there is a degree of mistrust of the Union among its members who work for the Employer. I agree with the Employer that this mistrust does not relate entirely to what has occurred in the present circumstances. However, the evidence disclosed that the effect of the un-bargained pay rate for new hires exacerbated any sense of mistrust that may have existed previously.

93. There are many cases in which arbitrators have awarded damages to a union when its collective bargaining or representational rights have been abrogated. For example, in *Winnipeg (City) and WPA, supra,* Arbitrator Werier ordered the employer to pay $40,000 to the union after the employer unilaterally altered the terms of the pension plan in effect. In *West Park Healthcare Centre, supra* (discussed in greater detail below), the panel awarded a $10,000 payment to the union. In *CKF Inc. v. Teamsters 213, supra,* this panel awarded $10,000 to the Union when the employer unilaterally implemented a hiring bonus which was ultimately found to breach the collective agreement.

94. Given the seriousness of the undermining of the Union, I find that the Union's submission that it be compensated $30,000 for breach of its exclusive bargaining authority to be a reasonable response, and I so order that the Employer make that payment to the Union.

95. The Union also asks that I award remedies to the senior employees who were not paid an enhanced rate. I think it is clear that it is within an arbitrator's authority under s. 89(a) of the *Labour Relations Code* to do so:

> 89. For the purposes set out in s. 82, an arbitration board has the authority necessary to provide a final and conclusive settlement of a dispute arising under a collective agreement, and **without limitation**, may
>
> (a) Make an order setting the monetary value of an injury or loss suffered by an employer, trade union **or other person** as a result of a contravention of a collective agreement, and directing a person to pay a person all or part of the amount of that monetary value.
>
> (emphasis added)

96. The Employer argues that no employees lost any money. The new hires were paid at rates higher than those set out in the collective agreement, but more senior employees were paid at the collective agreement rate. Therefore, there should not be any compensation to those employees above the Group 2(a) rate.

97. While it is true that no employees were paid less than the rates established by the collective agreement, the more senior employees were deprived of an opportunity to bargaining a higher rate of pay had the Employer been candid about its plans during collective bargaining.

98. I find that this is a case in which it is appropriate to award damages both to the Union and to some of its members. The award must be large enough to accomplish several things. It must deter this Employer and other employers from pursuing a similar line of action. In effect, the Employer was disingenuous during and after collective bargaining. The award must be large enough that it cannot be seen as merely a cost of doing business in that fashion.

99. In relation to the more senior employees, the Union asks that they be compensated at the rate of $2.62 per hour for 60 working days and $1.63 per hour for the next 60 working days. Those are the amounts paid to new hires above the rates set out in the collective agreement and so, argues the Union, it is fair and equitable to award those same amounts for the more senior employees. The Union calculates that this would amount to $2,550 per employee.

100. While I can appreciate the Union's view on the remedy to individual employees, I do not accept it in its entirety. What the more senior employees lost was not a guarantee that they would receive the same increase (above the agreed-to rates) as new hires were given for their first 120 working days. Rather, what they lost was the opportunity to bargain something in return for agreeing to increased rates for the new hires.

101. An somewhat analogous situation arose in *Westpark Healthcare Centre v. S.E.I.U., Local 1.on*, [2005] OLAA No. 780 (Charney, Filion, Sack). In that case, the collective agreement required the Employer to involve the Union in a staff planning committee before engaging in a staff reduction process. The employer there, as in the instant case, admitted that it had not followed the collective agreement requirements and the only issue was remedy. At paras. 10 to 13, Arbitrator Charney wrote:

> **10** However, the breach of Article 10.01 is clear. The action of the hospital amounted to a deliberate violation of Article 10.01, taken with full knowledge that it was a violation, at a time when it was cautioned by the union and could still have complied with its obligations. The hospital's action was clearly not a "mistake". As counsel for the hospital acknowledges, the hospital knew what its obligations under the collective agreement were. Over a number of months, it developed plans which affected a significant number of employees in the bargaining unit, discussed them with the Ministry of Health, and sought and obtained approval for its plans, without at any time apprising or involving the union. When it announced its decision, the hospital notified virtually everyone -- residents, patients, family members, staff and volunteers -- except the union. And, when the union secured a

meeting of the Staff Planning Committee at which it urged the hospital to defer action until it complied with Article 10.01, it refused to do so. Instead, it moved within days to implement its decision.

11 In these circumstances, although we are not persuaded that restoration of the pre-existing *status quo* is possible at this time, a declaration is not a sufficient remedy. While the monetary loss is not specific, the union and the employees are entitled to damages: the employees for denial of the benefit of union representation, and the union for denial of its right to represent the employees pursuant to Article 10.01, as well as for the injury to its reputation as an effective bargaining agent in administering the terms of the collective agreement. The union was not only marginalized; to all intents and purposes, it was ignored. The rights of the union and the employees have intrinsic value and compensation is warranted for their deprivation. Moreover, it is not just the employees who were reassigned who were affected by this deprivation, but all employees in the bargaining unit, to whom the message was clear that the union could not protect them when the need arose...

12 Counsel for the employer has urged that mitigating circumstances be taken into account. Thus, she argues, the events under review constitute the first time that the hospital has been found to be in noncompliance with Article 10.01. Moreover, the hospital did not seek to deny its liability, but admitted it, thereby saving the parties considerable time and cost. Finally, although grievances were filed by the union complaining of other hospital actions in violation of Article 10.01, these have all since been settled by agreement between the parties, These factors have persuaded us to take a different view than we would have done in the face of what amounts to a deliberate disregard for the rights of the union and the employees under the collective agreement.

13 The hospital has in effect made it clear to all the employees in the bargaining unit that the role of the union in the administration of Article 10.01 of the collective agreement will be respected in the future. In these circumstances, having regard to all of the above, including particularly the fact that this is a first offence, liability has been admitted, and related grievances have been settled, we award the sum

> of $10,000 to the union, and $1,000 to each of the employees, except the probationary employee who was terminated and the employee who chose early retirement.

102. A notable difference between *Westpark* and the instant case is that the role of the staff planning committee, which was bypassed in *Westpark*, was to make a recommendation to the CEO, who would consider that recommendation before acting. In other words, the process was a consultative one in which the employer could ultimately unilaterally pursue its course of action after appropriate consultation. The instant case, on the other hand, is not one in which the Employer could have enacted a pay increase after mere consultation with the Union. Rather, without the Union's agreement, the change could not be made under the terms of the collective agreement.

103. The awarding of non-pecuniary losses is rarely a scientific and exact endeavour. Taking into account the loss of bargaining opportunity suffered by the more senior employees caused by the Employer's actions, I have determined that the appropriate remedy is an award of $1,500 to each bargaining unit employee who:

- Was a full-time employee as of January 12, 2022, (the date upon which Mr. Basset told payroll that all new employees were to be paid the enhanced rate); and

- Was not paid anything on top of the rates set out in the collective agreement.

This award will be prorated for all part-time employees. For those who were employed in Groups 1 and 2 before January 12, 2022, any employee who was paid less than $1500 more than what would have been paid based on the collective agreement rates, will receive the difference between the amount they earned above the collective agreement rates and the award amount of $1500. For example, an employee who had worked 100 days before January 12, 2022, would have been paid

more than the collective agreement rates for the last 20 days before they would have properly moved to the Group 2(a) rate. That employee would be entitled to $1500 less the amount they were overpaid for those 20 days. If they were overpaid by more than $1500, they would not be entitled to any further payment under this award.

104. Both parties cited *CKF Inc. v. Teamsters Local 213, supra*, a case I decided in 2022. The award in *CKF* was lower ($10,000 to the union and no remedies to individual employees). In that case, the employer offered a "hiring bonus" to attract new employees. At hearing, the employer argued that the bonus was a "pre-employment" contract and, as such, did not violate the collective agreement. I found that the hiring bonus did violate the collective agreement insofar as part of the bonus was to be paid only after new employees had performed work for the employer for a number of months, thus effectively paying above the rates set out in the collective agreement for those months of work.

105. The facts in the instant case are significantly different. In *CKF*, the employer believed that it did not need the union's approval to implement its hiring bonus. Had it done the bonus differently, it may well have been correct. In the present case, however, the Employer knew that starting pay rates were a matter clearly covered by the collective agreement and that it would be violating the agreement unless it obtained the Union's consent to alter the terms. The Employer had the opportunity to bargain the change to starting wages, chose not to do so, and then implemented the change notwithstanding the terms of the collective agreement. I find that the Employer's actions in this case are more egregious than those in *CKF*.

106. I will reserve jurisdiction to deal with any issues that arise out of the interpretation or implementation of this award and particularly any dispute about whether any individual employee is entitled to payment or the amount of payment pursuant to this award. Any such disputes will be dealt with in an expedited manner in a process that I will determine after consultation with the parties.

DATED and effective at North Saanich, British Columbia on January 2, 2024

RANDALL J. NOONAN
Arbitrator