IN THE MATTER OF AN INTEREST ARBITRATION

BETWEEN

NANAIMO GOLF AND COUNTRY CLUB

(the "Employer")

AND

UNITE HERE, LOCAL 40

(the "Union")

Re: Final Offer Selection Interest Arbitration

APPAERANCES:	Israel Chafetz, Q.C., for the Employer
	Leo McGrady, Q.C., for the Employer
ARBITRATOR:	Mark J. Brown
DATES OF HEARING:	April 14 and 15, 2016
DATE OF AWARD:	April 26, 2016

I. ISSUE

The Collective Agreement between the parties expired on March 31, 2015. After engaging in approximately four sessions, of two days each, of collective bargaining, the Employer locked out the bargaining unit employees.

On or about March 4, 2016, the parties agreed to a Final Offer Selection interest arbitration process which ended the dispute and the lock out was lifted. The parties negotiated a Return to Work Agreement. At the time of this arbitration, the Employer's operations have reopened.

The parties agreed that the following terms would form part of the renewal Collective Agreement:

- The term of the renewal Collective Agreement will be three years (i.e. April 1, 2015 to March 31, 2018)
- There will be no retroactivity on any financial increase prior to the return to work date
- The Health and Welfare premium contribution will increase by $0.07 / $0.07 / $0.08 over the three year term
- Matters set out in a letter dated June 2015 from the Employer's negotiator
- All legal proceedings were withdrawn

With respect to the Final Offer Selection process the parties agreed to the following list of issues:

- Wage increases
- Wage progression
- No reprisal for those that crossed the picket line to work
- Lump sum payment
- Creation of an Executive Chef position excluded from the bargaining unit
- Participate in the LRB Relationship Enhancement Program
- Delete the Letter of Settlement arising from the initial lockout replacement application

The parties also set the terms for the Final Offer Selection arbitration process:

- Three weeks after agreeing to the arbitration dates, both parties were to provide the arbitrator with its position on the outstanding issues. Once the arbitrator had received both positions, the positions were to be forwarded to the other party by the arbitrator.
- The arbitrator had to choose one position or the other in its entirety
- No evidence as to anything that transpired in collective bargaining including positions taken that were rejected was to be referenced at the oral hearing

II. FINAL OFFER SELECTION POSITIONS

The Union submitted the following Final Offer:

1. Wage increase of 2% for 2016 and 2% for 2017 across the board.
2. No reduction to the wage progression schedule
3. No provision relating to no reprisal for those that crossed the picket line to work
4. A one time payment of $1,000.00 to each of the employees locked out for 11 months who returned to work
5. The Union opposed the creation of an excluded Executive Chef position
6. The Union dropped the proposal to participate in the LRB Relationship Enhancement Program
7. The Union agreed with deleting the Letter of Settlement arising from the initial lockout replacement worker application.

The Employer submitted the following Final Offer:

1. April 1, 2015 - $0.24 increase on the top rate
   April 1, 2016 - $0.24 increase on the top rate
   April 1, 2017 - $0.24 increase on the top rate
   (Employer asserted that a $0.24 increase equated to 1.5% on weighted average wage rate)
2. Wage progression – start rate $1.00 less than top rate
   180 hour $0.50 less than top rate
   800 hour top rate

   The Employer noted that all but one employee at the time of recall was at the top rate and that this one employee could stay on the current wage progression until reaching the top rate.

3. The Employer proposed that "the Union will not initiate nor encourage any reprisal in respect to any bargaining unit employee who crossed the picket line to work during the labour dispute. Neither the Union nor the Employer shall take any disciplinary or adverse action nor discriminate against any employee for any activities during the dispute. (This can be documented in a separate letter that is not part of the collective agreement document)".
4. No lump sum payment.
5. Establish an excluded Executive Chef position under the following terms:
   "i. Will not displace bargaining unit employees or reduce the scheduling of bargaining unit hours nor negatively impact the composition of the "core" group.
   ii. Can perform bargaining unit work for the purpose of;
   (1) Instruction
   (2) Unforeseen absenteeism
   (3) Emergency
   (4) Unanticipated fluctuations in business requiring a timely response

(5) Executive Chef duties include staff scheduling, menu selection and purchasing. Such duties may be assigned to the Chef from time to time.
(6) The necessary bargaining unit work is of a minor nature in terms of time involved or the work required and bargaining unit employees are not readily available to perform such work."

6. The Employer will commit to one session of the Relationship Enhancement Program and then access its utility for any further sessions
7. Delete the Settlement Agreement of June 4, 2015 that arose from the Union's complaint in respect to lockout replacements

III. BACKGROUND

The Employer's operations include a semi private golf course, a pro shop, restaurant, bar and banquet facilities. The Union's certification covers the food and beverage employees. The busiest times of the year are May to September and the Christmas Season (mid November to the end of December).

The size of the bargaining unit varies from approximately 20 to 35 employees. During the labour dispute 3 employees crossed the picket line to work. After the lockout was lifted 12 other employees returned to work.

Shelly Ervin, Secretary Treasurer of the Union, testified regarding the Union's final offer position.

She stated that the Union's proposed wage increase of 2% across the board was based on workers' needs. She asserted that based on an average wage rate of $15.00 per hour, the increase equated to $0.30 per hour. Referencing a Consumer Price Index document dated February 2016, she noted that the overall food cost rose by 3.6% since last February. In addition, the British Columbia Consumer Price Index Forecasts for 2016 and 2017 from the BC Government Budget and Fiscal Plan, the Business Council of BC Economic Review & Outlook, RBC Economics Provincial Outlook March 2016, Central Credit Union BC Economic Outlook January 2016, BMO Capital Markets Economic Provincial Outlook March 2016, and TD Economics Provincial Economic Forecast January 2016 average to 1.7% for 2016 and 1.9% for 2017.

With respect to the wage progression issue, Ervin stated that the increment progression has been $.50 per hour for years, and that the top rate of 600 hours has been in place a couple of decades with no problems brought to the Union's attention.

With respect to the Employer's no reprisal proposal, Ervin noted that based on the Union's Constitution any member can file charges and that there are approximately 200,000 members. The Union cannot refuse to process any charges. The process for adjudicating any charges is set out in the Constitution. There have been no charges laid to date. The time frame for doing so is one year.

Regarding the lump sum payment proposal Ervin characterized it as a good faith payment. She was unsure of the wage loss experienced by the employees during the lockout.

Ervin stated that the Union was prepared to work with the Employer on initiatives to get customers back to the golf course and other facilities.

In cross examination, Ervin stated that the lump sum payment was fair and based on $100.00 per month for approximately 10 months of lockout. She acknowledged that employees that picketed were paid $200 per week for 3 months, $400 per week for 6 months, and $600 per week for the last 6 weeks of the lockout. These payments are not subject to income tax deductions.

With respect to the wage increase she acknowledged that past collective agreement increases had always been based on a cents per hour, not a percentage. However, she could not answer why that had always been the case.

Ervin was unaware that in a similar situation at the Marine Drive Golf Club, where the employees were locked out and some employees crossed the picket line to work, the Union had agreed to a no reprisal clause similar to the one proposed by the Employer in the case at hand.

Ervin stated that with respect to the Executive Chef proposal, the Union was concerned with duties being taken from the current Chef. The Union did not believe that it would not impact hours. She acknowledged that the Vancouver Lawn, Tennis & Badminton Club had a Letter of Understanding with the Union regarding management performing bargaining unit work that had similar provisions to those proposed by the Employer; and, that the Marine Drive Golf Club had a provision allowing the Manager of Food and Beverage and the excluded Chef to perform some bargaining unit work under similar provisions. However, Ervin asserted that the bargaining units were larger and that each employer is unique.

Taj Parmar, the current Chef, also testified on behalf of the Union. He stated that he currently oversees 7 to 8 employees in the kitchen area. He stated that he has been asked multiple times about moving outside the bargaining unit. He said that reasons for such a move were never indicated. He recommends hiring, promotion and discipline but the Food and Beverage Manager is responsible for such matters. Prior to the lockout Parmar stated that he scheduled employees, ordered food and did most of the work relating to the menu. He was paid $20.84 per hour.

Parmar asserted that he was never told that the wage rate was based on the Collective Agreement wage rate plus the Lead Hand premium. The Collective Agreement current Chef wage rate is $19.59 and the Lead Hand premium is $1.25, which adds to $20.84. The Lead Hand premium is paid for “an employee so designated will be paid an additional $1.25 per hour while acting as such”.

Parmar stated that after he returned to work his hours have been reduced and his wage rate reduced. He asserted that the Executive Chef position would be unworkable as fluctuations happen daily and the new position would do his work.

Much of the cross examination related to Parmar's hours of work and duties since his return to work after the lockout. I do not intend to set out that part of the testimony. Suffice it to say that I do not find it surprising that after a lengthy lockout, with the busy golf season yet to commence and with reduced hours of operation because not all business has been recovered, that hours of work are not yet what they were prior to the labour dispute.

Ash Chadha, the Employer's General Manager, testified on behalf of the Employer.

With respect to the Executive Chef proposal, Chadha stated that the current Food and Beverage Manager is responsible for sales, marketing, booking and running events and day to day supervision. With a staff of 25 to 35 in peak season, Chadha asserted that the Employer required an excluded Executive Chef position for leadership, accountability and financial planning. There would be no loss of bargaining unit hours or number of staff. The golf course side of the business has a comparable position in the Course Superintendent.

Regarding the Employer's position to increase the wage progression so that employees reached the top rate at 800 hours instead of 600 hours, Chadha stated that it would take an employee working fulltime during the busy season to reach 800 hours and so it created an incentive to remain employed by the Employer. He also noted that the last two Collective Agreement wage increases were on a cents per hour basis not a percentage.

Chadha was also referred to the Marine Drive Golf Club agreement relating to the no reprisal proposal. In addition he was referred to other collective agreements, such as Vancouver Lawn, Tennis & Badminton Club / Unite Here Local 40, Marine Drive Golf Club / Unite Here Local 40, Gorge Vale Golf Club / CUPE Local 50, Meadow Gardens Golf Course / SEIU Local 2, Fort Langley Golf Course / SEIU Local 244, Castlegar Golf Club / CUPE Local 2262 and Kamloops Golf and Country Club / CUPE Local 900 to show that other golf clubs have course superintendent positions, and/or executive chef positions, and / or provisions relating to management performing bargaining unit work.

In cross examination, with respect to the wage progression issue, Chadha could not quantity the number of employees who would not receive the top rate during the busy season based on the proposed change, or the number of employees who returned to work the following season and retained their seniority from the previous year. He also was not aware of the collective bargaining dynamics that lead to the Marine Drive Golf Club no reprisal agreement.

I asked the Employer to produce a document regarding the Lead Hand duties. It is titled “Job Description” and states that following:

> LeadHand
>
> An employee with the responsibility, in addition to the duties of the employee’s classification, to assign work, monitor, examine and review work of assigned employees for accuracy and quality.
>
> The employee’s duties include:

- Supervising a group of employees;
- Setting standards and priorities;
- Reporting to management on performance of employees;
- Taking emergency action;
- Issuing verbal warnings and recommending other disciplinary action.

The Union stated that they had never seen the document before.

I will also set out one Collective Agreement provision referenced in argument. Article 20.03 of the current Collective Agreement states:

> Persons whose regular jobs are not covered by the bargaining unit will not work on any job for which rates are established by this agreement except in cases of emergency, or when regular employees are not readily available, or for the purpose of instruction, experimentation, management training in which case trainees shall not displace or replace any employee, or except for the manager or acting manager who may relieve employees for breaks and on occasion may perform bargaining unit work to cover workload situations that employees on duty are not able to perform.

IV. ARGUMENT

The Union argues that the parties agreed that the arbitration would be conducted under Part 8 of the *Labour Relations Code* and that as set out in *Green Light Courier LTD and CAW – Canada, Local 2006*, [2007] B.C.C.A.A.A. No. 91, the arbitrator is obligated to keep in mind the policy directives set out in Section 2 (b) of the *Code*. The Union developed its proposals with that principle in mind.

The Union also emphasized that once back to work issues are resolved it is prepared to discuss with the Employer a joint program to increase business.

The Union emphasizes further that only two of the outstanding issues are the Union's (wage increase and lump sum payment). The other issues are the Employer's and the Employer bears the onus on those issues.

Relying on the statistics put before me, the Union argues that a 2% across the board wage increase in the last two years of the Collective Agreement is supportable. With respect to the Employer's wage progression proposal, the Union argues that the current progression has been in place for almost a quarter of a century. The Employer's assertion that such a change would improve employee return rates cannot survive scrutiny as the Employer had no data to support its position.

The Union argues that it cannot agree to a no reprisal clause. First, the matter is regulated closely by Section 5.1 of the *Code*, and a union must conduct itself in a manner consistent with the *Code*: *Buch*, BCLRB No. B113/2014. Second, it would be difficult for a union to fulfill its legislative mandate as the exclusive bargaining agent for the employees in the absence of an ability to forge union solidarity through democratically established rules and policies: *Garrett (Re)*, 1988 Carswell BC 3127, *McNamara et al*, IRC No C25/88 (Appeal of IRC No. C61/87 and C67/87); and, *Pacific Papers Inc. v. Communications, Energy and Paperworkers Union of Canada, Local 76*, [2000] B.C.C.A.A.A. No 455. Third, the Union argues that it is important to keep in mind the distinction between a no reprisal clause and a proposal about a union security clause. A no reprisal clause cannot be taken to impasse as it is not a term and condition of employment: *V.I. Care Management Ltd, (Re)*, [1993] BCLRBD No. 244; and, *IKEA Canada Limited Partnership (Re)*, BCLRB No. B155/2014. The Union argues that based on the jurisprudence that I have no jurisdiction to order such a clause.

Furthermore the Union argues that the Constitution makes the clause meaningless as only a member can file charges against another member, not the Union.

Regarding the lump sum payment, the Union argues that such payments are a frequent feature in situations where employees have lost income during lockouts.

With respect to the Executive Chef proposal, the Union argues that the proposal contradicts three fundamental features that I must consider. Proposed language must be clear, not vague or ambiguous and must avoid disputed interpretive issues: *British Columbia Public School Employers' Assn. v. BCTF*, 2012 Carswell BC 575, 111 C.L.A.S. 18; and, *Kelowna General Hospital*

and Hospital Employees Union, Re, 1989 Carswell BC 2498, 13 C.L.A.S. 3. In addition the Union argues that interest arbitrators have emphasized that there must be evidentiary underpinnings supporting a particular demand and not just assumptions: *Seaspan Marine Corporation and Canadian Merchant Service Guild and International Longshore and Warehouse Union, Local 400 (Health Benefit Plans)*, April 29, 2015 (Larson).

The Union also argues that objective criteria must be considered by the arbitrator: *SEM Resort Limited Partnership v. British Columbia Government and Service Employees Union,* [2014] B.C.C.A.A.A. Nos. 96 and 104.

The Employer argues that neither side bears the onus. I have two positions and I must pick one or the other.

The Employer notes that Article 4.01 of the Collective Agreement sets out that scheduling is part of management rights. The lead hand is a premium not a classification nor is it a posted position and therefore the lead hand duties can be taken away from the Chef as they are not the Chef's job.

With respect to the wage increase, the Employer argues that its 1.5% proposed increase is a reasonable number and closer to recent history looking at private sector employers bargaining in general. The Employer references Consumer Price Index statistics for all items noting that for 2015 Vancouver was 1.2%, British Columbia 1.1%; and that all items for the 12 months ending February 2016 was 1.6% for British Columbia.

The Employer argues further that its wage increase proposal results in a higher end rate wage rate. I do not intend to set out all the costing comparisons argued by the Employer which detailed an aggregate costing approach compared to an incremental costing approach. However, simply looking at the wage increases and using a weighted average wage rate of $15.73, the Employer's proposed increase of $0.24 in each of three years of the Collective Agreement results in the end rate being $16.45. The Union's proposed increase of 2% in each of the last two years of the Collective Agreement results in an end rate of $16.37.

The Employer argues further that the change to wage progression is an incentive for employees to stay beyond the season and is a financial benefit to the Employer for only five weeks.

The Employer argues that with respect to the lump sum proposal, the Union tendered no evidence that it is often part of labour dispute settlements. The Employer views it as a penalty.

With respect to the Executive Chef proposal, the Employer argues that other employers have the same position. It is not a groundbreaking proposal and not vague language. It will have no impact on employees.

Regarding the no reprisal clause, the Employer argues that it can be a collective bargaining proposal and the Union agreed to such a proposal at the Marine Drive Golf Club.

The Employer put several cases before me to set out what it argues is the approach that should be taken in analyzing the two positions. The Employer argues that objective data must be

assessed. It is not a question of fairness. It is an objective test based on comparability: *Re Beacon Hill Lodges of Canada and Hospital Employees Union*, [1985} B.C.C.A.A.A. No. 270; *Governor and Co. of Adventures of England trading into Hudsons Bay (c.o.b. the Bay) v. Britisj Columbia (Labour Relations Board)* [1996] B.C.J. No. 2698; *Farwest Handydart Services Inc (Re)*, [1996] B.C.C.A.A.A. No. 168; and, *Community Savings Credit Union v. Office and Technical Employees Union, Local 15*, [2000] B.C.C.A.A.A. No. 120.

V. AWARD

At the outset I will make some general comments.

The Final Offer Selection process agreed upon by the parties is a "winner take all" approach. I must accept either parties' position in its entirety. Had the process been one that allowed a final offer selection on an issue by issue basis, the result would have been different and perhaps more balanced at the end of the day.

I also note that there was no ability to pay argument.

I note further that when the Union makes its arguments regarding the language proposals of the Employer, it argues that I do not know the dynamics or the give and take that occurred in other collective agreement situations. I am not persuaded by this argument. Interest arbitrators compare other collective agreement provisions. They do not have evidence about the dynamics of the bargaining that led to those other collective agreement provisions. Such an exercise would involve a subjective assessment by the interest arbitrator regarding the give and take at the bargaining table. That is not a function that an interest arbitrator should undertake.

In addition, I note that I agree with the Employer that onus is not an issue.

Lastly, the Union commits to discuss with the Employer a joint program to secure business once back to work issues are resolved. Those discussions could have commenced before now as the Employer is back in operation and there was no need to wait for the outcome of this final offer selection process.

A number of the cases put before me involved first collective agreements. The case at hand is a mature collective bargaining relationship.

The case that I consider to be the one that is most instructive on the task before me is *Community Savings Credit Union v. Office Technical Employees Union, Local 15, supra*. At paragraphs 18 to 27 it states:

> It is generally accepted that interest arbitrators should attempt to replicate the result which would have occurred if the collective bargaining process had not been interrupted by arbitration.

This principle was expressed by the arbitration board in Re Board of School Trustees, School District No. 1 (Fernie) and Fernie District Teachers' Association (1982) 8 L.A.C. (3rd) 157 (Dorsey) in which the board, at p. 159, said:

There seems to be a consensus in British Columbia that the task of an interest arbitrator is to simulate or attempt to replicate what might have been agreed to by the parties in a free collective bargaining environment where there may be the threat and resort to a work stoppage in an effort to attain demands. This consensus accepts that an arbitrator's notions of social justice or fairness are not to be substituted for market and economic realities.

This approach was first articulated in Re Building Service Employees, Local 204, and Welland County General Hospital (1965) 16 L.A.C. 1 in which Professor Harry Arthurs asked whether the role pf an interest arbitrator was to adjust or adjudicate the difference between the parties. He rejected the notion of "adjustment", which might be described as finding a result to which both parties would subscribe. The correct approach, said Professor Arthurs, was adjudication, a process he described as follows:

Here, the board applies evidence to pre-determined and rational standards, as does a Court of law or a board of arbitration in a grievance dispute. The negotiating positions of the parties, and the acceptability of the award to them, is at best a marginal factor in the award. Rather, the board attempts to be objective in measuring the entitlement of the parties to wages and working conditions.

The board in Welland then went on to consider the proper yardstick for measuring proposed wage increases and determined that interest arbitrators should alter only the procedure and not the end-product of collective bargaining. Thus, it is an exercise in discerning labour market realities and, considered in this light, interest arbitration is a substitute for free collective bargaining where there may be the threat and resort to a strike. This being so, the interest arbitrator must look to relevant wage comparisons and not apply some abstract notion of social justice or fairness. The market and economic realities are the governing factors.

The views of Professor Arthurs in Welland were generally adopted by Arbitrator P.C. Weiler in Re Building Service Employees, Local 204 and Peel Memorial Hospital (1969) 20 L.A.C. 31. He did sound a cautionary note about the danger of the system "feeding on itself" by which he meant that interest arbitrators might simply rely on other interest arbitration awards.

If interest arbitration is an adjudicative method of decision making as opposed to an adjustment method through mediation, then it requires appropriate objective criteria to guide its reasoning. Since it is intended as a procedural substitute for the resort to a work stoppage within a system of free collective bargaining, then arbitrators must try to simulate the results which the parties would have reached under the sanction of a work stoppage. The best evidence of such a standard is the pattern of settlements in other

> comparable workplaces in the community, especially those reached in free collective bargaining.
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> It is not a function of an interest arbitrator to speculate as to how the issues would likely have played out in the dynamics of collective bargaining. Nor is it his or her function to fashion a settlement based on a reasonable compromise between the negotiating positions of the two parties. The interest arbitrator is required to "act adjudicatively" and base the final result on rational objective criteria: Re Beacon Hill Lodges of Canada and Hospital Employees Union (1985) 19 L.A.C. (3d) 288 (Hope) and Welland, supra.
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> The arbitral jurisprudence establishes that to achieve replication, the interest arbitrator must engage in an objective analysis of the terms and conditions of employment prevailing for similar work in the relevant labour market. In other words, what is the prevailing standard in relationships in which similar work is performed in similar conditions: City of Whitehorse and International Association of Fire Fighters, Local 2217 (1993) unreported (Taylor).
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> Interest arbitrators have observed that the search for accurate and relevant data to determine the prevailing standard and tailoring an appropriate replicated settlement will inevitably be an unscientific process. However, the arbitrator must ensure that, at the very least, an award is based upon a "rational matching of like circumstances": Fernie, supra.
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> If interest arbitration is to be viewed as a credible replacement for the result which likely would have occurred but for the interruption in collective bargaining, then it must not be based upon abstract notions of fairness or justice.

I now turn to addressing each of the proposals submitted by the parties.

Wage Increase and Wage Progression

Although the Union's wage increase proposal of 2% across the board in each of the last two years of the Collective Agreement departs from the historical cents per hour increase that the parties have normally utilized, it actually results in a lower end rate at the expiry of the Collective Agreement. The 2% is not out of line with BC Consumer Price Index forecasts, and is in the range of several private and public sector settlements as set out in the BC Bargaining Data. For example, although it is a public sector settlement, I note that the settlement between the Regional District of Nanaimo and CUPE includes a 2% increase in each of 2016 and 2017.

While the Employer urges that I adopt its $0.24 per hour increase in each of three years because it has been the historical approach taken by the parties, the Employer departs from the historical wage progression structure by proposing to amend the length of time to reach the top rate. I am not persuaded by the Employer's argument that such a change will be an incentive for employees to maintain employment after the busy season. There is no data to support such an assertion. It may well be that the current structure attracts and retains

employees because they receive an increase during their first busy season of employment. The only concrete thing to be taken from the proposal is that it does have a small financial benefit for the Employer.

Lump Sum Payment

I am not persuaded by the Union's argument that such payments are "a frequent feature in situations where employees have lost income during lockouts". I have no evidence before me to support such an assertion. Furthermore, the employees received lockout pay during the dispute as well, which helped offset lost income.

While the Employer views this proposal as a "penalty", it may also be an incentive for employees to return to the employment of the Employer.

The lump sum payment is a one time payment not built into the wage rates and is therefore not an ongoing cost.

LRB Relationship Enhancement Program

The Union dropped this proposal while the Employer proposes one session to assess its utility. Parties can access the LRB program at any point in time by agreement. Having had experience in offering such a program in the past, I can say that the LRB program is only effective when there is buy in by all parties concerned. There is no need to include it in a collective agreement settlement.

Settlement Agreement Dated June 4, 2015

The Employer proposed its deletion. The Union agrees with the proposal.

Executive Chef Position Excluded From the Bargaining Unit

The Employer proposes the creation of this new position under specific terms that guarantee that bargaining unit employees will not be displaced and bargaining unit hours will not be reduced or negatively impact the composition of the core group. The new position could perform bargaining unit work under certain circumstances.

The Union opposes the creation of this new position.

The Employer asserts that the position is required for leadership and accountability due in part to the size of the workforce that the current Food and Beverage Manager must supervise.

While I acknowledge that the Employer has pointed to a number of collective agreements that contain similar provisions, I do not have any data with respect to the size of those workforces.

Furthermore, it may be possible for the Employer to achieve what it wants to achieve with this proposal without amending the current Collective Agreement terms.

The Employer can create a new position without the Union's consent and attempt to argue that it is excluded from the bargaining unit by virtue of Section 139 of the *Labour Relations Code* if it is truly a management position. Lead Hand duties can be performed by the new position as those duties are not part of the Chef's job but are assigned by the Employer for which the employee receives a premium. The new position could do bargaining unit work pursuant to the current Article 20.03 provision.

On the other hand, the Employer could also continue to utilize the Chef with assigned Lead Hand duties. The Employer implied that it could not achieve the intended result by continuing with this approach. However, I have no evidence that the Employer made any effort to manage the Chef's work performance in order to ensure that proper results are achieved.

No Reprisal For Those That Crossed The Picket Line To Work

This is an Employer proposal rejected by the Union. The parties' positions on this issue are not surprising.

This issue is a problematic one. As noted by the Union in its argument, it has been addressed by the *Labour Relations Board* in *IKEA Canada Limited Partnership*, *supra*; and, *V.I. Care Management Ltd., supra*. In the *IKEA* decision the Board stated:

> The principle in *V.I. Care* recognizes the rights of parties. A union is within its right under its constitution and by-laws to investigate a member's conduct and then impose discipline on a member. A union's constitution and by-laws, however, do not give the union the right to terminate an employee from his/her employment. Rather, if a union decides to revoke an employee's membership, and if the terms of the negotiated collective agreement require union membership, the union can then notify the employer that with the loss of union membership, the terms of the collective agreement are to be applied. A resulting loss of employment would therefore be a consequence of the terms of the collective agreement and not the union's constitution. To avoid this situation flowing from the collective agreement, the employer is entitled to bargain about the collective agreement terms and the union is entitled to resist such a bargaining proposal. (paragraph 100)

The two cases stand for the proposition that a no reprisal clause does not go to the regulation of relations between an employer and its employees and therefore cannot be taken to impasse in collective bargaining. However, proposals about union security do relate to the regulation of relations between an employer and its employees and do not run afoul of *Code* principles.

I find the above to be somewhat form over substance. An employer can attempt to protect employees who have worked during a labour dispute and not violate *Code* principles by simply framing the matter under a proposed amendment to the collective agreement union security

provision; rather than a no reprisal proposal. The practical end result is the same. However, I am obliged to follow the above decisions.

In the case at hand the Employer's proposal is a no reprisal clause. The first part of the first sentence has no relevance as the Union as an entity cannot file charges against a member; only members can file charges. With respect to the second part of the first sentence, the Union as an entity could encourage a member to file charges. With respect to the second sentence, under the Union's Constitution hearings are conducted by appointed hearing boards. The result could be a reprimand, suspension, expulsion, fine or other discipline. The Employer's proposal would not allow the Union to take any disciplinary or adverse action. The proposal attempts to restrict the application and administration of the Union's Constitution and therefore cannot be taken to impasse. If the Employer's proposal had attempted to restrict the application of the Union Security provisions of the Collective Agreement, such a proposal would not run afoul of the *Code*.

The Union has agreed to such a proposal in the past at Marine Drive Golf Club. Parties can agree to whatever they want. The issue before me is whether I should award such a provision in a final offer selection process, when it could not be taken to impasse under free collective bargaining.

I must apply the replication theory in an objective fashion and select one of the parties' position in its entirety.

I award the Union's position for the following reasons, in addition to the comments made above.

I conclude that the Union's wage proposal of 2% in each year of the last two years of the Collective Agreement is within the range of recent settlements and can be supported by Consumer Price Index forecasts. The end rate wages will be less, on an ongoing basis, than the Employer's proposal. The historic wage progression is maintained.

While the lump sum payment initially appears to be problematic because the employees received significant pay from the Union during the dispute, it is a one time cost to the Employer and not built into ongoing costs.

The LRB program can be agreed to by the parties at any time.

The June 4, 2015 Settlement Agreement is deleted as agreed.

The Employer's position is not awarded.

While the wage increase results in a higher end rate, the wage progression proposal disturbs the historical structure and I am not persuaded by the argument that such a change will create an incentive for employees to maintain employment with the Employer.

I am not persuaded that the Employer has attempted to achieve its objective for an excluded Executive Chef position under current Collective Agreement terms and *Code* provisions.

And lastly, and perhaps most importantly, the no reprisal clause runs afoul of *Code* principles and would not be replicated in free collective bargaining in this instance given the Union's strong opposition to it, and the Employer's adamant position to include it.

I conclude that I cannot award a position that violates *Code* principles.

"Mark J. Brown"

Dated this 26th day of April, 2016.