

IN THE MATTER OF AN ARBITRATION

BETWEEN:

**United Food and Commercial Workers Union Canada, Local 175
(The “Union”)**

-and-

**Islamic Foundation School
(The “Employer”)**

GROUP/POLICY GRIEVANCE DATED December 11, 2017

Ian Anderson, Sole Arbitrator

For the Union:

Georgina Watts, Counsel
Jehan Ahamed, Union Representative
Storiy Whahedi, Union Steward
Hasan Lam, Union Steward

For the Employer:

Shazed Siddiqui, Counsel
Syed Akbar Warsi

Hearings February 9, April 10 and May 4, 2018.

Award issued on May 30, 2018.

1. For many years staff at the Islamic Foundation School received a tuition benefit for children which they enrolled in the school. The School has two campuses: the Scarborough Campus and the Durham Campus (also sometimes referred to as the Ajax school). The teachers at the Scarborough Campus unionized in 2017. After a difficult round of bargaining, a collective agreement was ratified on November 3, 2017. On November 29, 2017 the Employer advised the teachers at the Scarborough Campus their tuition benefit was being discontinued. The grievance which is the subject of this arbitration was filed on December 11, 2017. The Union alleges the Employer is estopped from terminating the tuition benefit. In the alternative, the Union alleges the Employer breached its duty of good faith in bargaining by failing to disclose its intention to terminate the benefit. In the further, alternative, the Union alleges in terminating the tuition benefit for the teachers at the Scarborough Campus, but not other employees of the Scarborough Campus or staff at the Durham Campus, the Employer discriminated against those employees on the basis of their membership in a trade union.

Facts

2. The facts are not in dispute except as noted.
3. The tuition benefit has existed for many years, perhaps since the formation of the school 20 years ago. The regular tuition fee to enrol a child at the school is currently \$450 per month. Teachers received a tuition benefit of a 50% reduction in the regular tuition fee for each of their own children enrolled at the school. Other parents received a “sibling benefit” of a 10% reduction in the regular tuition fee for each additional child enrolled at the school. Children whose tuition is subject to either reduction are sometimes referred to as “discounted students”.
4. In the spring of 2017 the Union commenced an organizing drive.
5. On April 28, 2017, on the eve of the certification vote, on behalf of the Employer Syed Akbar Warsi, then the vice-president of the Employer, and currently its president, sent the teachers a letter which stated in part as follows:

... I wanted to point out that there are benefits and advantages that we have made available to you here at Islamic Foundation of Toronto School (IFS) without the need for any third-party.

As you know, here at IFS, the wide range of benefits that we already provide to our Staff include:

1. Increased base salary for all staff members effective September 2014
2. Reasonable pay increases annually
3. Discounted school for children of staff attending IFS
4. Health care benefits up to \$2,000 annually
5. 50% reimbursement of fees for staff qualification courses
6. Special Ramadan teaching hours to allow staff to start late and end early
7. Full pay for one preparation period and one or two on call periods
8. There is a seat guarantee for the staff's children
9. Sick leave
10. Time off with pay including
 - one week with pay for March break
 - Eid holidays with pay

The flexibility that we now have here at IFS allows us to provide you with the sorts of benefits and advantages. If a union came in, you would have to start with a "clean sheet of paper" and bargain for your first collective agreement. As well, the flexibility that we have in our work arrangements would be lost.

I would ask you again: do you really want to spend hundreds of dollars of your hard-earned money to try and re-negotiate what you already have?

....

6. The Union was certified as the bargaining agent for the teachers at the Scarborough Campus at the bringing of May 2017 and collective bargaining commenced. The Union's bargaining committee consisted of three bargaining unit members and Union Representative Jehan Ahamed, who served as the Union's spokesperson throughout. The composition of the Employer's bargaining committee fluctuated. The one constant was Mr. Warsi, who also served as the Employer's spokesperson until the last few days of negotiations. Mr. Warsi had no prior experience in collective bargaining. The negotiations were difficult and little progress was made. The Union filed an application with the Ontario Labour Relations Board ("OLRB") seeking first contract arbitration. The Employer was represented by Michael Smyth on the application. The application came on for a hearing before Vice Chair Michael Mitchell. Through two marathon negotiating sessions, going well into the night, Mr. Mitchell assisted the parties in reaching a memorandum of agreement on October 25, 2017. The spokesperson for the Employer during these negotiating sessions was Mr. Smyth.

7. When the parties initially met to negotiate a collective agreement, the Union's proposals included the following:

Article 9 - Existing Working Conditions

9.01 Existing customs and practices, rights and privileges, benefits and working conditions shall be continued to the extent that they are more beneficial than and not inconsistent with the terms of the Collective Agreement unless modified by mutual agreement of the Employer and Union.

At some point in August 2017 the Employer tabled the following counter proposal:

Article 9 - Existing Working Conditions

9.01 Existing customs and practices, rights and privileges, benefits and working conditions not addressed in this collective agreement shall be discontinued.

There was no discussion of either proposal at the bargaining table. Both of these proposals stayed on the table until one of the final passes during the last day of collective bargaining when they were both withdrawn.

8. On September 8, 2017, on the directions of Mr. Warsi, the principal of the Scarborough Campus (Nusrat Sacranie) sent an email to the teachers of the Scarborough Campus, the text of which was as follows:

Salaams Teachers,

Br Akbar has asked me to inform you that the 50% staff discount offered to IFS teachers with children in the school is currently under union negotiations. The discount currently offered is therefore based on the previous year rates.

Once the union contract is negotiated and finalized Teachers will be informed about any/all changes to their children's fees.

A letter with the same information has been placed in your mailbox.

If you have any questions, please do not hesitate to speak to me.

A letter with the same information was also placed in the mailboxes of the teachers. In cross-examination, Mr. Warsi agreed that this letter did not put the Union on notice that the tuition benefit was going to be eliminated. He stated that was his intention, but he felt precluded from saying so because he thought it would give rise to another unfair labour practice complaint from the Union.

9. The parties had a negotiating session scheduled for September 21, 2017. On September 20, 2017, Mr. Warsi sent Mr. Ahamed an email with the subject line "Response to financial proposal". The email attached a one page document which read in part as follows:

The Foundation response to the union's financial proposal as follows:

....

Article 20 - Class Size

School rejects any proposal from the Union regarding class sizes. The responsibility of determining Call Size will remain with the management.

....

In addition Employer proposes to add the following in the collective agreement:

....

2.) Teachers children will pay the same school fees like other parents. No discounts.

....

The bolded text was highlighted in yellow in the document which Mr. Warsi sent to Mr. Ahamed. Mr. Ahamed opened the document on his BlackBerry and could not remember whether the display showed the yellow highlighting. Nothing really turns on this.

10. Mr. Ahamed met with his committee the morning of September 21, 2017. He learned from them that the Employer had charged at least one teacher the full undiscounted tuition fee for the month of September. The parties agree that this was the result of a mistake subsequently corrected by the Employer. However, at the time the Union negotiating committee believed the Employer had unilaterally ended the tuition discount. Mr. Ahamed could not recall whether he discussed with his committee Mr. Warsi's proposal from the night before that "2.) Teachers children will pay the same school fees like other parents. No discounts." From his perspective, this was simply an Employer proposal. He didn't pay too much attention to proposals from the other side unless the other side "brings it up".
11. Mr. Ahamed took notes by hand during the September 21, 2017 negotiating session. One of the Union committee members, Hasan Lam, took more detailed notes on a computer. Both were present for the entire day. On behalf of the Employer, Viquar

Ahmed, took notes. Mr. Ahmed arrived late and left early and his notes are, therefore, incomplete. Mr. Warsi took no notes.

12. Mr. Ahamed gave evidence on behalf of the Union with respect to among other things the discussions on September 21, 2017. Mr. Lam's notes were entered as an exhibit through Mr. Ahamed. Mr. Ahamed testified that Mr. Lam's notes were more thorough than his own (since he was often speaking on behalf of the Union during the session), and that Mr. Lam's notes accurately reflected what happened. No objection was taken to this evidence. Mr. Lam was not called as a witness.
13. Mr. Warsi gave evidence on behalf of the Employer with respect to among other things the discussions on September 21, 2017. The parties agreed that Mr. Ahmed's notes would constitute his evidence as to what he heard during the September 21, 2017 negotiating session.
14. The tuition benefit was referred to at least once and perhaps twice on September 21, 2017. The Employer states the first reference took place within the context of the Employer's response, or "pass" on the outstanding issues. Both parties agree that there was a reference later in the day (which I will refer to as the second reference) which specifically addressed the fact that it appeared to the Union the Employer had unilaterally ended the tuition benefit. Mr. Ahmed was present for the first reference but not the second. It is convenient to start what is recorded in his notes as to the first reference.
15. Mr. Ahmed's notes contain the following statement attributed to Mr. Warsi:

We have to give a clear financial picture to the parents. We are incurring the loss of approx \$33000 per month due to the declining enrolment of our elementary school students. We have lost our [sic] 75 students to other schools. We can't continue to bear this loss. We might have to reduce the staff, close a couple of grades. We want to Eliminate fifty percent teacher's children fee discount. Hence, kindly give me the financial numbers [i.e. the Union's financial proposal]. The parents are asking us about the future. Why the union is declining to discuss the financial matters.

[Emphasis supplied.]
16. The notes of both Mr. Ahamed and Mr. Lam both record a statement by Mr. Warsi about the financial picture, but neither contain a statement similar to the one which I have emphasized. Mr. Ahamed, however, testified in chief the issue of the tuition discount came up twice during the negotiating session of September 21, 2017. At

first, there was not a “full blown discussion”, rather there was a reference to it as part of a “pass” on the proposals tabled. Later in the day there was more of a full blown discussion.

17. With respect to the first reference to the tuition benefit, Mr. Ahamed was taken in chief to the statement in Mr. Ahmed’s notes set out above. He was then asked if the Employer gave notice across the bargaining table of its intention to eliminate the benefit, either on that day or any other day. He responded absolutely not. In cross, Mr. Ahamed was taken to the statement in Mr. Ahmed’s notes and testified that he disagreed with Mr. Ahmed’s notes and that the issue of tuition benefit had only come up once, later in the day after Mr. Ahmed had left.
18. With respect to the second reference to the tuition benefit, in chief Mr. Ahamed testified that after Mr. Ahmed left, the Union brought up the issue of the tuition discount for teachers having been stopped in September. Mr. Warsi responded that he wanted “the teachers to feel the same pain as the parents”. Mr. Ahamed testified that the Union committee members “lost it”. One demanded of Mr. Warsi: “What did you say?” Other comments from the Union committee members were “how can you say that” or “how awful that you would say that”. According to Mr. Ahamed, Mr. Warsi then “tried to back down” saying “I was only joking”. A Union committee member responded that it was not funny. The Employer side also indicated the fact the tuition benefit had been stopped in September was a mistake and that it would be corrected.
19. In cross, Mr. Ahamed was asked whether when he walked out of the meeting on September 21, 2017 he believed the tuition discount was not an issue. He referred to the discussion about the fact a teacher had been charged the full tuition (i.e. without the discount) in September, Mr. Warsi’s statement about wanting the teachers to feel the pain and Mr. Warsi’s subsequent backtracking of that statement. He then continued: “with the backtracking of that statement and the confirmation that the charges were made by mistake, yes I did get an impression that was not a big issue, that they did it by mistake.”
20. Mr. Ahamed was taken to his notes in cross examination. They do not contain a note about the “feel the pain” comment. They do, however, contain the following statement:

Discount for staff children: leave it status quo

Prep time: status quo

Akbar Warsi: we don't agree, now we have to hire a CEO too.

21. Mr. Ahamed testified in cross that in this exchange he was responding to the proposal advanced by Mr. Warsi in his email of September 20, 2017. Mr. Lam's notes also contain a statement by Mr. Ahamed that "We want status quo on the fee discount." Mr. Lam's notes record Mr. Warsi's "feel the pain" comment as being made within the context of his replying to Mr. Ahamed's response to the Employer's proposal to eliminate the tuition discount benefit for teachers.
22. Mr. Ahamed testified in chief and in re-examination that the Employer's "No discounts" proposal was never raised by it again during negotiations.
23. Mr. Warsi gave evidence on behalf of the Employer. In chief, in an answer which was not responsive to the question put to him, he stated that that in "most of the negotiating meetings I was very clear that the tuition benefit would not be continued". Counsel for the Union immediately objected to this answer on the basis that no such suggestion had been put to Mr. Ahamed when he was giving evidence on behalf of the Union. Counsel noted that she had repeatedly stated during the earlier part of the proceedings that if Mr. Warsi was going to contradict the Union's evidence the rule in *Browne v. Dunn* needed to be complied with; that is anticipated contradictory evidence had to be put to the Union's witnesses so that they could address it. Counsel for the Employer did not challenge the application of the rule in *Browne v. Dunn*. Rather counsel took Mr. Warsi to specific written communications in evidence and asked him to comment on them. In these circumstances, I place no weight on Mr. Warsi's statement that he gave notice to the Union in "most negotiating meetings" that the tuition benefit would not be continued.
24. Mr. Warsi was asked in chief about his September 20, 2017 email to Mr. Ahamed. He testified one of the things he was seeking to accomplish was to give notice to the Union that the tuition benefit for teachers would be eliminated. He testified on September 21, 2017 he gave "a brief statement that the teachers' discounted fees would be eliminated". He could not recall the precise time during the meeting but said that it was in response to Mr. Ahamed asking the Employer to maintain the status quo. In cross examination, Mr. Warsi agreed that the statement in his September 20, 2017 about the tuition discount took the form of a proposal. It was also put to Mr. Warsi that the evidence with respect to what had happened on September 21, 2017 was undisputed and he agreed. Mr. Warsi also agreed the issue of the tuition discount was never again raised in collective bargaining. He

added that in his view there was no reason to raise it again as he had already said no.

25. As noted earlier, the Union filed a first contract application which resulted in marathon negotiations mediated by Vice Chair Mitchell of the OLRB and ultimately a memorandum of agreement. It appears these discussions ended on or about October 25, 2017. The Union was represented by Mr. Ahamed, Fathima Cader and its counsel in these proceedings, Ms. Watts. The Employer was represented by Michael Smyth during these negotiations.

26. At the urging of Vice Chair Mitchell, the competing Article 9.01 proposals with respect to past practice were withdrawn at the same time. Mr. Ahamed testified that one of the last issues to be resolved was that of class size. The Employer ultimately proposed a class size limit of 28. The Union accepted. Mr. Smyth then approached Mr. Ahamed and had a discussion with him in the hallway. Mr. Ahamed testified Mr. Smyth advised him the Employer was seeking an exception permitting it to increase the size of a class to 29 if one of the students in the class was a “discounted kid”. According to Mr. Ahamed, Mr. Smyth then “mentioned that the siblings also get the discount”. Article 21 of the Collective Agreement was finalized that night. It reads:

ARTICLE 21 - CLASS SIZE

21.01 Class size maximums will be maintained at 28 students except in order to accommodate a teacher’s child and the admission of siblings. In those circumstances class size will not exceed 29 students.

27. In cross examination, Mr. Ahamed was first taken to the Employer’s April 28, 2017 letter to teachers and the list of benefits the Employer asserted teachers already enjoyed without a union. He agreed that all of these benefits were expressly reflected in the collective agreement ultimately concluded by the parties, except the tuition discount. In particular, it was put to him that the “seat guarantee” had made its way into the collective agreement. He agreed that it was reflected in the form of the exception language set out in Article 21. He clarified that there was no discussion of the seat guarantee *per se*. Rather, he said, there was a couple of minutes discussion between himself and Mr. Smyth. He stated Mr. Smyth wanted the exception and gave his reason, which Mr. Ahamed conveyed to his Committee.

28. Later in his cross examination Mr. Ahamed was taken back to Article 21. He agreed that Article 21 does not contain the word “discount”. He resisted the suggestion that

the purpose of Article 21 was to provide a “seat guarantee”, to ensure that children of teachers and siblings of other students did not have to go to another school. Mr. Ahamed was asked if it would change his evidence if Mr. Smyth provided a sworn statement that the discussion never took place. He said it would not. Mr. Ahamed was asked if it would change his evidence if Mr. Smyth denied using the word “discount”. Mr. Ahamed said it would not.

29. On the agreement of the parties, the Employer filed an affidavit of Mr. Smyth as his evidence in chief. The Union elected not to require the Employer to produce Mr. Smyth for cross examination on his affidavit. Accordingly, Mr. Smyth’s evidence was unchallenged. Mr. Smyth’s affidavit, however, does not specifically address either of the suggested contradictions (about a discussion taking place at all or about the use of the word “discount”) put to Mr. Ahamed in cross examination. Rather, Mr. Smyth’s affidavit contains the following statement:

At no time during the negotiations did I make a representation to the union negotiators that [the Employer] would continue to provide the teachers at the school with the tuition discount. I did not discuss the issue of a tuition discount with Mr. Ahamed, Ms. Cader, nor with Ms. Watts at any time during the negotiations.

30. In final argument, counsel for the Union argued there was no conflict between the evidence of Mr. Ahamed and Mr. Smyth, asserting Mr. Ahamed had never suggested Mr. Smyth had mentioned the teachers’ discount. Given this position, I do not find it necessary to scrutinize the evidence of Mr. Ahamed or Mr. Smyth more carefully.
31. On November 3, 2017 the Union held a ratification meeting. The issue of whether or not the proposed collective agreement contained the tuition discount benefit was raised. At the meeting, Mr. Ahamed acknowledged it did not contain an express reference, but also expressed the view that given the language of Article 21 and the negotiating history the teachers were entitled to continue to receive the benefit, but nothing in life was guaranteed. He told the meeting that if the Employer eliminated the benefit, the Union would take a grievance to arbitration. The proposed collective agreement was ratified by the Union members.
32. Mr. Ahamed testified that had the Employer put the Union on notice that it intended to end the tuition benefit, the parties would not have concluded the memorandum of agreement on October 25, 2017 and, even if they had, he would never have been able to get that agreement ratified on November 3, 2017. Many of the teachers had

children or anticipated having them in the future. Given their salaries, the tuition benefit was of significant value to them.

33. On November 9, 2017 the collective agreement was signed by the parties.
34. On November 29, 2017, teachers at the Scarborough Campus were given letters with the following text:

Re: Staff Discount

Dear [teacher's name],

The IFT Maglis¹ would like to advise teachers that the collective agreement has been ratified by the membership and final signing of the collective agreement between Islamic Foundation of Toronto and UFCW Local 175 took place on November 9, 2017. As a result, as of December 1 (unionized) teachers will be charged fees of \$450 per child.

If you have any questions or concerns please direct them to your union representatives.

Another letter, which was identical in content except that it omitted the last sentence directing the recipient to their union representative if they had any concerns, was sent to the teachers by email on November 30, 2017.

35. The parties disagree about whether the tuition discount benefit was also eliminated for the Department Head (a position outside of the bargaining unit) at the Scarborough Campus. There was ultimately no clear evidence on this point, but in the Union's view little turned on it. The parties stipulated the Principal of the Scarborough Campus continued to receive the benefit and that all the teachers, Department Head(s) and the Principal at the Durham Campus continued to receive the tuition benefit.
36. On several occasions during the hearing process, counsel for the Union advised the Employer that if it was going to take the position there was a financial reason for the continuation of the tuition benefit for the teachers at Durham Campus and not the Scarborough Campus, then it needed to call a witness and produce any documents on which it intended to rely in advance. Ultimately, at the conclusion of the second

¹ "IFT" is the Islamic Foundation of Toronto and the "Maglis" is its governing body. The Islamic Foundation School ("IFS") is a separate entity and the employer in this case. The IFT Maglis has some governance role in relation to the IFS the exact nature of which was not described to me.

day of the hearing, I directed the Employer to advise the Union of any such reason and produce any documents on which it intended to rely prior to the next day of hearing. The Employer did not do so. On the next (and final) day of hearing, counsel for the Employer indicated it would be calling Mr. Ahmed, the principal of the Durham Campus, to give evidence. Counsel for the Union noted the parties had stipulated Mr. Ahmed's notes of the September 21, 2017 meeting would constitute his evidence as to that meeting and indicated that if Mr. Ahmed was being called to give evidence as to a financial difference between the situation of teachers at the Scarborough and Durham Campuses, she would object. Counsel for the Employer stated Mr. Ahmed was not being called for that purpose, but rather to give evidence with respect to the "differences between the Ajax and Scarborough schools".

37. I do not find it necessary to set out Mr. Ahmed's evidence on the differences. It is quite clear that it was addressed to differences in the terms and conditions of employment at the two different Campuses, which largely, if not entirely, had financial consequences, and the Union objected to its receipt on that basis. The Employer is thus precluded from relying on this evidence by its failure to comply with the order made at the conclusion of the second day of the hearing. Even if I were to consider this evidence, it would not be relevant. As noted by counsel for the Union, at no time did the witnesses for the Employer, Mr. Ahmed and Mr. Warsi, testify that these differences were the reason why the tuition benefit was eliminated for teachers at the Scarborough Campus. Indeed, in cross examination Mr. Ahmed agreed that at no time were the Union or the Scarborough teachers told that these differences were the reason for the cessation of the tuition benefit. He further stated that apart from the November 29 and November 30, 2017 letters, he was unaware of any other communication to teachers as to the reason for the cessation of the tuition benefit. Mr. Warsi testified in chief that it had always been his intention to eliminate the tuition benefit. The degree to which this intention was communicated to the Union has been set out above and will be reviewed below. In any event, he was not asked any questions at all about the actual cancellation of the tuition benefit after the collective agreement was ratified, the reasons for doing so, the reason the November 29 and 30, 2017 letters were sent to teachers or the meaning of those letters.

Argument for the Union

38. The Union argues the Employer is estopped from discontinuing the tuition benefit for the duration of the collective agreement. The essence of the Union's argument is that the long standing practice of paying the tuition benefit constitutes a

representation which could only be put to an end by clear notice. The Union argues that none of the Employer's communications during collective bargaining constituted clear notice. In the alternative, it argues the statements made by or on behalf of the Employer within the context of collective bargaining constituted representations that the practice of paying tuition benefits would continue and give rise to an estoppel. It cites: *Sklar-Peppler Inc. v. IWA*, (1985) 20 LAC (3d) 413 (Knopf); *Maple Lodge Farms Ltd. v. UFCW Local 175*, (1991) 24 LAC (4th) 211 (R. Brown); *Quality Meat Packers Limited v. UFCW*, [1997] OLAA No. 472 (Joachim); *Nor-Man Regional Health Authority v. Manitoba Association of Health Care Professionals*, [2011] 3 SCR 616; and *B.C. West Terminal Freight Services Inc. v. RW, Local 580*, 277 LAC (4th) 83, 2017 CanLII 10834 (BC LA) (J. McEwen).

39. In the alternative, the Union argues the Employer has breached its duty of good faith in contract administration. Reference is made to *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 SCR 494; *Global Edmonton v. Unifor Local M-1*, 2015 CanLII 72296 (AB GAA) (Sims); *K-Bro Linen Systems Inc v Teamsters Local Union 847*, 2015 CanLII 67644 (ON LA) (Luborsky); and *USW, Local 1-423 v Greenwood Forest Products (1983) Ltd.*, 2015 CanLII 52231 (BC LA) (Dorsey).

40. In the further alternative, the Union argues the Employer's decision to terminate the tuition benefits for teachers at the Scarborough Campus, and not the Durham Campus constitutes discrimination on the basis of union membership. The Union points to the letters of November 29 and 30, 2017 which state on their face that as a result of the conclusion of the collective agreement, the tuition benefit for unionized teachers will be eliminated. This at the very least placed an onus on the Employer to explain its decision and show that it was objectively reasonable. The Employer has tendered no evidence in this respect. Reference is made to: *OPSEU v. Complex Services Inc. c.o.b. Casino Niagara*, unreported, June 15, 2006 (MacDowell) and the unsuccessful application for judicial review of that decision, *Complex Services Inc. c.o.b. Casino Niagara v. OPSEU*, 2007 CanLII 37353 (ON SCDC).

Argument for the Employer

41. The Employer takes no issue with the application of the doctrine of estoppel in labour arbitration. It argues, however, it is the Union which has led the teachers out on to the proverbial limb and then sawed it off behind them. All the benefits described in the Employer's April 28, 2017 pre-certification letter to the teachers made their way into the collective agreement in some manner with the exception of

one: the tuition benefit. The statement in that letter that if the Union came in the employees would start with a “clean sheet” constituted notice the benefit would be removed. The September 8, 2017 letter to teachers advising them they would be advised of any changes to the benefit once the collective agreement had been negotiated and finalized constituted further notice. The September 20, 2017 email from Mr. Warsi to Mr. Ahamed also constituted notice, as did the statement made by Mr. Warsi during negotiations on September 21, 2017, recorded in Mr. Ahmed’s notes, that: “We want to Eliminate fifty percent teacher’s children fee discount.” Mr. Smyth’s affidavit puts an end to any suggestion there was a representation during the last days of collective bargaining that the tuition benefit would continue. The issue was specifically raised during the ratification meeting, and the Union agreed there was no “guarantee” of the tuition benefit in the collective agreement.

42. *Bhasin v. Hrynew* has been applied in a labour relations context. The obligation of honest good faith performance applies to a union just as much as it does to an employer. In this case, the Union has not acted in good faith. In addition to the cases cited by the Union, reference is made to *Bell Canada v. Unifor, Local 34-0*, 2016 CanLII 11573 (CA LA) (Surdykowski).
43. With respect to the allegation of discrimination, the evidence of Mr. Ahmed was proffered not to show there were financial differences between the Scarborough and Durham Campuses, but to show there are differences in what teachers at the two Campuses. The Durham teachers have burdens and duties which the Scarborough teachers do not have.
44. The real issue here is that the teachers have been ill served by the Union which has tried to change the collective agreement after the fact to include the tuition benefit, having known all along it was not included.

Analysis and Decision

Estoppel

45. There is, and can be, no dispute that a labour arbitrator has the jurisdiction to adapt and apply the doctrine of estoppel to the labour relations context: *Nor-Man* at para. 44 et seq. The issue is whether it applies in this case.

46. I turn first to consider whether a long standing practice which pre-dates the certification of the Union can, in and of itself, constitute a representation forming the basis for an estoppel.

47. *Quality Meat Packers* sets out the seminal statement of the common law principle of equitable estoppel by Denning L.J. in *Combe v. Combe*, [1951] 1 All ER 767 (CA) at 770:

The principle, as I understand it, is that where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration, but only by his word.

[Emphasis supplied.]

A representation intended by one party to affect the legal relations it has with the other party must be a representation made while the parties are in a legal relationship.² In a labour relations context, this includes not only the period of time during which there is a contractual relationship (i.e. when a collective agreement is in effect), but the period of time when there is a legal obligation to negotiate a collective agreement. But the parties must be in some form of a legal relationship. It follows that while the long standing practice of the Employer of paying the tuition benefit may have constituted a representation to the teachers, it did not constitute a representation to the Union. Some further representation by the Employer at a time when it was within a legal relationship with the Union is necessary. In particular, in the circumstances of this case, there would need to have been a representation by the Employer within the context of collective bargaining.

48. With one exception, all of the cases provided by the Union involve representations made over successive collective agreements. That is, they were made within an existing legal relationship between the union and the employer. I do not find it necessary to discuss them further.

² That this was Denning L.J.'s intent is made clear in the oft cited *Canadian National Railway Co. et al. vs. Beatty et al.* 1981 CanLII 1888 (ON SC), [1981] 34 O.R. (2d) 385 at 389-90.

49. The exception is *B.C. West Terminal Services*. In that case, Arbitrator McEwen stated:

While arguments based on estoppel have been defeated in some cases due to the fact that the impugned practice pre-dated union certification, there is no hard and fast rule in that regard. Suffice to say that I adopt the Union's argument in respect thereof.

50. The union's arguments on the issue of estoppel in *B.C. West Terminal Freight Services* are set out at paragraphs 59 to 70. At paragraph 63, there is recognition that several cases have found that estoppel cannot be grounded on an employer's pre-union practice:

The Employer relies upon several now-dated case authorities for the proposition that an estoppel cannot be grounded in an employer's pre-union practice: *Quebecor World Islington v. G.C.I.U., Local 500M*, [2004] O.L.A.A. No. 320 (Goodfellow); *Bay Mills Ltd. v. U.S.W.A.* (2000), 88 L.A.C. (4th) 101 [[2000] O.L.A.A. No. 207, 60 C.L.A.S. 130, 2000 CarswellOnt 6147] (Knopf); and *British Columbia Automobile Assn. and O.P.E.I.U., Local 378* (2002), 71 C.L.A.S. 62 (B.C. Arb.) [2002 CarswellBC 4100] (Devine). These cases turn on their facts and do not support a rigid doctrinal rule to the effect that practices pre-dating a collective agreement cannot be considered in determining whether the indicia of estoppel have been established.

51. With respect, simply asserting that these cases are "dated" and that they "turn on their facts" is not a compelling argument. It is, therefore, useful to review *Quebecor*, *Bay Mills* and *British Columbia Automobile Association*. It is also useful to review *Sterling Place v. UFCW Local 175/633*, [1997] OLAA No. 287 (Pineau), which is also referenced in *B. C. West Terminal*, and which is the only other case of which I am aware in which an estoppel was found based on pre-unionization practice. Because *Sterling Place* in turn makes reference to *Medicine Hat News and Print Media Union of Alberta*, No. 33, Re, [1994] A.G.A.A. No. 13, 43 L.A.C. (4th) 110 (McFetridge), it is also useful to review it. I review these cases from oldest to most recent in order to track the development of the reasoning.

52. In the 1994 decision of *Medicine Hat News*, Arbitrator McFetridge stated

35 It is an undisputed fact that prior to the commencement of the collective bargaining process, and for many years before, [sic] this union was certified as the bargaining agent for these employees, the employer paid 100% of the employees' AHC and supplementary medical benefits. This past practice was mentioned by the union in support of its estoppel argument. Although the union's main estoppel argument was based on representations made by the employer during the collective bargaining

process, the issue of estoppel by conduct was integral to its claim and deserves comment if only in passing.

36 The classic statement on the doctrine of promissory estoppel is contained in Lord Denning's decision in *Combe v. Combe*, [1951] 1 All E.R. 767 at p. 770, where he states:

The principle, as I understand it, is that where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to qualification which he himself has so introduced, even though it is not supported in point of law or by any consideration, but only by his word.

37 The doctrine of promissory estoppel presupposes a pre-existing legal relationship between the parties. In the absence of any pre-existing legal relationship, no estoppel can arise. Prior to the certification of the union, no legal relationship existed between the parties to this dispute. Therefore, the employer cannot be estopped by conduct which preceded the existence of the legal relationship between the parties. Support for this conclusion is found in *Re Ottawa General Hospital and O.N.A., Loc. 83* (1985), 18 L.A.C. (3d) 208 (Roach) at p. 214, as is discussed in further detail below.

This analysis, which notes the existence of promissory estoppel presupposes a pre-existing legal relationship, is similar to the one which I have set out above.

53. *Sterling Place*, a 1997 decision of Arbitrator Pineau, is another first contract case. The facts are stated in paragraphs one to four of the decision. In short, the union sought to found an estoppel on a practice which existed for six years prior to “the coming into effect of the collective agreement” (and it would seem about five years prior to unionization) and continued for eleven months after the signing of the collective agreement, but which was then terminated prior to the expiry of the collective agreement. It is noteworthy that Arbitrator Pineau commences her analysis by citing *Coombe v. Coombe* for its seminal statement of the doctrine of estoppel. Arbitrator Pineau then engaged in a lengthy review of arbitral jurisprudence in answering the question of whether or not an estoppel may apply with respect to a matter not mentioned in the collective agreement. She concluded that it could, “if the past practice does not create new rights”: see para. 50. I express no opinion on this conclusion.

54. In the penultimate paragraphs of her award in *Sterling Place*, Arbitrator Pineau then states:

52 In response to the argument of the absence of a legal relationship between the parties on which to create an estoppel, I am of the view that the conclusions of Arbitrator McFetridge [in *Medicine Hat News*, set out above] do not apply to this case. In the first instance, a legal relationship was established between the parties upon the signing of the collective agreement. The practice of providing meal benefits continued for an extended period after the coming into effect of the first collective agreement and constituted a form of compensation incurred on a daily and recurring basis.

53 My view might have been different if the practice had been terminated upon the signing of the collective agreement, or had been raised at the bargaining table, or had been a sporadic payment as in the case of *Re Browning Harvey Ltd. and N.A.P.E.* (1992), 26 L.A.C. (4th) 35 (Clarke) where the employer withheld a Christmas bonus and the employees had received a bonus upon signature of the collective agreement.

55. I am unable to agree with these comments. It is correct that a legal relationship between the union and the employer is created upon the signing of the collective agreement. Indeed, there was a legal relationship upon the certification of the union. That does not transform a practice which pre-dates the relationship created by the certification of the trade union into a representation by the employer to the union within the legal relationship. Similarly, the continuation of the practice subsequent to unionization and prior to the signing of the collective agreement is required by the statutory freeze. Since it is compelled, it would not normally be sufficient to constitute a representation by the employer which can give rise to an estoppel. The termination of the practice upon the signing of the collective agreement is irrelevant since the practice was not sufficient to give rise to an estoppel in the first place. The continuation of the practice after the signing of the collective agreement can constitute a representation, but it is not one which was in existence at the time the union negotiated the first collective agreement. Therefore it cannot be one upon which the union relied at the time it negotiated the collective agreement. If the practice is continued over the life of the first collective agreement, it may constitute a representation for the purposes of negotiating a second collective agreement, but that is not the issue before me, and was not the issue before Arbitrator Pineau.

56. At paragraph 104 and 105 of *B.C. West Terminal*, Arbitrator McEwen returns to *Sterling Place*, stating:

Regarding the *Sterling Place* case, the Employer argues that, critical to the finding in that case is the fact that the practice involved 11 months of post-agreement practice. However, the arbitrator expressly left open what her view would have been—it “might have been different”—had the practice been terminated upon the signing of the collective agreement.

I respectfully disagree with that caveat. It seems to be [sic] that, in determining whether there exists a “legal relationship” between the parties, it matters not whether the length of time between the signing of a collective agreement and the unilateral termination of a long-established practice is eleven months or (merely) a few days. Surely detrimental reliance crystallizes, in a case such as this, at the very moment the collective agreement is signed.

With respect, this passage fundamentally misconstrues the concept of equitable estoppel. An estoppel arises when there is a representation within a legal relationship upon which there has been detrimental reliance. It is correct that the length of time of the practice is irrelevant to determining whether or not there is a legal relationship. The question remains, however, whether there has been a representation within the legal relationship once created. A practice, of what ever length, which pre-dates the relationship does not constitute a representation within the relationship, nor does the practice create the relationship.

57. *Bay Mills* was a 2000 decision of Arbitrator Knopf. Arbitrator Knopf stated:

20 Even if I accept that there was a consistent practice of paying short term benefits prior to the signing of the parties' first collective agreement, it is highly problematic as to whether this kind of a "practice" can form the basis of estoppel. In the *Sterling Place and U.F.C.W.* case, supra, there is a great deal of discussion about previous cases where arbitrators have ruled that the doctrine of estoppel cannot apply in the absence of a contractual relationship prior to the signing of the first collective agreement. Arbitrator Pineau did apply the doctrine in *Sterling Place and U.F.C.W.*, supra, in a first contract situation. But she made it clear that the reason she did this was that the consistent practice in place before the signing of the first collective agreement continued for eleven months after the collective agreement had been in place. She went on to say that, "MY VIEW MIGHT HAVE BEEN DIFFERENT IF THE PRACTICE HAD BEEN TERMINATED UPON THE SIGNING OF THE COLLECTIVE AGREEMENT" (emphasis added [by Arbitrator Knopf]). It is important to remember that the Union's evidence revealed that the Employer in the case at hand did discontinue the "practice" of paying the short term sick benefits immediately after the signing of their first collective agreement. Therefore, the *Sterling Place and UFCW* case, supra, lends no support to the Union's claim.

58. With respect, Arbitrator Knopf was mistaken in her suggestion that *Sterling Place* contained a “great deal of discussion about previous cases where arbitrators have ruled that the doctrine of estoppel cannot apply in the absence of a contractual relationship prior to the signing of the first collective agreement”. While Arbitrator Pineau did discuss many cases, the only case she specifically identified as being a first contract case was *Medicine Hat News*. To the extent that I am familiar with the others she discussed, they are not first contract cases. In any event, only *Medicine Hat News* is identified by Arbitrator Pineau as having addressed the argument that an estoppel cannot be based on pre-unionization practice in a first contract case.

Further, while Arbitrator Knopf distinguishes *Sterling Place* on the basis the practice in that case had not been terminated on the signing of the collective agreement while in her case it was, as I have stated above this is an irrelevant consideration. Conversely, if there had been a representation at the bargaining table that the practice would continue, and the union had relied upon that representation in not seeking to incorporate the practice into the first collective agreement, the employer would almost certainly be estopped from discontinuing the practice. In this respect, the result would be no different if the employer discontinued the practice upon the signing of the collective agreement or mid-term.

59. In *British Columbia Automobile Association*, a 2002 decision of B.C. Arbitrator Devine, the first collective agreement was the result of an interest arbitration award which resolved the outstanding issues between the parties. The union argued it had relied upon alleged representations by the employer in deciding not to raise certain issues with respect to vacation entitlement before the interest arbitrator. The resulting collective agreement was silent on the issue in question. The union grieved when the employer departed from the pre-unionization practice. Arbitrator Devine stated:

79 As far as the doctrine of estoppel is concerned, I agree generally with the Employer that the Union is unable to rely on past practice evidence to found an estoppel. There was no legal relationship between the parties prior to the certification. While there was a longstanding practice to provide holidays based on blocks of 8 hours to the Grievors, the practice did not involve the Union. There was no detrimental reliance by the Union concerning the Employer's practice because there was no pre-existing legal rights which the Union could waive. The facts here bear some similarity to *Re Medicine Hat News - and - Print Media Union of Alberta*, No. 33 (1994), 43 L.A.C. (4th) 110 (Alberta, W.D. McFetridge).

60. In *Quebecor*, a 2004 decision of Ontario Arbitrator Goodfellow, the union represented employees in the "Bindery Department" of the employer, including "Apprentice J1s". Certain other employees were not unionized, including "truckers" and "strapper-operators". The starting wage rate for Apprentice J1s was less than that of truckers or strapper-operators. If a trucker or strapper-operator obtained the position of an Apprentice J1, there was a long standing practice of continuing to pay them at the trucker or strapper-operator rate until they had advanced sufficiently on the Apprentice J1 wage grid to attract a higher rate. The union obtained bargaining rights with respect to a tag end unit which included the truckers and strapper-operators. Subsequently, trucker and strapper-operators who applied for Apprentice J1 positions were told that they would only be paid at the start rate for that position

as set out under the Bindery Department collective agreement. A grievance was filed under the Bindery Department collective agreement.

61. The union argued, among other things, the long standing practice gave rise to an estoppel precluding the employer from paying the lower rate for Apprentice J1 set out in the Bindery Department collective agreement. Arbitrator Goodfellow rejected this argument for reasons which need not be set out here. He went on to say:

51 The foregoing addresses the question of estoppel from the point of view of the Union as representative of the Bindery unit which appeared to have been the focus of the Union's case. However, reference was also made to the possibility that the Union, as representative of the tag-end unit, might have attempted to negotiate the benefit into the tag-end agreement and that that opportunity, too, had been lost. At least in terms of motivation, this, in my view, would have been a much more realistic scenario. However, this argument suffered from its own set of difficulties.

52 First, as summarized above, Mr. Nytko's evidence in this area was somewhat weak. It is obvious that, when negotiating the first agreement for the tag-end unit, the Union had every opportunity to negotiate all of the benefits that it was seeking - including pay-protection for members of higher-rated classifications moving into Apprentice J1 positions in the Bindery unit. In this respect, the Company's practice stands on no different footing from any other pre-collective bargaining practice or benefit that the Union would wish to have continued. Especially when working from the template of the Bindery agreement - which contained just such a provision - the opportunity was there for the Union to have attempted to negotiate the benefit but it declined to take it.

53 Second, in my view, it is clear law that an estoppel cannot be grounded in an employer's "pre-union" practice. The parties and the two legal regimes are entirely different. A practice in respect of a group of unrepresented employees is not a representation to a newly certified trade union that the practice will continue. That is the role of collective bargaining. Estoppel cannot be utilized to transform an employer's pre-union practices into the terms and conditions of a first collective agreement. In respect of this issue, I agree with the awards of arbitrators Knopf and McFetridge in *Baylite/Door Seal Division, Bay Mills Ltd.*, supra, and *Medicine Hat News*, supra, respectively, and would distinguish the award of Arbitrator Pineau in *Sterling Place*, supra, in the manner of Arbitrator Knopf in *Bay Lite*.

54 Finally, and lest there be any doubt, it cannot be said that any of the individual grievors relied on the practice to their detriment. Indeed, there is no evidence that the grievors were even aware of the practice prior to the postings. And, of course, they were advised of the pay-rate before accepting the posted positions.

62. It appears to me Arbitrator Goodfellow's comments are *obiter dicta*, since the grievance before him was brought under the Bindery Department collective agreement, not the tag-end unit collective agreement. Nonetheless, I find persuasive his observation that: "an estoppel cannot be grounded on an employer's

pre-union practice. The parties and the two legal regimes are entirely different.” I adopt that statement here.

63. Paragraph 69 of *B.C. West Terminal*, records the union as having argued the decision of BC Arbitrator Hickling in *Euorcan Pulp & Paper Co.*, (1990) 14 LAC (4th) 103 supported the proposition that pre-certification practice can give rise to an estoppel. The issue addressed by Arbitrator Hickling appears to have been whether a representation made within the context of negotiation of a first collective agreement could form the basis for an estoppel. Arbitrator Hickling is quoted as stating:

The doctrine depends not on the existence of a contract as such, but on the existence of a legal relationship between the parties. The existence of a collective bargaining relationship between the parties is sufficient basis for invoking estoppel even if at the time the promise is made there is no contractual relationship in existence, whether because the parties have not completed negotiations for a first collective agreement, or because the old agreement had expired and its replacement had not yet been concluded.

I agree. This, however, does not constitute authority for the proposition that a representation which predates that legal relationship can form the basis for an estoppel.

64. At paragraph 64 of the *B.C. West Terminal* award, paragraphs 44 and 45 of the *Nor-Man* decision of the Supreme Court of Canada are quoted. Paragraph 44 of *Nor-Man* recognizes labour arbitrators have the jurisdiction to interpret and apply equitable doctrines in disputes before them. Paragraph 45 of *Nor-Man* notes labour arbitrators are well placed to “develop doctrines and fashion remedies in their field, drawing inspiration from general principles, the objectives and purposes of the statutory scheme, the principles of labour relations, the nature of the collective bargaining process, and the factual matrix of the grievances of which they are seized.” Paragraph 68 of the *B.C. West Terminal* award sets out the union’s assertion that the flexible approach to the application of equitable principles in labour relations recognized in *Nor-Man* was at odds with the principle that pre-collective agreement conduct cannot found an estoppel. Why this would be so is not disclosed.

65. On the contrary, I would note at paragraph 52 of *Nor-Man*, the Court stated:

But the domain reserved to arbitral discretion is by no means boundless. An arbitral award that flexes a common law or equitable principle in a manner that does not reasonably respond to the distinctive nature of labour relations necessarily remains subject to judicial review for its reasonableness.

In my view, “flexing” the equitable principle of estoppel, which is fundamentally about representations within a legal relationship, to include representations which pre-date that legal relationship goes beyond the bounds of reasonableness. Indeed, it is incorrect.

66. I note that Arbitrator McEwen justifies her approach by reference to “the uniquely British Columbia “modern doctrine of estoppel””. At paragraph 95 of her decision, Arbitrator McEwen describes this “modern doctrine of estoppel”.

The British Columbia Labour Relations Board in *B.C. Rail Ltd, I.R.C. No. 152/92*, adopted what it termed the “modern doctrine of estoppel” set out in the British Columbia Court of Appeal decision *Litwin Construction (1973) Ltd., (1988)*, 29 B.C.L.R. 88. This modern doctrine established a “broad principle,” collapsing many prior equitable precepts to achieve one basic purpose: the prevention of “inequitable detriment.”

Under this broad principle, the distinctions between estoppel, promissory estoppel, waiver, election, laches and acquiescence do not always affect the outcome, though they may in some cases. *The underlying concept is that of unfairness or injustice and it is not essential to its application that there be knowledge, detriment, acquiescence or encouragement although their presence may serve to raise the unfairness or injustice to the level requiring the exercise of judgment. If the unfairness or injustice is very slight, then the principle would not be applied. If it is more than slight, then the principle may be applicable.*

....

[Emphasis supplied by Arbitrator McEwen]

67. This so called “modern doctrine of estoppel”, in some respects, appears consistent with the general organizing principle of good faith in contract law and the common law duty of honest performance applicable to all contracts law set out by the Supreme Court of Canada in *Bhasin v. Hrynew*, which I will discuss below. The “modern doctrine of estoppel”, however, clearly is not “estoppel”, as both of the key elements of an estoppel, representation and detrimental reliance, are said not to be necessary. In my view, it confuses matters to use the term “estoppel” at all in describing this “modern doctrine”. Estoppel continues to exist as a concept in its own right. In this respect, I note in *Bhasin* the Supreme Court was careful to

contrast the principle and duty which it described with equitable estoppel: see para. 88.

68. For all of the foregoing reasons, I decline to follow Arbitrator McEwen's award in *B.C. West Terminal*. Rather, I conclude that an estoppel cannot be founded solely upon a pre-unionization practice.

69. I turn to the Union's alternative estoppel argument: that the statements made by or on behalf of the Employer within the context of collective bargaining constituted representations the practice of paying tuition benefits would continue and give rise to an estoppel.

70. The Union relies upon the September 8, 2017 letter sent to the teachers by the principal of the Scarborough Campus on the directions of Mr. Warsi as constituting the representation the practice would continue. For ease of reference, I set out the text of that letter again:

Salaams Teachers,

Br Akbar has asked me to inform you that the 50% staff discount offered to IFS teachers with children in the school is currently under union negotiations. The discount currently offered is therefore based on the previous year rates.

Once the union contract is negotiated and finalized Teachers will be informed about any/all changes to their children's fees.

A letter with the same information has been placed in your mailbox.

If you have any questions, please do not hesitate to speak to me.

71. Assuming the September 8, 2017 letter can be treated as a representation to the Union, I am unable to read it as a statement the tuition benefit would continue over the term of the collective agreement being negotiated. Rather, it simply states the benefit will be maintained during collective bargaining. As Mr. Warsi stated in his evidence, the statutory freeze required the Employer to do so.

Bhasin v. Hrynew

72. I turn to consider *Bhasin v. Hrynew*. In that case, in a unanimous decision, the Supreme Court of Canada expressly set out to restate some fundamental principles

of contract law. At paragraph 92, the Court provided the following summary of the principles which it had established:

- (1) There is a general organizing principle of good faith that underlies many facets of contract law.
- (2) In general, the particular implications of the broad principle for particular cases are determined by resorting to the body of doctrine that has developed which gives effect to aspects of that principle in particular types of situations and relationships.
- (3) It is appropriate to recognize a new common law duty that applies to all contracts as a manifestation of the general organizing principle of good faith: a duty of honest performance, which requires the parties to be honest with each other in relation to the performance of their contractual obligations.

73. *Bhasin v. Hrynew* has been widely applied in a labour relations context. Counsel advised that as of the last date of the hearing in this matter, there were 68 arbitral decisions which referred to *Bhasin*, 32 of which were from Ontario. As tempting as it is to write at length on *Bhasin* and its application in an arbitral context, I have restricted myself to discussing the four arbitral cases which I have been provided.

74. *Global Edmonton* involved the negotiation of a first collective agreement following the merger of two bargaining units, one in Calgary and one in Edmonton. The old Edmonton collective agreement had a provision which stated meal breaks were excluded from work hours. The old Calgary collective agreement had a provision which stated meal breaks were included in work hours and a separate provision which stated employees would receive the “inclusive meal break” no earlier than the 3rd hour of their work day. The Calgary collective agreement was used as a basis for negotiation of the new collective agreement applicable to the merged bargaining unit. The provision with respect to work hours was amended to differentiate between Calgary and Edmonton employees and continue the exclusion of meal breaks from work hours for the Edmonton employees. The provision with respect to the timing of the “inclusive meal break” was subject to no discussion, with a result there was a patent ambiguity in the collective agreement with respect to whether the “inclusive meal break” it described also applied to Edmonton employees. The union did not realize this during negotiations but did prior to ratification. Nonetheless it remained silent, secured ratification of the collective agreement with the ambiguity and then filed a grievance seeking inclusive meal breaks for the Edmonton employees.

75. Alberta based Arbitrator Sims held that estoppel and the doctrine of rectification (i.e. that the written contract should be amended to reflect the true intention of the parties) both applied to bar the grievance. However he also spent some time reviewing *Bhasin* before suggesting that it was time to recognize “a similar “general organizing principle” for the interpretation, administration and enforceability of collective agreement terms”. He called this the “principle of good faith collective agreement administration”.
76. Arbitrator Sims does not, in my view, provide a clear definition of what he considers to flow from this new principle of good faith collective agreement administration. However, he does appear to hold that it was breached by the union in the case before him when knowing that the employer held one view, it failed to give notice to the employer that it had a different view, and failed to return to the bargaining table to attempt to resolve the difference before ratifying the collective agreement.
77. *K-Bro Linen Services* is a decision of Ontario Arbitrator Luborsky with respect to a preliminary motion by the employer seeking dismissal of a grievance on the basis that it failed to state a *prima facie* case. In that case, the employer had sought a vote on its final offer. It appears that the final offer itself was arguably silent about pay increases. However, during the period leading up to the final offer vote the employer held meetings with employees in which it made representations to them about the pay increases they would receive if they accepted the employer’s final offer. The employees voted to accept the employer’s final offer.
78. No pay increases were implemented. The union grieved there was a breach of the collective agreement or alternatively the employer was estopped from asserting that there was not. The Employer challenged the applicability of the doctrine of estoppel on a number of grounds, including that it could not be used to found a right. The employer also argued that any allegation of misrepresentation during the final offer vote fell within the exclusive jurisdiction of the OLRB.
79. Relying on *Bhasin*, Arbitrator Luborsky held that he had at least concurrent jurisdiction with the OLRB to determine “whether representations made in the course of the voting process on the Employer’s final offer, impacted upon the fair and honest administration of the contractual duties under the collective agreement that was eventually confirmed as a result of that process.”

80. Arbitrator Luborsky held the union's pleadings made out a *prima facie* case and refused to dismiss the grievance without hearing the evidence.
81. In *Greenwood Products*, a decision of B.C. Arbitrator James Dorsey, the issue was whether the union was deemed to have abandoned a grievance for failure to advance it to the next step in the grievance procedure within the time specified by the collective agreement. There was a dispute about whether the employer had provided its response at step 2 of the process triggering a requirement on the part of the union to advance the grievance to the next step. The employer had not made it clear to the union that its position was that it had provided its response.
82. In approaching this question, Arbitrator Dorsey cited *Bhasin* to find [at para. 34] that there was by analogy:
- An overarching organizing principle of good faith administration of collective agreement provisions to achieve resolution of mid-agreement disputes without stoppage of work
83. Arbitrator Dorsey found the silence of the Employer was not consistent with the good faith administration of the collective agreement. The employer was not permitted, therefore, to "invoke" abandonment of the grievance by the union.
84. *Bell Canada* is a decision of Ontario Arbitrator Surdykowski. It involved a first collective agreement with respect to three classifications of employees. There had been and continued to be a significant differential between the wage ranges applicable to each. After the collective agreement was operative, the employer used a questionnaire to determine which employees would be reassigned from one of the lower wage classifications to one of the higher ones. This was inconsistent with an asserted long standing management practice of not using testing for such a purpose. The union alleged in proceeding in this new manner the employer exercised its management rights unreasonably by unnecessarily and arbitrarily using a testing process and an arbitrary passing grade to select employees. In the alternative, the union alleged the employer was estopped on the basis of past practice from proceeding as it had. The employer sought dismissal of the grievance on a preliminary basis, arguing an arbitrator had no jurisdiction to deal with a grievance based solely on a management rights clause and that there was no *prima facie* case for an estoppel.
85. Arbitrator Surdykowski rejected the argument that a grievance could not be solely based on the management rights clause, stating that exercise of management rights

was an exercise of management discretion and the employer was required to do so in a manner that was not arbitrary, discriminatory or in bad faith. He continued [at para. 38] that any doubt in the matter was removed by *Bhasin*, which “posits a general principle of honest and reasonable good faith contractual performance”. He agreed with Arbitrator Sims that the principle should apply to collective agreements [at para. 39]. He concluded he had jurisdiction to hear the allegation of a breach of the management rights clause.

86. I note Arbitrator Surdykowski went on to conclude that for estoppel to apply to a matter not addressed in a collective agreement, a long standing management practice was not sufficient without more to constitute a representation such as could give rise to an estoppel. Given my conclusions above under the topic of estoppel, it is not necessary for me address this proposition and I decline to do so. I note only that no reference is made in Arbitrator Surdykowski’s analysis to the fact that the collective agreement before him was a first collective agreement. The decision is also silent about how the parties came to be negotiating a first collective agreement. It is not clear, for example, if it was the result of re-organization by the Canada Industrial Relations Board of existing bargaining units previously represented by the same bargaining agent. In any event, Arbitrator Surdykowski does not address the question of whether a long standing practice which pre-dates unionization can be relied upon in any circumstances to give rise to an estoppel.
87. These authorities recognize the general organizing principle of good faith recognized in *Bhasin* is applicable in a labour arbitration context. I agree. There is a “principle of good faith collective agreement administration” to use the term coined by Arbitrator Sims. Further, some of these cases suggest this principle is applicable not only to the administration of the collective agreement, but to its negotiation and ratification. An arbitrator has limited jurisdiction to hear such complaints, notwithstanding they might also form the basis of a duty to bargain complaint to the OLRB. While I am inclined to accept these latter propositions, given the view I take of this matter I need not decide whether they are all correct.
88. As noted, in *Bhasin*, the Supreme Court of Canada also held that there was a “new common law duty that applies to all contracts as a manifestation of the general organizing principle of good faith: a duty of honest performance, which requires the parties to be honest with each other in relation to the performance of their contractual obligations.” A collective agreement is a contract and thus subject to this new common law duty. It is to this duty of honest performance to which I now turn.

89. What is the content of the duty of honest performance? Does it simply prohibit outright lies, or does it require something more? The answer is that it requires something more. In particular, it comprehends “in certain respects” the requirement to be honest, candid, forthright and reasonable in contract performance. (See *Bhasin* at para. 66; see also *Potter v. New Brunswick Legal Aid Services Commission*, [2015] 1 SCR 500, 2015 SCC 10 (CanLII) — 2015-03-06 at para 99, specifically interpreting para. 66 of *Bhasin* in this manner.) The qualification that the requirement only exists “in certain respects” is important to note. For example, in *Bhasin*, the Supreme Court appears to state:

- at least with respect to commercial contracts, the mere fact that one party causes loss to another party, even intentionally, is not a breach of good faith if done in the legitimate pursuit of economic self interest (see para. 70);
- in general (other than in contracts of utmost good faith, such as insurance contracts) a party is not required to subordinate its interests to those of the other party (see para. 86);
- it does not give rise to a requirement to disclose an intention to terminate a contract (see para. 87).

90. In my view, the first two of these examples demonstrate the need to remain sensitive to the particular context when considering the requirement to be honest, candid, forthright and reasonable in contract performance. The particular context here is the conduct of the parties during collective bargaining. Their conduct must be understood against the duty imposed on them by section 17 of the Ontario Labour Relations Act (“OLRA”) to “bargain in good faith and make every reasonable effort to make a collective agreement”. An allegation a party has breached that duty lies within the exclusive jurisdiction of the OLRB. The OLRB has developed a rich and nuanced jurisprudence with respect to the content of the duty to bargain. Assuming, without deciding, an arbitrator has the limited concurrent jurisdiction identified by Arbitrator Luborsky, then in my view an arbitrator should be mindful of the approach of the OLRB in determining such issues.

91. It is beyond the scope of this decision to attempt to summarize the duty to bargain jurisprudence of the OLRB, but it is clear the OLRB has emphasized that collective bargaining is a voluntary process and the OLRB's role is not that of an interest arbitrator. Accordingly, the OLRB will only concern itself with the substance of the parties' negotiating positions in very limited circumstances. The OLRB is also

careful not to be overly vigilant of the process of collective bargaining. As stated in *Radio Shack*, [1979] OLRB Rep. Dec. 1220, 1979 CanLII 817 (ON LRB), 1979 CanLII 817 (ON LRB): “Collective bargaining is not a process carried on in accordance with the Marquess of Queensbury rules.” Further, as stated in *Pine Ridge District Health Unit*, [1977] OLRB Rep. Feb. 65, 1977 CanLII 412 (ON LRB):

14. It should be stressed, however, that section 14 [now section 17] of the Labour Relations Act is not intended to redress any imbalance of bargaining power that may exist between the parties. A party whose bargaining strength allows it to force the acceptance of hard terms at the bargaining table does not thereby bargain in bad faith. The very word "bargain" presupposes that the parties will seek to maximize their own best interests. Hard bargaining, albeit ruthless, is not bad faith bargaining.

15. Nor will every heated comment made in the charged atmosphere of the bargaining room be a breach of the duty to bargain in good faith. Words may sometimes betray bargaining in bad faith, but the Board must view the words carefully and in the light of all of the surrounding circumstances. Those familiar with collective bargaining know that fighting words are sometimes no more than a form of posturing for desired effect. And at other times they merely reflect the inevitable fact that when people form hard lines on opposite sides of a tough issue tempers will flare, notwithstanding the best of intentions.

16. Lastly it must be recognized that people are not equally gifted in diplomacy and good manners. While obvious insults may, in some cases, form the basis from which to infer a contempt of the opposite party that is tantamount to a refusal to recognize their status at the bargaining table, or to truly communicate with them, it would be unrealistic to find a breach of section 14 of the Act in every tactless remark that offends one of the parties. Freewheeling verbal encounter can be a valuable antidote to stalemate in collective bargaining. Therefore, occasional gaucherie and inadvertent slips are inevitable and must, within reason, be tolerated.

92. There is another issue which must be addressed given the case before me is concerned with a pre-unionization benefit. The duty to bargain requires an employer to disclose information in relation to pre-unionization benefits and not to refuse to bargain in relation to them. I am unaware, however, of any authority for the proposition that the duty to bargain would be breached solely by the unilateral termination of such a benefit by an employer following the ratification of a collective agreement which did not incorporate the benefit. Rather, as stated by Arbitrator Goodfellow, if a union wishes to continue such a benefit, it must negotiate for its inclusion in the collective agreement. In the absence of inclusion in the collective agreement, the default is that the benefit comes to an end. If asked during collective bargaining, an employer must candidly acknowledge an intention to end such a

benefit. But there is to my knowledge no positive duty on an employer to disclose such an intention in the absence of a query. The conduct of the parties in the case before me must also be assessed against this framework.

93. There is no question the Union was aware of the details of the tuition benefit. There is no question that it was the subject of negotiations at the collective bargaining table. There is also no question that it did not ultimately find its way into the collective agreement.
94. There is no suggestion that at any point the Union asked the Employer if it intended to maintain the tuition benefit following the conclusion of the collective agreement. Nor was there any statement by or on behalf of the Employer that reached the level of a clear misrepresentation that it would continue the tuition benefit.
95. The April 28, 2017 letter clearly did not amount to such a representation. On the contrary, it alerted the teachers (if not the Union) to the Employer's position (with which I largely agree), that they would lose various benefits (including the tuition benefit) unless negotiated into the collective agreement.
96. The competing proposals during collective bargaining with respect to whether the maintenance of existing practices did not amount to such a representation. The Employer's proposal was that: "Existing customs and practices, rights and privileges, benefits and working conditions not addressed in this collective agreement shall be discontinued." Given the view I have expressed, this proposal was largely superfluous. I have considered the possibility that its subsequent withdrawal amounted to a representation that existing benefits would continue or conversely end. I am unable to reach either conclusion. The Employer's proposal was in response to the Union's proposal that existing benefits would be continued. Both proposals were withdrawn simultaneously with no further discussion. In the circumstances of this case, the withdrawal of the Employer's proposal can no more be considered a representation that benefits would continue than the withdrawal of the Union's proposal can be considered an acknowledgement that they would not.
97. As discussed above under the subject of estoppel, the September 8, 2017 letter cannot be considered such a representation.
98. The September 20, 2017 proposal from the Employer expressly stated the tuition benefit would be eliminated. On the Employer's evidence, this statement was

reinforced during collective bargaining on September 21, 2017 when Mr. Warsi told the Union: "We want to Eliminate fifty percent teacher's children fee discount." On the evidence of both parties, they returned to the issue of the tuition discount later in the day. The discussion of the proposal was largely displaced by the discussion of the Union's concern the Employer had unilaterally terminated the tuition benefit and Mr. Warsi's "feel the pain" comment. To the extent the Employer's proposal was discussed, it appears Mr. Ahamed advised the Employer that it was not acceptable to the Union ("leave it status quo") and Mr. Warsi indicated the Employer did not agree. There was no further discussion of the Employer's proposal during collective bargaining and it did not make its way into the collective agreement. In my view, this sequence of events cannot be understood as notice the benefit would be discontinued (since the Employer's proposal to that effect was withdrawn). Neither can it be understood as a misrepresentation that the benefit would be continued. The actual proposal was to the contrary. Given that it was superfluous, its subsequent withdrawal, with nothing more, does not constitute a misrepresentation that it would be continued.

99. Finally, there was no discussion of the tuition benefit between Mr. Ahamed and Mr. Smyth on or about October 25, 2017.

100. In summary, Mr. Warsi's comment that he wanted the teachers to "feel the pain", was not constructive but not a breach of the "principle of good faith collective agreement administration". The statements made by the Employer about tuition benefits, all of which were made either by or on the direction of Mr. Warsi, were confusing but do not fall to the level of outright lies. The question of whether the Employer intended to discontinue the tuition benefit after the conclusion of the collective agreement was never raised and so the Employer was never called upon to respond to the question candidly.

Discrimination

101. Article 5.01 of the collective agreement provides:

The Employer and the Union each agree that there shall be no discrimination, intimidation, interference, restriction, or coercion exercised or practiced by either of them or their representatives or members because of an employee's membership or non-membership in the union or because of his/her activity or lack of activity in the Union. The employer and the Union agree to cooperate to resolve any issues that arise.

102.As noted, on November 29, 2017, the Employer sent teachers at the Scarborough Campus letters with the following text:

Re: Staff Discount

Dear [teacher's name],

The IFT Maglis would like to advise teachers that the collective agreement has been ratified by the membership and final signing of the collective agreement between Islamic Foundation of Toronto and UFCW Local 175 took place on November 9, 2017. As a result, as of December 1 (unionized) teachers will be charged fees of \$450 per child.

If you have any questions or concerns please direct them to your union representatives.

103.To the extent the letter suggests the collective agreement removes the tuition benefit, it is at best misleading. The collective agreement is simply silent on the issue. Put differently, the collective agreement does not preclude the Employer from continuing to offer the tuition benefit had it chosen to do so.

104.The letter states the tuition benefit is being removed for “(unionized) teachers”. The context for this statement includes Mr. Warsi’s comment during collective bargaining that he wanted these teachers to “feel the pain” through the removal of the tuition benefit and the fact the tuition benefit continues to be offered to the non-unionized teachers at the Durham Campus. Taken together, these facts are capable of supporting the inference that termination of the tuition benefit for the Scarborough teachers was motivated at least in part by the fact they were unionized.

105.Since the reason the Employer decided to remove the tuition benefit from the teachers at the Scarborough Campus lies within its knowledge, very little evidence is required to create a *prima facie* case of discrimination on the basis of union membership so as to shift an evidential burden to the Employer to explain. In my view, the facts I have outlined are sufficient to shift such an evidential burden to the Employer. As noted, there was simply no evidence from the Employer as to the reasons why the tuition benefit was eliminated for teachers at the Scarborough Campus.

106.Of course it is possible the Employer eliminated the tuition benefit for the teachers at the Scarborough Campus to offset the other gains which they had made in collective bargaining or for some other legitimate reason. I am not, however, prepared to assume that was the case. If the Employer had led evidence to that

effect it almost certainly would have been subject to vigorous cross examination, and perhaps reply evidence. I was advised that there was at least one, if not more, unfair labour practice complaints laid by the Union against the Employer during the certification and/or collective bargaining process. While I was not informed of the details of those complaints, and the assertions contained in them of course remain unproved, it does suggest the Union would have challenged evidence with respect to the Employer's intentions. In this respect, I also note the antipathy between the parties remained palpable during the arbitration hearing and was reflected in the closing argument of the Employer which directly attacked the Union's representation of the teachers and accused it of bad faith. It is not possible for me to say in these circumstances that had the Employer offered evidence of a legitimate reason for ending the tuition benefit (which it did not), I would have concluded it was in fact the reason for its decision or untainted by a discriminatory motive.

107. In the result, on the evidence before me, I conclude the Employer's decision to eliminate the tuition benefit for the teachers at the Scarborough Campus was made to discriminate against them on the basis of their membership in the Union contrary to Article 5.01 of the collective agreement.

Remedy

108. There was no agreement to bifurcate remedy in this case and I am advised the matter is of some urgency because the affected teachers need to make a decisions about whether or not to enrol their children in the Employer's school in the up coming year. The appropriate remedy is to put the teachers in the same situation they would have been but for the Employer's discriminatory act. Accordingly, I make the following orders:

- (a) I declare the Employer discriminated against the teachers and breached Article 5.01 of the collective agreement when it ended the tuition benefit for them on or about November 30, 2017; and
- (b) I order the Employer to make whole any affected teacher for the difference between the tuition which they paid and the tuition which they would have paid but for the Employer's breach.

109. I remain seized with respect to any issues regarding the interpretation or implementation of this award.

Dated at Toronto this 30th day of May, 2018.

“Ian Anderson”

Ian Anderson
Arbitrator