IN THE MATTER OF AN ARBITRATION UNDER TRADE UNION AND LABOUR RELATIONS (CONSOLIDATION) ACT 2021 BEFORE THE EMPLOYMENT AND LABOUR RELATIONS TRIBUNAL

BETWEEN

UNION
(on behalf of employees)

Claimant

AND

EMPLOYER

Defendant

DECISION

Date of Hearing: 30th March 2022

Appearing for the XXXXXXX Union:	XXXX
Appearing for the Employer:	XXXXXXXX
Assessors:	Mr. Derrick Burgess & Mr. John Harvey

Background

1. The Employer did not have a retirement policy prior to 2018 and the Collective Bargaining Agreement between the Union and the Employer for 2018-2021 did not contain provisions on retirement. Following a change in management in 2017, a retirement policy was developed in consultation with the Union ("the Union" and/or "Union"). The Union assisted with this process by providing copies of a few policies with other Employers including a draft retirement policy from XXXXXX.

2. The retirement policy agreed between the Employer and the Union came into effect on 1st May 2018 and read as follows:

   *"**POLICY***

   Retention beyond the age of 65 is at the discretion of XXXXXX management. The policy also seeks to provide an opportunity after retirement for eligible employees who meet establish criteria.

PROCEDURE

- *Between twelve (12) and six (6) months before the employee's 65th birthday, Human Resources will meet with the prospective retiree to discuss with him/her their retirement plans and options.*

- *Employees of retirement age seeking continued employment post–retirement must make a request in writing to the Human Resource manager no later than 3 months before the effective date of retirement or no less than 3 months prior to the employee's birthday each year beyond the age of retirement if continued employment was granted at age 65.*

- *Employees working in post retirement are not eligible to be included in the pension plans, nor for any other benefits which do not apply after retirement age. The employee will be provided with a schedule outlining their entitlement if any when they are offered employment.*

Criteria considered for employment post retirement

- *Colleague has clearly demonstrated a willingness to participate and support The Employer programs to ensure exceptional service to our guests.*

- *No retiree will prevent the legitimate career aspirations of other employees.*

- *A careful assessment of performance appraisals must clearly indicate that the employee has exemplified the highest standards of work performance, personal deportment and positive attitude towards work and colleagues.*

- *The employee must agree to a physical examination by a position approved by the Employer three months prior to the effective retirement date and voluntarily agreed to an annual medical thereafter and if indicated, psychological examination. The medical and psychological examination will determine whether or not the employee is able to completely satisfy all job functions of the present position."*

3. The retirement policy was communicated to the employees of the Employer who were of retirement age of 65 or turning 65 by 31st December 2018. This was communicated in a group presentation in July 2018 with the Union. The retirement policy was also included in the July 2018 edition of the Colleague Handbook. Employees were issued with and requested to acknowledge receipt of the handbook during presentations in August and September 2018.

4. Any employee who wished to be considered for post-retirement employment had to complete a Post-Retirement Employment Request Form. This form was explained to the retiree group in October 2018 by the Employer and copies were distributed to each employee.

5. Of the employees that were of retirement age, the first group was scheduled to retire on 28th February 2019 and for those retirees who were successful in being selected for post-retirement employment it was proposed by the Employer that they should take a mandatory

31-day break. The Employer's intention was that after this 31-day break, the employees would be rehired under the terms of new contracts of employment.

6. On 25th January 2019, a meeting was held between the management team of the Employer and the Union to discuss the retirement of some staff members who had reached the age of 65. Out of 20 who applied, 12 were offered further employment. Due to the proposed 31-day break in employment, concerns were raised by the Union that the employees would lose their health insurance during this period. The Union were also concerned at the reduction of sick and vacation benefits for the 12 employees that were to be offered further employment. To avoid the need for a 31 day break in employment, it was agreed that the Employer would prepare a waiver for the Union to review.

7. The first waiver that was prepared by the Employer and sent to Union on 29th January 2019 read as follows:

   "We, the management of XXXXXXXX ("The Employer"), hereby enter into this agreement with the XXXXXXX Union ("X").

   In accordance with earlier discussions and agreement with the Union laying out retirement terms for the Employer's employees under the terms laid out in the Employer Colleague Handbook (2018) and according to the procedures attached ("the procedures") established therefrom, it is agreed that:

   1. *Employees who have retired and successfully applied for new employment with the Employer may be rehired.*
   2. *In order that no loss of employment and earnings are incurred by such employees as a result of a month's lay off in accordance with the Employment Act 2000*
      a. *Such employees will not claim continuous employment if re-hired less than a month after retirement.*
      b. *Such employees will have benefits in accordance with a new hire with the exception of:*
         i. *Vacation pay, which will be 50% of the employee's entitlement prior to retirement to a maximum of three (3) weeks, but no lower than 2 weeks."*

8. This waiver was not signed. Instead on 28th March 2019, the Union forwarded a sickness and vacation benefits proposal for consideration. The Employer responded to this proposal by letter dated 9th April 2019 with a revised vacation benefit proposal. This increased the amount of vacation offered to the post-retirement employees so that they were not treated as if they were new employees.

9. A further email was sent to the Union by the Employer on 1st May 2019 requesting a response followed by a further chaser letter dated 30th May 2019. Part of this letter stated:

   "Those selected for post-retirement employment were scheduled to take a mandatory 31-day break before brought back on under new contracts of employment with effect from April 1st, 2019. Under the new contracts, sick and vacation benefits were to be reset as if they were new employees.

   During a meeting with Employer management on January 25th, you indicated that if you had known that this is what we wanted to do, you could have recommended that we offer

something similar to another employer, who worked with the Union on developing benefits that were somewhere in the middle for their retirees.

Also in response to your offer to have the Union waive the need for a 31-day mandatory break for retirees being offered post-retirement employment, Employer management drafted and submitted a waiver, which has not been accepted, for various reasons.

On March 28, 2019 we received a copy of your personally developed sick and vacation benefits proposal for consideration. Unfortunately, we never received details of the sick and vacation benefits specially negotiated by the other employer for their retiree group.

Due to the Employer's financial position, which was explained to you and your team during January's meeting, we were unable to agree with your personal suggestion. Hence I submitted a counter-proposal, which is our final proposal on April 9th. A follow-up attempt was made on May 1st.

I trust you have noted that our counter-proposal offers increased benefits over those we initially presented, which would have seen the post-retirement group start anew with the accrual of their benefits...."

10. Another meeting was held between the Employer and the Union on 17th September 2019 to discuss a further version of the benefits proposal by the Union and the waiver. The Employer responded to this further on 1st October 2019. Ultimately, the following waiver was signed by the Union on 11th November 2019:

"We, the management of XXXXXXXX ("The Employer"), hereby enter into this agreement with the XXXXXXX Union ("X").

In accordance with the earlier discussion and agreement with the Union laying out retirement terms for the Employer's employees under the terms laid out in the Employer Colleague Handbook (2018) and according to the procedures attached ("the procedures") established therefrom, it is agreed that:

1. *Employees who have retired and successfully applied for new employment with the Employer may be rehired.*
2. *Once rehired, employees will receive the following benefits.*
    a. *Vacation:*
        i. *After 1 years' service: 2 weeks*
        ii. *After 10 years' service: 3 weeks*
        iii. *After 20 years' service 4 weeks*
        iv. *After 25 years' service 4 weeks 3 days*
    b. *Sick*
        i. *1st year to end of 10th year Maximum 15 days*
        ii. *From 10th year on: Maximum 20 days*
        iii. *Employees may accumulate up to 50 days sick leave."*

11. The Employer's position is that the discussions with the Union and, in particular, at the meeting on the 25th January 2019 made clear that the employees would retire and then be rehired on new contracts with their benefits reset and that the Union understood that this was the plan. The initial waiver's reference to "*new employment*" and "*rehired*" as well as

employees not being able to "*claim continuous employment*" indicated that employees would be working under a new post-retirement employment contract in which their past years of service would not be recognized. The Employer also asserted that the policy agreed was not a deferred retirement policy, but one which provided employment after actual retirement.

12. The Union's position is that as they did not accept the initial waiver provided by the Employer referring to "continuous employment", there was no concession made on seniority or past length of service not being recognized in the new post-retirement employment. Their position was that the Union would never agree that an employee's seniority be taken away from them. The employees also had no break in service with the Employer. The Union also relied upon the fact that the waiver that was signed by both parties took account of the employees' past years of service as a higher level of vacation and sick benefits were agreed than if the employees were new hires. Likewise, the Union argued, account should be taken of past years of service when calculating any redundancy pay due to the employees.

13. In January and February 2020, each of the Claimants' employment was terminated and their vacation benefits paid out to them accordingly. They also each signed new employment contracts, with the one exception being PG whose contract was signed on her behalf by RH. PG's contract was signed on 23rd January 2020, WM's contract was signed on 2nd February 2020, GS's contract was signed on 24th January 2020 and MT's contract was signed on 30th January 2020.

14. Each of the employees were also sent a letter dated 23rd January 2020 explaining their post-retirement employment. These letters informed them that their current employment would terminate on 28th February 2020 – their official retirement date. They would then be issued with a post-retirement contract that would be effective for the period from 1st March 2020 to 31st December 2020. They were notified that they would be paid for all hours worked and vacation accruals on 29th February 2020 which was the end of their current employment contract. Their sick and vacation benefits would be reset as per the agreement with the Union. If they wished to remain on staff beyond 31st December 2020, they had to submit a new Post-Retirement Employment application by 30th September 2020.

15. The contracts that were signed were entitled "*Post-Retirement Employment Contract*" and stated that "*This contract of employment must be completed and signed prior to the commencement of employment by all Post-Retirement Employees*". The Employment period stated "*Start date: March 1, 2020 End date: December 31, 2020*". Conditions of Employment were: "*Unless otherwise specified, employment will be subject to the Colleague Handbook, Employer policies and the HEB-UNION Collective Bargaining Agreement (CBA), where applicable. This offer does not imply or guarantee ongoing or regular work beyond the dates listed under the section entitled EMPLOYMENT PERIOD*". Under Employee Acknowledgement, it confirmed that "*Each occasion that you work, i.e. after the End Date specified in this contract, will require a separate fixed term contract of employment*". Under Employer Declaration, it stated that "*The terms and conditions referred to in this contract constitute all of the terms and conditions of your employment and replace any prior understanding or agreement between you and the Employer.*"

16. These contracts were signed only a few weeks prior to the Covid-19 pandemic. Instead of being employed for at least another year as had been their expectation, the Claimants' employment was subject to lay-off and then redundancy due to the closure of the Employer.

WM employment was terminated due to redundancy on 19th October 2020 and GS, MT and PG's employment was terminated for the same reason on 26th October 2020. The Employer made a redundancy payment to each of the Claimants in accordance with their new contract of employment and its start date of 1st March 2020. Whereas their colleagues who had not yet reached retirement age received significant redundancy payments due to their long years of service, the Claimants did not do so as their service was only recognized from 1st March 2020.

THE EVIDENCE OF THE PARTIES

17. In the Union's opening submissions, the Union representative stated that the Claimants had retired and had been offered employment from 1st March 2020 to 31st December 2020, but they had been unable to be employed and receive those wages for the full 10 months because of the pandemic. This situation was not the fault of the Claimants or the Employer. However, the Claimants should not be penalized for their inability to work because the pandemic closed the Employer. They should be properly compensated for their combined 100+ years of service as a matter of integrity. The Union representative stated that he had spoken with the Employer's representative, GW, and discussed reaching a compromise. However, this had not occurred.

18. In the Employer's opening submissions, RH agreed that, but for the pandemic, the circumstances would be very different. Redundancy could not be avoided for the employees under the Employment Act 2000 as the extended lay-off period of 4 months had been reached in 2020. He asserted that even though the final waiver made no mention of continuous employment, it was clearly understood by the Union that new contracts would be issued to the post-retirement employees throughout the negotiations and this step was implemented in early 2020. The waiver had only been suggested by the Employer to meet the concern of the Union that the 31-day break would have left the employees for a period without health insurance. The 31-day break had initially been proposed by the Employer to avoid any possible claim by employees that there was continuous employment between their pre-retirement and post-retirement contracts.

PG – Signing of her contract

19. PG had been employed as a XXXXX and had worked for the Employer for 35 years. PG gave evidence that on or around 23rd January 2020, RH called her to request that she attend the Employer to sign a document. As this was PG's day off and she was busy, she informed RH that she would not be able to come into work to sign the document. She stated that RH informed her that it must be signed and handed in the same day, with him additionally saying "What so I have to sign for you?" In response to this, PG said "whatever". She stated that this was not her indicating that she was giving RH permission to sign the new employment contract on her behalf.

20. When PG next went into the Employer to work some time later on 15th March 2020, RH handed her a closed envelope. As she was working that day, she did not have a chance to open the envelope until she got home and was unaware of its contents: the new employment contract. After opening the envelope when she got home, PG noted that RH had signed the contract on her behalf. She was unable to go back to the Employer to address this issue as that same day there was a Covid case, and all staff were sent home. She stated that the Employer was subsequently shut down on 16th March 2020 due to the Covid case.

21. RH gave evidence that in the call to PG on 23rd January 2020, he had taken time to describe the contents of the employment contract and explain the effect of signing it. He stated that he explained to PG that as she had turned 65 years of age on 24th December 2019, her employment had terminated due to her retirement and that she was being offered a new contract with reduced vacation. After PG explained that she was unable to come into work, RH asked whether he should sign on her behalf. RH stated that in reply to this, PG said "do whatever" which he interpreted as being permission to sign on her behalf.

22. The Union argued that there was no real urgency for RH to sign the contract on PG's behalf on 23rd January 2020 because the signature date of this contract was earlier than the others: XM contract was signed on 2nd February 2020, GS contract was signed on 24th January 2020 and MT signed her contract on 30th January 2020. Time ought to have been given for PG to sign the contract after reviewing it herself.

RB

23. RB explained that she had provided to the Employer a copy of the retirement policy of another Employer as she had previously worked on this with that employer. She assumed that the terms of the new XXXXXX policy would follow this. The policy was not to be used to eliminate staff. RB had a meeting with the staff in July 2018 to make it distinctly clear to them that the policy in place was not to be used in a way to eliminate their employment. Within this policy (modelled after XXXXXX's), it was common practice that once an employee reached the age of 65, the individual would obtain a doctor's letter to present to the employer confirming that they were fit to continue employment. If this was accepted, then the employee's employment would be continued. There had been no negotiation in which the seniority of any employee had been given away by the Union and this was not an issue that they had faced at any other Employer.

24. In the meeting of 25th January 2019, RB recalled RH stating that employees would "apply for continued employment".

25. RB also stated that in the meeting on 11th November 2019 at which the final waiver was signed, past service had been recognized by the increased vacation and sickness benefit that had been agreed. This service should also therefore be recognized when it came to determining any redundancy payment. She accepted that RH had talked about the break in service for 31 days, but the Union did not agree with this.

26. RB stated that reducing the redundancy payment by not recognizing the full length of service of the employees was effectively a cost saving exercise. Neither her nor the Union saw a copy of the post-retirement contract before the staff signed it. The employees only went to her after they had signed it. RB advised them that they should not have signed the contract that was provided to them.

RH

27. RH stated that in the meeting of 25th January 2019 that after referring to the employees having "continuous employment", he subsequently corrected himself to confirm that there would not be "continuous employment". RH re-iterated that the policy was not a deferred retirement policy in which seniority would be automatically recognized as employment would be continuous, but rather employees were retired and then re-hired under a new contract.

28. RH also re-iterated that the firm intention of the waiver was to ensure that the employees were not without health insurance, but with the understanding that any post-retirement employment was not treated as continuous employment.

TC

29. TC was one of the two Managing Directors of the Employer, responsible for the areas including human resources, finance and insurance. She confirmed that the pandemic had taken a huge toll on the industry which had made this situation very difficult. The local management, including herself, had been laid off on 31st July 2020 so she was not able to comment on events after that date. Nonetheless, she was very sorry to see what had happened. TC recalled that there were discussions regarding the retirement policies, including another Employer policy, and that the intent on the Employer's side was to revitalize the work force and their approach was not to be construed as an ageist policy. The broad details of the policy were discussed and laid out to the employees and she believed that all employees were present with the exception of PG.

30. The policy provided that the employees were to be retired at the age of 65 and based on an assessment by Human Resources of job performance, discretion would be exercised in granting a new contract on "day zero". The intent initially was to cut continuous employment by having a 31 day break in service. However, the issue was the employees would have lost their health insurance at an age when they would most need it for this short period. Therefore, whilst not keen to do so from a legal perspective, the Employer was willing to look again at this from the human side and so the Employer suggested a waiver which would enable the employment to proceed without taking the employees off the roster and their health insurance. It was therefore agreed that if the Union signed a waiver, there would not be a gap in service and the employees would not be taken off the health insurance.

31. Nonetheless, the contract signed by each employee made clear that it was a new contract and Human Resources met with each employee one by one to explain the process. She recalled that the drafting of the waiver was ongoing at this time and pressure was building with the contracts all prepared, but the waiver was still not signed. TC was not directly involved with the new employment contracts, but it was quite clear that the contracts were brand new.

KT

32. KT was the Human Resources Manager at the Employer. She worked on the development and execution of the retirement policy. KT explained that the reference to the Employment Act 2000 in the initial waiver was included to make doubly sure of the Employer's position in case the employees raised the issue of continuous employment later. She was present at the meeting on 25th January 2019 at which RH went through the policy with the Union. She recalled RH referring to continuous employment and when he said that she passed him a note on this point. He then went on to explain that the Employer would provide new contracts of employment with the employees being treated as new employees of the organization.

33. She recalled that between January to November 2019 there was a lot of "to and fro-ing" between RH and the Union representative. The Union representative had provided a copy

of similar vacation and sick benefits with XXXXXX as part of this. The discussion between them was in relation to these benefits rather than any discussion in relation to continuous employment. The original plan had been to carry out the retirement of the employees and offer new contracts earlier in 2019. However, due to ongoing discussions, this did not occur until 2020. At that time, the internal forms and final wage slips confirming retirement were issued along with the new contracts. The plan at that time was to have all those who were to be offered new contracts to sign these by 25th January 2020. Hence why RH was keen for PG to sign her contract by that date.

34. KT also referred to her own subsequent conversation with PG in October 2020 regarding her redundancy. KT made various attempts to request PG to come into the office to hold the redundancy meeting. PG refused to come into work for the redundancy meeting and she therefore sent an email with the redundancy document to PG's daughter's email that PG had given to her.

35. KT stated that she had been comfortable with the final waiver signed as it was clearly understood by everyone that there would be new contracts of employment issued. She recalled MB at the meeting on 25th January 2019 as stating: "So, when they start again, they get new benefits."

36. KT also referred to the example of the retirement policy of another Employer. This was different. The other Employer had a deferred retirement policy and this did not apply to all employees. Whereas the Employer had a policy of actual retirement, and any further employment was only offered by way of a new contract, not by an agreement to defer the retirement date.

Closing Arguments

37. RH in closing reiterated that when the parties developed the retirement policy, the pandemic had never been in mind. He strongly asserted that the Employer has always made its decisions in good faith. The waiver signed by both parties came about and was driven as a result of discussions with the Union to make sure employees were not disadvantaged to take the 31-day break in respect of their health insurance. The Employer acquiesced to Union's concerns on this point and, in his view, the Union understood the Employer's position that there was no continuous employment due to the retirement of the employees and issuing of new contracts. He therefore considered that the correct amount of redundancy pay was provided to each of the Claimants upon their redundancy in October 2020.

38. The Union representative in closing highlighted that PG was an employee with 35 years' service, GS had 27 years' service and both WM and MT also had over 20 years' service. Through no fault of the employees or either party, Covid negatively impacted their employment and yet it was the Claimants that had been penalized. Their expected employment in 2020 had not materialized due to an "act of nature". The initial waiver referred to the Employment Act 2000 and continuous employment and so this had to be changed. There was no reference to seniority in the signed waiver and it was only reasonable, fair and just that the Claimants should receive their redundancy pay based on their full years of service with the Employer, and not just their service since 1st March 2020.

39. RB in closing highlighted that the Employer's position was simply to save costs, which should not be the case when employees have worked for the company for decades. She

also re-iterated that the Employer did not have the authority to bring someone in on their vacation day as they attempted to do so with PG. She emphasized that PG was right deciding not to go into the Employer to sign the document and RH improperly signed the contract on her behalf.

Analysis

40. In an earlier decision also dealing with the retirement policy of the Employer, I summarized it as follows: "*This was a compulsory retirement policy and it was agreed between the Employer and Union and became effective on 1st May 2018. It was communicated to the employees in July 2018 and there was no objection to the policy's implementation at that time. The policy provided that retention beyond the age of 65 was at the discretion of the Employer. The policy together with the waiver envisaged that the post-retirement employment was a new contract of employment with different benefits for those chosen. Therefore all employees over the age of 65 would have their former employment terminated by reason of retirement and new employment entered into with the Employer if selected.*"

41. At the time that decision was written on 23rd March 2020, Covid-19 had just reached Bermuda, but its ramifications could still not be foreseen. In 2019 when the discussions were ongoing between the Employer and Union, the pandemic could scarcely be imagined. At that time, the Employer were nonetheless keen to ensure that if new contracts were to be entered into following retirement, then, for the avoidance of doubt or, as KT put it, to be doubly sure, there should be a recognition, whether by way of a 31 day break in service or a waiver, that no continuous service was being recognized. From the Union's perspective, they were keen to ensure that there was not a time when the employees were without health insurance due to a break in service.

42. For both parties, they would have assumed that under the new contracts issued to the post-retirement employees, it would be unlikely that any employee would have their employment terminated by reason of redundancy. After all, the clear understanding of the parties was that each post-retirement employee would be on a fixed-term contract of 12 months or less. Any termination of employment for these post-retirement employees would therefore most likely occur on the basis that the contract would not be renewed for a further year at some point in accordance with the retirement policy. Their termination by retirement would not result in a severance payment and so length of service would be an irrelevant consideration. To be plunged into a situation in which there was no option but to pay redundancy (rather than await the end of the fixed-term post retirement contract) was not a particularly likely outcome.

43. However, that is what occurred as a result of the pandemic in 2020.

44. Much of the evidence at the hearing was taken up in relation to the discussions between the Employer and the Union and the terms of the initial waiver and signed waiver. In attempting to identify the contractual intent of the parties, these exchanges between the Employer and the Union provide an important backdrop, but an equally relevant document is the "Post-Retirement Employment Contract" signed by each Claimant with the Employer. This, together with the Collective Bargaining Agreement, Colleague Handbook containing the retirement policy and the waiver form the contractual matrix agreed between the parties and the Claimants.

45. The appropriate legal approach to ascertain whether the parties have reached agreement on the terms is not determined by evidence of the subjective intention of each party. It is, in large measure, determined by making an objective appraisal of the exchanges between the parties. If one party understands an offer in accordance with its natural meaning and accepts it, the other party cannot be heard to say that he intended the words of his offer to have a different meaning. The contract stands according to the natural meaning of the words used. The object of the exercise is to determine what each party intended, or must be deemed to have intended.

46. The first document chronologically is the Retirement Policy itself. This establishes a "compulsory retirement policy" with retention "beyond the age of 65 [being] at the discretion of XXXXXX management." It refers to "working post retirement" and an "effective date of retirement" being at age 65. These all point firmly to the fact that the Retirement Policy is not one in which retirement is deferred, but actually occurs and is then followed by post retirement employment. On the issue of continuous employment/past service, the language does include reference to "Colleagues of retirement age seeking continued employment post retirement" and the granting of "continued employment". This does introduce some ambiguity as to whether there is continuous employment. However, overall the natural meaning of the policy is that employees will be retired at age 65. Unless otherwise stated, with employment being terminated due to retirement, it would normally follow that service or continuous employment would come to an end at that time.

47. The meeting between the Employer and the Union on 25th January 2019 represented an exchange in which the Employer made clear that any post retirement employment was to be new employment in which when the employees "started again", they would "get new benefits". The self-correction by RH that it was not continued employment would have further reinforced this impression and the request that there be a 31 day break between contracts by the Employer made it clear that past service was not to be recognized. The initial waiver also confirmed that the employees would not be able to claim continuous employment. Had this waiver been signed, then there would have been no doubt that the agreement reached between the parties was that no past service pre-retirement was to be recognized.

48. The subsequent removal of the reference to employees not being able to claim continuous employment would, conversely, be expected to be an indication that the failure to acknowledge past service post-retirement was unacceptable to the Union. However, as recalled and explained by RH, and not seriously contested by U1 and RB, the reason for its removal was because the Union considered that there should be no reference to the Employment Act 2000 as it did not apply and the CBA should govern the employment relationship.

49. Hence, although the explicit reference to employees not claiming continuous employment was removed from the initial waiver and not repeated in the final waiver, this does not appear to have been because the Union were not prepared to countenance any loss of seniority at that time. That may have been their unstated position, but it was not expressed in any of the exchanges with the Employer. Instead, the discussions then continued with the sole focus of the negotiation being what ought to be the vacation and sick benefits under the post-retirement contract. No further discussion seems to have been undertaken in relation to recognition of past service. It is evident that had this issue been discussed, then the Employer's position would be to reiterate that there was no continuous employment or past service recognized other than insofar as it was taken into account in agreeing the

vacation and sick benefits. Based on what RB stated at the hearing, likewise the Union would have stated that seniority of the employees was not to be compromised in any way. It is a pity that the drafting of the signed waiver did not explicitly deal with whether the past service of the employees was to be recognized in relation to severance pay under Article 19 of the CBA as it did with vacation and sick leave under Articles 22 and 23. Instead, the agreement reached was to recognize past service in relation to vacation and sickness benefits but make no mention of it generally.

50. The Employers were comfortable that the reference to new employment and rehiring in the context of the discussions with the Union indicated that the Union understood that the employment post-retirement was to be a new start for the employees. The signed waiver referred to these earlier discussions in its second paragraph. The Employer had made the concession to reach agreement by removing the 31-day break and agreeing that the vacation and sick leave benefits could be based on pre-retirement service with no mention made by the Union of seniority being acknowledged more widely than that. There is no provision in the signed waiver recognizing past service.

51. Whilst it is accepted that the reference to the service for vacation and sick leave does enable the Union to argue that past service was being recognized in the post-retirement employment, it is within the context of agreeing vacation and sick leave benefits and not more generally than that. There is a definite tension in the signed waiver between the reference to retirement/new employment/re-hire and the reference to service. However, the overall meaning of the waiver is reasonably clear in that past service is agreed to be taken into account in relation to vacation and sick leave alone. It is not taken account of in relation to severance pay, which is not carved out as another exception to the new start for the employees post-retirement.

52. With there being clear agreement under the retirement policy and the waiver that the employees were to be retired, and so their employment be terminated at that time, before being offered new contracts and re-hired, if there was an intention to ensure that seniority was to be protected across the board, then this needed to be explicitly included in either the waiver or the contracts of employment. In the absence of any discussion or negotiation on this point, the fact that there was to be a termination of employment by way of actual retirement (rather than deferred retirement) meant that the length of service would commence anew post-retirement. Insofar as it is relevant, continuous employment as defined by the Employment Act 2000 would continue only up to and including the retirement date.

53. The Employer was incorrect to feel "comfortable" on the issue of continuous employment and the lack of a break of service of 31 days given the ambiguity introduced in the signed waiver on this issue by the recognition of past service in relation to vacation and sickness benefits. However, on balance, the objective meaning of the policy together with the final waiver is in the Employer's favour. This was because of its reference to employees "*who have retired*" and their "*new employment*" "*once rehired*". As both KT and RH pointed out, the Employer's policy involved actual retirement of employees rather than deferred retirement. In a policy where retirement is deferred, then length of service and continuous service will continue unless otherwise stated. Conversely, with a policy of actual retirement and rehiring, length of service and continuous employment will come to an end and re-start unless otherwise stated.

54. The final piece of the contractual jigsaw to consider is the "Post-Retirement Employment Contract". As with the ambiguity inherent in the final waiver, it is again a pity that this contract was not shared with the Union prior to its distribution to the employees or alternatively, the Union upon being shown the signed contracts, did not immediately object to it. Either might have provoked a dialogue on the issue of past service generally at that time and avoided it coming to a head only when redundancies were made 9 months later. However, both inactions are very understandable. The Employer would have viewed the contract as being entirely consistent with their understanding of the policy and waiver and the Union would have had more than enough urgent issues to deal with at the start of the pandemic than to focus on the terms of the contract.

55. The "Post-Retirement Employment Contract" for each Claimant has the employment period as having a start date of 1st March 2020 and end date of 31st December 2020. There is no reference to any date of continuous employment or acknowledgement of past service in the contract. The contract also contains the entire agreement provision that "*the terms and conditions referred to in this contract constitute all of the terms and conditions of your employment and replace any prior understanding or agreement between you and the Employer*". However, the contract also confirmed that the employment will be subject to the HEB-UNION CBA and Employer policies and Colleague Handbook.

56. With each Claimant (with the exception of PG) having personally signed their new contract containing these terms, there can be no dispute contractually that these employees were re-hired on a new contract and that the start date of this contract was 1st March 2020. As this is the start date to which each employee agreed without any reference to past service or prior continuous employment, then there is no legal basis based strictly on the terms of the contract for calculating the redundancy pay that was due to each Claimant from any other date than 1st March 2020.

57. The contracts were consistent with the 2019 discussions and the signed waiver of 11th November 2019 in which both parties agreed that "*Employees who have retired and successfully applied for new employment with the Employer may be rehired. Once rehired, employees will receive the following benefits……*". The signed waiver envisaged the actual retirement and rehiring of the employees and the benefits agreed were accurately included in the contract. The terms of the signed waiver were also reflected in the letter to each employee of 23rd January 2020 in which they were informed that their current contract of employment would terminate on their official retirement date of 28th February 2020 and a new Post-Retirement Employment contract would be then issued for the period from 1st March 2020 to 31st December 2020. This letter was also consistent with the discussions that had been ongoing between the Union and the Employer during 2019.

58. In PG's case, there is the issue of whether she actually agreed to her new contract of employment. The situation in which RH signed on her behalf after Mrs Goater said "Do whatever" in response to his question whether he should do so, is not ideal. She then did not receive the signed contract until some 7 weeks later on 15th March 2020 and then the Employer shut its doors the next day due to a Covid case and never opened them again for the remainder of PG's employment. PG therefore never physically worked under the terms of the new contract, albeit her employment continued for another 7 months until her employment was made redundant.

59. Whilst there might be an argument as to whether the new contract was agreed or not, that argument does not benefit PG either way. I do find that she did agree to the contract as she

did not protest that her signature was unauthorized or that the contract's terms were unacceptable for the following 7 months. Even if PG did protest against the unauthorized signature, and there was no evidence given that she did during the course of her employment, the practical outcome of any objection to her of the new terms would have been presumably that the Employer would have informed her that these were the only terms on offer, and were those agreed with the Union and explained to her by the Employer during 2019.

60. Given the above analysis, I conclude that the Employer paid the correct amount of severance pay to the Claimants. It is appreciated that the paltry sums that these involved were very galling to the Claimants given their numerous years of service overall, particularly when compared to the much more significant sums that were received by their long-term colleagues at the same time who had not yet reached retirement age. It is also made worse by the fact that upon agreeing to their new contracts for 2020, they did not have the benefit of working for a full wage for that year and missed out on 10 months' pay. The Claimants had the great misfortune of their age placing them on the wrong side of the retirement when a wholly unforeseen "act of nature" (as the Union representative put it) closed the Employer and obliged it to pay full severance to all its employees.

61. By this timing of the pandemic and its impact on the Employer, understandably not foreseen by either the Employer or the Union, there is every reason to be sympathetic to the Claimants. By a matter of months, they missed out in receiving a much larger severance package based on their pre-retirement length of service.

62. Although the Union have not argued that Section 5 of the Employment Act 2000 relating to continuous service should apply, that is one legal basis that potentially enables the Claimants to be able to claim that their pre-retirement length of service should be taken into account when calculating the redundancy payment. Section 5(2) states that "it shall be presumed, unless the contrary is shown, that the employment of an employee is continuous". However, by Section 5(1) continuous employment is defined as being from and including "*the first day on which he begins to work for an employer (including any probationary period) and shall continue up to and including the date of termination.*" The date of termination for the Claimants is their official retirement date of 28th February 2020. This is not a sham situation in which there have been a series of short term contracts or a break in service for the other reasons outlined in Section 5 when continuous service is deemed to continue. On the contrary, it is in accordance with an agreed retirement policy that was the subject of consultation with the Union and explained to the employees. There is arguably not a 'harder' termination date than that of retirement.

63. Although not referred to by either party, the CBA also is of not much more assistance to the Claimants. In the Article relating to Seniority, it states that "the employee's seniority shall cease automatically upon termination of service". There was the termination of employment of 28th February 2020 which the Employers were careful to record by way of their termination and offer of new employment and then the new employment contract with the start date of 1st March 2020.

64. Viewed from the Employer's perspective, it was nonetheless as early as July 2018 that the Employer together with the Union first informed the employees of the new retirement policy. So each Claimant would have appreciated that their employment would have ended in retirement with the promise thereafter of another 12 months fixed term employment renewed annually at the Employer's discretion.

65. This takes us full circle to telling point and rhetorical questions made at the start and conclusion of the Tribunal hearing: the Claimants entered 2020 with the expectation of a wage for at least 10 months of 2020, but come October had neither received this nor anything other than a minimal severance package. Was this reasonable, just or fair? Or upholding the integrity of the relationship as stated? Whilst the was legally entitled to abide by the contractual agreement reached with the Claimants, it was nonetheless a situation in which the might also have concluded, as reported on behalf of the stating, "let's make that compromise". That has not been achievable to date, but perhaps with the resurrection of tourism in a post-pandemic world, such might become possible irrespective of the outcome of this decision in the favour, depending on the future.

66. In conclusion, unfortunately for the Claimants and with much reluctance given their years of service prior to their retirement, I find that the made the correct payments in accordance with the agreement reached with the employees directly in their new contracts of employment and the agreement reached with the Union in the form of the retirement policy and waiver.

Dated this 15th day of June 2022

C.J. Rothwell

Craig Rothwell
Chairman