

IN AN ARBITRATION

BETWEEN:

**VICTORIA TIMES COLONIST, A DIVISION OF  
CANWEST MEDIAWORKS PUBLICATIONS INC.,**

the "Company"

AND:

**VICTORIA-VANCOUVER ISLAND NEWSPAPER GUILD,  
LOCAL 30223 OF THE NEWSPAPER GUILD,**

the "Guild"

RE: **Mandatory retirement policy**

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**AWARD**

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Arbitrator:	Rod Germaine
For the Guild:	N. David McInnes
For the Company:	Michael H. Korbin
Hearing:	May 31 & June 1, 2005; Victoria, B.C.
Written Submissions:	November 4 & 18, and December 20, 2005; January 19, and February 21, 2006
Date of Award:	March 13, 2006

## **Introduction**

[1] In late January 2004, the Company introduced a policy of mandatory retirement at age 65. The Guild immediately grieved. The parties agree the issue is whether the Company is entitled to unilaterally implement and enforce such a policy. The parties also agree the issue encompasses the question of whether this particular policy meets the requirements for any rule unilaterally promulgated by management.

[2] The impugned policy is intended to complement an existing mandatory retirement scheme in the parties' collective agreement. The existing scheme is a component of Letter of Understanding No. 5 ("LOU#5"), adopted by the parties and incorporated into the collective agreement in 1984. But the scope of LOU#5 is restricted to regular employees on the payroll on December 1, 1983. The existing mandatory retirement provisions therefore do not apply to employees hired since 1983 (referred to in this award as "post-1983 employees"). The purpose of the disputed policy is to extend mandatory retirement to all employees by covering post-1983 employees.

[3] The Company gave the Guild notice of the disputed policy on January 27, 2004. The effect of the policy is unmistakably conveyed by the first paragraph: "Employees, once reaching the age of sixty-five years (65), must retire by the end of the calendar month in which their 65<sup>th</sup> birthday occurs." The Guild's response was swift. In a letter to Ms. Robinson dated and faxed on January 29, 2004, Deborah Service-Brewster, the Guild's Administrative Officer, said:

The policy is inconsistent with the terms of the collective agreement. Please confirm that the... [Company] will be rescinding the retirement policy. Failing receipt of such confirmation, the Guild will pursue the matter through the grievance procedure.

The collective agreement reference was to LOU#5. I will quote the relevant portions of LOU#5 below.

[4] The purpose of the policy was explained by Cindy M. Robinson, the Company's Director of Human Resources. She testified it is responsive to the low rate of turnover in the bargaining unit, which results in very little "new blood" among the employees. Past buy-out programs have given the Company experience with the positive contribution derived from new employees. Their enhanced enthusiasm, particularly in editorial and advertising, is reinvigorating and, in the Company's view, tends to attract younger readers. As Ms. Robinson put it, "although people at 70 are productive, we need turnover." As the post-1983 employees are now approaching age 65, the policy will increase turnover and, it is anticipated, assist the Company to cultivate wider readership.

[5] The parties' positions necessitate an extensive review of the history of mandatory retirement in this relationship. Relying on that history, the Guild argues that the restricted scope of LOU#5 implies that other employees have the right to retire when they choose - a right enjoyed by all employees until 1984 and recognized by the Company in collective bargaining in 1984 and after. The Guild says the Company cannot unilaterally do what it has agreed in bargaining it cannot; it must instead "negotiate the right to compel mandatory retirement."

[6] The Company's response is that, since the collective agreement is silent on the matter of mandatory retirement for employees hired since 1983, nothing in the collective agreement prevents the Company from exercising its management right to implement a mandatory retirement policy. For the reasons which follow, I conclude that this is the correct view of the collective agreement. The Guild's case is unable to overcome the fundamental fact that, if there ever was an agreement between the parties to the effect that employees outside of LOU#5 are not required to retire, it was never reduced to writing and is therefore beyond the jurisdiction of this arbitration board to enforce.

[7] The Company also says it has never agreed *not* to introduce a mandatory retirement policy. But, as the Company contends, even if it had made a such a representation by practice or otherwise, or even if it had signed a letter of understanding

to that effect, the Company would have been entitled to introduce a new mandatory retirement policy in the manner it did. The Company gave the Guild notice of its intention to implement the policy in time to permit the Guild the opportunity to address the subject in collective bargaining. The Guild had that opportunity in the collective bargaining which produced the current renewal of their collective agreement. That bargaining began in October 2004, nine months after the grievance was filed. It concluded in January 2005, when the terms of the 2005-2007 collective agreement were settled. The relevant contract language is unchanged. The Guild is thus precluded from asserting estoppel, and it makes no such argument.

[8] Somewhat unexpectedly, then, the case therefore comes down to a different question, one which is not peculiar to the thorny subject of mandatory retirement. In order to be effective, every rule unilaterally introduced by management must be consistent with the collective agreement. This collective agreement contains one particularly relevant clause originating from a period well before LOU#5, when there was a practice of some employees continuing to work past the age of 65. While I accept the Company's contention that the clause was not intended to restrict management's right to impose mandatory retirement, it nevertheless speaks to the retirement age of employees. For that reason, the impugned policy must be carefully examined in relation to the contractual clause in question to determine whether the requirement of consistency is met.

[9] Before turning to the history of mandatory retirement in the parties' relationship, it will be useful to emphasize that this dispute is not about the intrinsic merit of mandatory retirement. It is not disputed that, subject to collective agreement terms, employers in British Columbia are entitled to compel employees to retire at age 65: *Bell Canada v. OPEIU, Local 131* (1973), 37 DLR (3d) 561 (SCC); *Board of School Trustees, School District No. 39 (Vancouver) and Vancouver Teachers' Association* (1995), 51 LAC (4th) 91 (Taylor); *Campbell River TV Association and IBEW, Local 230* (1998), 71 LAC (4th) 343 (McConchie); *Pacific Newspaper Group, Inc. and CEP, Local 2000*

(2003), 123 LAC (4th) 209 (Germaine); *Lehigh Northwest Cement Ltd. -and- Boilermakers' Lodge D-277*, [2005] BCCAAA No. 159 (Taylor).

[10] The underlying basis of these decisions is that the *Human Rights Code* does not preclude discrimination against persons who are 65 and older on the basis of their age. That is the effect of the restricted definition of age in the Code: section 1 provides that "age" means "less than 65 years."

[11] Mandatory retirement is thus a form of approved discrimination. As such, it is expected to disappear in the foreseeable future. Whether it would survive re-evaluation by the Supreme Court of Canada is an open question: *Lehigh Northwest Cement, supra*. But that question is being overtaken by demographics, the labour market and Canadian legislatures. Mandatory retirement is no longer lawful in most Canadian jurisdictions, the exceptions being British Columbia, Saskatchewan, New Brunswick, Nova Scotia and the Yukon. A recent Vancouver conference focused on the consequences of abolition rather than the constitutionality of mandatory retirement: *Human Rights Conference 2005 Annual Update (Vancouver)*, April 22, 2005 (Lancaster House).

[12] The policy at issue in this proceeding illustrates the problematical nature of mandatory retirement. I accept the Company's reasons for adopting the policy. But if the Company is entitled to introduce mandatory retirement for post-1983 employees, it successfully avoids the inconvenient task of negotiating its turnover needs with the Guild, the employees' bargaining agent. It does so by invoking a legal right to discriminate against employees older than 64.

[13] The point of this digression, however, is to emphasize that these considerations have no bearing on the interpretation of the collective agreement. As long as the *Human Rights Code* retains its present definition of "age", the Company is free to implement mandatory retirement at age 65 unless it has contracted that right away. The question of what the contract provides in this respect turns on the parties' mutual intention, not the

law which permits this form of discrimination. I turn now to the collective bargaining history on which the Guild relies to establish the mutual intention it asserts.

#### **Pre-1984**

[14] The only firsthand evidence in this respect was given by Roger Stonebanks, who joined the Company as a reporter in 1964, and retired in 2000. He became an officer of the Guild in 1967 and remained an officer until 1995, serving mostly in the capacity of the Guild's Second Vice-President. He was also a founding co-chair of The Victoria Joint Council of Newspaper Unions ("Joint Council") formed by the Guild and the other trade unions representing the Company employees in 1971. He remained the co-chair of the Joint Council until 1995. In these capacities, Mr. Stonebanks participated in several rounds of collective bargaining between the parties.

[15] Until 1984, there was no requirement for employees to retire at any age. Mr. Stonebanks testified retirement was voluntary for Guild members, as well as other employees. Most employees did retire around the age of 65, or earlier if they were able. But Mr. Stonebanks recalled two examples of Guild members who worked beyond the age of 65, and said he was "certainly aware" of employees in other bargaining units "working past 65." He testified they did not need the Company's agreement: "I am absolutely unaware of... there being any contest about someone choosing to go past 65." Consistent with this evidence, the Guild contends that its members "had the right to work beyond age 65 if they chose to do so." In the submission of the Guild, the Company accepted that employees enjoyed the right and, although not expressed in the collective agreements, it "was at all times an implied term that Guild employees were not subject to mandatory retirement."

[16] The Company agrees employees "occasionally worked past the age of 65." But the Company characterizes this history as a practice, not a right based on any mutual understanding or agreement. The Company also submits its understanding of whether it

could unilaterally implement a mandatory retirement policy is immaterial. Whether or not that is so, the pre-1984 collective agreements afford some indication of the Company's understanding. The indication is found in a term of the technological change provision which originated in the parties' 1975-78 collective agreement. The provision remains in the current collective agreement, albeit in a slightly modified form.

[17] Mr. Stonebanks testified the introduction of video terminals in the mid-1970s impacted the work of composers in particular. Following a lengthy strike, the Company sought to negotiate "early separation allowances" in order to encourage employees to retire or leave their employment. These included "a special retirement allowance" the purpose of which was, in the words of Mr. Stonebanks who participated in the bargaining, to "take care of people who had chosen to work beyond 65."

[18] The substance of technological change protection is not material to this dispute and need not be quoted. The provision, now Article 7, Technological Change, has not changed significantly over the years. It begins with a definition of technological change (clause 1) and includes a "guarantee" that none of the employees represented by the Guild will lose their employment due to such change (clause 2). This guarantee is separate from the job guarantee incorporated into the collective agreement by LOU#5 in 1984. But it is also very specific in the sense that, with each renewal of the collective agreement, the parties have agreed on the number of regular employees protected by the guarantee. In the 1975-1978 collective agreement, the number of Guild members was 170 "as of November 30, 1975", and in the 2002-2005 collective agreement governing this dispute it was 169 "as at January 1, 2002." In addition, Article 7 prescribes the procedure for the introduction of technological change (clause 3), provides for the "early separation" allowances (clause 5) subject to mutual agreement (clause 7), stipulates that such allowances are payable "only in the case of technological change" (clause 6), and designates early separation as normal attrition (clause 8).

[19] Among the “early separation allowance” sub-clauses is the provision for “a special retirement allowance.” When it first appeared in 1975, the language was as follows:

For those employees with 5 or more years continuous service *who are over 65 years of age at June 30th, 1976, and who have not previously retired*, the Management will make a special retirement allowance of \$3,000.00. (emphasis added)

The clause was amended in the next round of bargaining. The clause which appeared in the 1978-81 collective agreement remains unchanged in the current collective agreement as Article 7(5)(g):

For those employees with five or more years’ continuous service who reach 65 years of age during the term of this Agreement, and who have not previously retired, the Management will make a special retirement allowance of \$4,000.00.

### **1983-84 bargaining**

[20] On November 3, 1983, the Company issued a statement signed by the then Publisher. It notified the Joint Council that the Company expected to discontinue the evening edition of the paper during the term of the next collective agreement. According to the statement, the Company was giving notice “beforehand so that ... the Joint Council and the Company can have frank and meaningful discussions” in relation to a “significant reduction in the work load and in turn the number of employees required.”

[21] The response of the Joint Council was informed by recent experience. In 1980, the Company had merged two previously separate newspapers into a single daily. Mr. Stonebanks testified that, because the merger had occurred mid-contract, the Guild was forced to accept 29 layoffs from its bargaining unit. In Mr. Stonebanks’ words, “that was never going to occur again.” On the same day - November 3, 1983 - the Joint Council issued a statement, written by Mr. Stonebanks, who was co-chair of the Joint Council’s bargaining team at the time. The statement informed the Company that, “regardless of

any future changes which may be made in the present publication schedule, the new contracts which will be negotiated will contain employment guarantees or equivalent clauses for all present employees, as at November 3, 1983, in the event of any such organizational change.” The statement also conveyed the Joint Council’s position that it would not bargain other terms until this issue of job security was settled.

[22] On November 9, 1983, the Joint Council tabled a proposal for protection from changes to the publication schedule. Central to the proposal was a “lifetime employment guarantee” for all regular employees on November 3, 1983 who were to be identified “by name.” The proposal also extended the contract’s technological change provision to include protection from reorganizations and it improved the buy-out benefits. Mr. Stonebanks testified the Company was not receptive to several aspects of this proposal. The Joint Council’s notes of the November 9 bargaining session record the Company’s spokesperson asking what the Joint Council meant by “lifetime” and expressing concern about the prospect of guaranteeing employment to individuals already in their 70s. But the Company did not reject the proposal out of hand. A mediator was appointed.

[23] On December 9, the Company tabled a proposal which, as Mr. Stonebanks described it, was on the “right track” and eventually “morphed into LOU#5.” The job guarantee was accompanied by mandatory retirement. To accommodate the employees who were already more than 65 and the expectations of those approaching 65, it required retirement according to a scheme which is still evident in LOU#5. Employees older than 65 were to retire within four years, those aged 60 to 64 years were to retire before their 70<sup>th</sup> birthday, and so on. But the language of this aspect of the proposal commenced with these words: “Retirement at age 65 *for all employees*, except that those named on the attached list will retire as follows...” (emphasis added). The Joint Council presented its counter-proposal the same day. It contracted this introductory clause so that it commenced this way: “Those names on the attached list will retire as follows...”

[24] Bargaining continued with the assistance of the mediator. Strike votes were taken by the Joint Council trade unions. Other issues were yet to be resolved but the Company's next proposal accepted that mandatory retirement would apply to only the named employees, not "all employees." The issue did not surface again in the bargaining. The settlement included the current form of LOU#5, the relevant aspects of which are:

**LETTER OF UNDERSTANDING No. 5  
Job Guarantee**

1. The employees named and specified in Appendix "A" hereto shall be permanent full-time or part-time employees until their employment status is lawfully terminated as provided for in paragraph 3 hereof...  
.....
2. The employment status of each of the said employees will terminate only upon the happening of the first of any of the following events:  
.....
  - d) The retirement by the employee according to the schedule which is Appendix "B" hereto.  
.....

**APPENDIX "B"  
MANDATORY RETIREMENT**

1. Employees who had attained 65 years of age on or before December 1, 1983, will retire not later than on December 1, 1987.
2. Employees who had attained not less than 60 years and not more than 64 years of age on or before December 1, 1983, will retire not later than upon attaining the age of 70 years.
3. Employees who had attained not less than 55 years and not more than 59 years on or before December 1, 1983, will retire not later than December 1, 1993.
4. Those employees who had not attained 55 years of age as at December 1, 1983 will retire not later than upon attaining 65 years of age.

[25] The Guild places much emphasis on this aspect of the bargaining history, especially the Company's initial proposal that mandatory retirement would apply to "all employees" together with the Guild's success in replacing those words with language restricting the scheme to identified employees. The Company disputes the significance of

this history on the basis that the focus of the bargaining was the job guarantee for present employees, not the status of future employees.

[26] Mr. Stonebanks' evidence was somewhat contradictory in this respect. On the one hand, he agreed the parties were not "thinking about" subsequent hires when they bargained the language of LOU#5. On the other, he testified the Joint Council perceived the Company's initial position to be an attempt to introduce mandatory retirement for all employees. The Joint Council, he testified, saw mandatory retirement as a "trade-off" for the job guarantee, and it was not prepared to agree to it for future employees who would not be covered by the guarantee.

[27] In cross-examination, Mr. Stonebanks agreed the Company's principal concern was the surplus staff, and its primary focus was therefore on the buy-out aspects of the proposed job guarantee. Moreover, the scope of the job guarantee remained unresolved for several months after January 1984; no actual list was exchanged until April. For a period of this time, the Company also sought to exclude employees with less than two years' service from the job guarantee. But Mr. Stonebanks did not agree this indicated the intention of the Company's original proposal was confined to current employees and, indeed, only some of the current employees. He testified the "plain meaning" of the proposal was much wider, and reiterated the Joint Council's determination to restrict the scope to current employees.

#### **Post-1984**

[28] In collective bargaining with the Mailers' Union in 1987, the Company sought new terms to address its manning requirements. The Mailers' Union agreed to provide "substitutes" to reduce the Company's overtime costs. A related term provided that: "Substitutes who are subsequently hired as full-time situation holders will retire at age 65." The Company thus negotiated mandatory retirement into its collective agreement with the Mailers' Union, although only in relation to certain new regular employees.

[29] The Company's initial proposals to the Guild did not mention mandatory retirement. But, in a bargaining session on February 12, 1987, the Company spokesperson alluded to future proposals on "matters of substance" in the area of job security. According to Mr. Stonebanks, the Joint Council did not understand this comment until later, in April 1987, when the bargaining returned to the subject of technological change.

[30] As stated, Article 7(2) has long included the precise number of employees protected from loss of employment due to technological change. Each of the trade unions comprising the Joint Council has such a number in its collective agreement. The numbers are settled during the bargaining of "commons" between the Company and the Joint Council. On April 6, 1987, the Joint Council presented the Company with a written position on outstanding issues, including the employee number for Article 7(2). The bargaining notes made by a member of the Company's team record a discussion of the relationship between the two guarantees in Article 7 and LOU#5. In that context, a Company spokesperson asked about the "fate of the new people" not covered by LOU#5 "in relation to retirement." The notes record that Mr. Stonebanks, on behalf of the Joint Council, declined to respond to the question. The Company's counter proposal on April 9 dealt with it specifically, by adding a proviso to the employee number: "as long as all employees hired after 30 November 1983 retire at age 65." The Joint Council did not accept that aspect of the Company's position. The Company removed it from its position in the exchanges which eventually led to settlement of the technological change language and the 1986-89 collective agreement. In the result, then, the Company had successfully bargained mandatory retirement into the Mailers' Union collective agreement only.

[31] The next round of bargaining in 1993 did not generate any proposal on mandatory retirement. But it was the subject of a discussion at the bargaining table in which Mr. Stonebanks was a participant. Two sets of Guild notes record the Company's spokesperson asking the Guild to indicate its position with respect to post-1983

employees and mandatory retirement. Mr. Stonebanks and another Guild spokesperson said mandatory retirement applied to only the employees listed in LOU#5, and post-1983 employees could work until 90 or 99, depending on which set of notes is reference. Mr. Stonebanks volunteered that the Guild would agree to mandatory retirement for “new employees” if the Company would give them a job guarantee. The notes do not record any further discussion of the subject.

[32] In 1999, when the parties negotiated their 1998-2003 collective agreement, the Company was again expecting staff surpluses. Due to the job guarantees in LOU#5 and Article 7, the Company proposed a buyout scheme, referred to as a Voluntary Staff Reduction Plan (“VSRP”). One of the payout limits initially proposed by the Company was: “The employee shall not receive more than he/she would if he/she was to remain employed to a normal retirement age of sixty-five (65) years.” Ms. Service-Brewster participated in the bargaining on behalf of the Guild. She testified the response of the Guild was to assert that post-1983 employees were not subject to mandatory retirement, the implication being there was no “normal retirement age” for those employees. The Company’s spokesperson expressed the view that mandatory retirement was applicable to all employees. Ms. Robinson, by then the Company’s Director of Human Resources, testified this was the Company’s view of the matter in 1999.

[33] According to Ms. Service-Brewster, had the Company persisted in requiring the Guild to agree with that view, it would have “derailed” the bargaining. But the difference did not prove to be a significant obstacle to the bargaining. Other terms of the proposed VSRP effectively precluded the possibility of post-1983 employees receiving more than they would have if they remained employed to age 65. The parties were therefore able to settle the terms of the VSRP while reserving their positions on the issue of mandatory retirement. Letter of Understanding No. 18, Voluntary Buyout, includes this clause: “The employee will not receive more than he/she would if he/she was to remain to a retirement age of sixty-five (65) years, for those named under the Job Guarantee - without prejudice to position on mandatory retirement at age 65.”

## Recent history

[34] The next chapter in this history is a series of exchanges in 1999 between the parties concerning the pension implications of the VSRP. In a letter to Ms. Robinson dated February 5, 1999, the Guild's Pension Committee Chair made several inquiries about the Company's pension plan, including questions about the position of employees "who choose to work beyond age 64." The parties met on February 23, with their actuaries, to address pension issues. According to the Guild, the Company's response to the questions about employees working beyond age 64 was that "we have mandatory retirement at age 65." The Guild did not agree and the Company appears to have entertained some doubt about the matter. In a letter to the Guild's president dated June 15, 1999, Ms. Robinson enclosed a document setting out answers to the Guild's earlier inquiries. Some of those answers addressed the pension consequences of an employee "who defers retirement" without asserting the application of mandatory retirement.

[35] Ms. Robinson testified the view expressed on behalf of the Company in February had not changed. The answers in the document she forwarded to the Guild were prepared by or on behalf of the Company's corporate parent, a national newspaper publishing company. She had simply not thought about it; she had "too much going on." Her evidence was that she thought the Company had mandatory retirement for all employees.

[36] Mandatory retirement was not raised in the bargaining which settled the 2002-05 collective agreement under which this dispute arose.

[37] Ms. Robinson subsequently learned of a mandatory retirement arbitration at the corporately-related daily newspapers in Vancouver. She asked her counterpart in Vancouver for a copy of the award in *Pacific Newspaper Group, Inc. and CEP, Local 2000, supra*. She read the award and discussed it with the publisher. The Company then developed the policy the Guild challenges in this proceeding.

[38] The policy was issued to each of the trade unions representing employees of the Company, and to every employee with their January 2004 pay statements. The Guild and one other trade union, the Communications, Energy and Paperworkers Union of Canada, Local 2000 (the “CEP”), grieved. The CEP represents the composers, a unit decimated by technological change and consisting now of only twelve members. Under Section 1 of the CEP collective agreement, management “agrees to respect and observe the conditions prescribed by the By-laws... and General Laws” of the CEP. Article II, Section 13 of the CEP’s General Laws provides that, except in relation to the minimum age for apprenticing, “an employee’s age shall not be a factor in employment or separation from employment.” Reminded of these provisions, the Company was persuaded the CEP had negotiated contractual protection against the implementation of compulsory retirement. As it applied to the composers, the policy was rescinded.

[39] As far as the Company is concerned, then, the policy implements mandatory retirement at 65 for all employees in four of its five bargaining units, including the Guild’s. And, the policy is consistent with the Mailers’ Union collective agreement.

[40] As I have recorded, the parties have renewed their collective agreement since the Guild filed the grievance in this proceeding. In the course of the bargaining, the Guild offered to discuss the issue of mandatory retirement “without prejudice.” According to Ms. Service-Brewster, the Company “wasn’t interested.” Ms. Service-Brewster’s evidence was that, since the Guild believed mandatory retirement did not apply to post-1983 employees, it was content to pursue its position in this arbitration.

#### **Management’s right to introduce a mandatory retirement policy**

[41] The evidence supports the Guild’s contention that for many years the Company did not consider itself entitled to compel retirement at age 65. This conclusion rests on far more than the pre-1984 practice conceded by the Company, which was that employees

were not prevented from working beyond 65 although only a small number actually did. As I have recorded, the Company agreed in the 1975-78 collective agreement to pay a “special retirement allowance” to employees over the age of 65 in the event of technological change. In the next collective agreement, the allowance became payable when the employee reached 65. Putting aside the question of relevance for the moment, I agree with the Guild that the special retirement allowances are persuasive evidence the Company understood employees could continue working beyond age 65. Further, the Company’s understanding was that this scheme of voluntary retirement would prevail until it could bargain a contrary provision into the collective agreement. As counsel put it, if the Company “...considered that it had the right to unilaterally impose mandatory retirement at age 65, it seems highly unlikely that it would have considered it necessary to pay a ‘special retirement allowance’ for the purpose of inducing employees to voluntarily retire at age 65.”

[42] Consistent with an understanding that it was required to bargain retirement at age 65, the Company negotiated a mandatory retirement clause into the job guarantee in LOU#5. Of course, the context of this bargaining must be considered. The Company may have regarded mandatory retirement as a convenient method of fixing a cap on the lifetime guarantee in LOU#5. But the Company could have limited the guarantee by means of language which simply terminated it at age 65; mandatory retirement was not necessary for the purpose. The Company nevertheless sought and secured the Guild’s agreement to mandatory retirement for employees covered by the guarantee.

[43] In the next round of bargaining in 1987, the Company negotiated a mandatory retirement clause with the Mailers’ Union and unsuccessfully attempted to secure it in bargaining with the Guild. I accept the Guild’s submission that this bargaining conduct is “compelling evidence that... [the Company] understood and accepted that mandatory retirement was not something which it could unilaterally implement as a matter of policy, and must be achieved, if at all, through collective bargaining.”

[44] That understanding and acceptance apparently dissolved after 1987. The Company did not show its hand on the issue during the bargaining in 1993. But it reflected a new and different understanding in 1999 by proposing a term that implied employees must retire at age 65 and by reserving its position on the issue when the Guild declined to agree. Owing to the position of its corporate parent, the Company's communications with the Guild in 1999 were not altogether consistent with its bargaining posture. But the evidence does not sustain the inference I have drawn from the Company's 1987 bargaining conduct. That is, the evidence does not establish that, in the 1990s, the Company believed it was required to obtain the Guild's agreement to force retirement at age 65.

[45] The transformation in the Company's understanding was the product of at least two factors. First, as a result of a series of corporate acquisitions in the print media, more senior management personnel changed. Second, owing to LOU#5, the pre-1984 practice was no longer evident. The first post-1983 employees to reach age 65 will not do so until this year, 2006. But the effect of the evidence is that, for a period of about 20 years, the Company plainly considered itself constrained to accept the practice of voluntary retirement or seek to introduce mandatory retirement through collective bargaining. In the 1990s, that understanding was replaced by a self-induced belief that all employees were subject mandatory retirement. The assertion in this proceeding of an entitlement to impose mandatory retirement by means of a unilateral management rule or policy is one which has emerged more recently, after the Company was apprised of the *Pacific Newspaper Group* award in 2003.

[46] That conclusion raises the Company's contention to which I have alluded. In the words of counsel, "whether the Company thought that it had the right to implement a mandatory retirement policy in 1983 or 1987, or at any other time, is immaterial." The Company supports this proposition with strong arguments.

[47] As the Company submits, in all the evidence of the history of retirement in this workplace, there is no evidence the Company ever “gave up its right to implement a mandatory retirement policy.” Further, the only provision in the collective agreement dealing with mandatory retirement is LOU#5. Thus, the collective agreement is silent in relation to mandatory retirement for post-1983 employees. That opens the door for the Company’s contention that only one contract provision has any relevance. That provision is the management rights language in Article 2(2): “The Guild recognizes that matters of Management and direction of staff are vested exclusively in the management and agrees not to abridge this right.” On this basis, the Company contends there is nothing in the collective agreement which “prevents or restricts the Company from unilaterally implementing its mandatory retirement policy” for post-1983 employees.

[48] The argument is undeniably correct to this extent: there is no express limitation in the collective agreement. The Guild therefore asserts a right not stated in express contract language. The challenge inherent in that position is fundamental. A collective agreement is a written instrument. As defined in section 2(1) of the *Labour Relations Code*, “‘collective agreement’ means a *written* agreement” (emphasis added). The Guild agrees that an arbitrator does not have jurisdiction to enforce oral agreements.

[49] The Guild does not shrink from this challenge. The foundation of its response is that, by limiting the scope of mandatory retirement under LOU#5, the parties “intended and in fact agreed” to preserve the right of other employees to retire voluntarily. Thus the agreement, it is submitted, is not oral; rather, it is implied by LOU#5, which means the collective agreement is not silent about mandatory retirement. The Guild seeks to reinforce the asserted implication by reference to specific terms of LOU#5 and the extrinsic evidence. It contends “...the express identification of those employees covered under... [LOU#5] Job Guarantee as being subject to mandatory retirement recognizes the true agreement between the parties that retirement at age 65 was otherwise voluntary.” In the submission of the Guild, the Company is precluded from denying it was attempting

to gain the contractual right to impose mandatory retirement on all employees by the bargaining attempts it made to achieve precisely that result in 1987.

[50] Unfortunately for the Guild, none of these arguments is capable of manufacturing a written contractual term. To acknowledge that LOU#5 does not apply to post-1983 employees is to concede it contains nothing applicable to those employees. The identification of every employee to whom it applies does not give it any broader application. More particularly, the post-1983 employees did not gain the benefit of an implied term which assures them of the continued right to voluntary retirement. While it is obvious that, since LOU#5's mandatory retirement terms apply to identified employees, the parties did not intend that retirement regime to apply to other employees. But that basic reality does not warrant the further conclusion that the parties must have mutually agreed on another retirement regime for post-1983 employees. There is nothing to suggest the parties came to *any* agreement regarding the retirement of post-1983 employees, much less a specific agreement to the effect that they are entitled to retire when they choose until the parties agree on some other regime in collective bargaining.

[51] The cases cited by the Guild confirm this analysis. In *Brampton Hydro-Electric Commission and CAW-Canada, Local 1255* (1994), 44 LAC (4th) 1 (Brunner), the dispute arose from the grievor's assignment to an afternoon shift. An article in the collective agreement defined normal hours of work and expressly identified the classifications which could be assigned afternoon and evening shifts. While it is true the relevant contract term made no mention of the grievor's classification, it nevertheless applied to all employees in the sense that it regulated management's right to schedule shifts. The grievor's classification was not identified as one the employer could assign to an afternoon shift. The grievance thus succeeded because Arbitrator Brunner held the provision had general application; it "circumscribed the general right of management to establish hours of work and shifts for employees." The distinction here is that LOU#5 does not apply to post-1983 employees; it regulates mandatory retirement only in relation to the named employees as of December 1983.

[52] In *Hydro Ottawa and IBEW, Local 636* (2004), 132 LAC (4th) 259 (R. Brown), the grievance was framed as a complaint about contracting out. On the facts, however, it was a case of “contracting in” because it concerned work performed on the employer’s premises, under the employer’s supervision, using the employer’s equipment and material, by persons who were generally indistinguishable from bargaining unit employees: page 272. The award accepted that the individuals in question were employed by a contractor, not the employer. It upheld the grievance challenging the presence of the contractor’s employees by relying, in a large measure, on a collective agreement provision that limited the use the employer could make of casual and temporary employees. Implicit in that provision, Arbitrator Brown reasoned, was a prohibition against extended use of the contractors’ employees because it “would undermine the collective agreement”: page 373.

[53] Although the analysis speaks of an implied contractual term, the case is not analogous. The implied obligation in *Hydro Ottawa* was the employer’s rather fundamental contract responsibility not to use outside personnel to perform bargaining unit work in a manner which subverts its collective agreement commitments. The reasoning was consistent with the long line of authorities which have held that, even in the absence of express contract language, the collective agreement implicitly proscribes the performance of bargaining unit work by employees outside the bargaining unit to such an extent that they become bargaining unit employees bound by the collective agreement: *Orenda* (1972), 1 LAC (2d) 72 (Lysyk); *Westroc Industries Ltd.* (1973), 5 LAC (2d) 61 (Beatty); *Irwin Toy Ltd.* (1982), 6 LAC (3d) 329 (Burkett); *Prince George School District* (1990), 15 LAC (4th) 105 (Larson); *Nova Scotia (Department of Transportation and Communications)* (1991), 19 LAC (4th) 23 (Veniot). As Arbitrator Beatty said in *Westroc, supra*,

...the basis of this implied prohibition lies in preserving the integrity of

the bargaining unit and is found implicit in the seniority, classification, recognition and wage clauses of the agreement. (page 69)

On this analysis, it can be seen the collective agreement in *Hydro Ottawa* was not really silent. From the relevant perspective, the entire collective agreement applied to the outside employees working in the same conditions as bargaining unit employees.

[54] This reasoning cannot be utilized to expand a term expressly restricted to certain employees. With respect to the post-1983 employees, the collective agreement here is silent in the same manner as a collective agreement containing no reference to mandatory retirement: see *Pacific Newspaper Group, supra*, page 220.

[55] Finally, the Guild cites *University of British Columbia -and- AUCE, Local 1* (January 7, 1985), unreported award (McColl), in which the history of an unaccepted bargaining proposal was an important consideration in the arbitrator's interpretation of the collective agreement. I agree with the Company's submission that the award is consistent with the appropriate use of extrinsic evidence to construe contract terms. More importantly, it is not authority for the use of extrinsic evidence to establish a contract term where none exists.

[56] The Company's further submission respecting its unaccepted bargaining proposals is even more important. I refer to the initial bargaining proposals of the Company in relation to LOU#5 in 1984 and its mandatory retirement proposal in bargaining in 1987. Both attempted to secure the Guild's agreement to universal mandatory retirement and both were not accepted. To the extent the Guild relies on these bargaining proposals to buttress its implied term contention, or at all, the argument is without merit. As counsel for the Company submits, to adopt that argument "would have a chilling effect on bargaining; ...[i]f a rejected request for agreement... [were] enough to create rights for the party rejecting the request, there would be a disincentive for parties to raise workplace issues in collective bargaining." The Company cited a number of awards which have recognized this potential and rejected essentially the same argument: *United Steelworkers*

*and Uddeholm Steels Ltd.* (1971), 22 LAC 419 (P.C. Weiler), at page 422; *Eurocan Pulp and Paper Co. and CPU, Local 298* (1990), 14 LAC (4th) 103 (Hickling), at page 113; *White Spot Ltd. and CAIMAW Food and Service Workers, Local 112* (1991), 21 LAC (4th) 421 (McPhillips), at page 430; *British Columbia Government and BCGEU and Open Learning Institute*, [1997] BCCAAA No. 709 (Jackson), at paragraph 70; *ADT Security Services Canada Inc. and IBEW, Local 213*, [2000] BCCAAA No. 119 (McEwen), at paragraph 69.

[57] In an attempt to turn weakness into strength, the Guild argues these cases have no application because they concern bargaining proposals intended to clarify existing contractual rights, while the proposals in this case were made because the Company understood it did not have the right to compel the post-1983 employees to retire at age 65. But the value of extrinsic evidence is that it may illustrate what the parties mutually intended *by the language of their agreement*. Here, as far as the post-1983 employees are concerned, there is no language to be construed. If evidence of unaccepted bargaining proposals should not be relied on to interpret existing language, it follows that such proposals are even less reliable as evidence of implied contract rights. Fundamentally, the subjective intention of a party making or rejecting a proposal is not determinative of contractual rights and certainly cannot create a contractual right.

[58] I conclude the collective agreement does not contain a term, express or implied, intended to prevent management from implementing a policy of mandatory retirement applicable to the post-1983 employees.

### **Consistency with the collective agreement**

[59] Although the collective agreement does not say the Company is prevented from implementing a policy of mandatory retirement, any such policy must nevertheless meet the arbitral law requirements for valid and enforceable rules or policies introduced unilaterally by management. These are different questions, and have been recognized as

separate since the arbitral requirements were summarized in the award in *KVP Co.* (1965), 16 LAC 73 (Robinson):

While the making of rules appears to be considered to be an inherent right of management, unless taken away by the terms of the collective agreement (*R. Cane Workers, Local 354, and American Can Co. of Canada Ltd.* (1963), 14 LAC 297, Judge W.S. Lane, board chairman) yet a review of arbitration cases over the past seventeen years has convinced the board chairman that the general principle appears to be well established that company rules and regulations must be consistent with the terms of the collective agreement. (page 81)

A rule unilaterally introduced by the company, and not subsequently agreed to by the union, must satisfy the following requisites:

1. It must not be inconsistent with the collective agreement... (page 85)

[60] The other “requisites” have no bearing on this case. It is worth emphasizing here that these requirements are not unique to policies of mandatory retirement; all policies or rules unilaterally introduced by management must comply in order to be effective.

[61] The issue of consistency revolves around Article 7(5)(g). That clause, it will be recalled, provides that, in the event of technological change as defined, “a special retirement allowance” will be paid to employees “who reach 65 years of age during the term of this Agreement.” As stated, the clause has its roots in the parties’ 1975-78 collective agreement, and assumed its present form in the 1978-81 contract. At that time, of course, and until 1984, the practice of some employees to continue working beyond age 65 still prevailed. The Guild says Article 7(5)(g) “clearly contemplates the continued existence of employees who are age 65 or older” and, for that reason, the impugned policy is necessarily inconsistent with the collective agreement.

[62] In its initial submission, the Company dismissed the significance of various “arrangements... to accommodate existing employees working past the age of 65” under the pre-1984 practice. I agree the pension plans on which the Guild also relies do not present any impediment to the impugned policy. The documents in evidence define a series of pension plans effective from 1977, 1979, 1994 and 1998 respectively. Each

provided or provides for “late retirement” or “postponed retirement” after age 65. But the Guild was not a party to any of those plans. Further, since the plans encompassed related employers and their employees, it is impossible to infer whether the delayed retirement language was even intended to apply to the Company and its employees. These terms are not evidence of any right on the part of Guild members.

[63] The ‘special retirement allowance’ is a different matter. It is part of the collective agreement and presumably has some application. The Company submits that Article 7(5)(g) is akin to one of the welfare plan provisions considered in *Pacific Newspaper Group, supra*. The collective agreement in that case consisted of six components in which there were “only minor differences” between the welfare plan terms. Among those terms, the amount of the group life insurance was prescribed at a lower level “for employees over age 65”: paragraph 15. The award considered whether this reference to “employees over age 65” was inconsistent with mandatory retirement. The provision for group life insurance was standard in every component of the collective agreement. It was necessitated by the prohibition of mandatory retirement in at least one of the components, and by some lifetime employment guarantees. But it was also contained in collective agreement components governing employees who were subject to mandatory retirement. However, it had meaning in that context because the employer’s practice of mandatory retirement allowed some employees to continue working for up to a year after they turned 65. Therefore, although it contemplated employees working beyond age 65, the clause was neither consistent with nor inconsistent with mandatory retirement in that case.

[64] The question here is whether the same can be said for Article 7(5)(g) in this case. I am unable to accept the Company’s contention that it is neutral in this respect because of the presence of “almost identical” clauses in collective agreements between the Company and other trade unions. Allowance for employees older than 65 is of course necessary in the CEP collective agreement because, as I have indicated, the Company accepts that it prevents mandatory retirement. On the other hand, the Mailers’ Union collective agreement contains a mandatory retirement provision. If the same clause is in

that collective agreement, there may be an interpretive issue which flows from the presence of both provisions. Indeed, a similar interpretive issue may arise from the presence of both Article 7(5)(g) and LOU#5 in the collective agreement at hand, and the Company makes a related argument to which I will return below. But the possibility of such issues in other collective agreements does not deprive Article 7(5)(g) of meaning in this collective agreement. In contrast with the collective agreement in *Pacific Newspaper Group*, the collective agreements here are separate. They are bargained jointly under the auspices of the Joint Council, but the process of negotiating “peculiar” generates ample opportunity for the parties to settle issues specific to each bargaining unit.

[65] The question therefore remains: is the policy of mandatory retirement consistent with Article 7(5)(g)? The Company has repeatedly emphasized the absence of any evidence to suggest that Article 7(5)(g) was ever intended to restrict the right of management to introduce mandatory retirement. The Company submits, for example, that if the parties had intended to restrict management’s right to implement mandatory retirement, they would have expressed that intention in the same manner they specifically dealt with dismissals and layoffs in Article 6. In my view, this argument confuses two different questions. I have accepted the Company’s argument the collective agreement is silent in the sense that it does not contain any term intended to prevent management from issuing a mandatory retirement policy. But, here, the question is whether the disputed policy is consistent with the collective agreement. To repeat, the *KVP Co.* criteria are not necessarily satisfied because the collective agreement is silent. Article 7(5)(g) was negotiated before 1984 when there was a practice of employees continuing to work beyond age 65. The parties’ expectation of a small number of employees after age 65 could have influenced their negotiation of the language of Article 7(5)(g). If so, it is not difficult to see that a policy of mandatory retirement could conflict with a feature of the provision which the parties regarded as unremarkable at the time.

[66] One of the Company’s answers is to assert that a policy of mandatory retirement would simply constitute another of several methods by which employment may be

lawfully terminated before an employee can take the benefit of a special retirement allowance. The Company cites dismissal for just cause or for non-culpable cause, as well as layoff under Article 6. While those events would prevent the operation of Article 7(5)(g), all of them are contemplated by the collective agreement or labour relations law generally. None is imposed unilaterally by the Company, which is the basis of this issue.

[67] The Company contends the presence of the mandatory retirement scheme in Appendix “B” to LOU#5 demonstrates the absence of any inconsistency between Article 7(5)(g) and a policy of mandatory retirement. Relying on this “co-existence”, the Company cites the established interpretive principle that “...the provisions of a collective agreement are to be read as a whole with the presumption that they were not intended to conflict” (*Board of School Trustees of School District No. 61 -and- Greater Victoria Teachers Union* (November 30, 1992), unreported award, 29 CLAS 639 (Kinzie).

[68] I agree that Article 7(5)(g) and LOU#5 should be construed as harmonious provisions of the collective agreement: *Pacific Press, A Division of Southam Inc. -and- GCIU, Local 25-C* (November 14, 1995), unreported award (Bird). But that interpretation would not be difficult. When LOU#5 was negotiated, section 1 of Appendix “B” applied to the older employees who had continued to work beyond age 65 as contemplated in Article 7(5)(g). Since then, the mandatory retirement scheme in Appendix “B” of LOU#5 is easily construed as a specific exception to Article 7(5)(g), the effect of which is to preclude the payment of any “special retirement allowance” to employees who must retire at age 65. That is the Guild’s view of the tension between the provisions.

[69] However, arbitration law does not mandate the same effort to find harmony between a unilateral management policy and the terms of a collective agreement. If the effect of the Company’s mandatory retirement policy were to delete the retirement allowance obligation in Article 7(5)(g), I would have no hesitation concluding that it is

inconsistent with the collective agreement. The point of *KVP Co.* is that management does not have the right to unilaterally change employer contract obligations.

[70] Ultimately, of course, the issue of consistency depends on the precise language and effect of both the collective agreement and the policy. In this respect, the first question is whether Article 7(5)(g) does contemplate employees continuing work beyond age 65, as the Guild contends. If so, the second question is whether that is sufficient to render the Company's proposed mandatory retirement policy inconsistent with the collective agreement.

[71] In its original form, Article 7(5)(g) obviously contemplated employees continuing to work beyond age 65. It expressly referred to employees... "who are over 65 years of age... and who have not previously retired." But the modified clause which replaced it in the 1978-81 and which has remained unchanged in subsequent collective agreements refers to employees... "who reach 65 years of age during the term of this Agreement, and who have not previously retired." Does it still contemplate the possibility of employees continuing to work beyond age 65?

[72] For convenience, I quote the clause again:

For those employees with five or more years' continuous service who reach 65 years of age during the term of this Agreement, and who have not previously retired, the Management will make a special retirement allowance of \$4,000.00.

It is clear the Company must "make" the allowance. But the clause does not say, or overtly imply for that matter, that the employee has any choice about whether to retire. However, a moment's reflection erases any doubt in that respect. There is no reason why the Company would commit to paying the allowance except to offer an incentive to employees to retire. Since the allowance is only payable in cases of technological change, a purposive interpretation must consider the Company's interest. It is to encourage retirement as a means of redressing an excess of staff resulting from such change. No

incentive would be necessary if the employees did not have the option to continue working. It follows that an employee turning 65 during the term of the Agreement must have the opportunity to choose to continue to work. That conclusion is consistent with the practice which prevailed when the language was first negotiated, and with the readily apparent objective of the original clause. I have no doubt it is what the parties intended.

[73] On this basis, I accept the Union's characterization of Article 7(5)(g). It does contemplate the possibility that employees will continue to work past age 65. The scope of Article 7 is narrowly restricted to technological change. No payment is promised by Article 7(5)(g) to encourage retirement at age 65 unless there is technological change. But Article 7(5)(g) provides a crucial clue to the parties' expectations regarding retirement. Except where LOU#5 operates, the employee is not provided any extraordinary incentive to retire at age 65. The collective agreement is premised on the expectation that employees may choose to work beyond 65.

[74] That being so, would a mandatory retirement policy be inconsistent with the provision? The Company says that, because the impugned policy does not compel an employee's retirement until the end of the month in which the employee turns 65, it does not create any obstacle to the payment of the allowance. In the words of counsel for the Company, "it is possible they will be eligible for the retiring allowance if a technological change has occurred during the term of the agreement." I accept that it is chronologically possible if that is the intent of the submission. I am unable to say the submission is sufficiently unequivocal to be construed as a concession that the policy would not be relied on to withhold the allowance. Nevertheless, in my view, although the collective agreement is silent on the subject of mandatory retirement, the premise of voluntary retirement invites the conclusion that a unilateral policy of mandatory retirement would be inconsistent with the collective agreement.

[75] The inconsistency arises from the effect of the proposed mandatory retirement policy on Article 7(5)(g). It would change the provision because, although the Company

says the allowance would still be payable in the event of technological change, it would no longer make any sense for an employee to decline it. The decision would no longer represent a choice between the allowance and continued employment for an indefinite period. An employee choosing to refuse the allowance would remain an employee for a maximum of another 30 days because she or he would be forced to retire at the end of the month in any event. It follows that a mandatory retirement policy would change Article 7(5)(g) of the collective agreement by effectively removing one of the options contemplated by the provision. Employees would cease to have the opportunity to reject a special retirement allowance and continue working.

[76] It should not be surprising that a clause originally adopted when there was a practice of employees working past age 65 would be framed in terms which accommodate the practice. Nor should it be surprising that language negotiated for that purpose is inconsistent with a policy intended to terminate the practice. In the end, a contract remnant of the period of voluntary retirements poses an insurmountable obstacle for the Company's proposed policy.

### **Conclusion**

[77] There was a practice of employees continuing to work past the age of 65. When it existed, the Company understood it was required to secure the Guild's agreement before it could compel retirement. The practice has not been followed for 23 years because in 1983 the parties adopted LOU#5, which provided for mandatory retirement of all existing employees at 65. The first post-1983 employee to reach 65 will do so in 2006.

[78] It is not clear whether the parties ever agreed that the pre-1983 practice could only be terminated by collective bargaining. If they did, the Guild is unable to point to a written agreement to that effect. Further, the applicable legal principles do not support the Guild's contention that such an agreement can be read into the collective agreement as an implied term. In the absence of any written or implied term applicable to the

retirement of post-1983 employees, the Company's understanding up to and in 1987 is immaterial. So is the belief of Ms. Robinson in 1999 that all employees are subject to mandatory retirement. In the result, then, the collective agreement does not contain any term, express or implied, intended to limit management's right to promulgate a mandatory retirement policy applicable to post-1983 employees.

[79] The impugned policy must nevertheless meet the requirements for an effective rule or policy unilaterally introduced by management. It must first of all be consistent with the collective agreement. Clause (5)(g) of Article 7, Technological Change, contemplates that employees may continue to work beyond age 65. It provides an incentive in the form of a "special retirement allowance" to encourage employees to retire at age 65 when the Company has introduced technological change. But the effect is that the collective agreement is consistent with the practice of employees enjoying the option to continue working past age 65. Since the collective agreement is consistent with voluntary retirement, logic dictates that a policy of mandatory retirement is likely to be inconsistent with the collective agreement. This policy is inconsistent because it changes the meaning of Article 7(5)(g) by eliminating the option of declining the "special retirement allowance" in order to continue working.

[80] The grievance therefore succeeds. Since the Company's policy of mandatory retirement does meet the *KVP Co.* requirements of an effective unilateral policy, it is not enforceable. Employees to whom LOU#5 is not applicable cannot be forced by a policy introduced unilaterally by the Company to retire at age 65. It is so awarded.

[81] Dated at Vancouver, British Columbia, this 13th day of March 2006.



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Rod Germaine, Arbitrator