Case Name:

British Columbia Public School Employers' Assn. v. British Columbia Teachers' Federation (Rondinelli Grievance)

IN THE MATTER OF an Arbitration
AND IN THE MATTER OF the Labour Relations Code R.S.B.C. 1996, c. 244
Between
British Columbia Public School Employers' Association/ Board of Education of School District No. 73 (Kamloops/Thompson), (the "Employer"), and
British Columbia Teachers' Federation/ Kamloops Thompson Teachers' Association, (the "Union")
(Failure to Post and Fill Grievances - Rondinelli et al)

[2008] B.C.C.A.A.A. No. 192

British Columbia
Collective Agreement Arbitration
Kamloops, British Columbia

Panel: Christopher Sullivan (Arbitrator)

Heard: October 25 and 26 and December 17, 2007.
Award: November 24, 2008.

(60 paras.)

Labour Arbitration -- Management Rights -- Job postings.

Labour Arbitration -- Employee Rights and Benefits -- Job postings.

Labour Arbitration -- The Collective Agreement -- Interpretation -- Estoppel.

Labour Arbitration -- Awards -- Declaratory relief.

The grievor employees alleged the employer had not acted in a timely manner in posting positions.

HELD: Grievance allowed in part. The collective agreement treated the posting and filling of vacancies differently than it treated the posting and filling of positions held by continuing appointment teachers who would be absent for two months or more. The union was estopped from relying on its strict legal rights. The union was entitled to a declaration that the employer had violated the collective agreement.

Appearances:

Judith Anderson for the Employer.

Randy Noonan for the Union.

AWARD

1 The parties agree I have jurisdiction to hear and determine the matters in dispute. The case involves four separate grievances filed by the Union alleging the Employer has breached Article IV.2.2 of the Collective Agreement in relation to the posting and filling of certain positions. Article IV.2.2 provides as follows:

> **ARTICLE IV: EMPLOYEES** DEFINITION AND CATEGORIZATION OF
>
> 2.2
>
> When it is known that a teacher on continuing appointment will be absent for two (2) months or more, that position shall be posted and advertised and filled as described in Article XI.4.2. A Teacher on Call who serves in the position shall be granted an interview and consideration for the position.

Article XI.4.2 states:

> **ARTICLE XI: TRANSFER ASSIGNMENTS**
>
> **4. POSTING AND FILLING VACANT POSITIONS**

4.2

> Positions which become vacant, or new vacancies greater than two (2) months which arise after September 1st shall be posted and advertised and shall be filled firstly with teachers identified in September as surplus to their school needs, and then with teachers from the re-call list, and appointed as per Article IV. Remaining vacancies will then be filled as per Article XI.4.1 (above)...

2 The grievances in dispute arise from the absences of the following continuing appointment teachers: Giovanna Rondinelli, Kirsten Humphrey, Janice Walling and Stephany Dean. All of the grievances include an allegation that the Employer did not act in a sufficiently timely manner in posting positions. The grievance relating to Ms. Rondinelli also includes an allegation that the Employer improperly posted something different than what Ms. Rondinelli performed prior to going off on leave.

3 The Employer responded to the grievances asserting it acted properly under the Collective Agreement. It expressed the position it posted positions in a timely manner and, in regards to the Rondinelli grievance, it relied upon the in-school assignment change provisions contained at Article XI.6 of the Collective Agreement. That provision states:

ARTICLE XI: TRANSFER ASSIGNMENTS

6. ASSIGNMENTS WITHIN SCHOOLS

No teacher shall be reassigned for disciplinary or punitive reasons.

Discussions pertaining to school organization, proposed timetable and staff assignments shall occur during regular staff meetings.

In-school assignment changes shall be accommodated wherever possible, taking into consideration qualifications, training, experience and the teacher's preference.

Prior to a position being declared available for transfer or vacant, Administrative Officers in consultation with staff will consider in-school assignment changes.

4 During the course of these proceedings the Employer also made reference to the management rights provision of the Collective Agreement, which provides:

ARTICLE II: MANAGEMENT RIGHTS

> The Union recognizes the right and responsibility of the board, subject to the provisions of this agreement or applicable legislation, to manage and operate the school district, and agrees that the employment, assignment, direction and determination of employment status of the work force is vested exclusively in the Board.

5 At these proceedings reference was also made by the parties to a local agreement captured in correspondence dated June 8, 2004 in regards to the elimination of "bands as noted in Article IV - 1 and XIII - 3.2". At that time the parties agreed on a number of interpretations to Articles IV; XI; and XIII to be practiced including:

1. All teachers appointed by the Board shall be appointed as either full-time or part-time.

2. Transfer - part-time teachers who wish to transfer to increase their percentage of fte...

3. Recall - part-time teachers who wish to increase their percentage of fte...

4. In-school assignment changes - part-time teachers may accept additional part-time positions through in-school assignment changes.

5. Vacancies - part-time teachers who apply for other part-time vacancies that do not conflict with their current part-time assignment shall be awarded the additional part-time assignment on the basis of the necessary qualifications and the greatest seniority....

6 Reference was also made in these proceedings to a Letter of Understanding between the parties dating back to May 2, 1995, which has been expressly renewed at collective bargaining since that time. The LOU provides, in part:

SUBJECT: TERM CERTAIN/TEMPORARY APPOINTMENTS

To resolve the outstanding grievance regarding term certain/temporary appointments, the parties agree to the following:

1(a) The employer agrees to adopt the practice of automatically posting a position once two months has elapsed as a term certain position.

SUMMARY OF EVIDENCE

7 The evidence reveals Ms. Rondinelli is a .7143 FTE Photography and English teacher at South Kamloops Secondary. Her assignment for the 2005/2006 school year included two Photography and one English block in the first semester and two Photography blocks in the second semester. In early January 2006 Ms. Rondinelli informed the Employer she would be taking maternity leave commencing January 9, 2006. From January 9, 2006 until the end of the first semester the Employer employed a Teacher On Call (TOC), Catherine Farynuk, to replace Ms. Rondinelli. For the second semester, commencing February 6, 2006, the Employer changed Dina Chase's assignment within the school to include Ms. Rondinelli's two Photography classes. Ms. Chase's Social Studies 9 and English 10 classes were then posted as a vacant position on January 25, 2006.

8 Kirsten Humphrey is a 1.0 FTE Social Studies teacher at Valleyview Secondary. A payroll authorization form dated January 3, 2006 indicates she informed the Employer at about that time she would be on a medical leave until February 10, 2006. A payroll authorization form dated January 4 indicates she would then be taking maternity leave from February 11, 2006 to February 2, 2007. The Employer filled Ms. Humphrey's position with a TOC until the conclusion of the first semester. It then posted Ms. Humphrey's position on January 25, 2006 and filled it for the second semester, which commenced February 13, 2006.

9 Janice Walling held a 1.0 FTE Counselor position at Clearwater Secondary. In late November 2005 she submitted a partial medical leave certificate and was granted a two-month partial medical leave from December 1, 2005 to February 3, 2006. Her position was filled by a TOC. A payroll authorization form dated February 9, 2006 indicates the leave was extended from February 4, 2006 to June 30, 2006. The vacant position was posted on February 15, 2006 and was filled on February 24, 2006.

10 Stephany Dean is a 1.0 FTE Math, Science, and Business Education teacher at Twin Rivers Education Centre. A payroll authorization form dated January 4, 2006 discloses Ms. Dean informed the Employer at about that time she would be going on a maternity leave from February 1, 2006 to June 30, 2006. Her position was posted on January 16, 2006 and filled on January 23, 2006. Twin

Rivers Education Centre is not on a semester system.

11 Assistant Superintendent, Human Resources Dan Cairnie has been responsible for posting and filling teacher positions in the School District for a period of about eleven years, having performed this personnel function for Special Education since 1997, and for all of the District since August 2003. At these proceedings Mr. Cairnie described the process he followed generally and in relation to the specific grievances.

12 Mr. Cairnie stated he did not follow a mechanical process, but that he arrived at his decisions in what he felt to be a responsible, timely and transparent manner. He testified he did nothing different in relation to the situations being grieved, than what he has been doing for many years.

13 Regarding the timing of the postings, which was an issue raised in all of the grievances, Mr. Cairnie testified he followed his usual practice. Upon receiving a leave request from a teacher he would normally take one to three days to decide when and what to post. He then directs staff to prepare a posting, which goes up and remains posted for a period of five days. Once the posting is closed Mr. Cairnie's staff collates all applications and ensure they include the status and seniority of the respective applicants. Within one to three days a decision is made and the successful applicant is contacted.

14 Mr. Cairnie prefers to contact a successful candidate one week prior to the commencement of work. From start to finish the process takes about two weeks. Ideally a teacher gives three weeks' notice of vacating a position, but the reality is that all different lengths of notification are given by vacating teachers.

15 Mr. Carnie testified he purposely put up a second semester cluster of postings, rather than a number of "singletons" as he felt it was not fair for a senior teacher to be given limited options, and preclude them from applying on more favourable positions that are subsequently posted. Mr. Cairnie perceived this caused bad feelings in the workplace.

16 Mr. Cairnie testified that since 2001 there has always been a semester two cluster posting and this has never been raised with him by the Association, which received a copy of all of the relevant documentation indicating not every mid-term posting for relief of two months or more precisely reflects a position vacated by an incumbent on a leave. At these proceedings Mr. Cairnie disclosed he "always believed the Association favoured" his posting practice.

17 Mr. Cairnie pointed out that he did not post Ms. Dean's position as part of a semester two cluster because the school Ms. Dean worked at, Twin Rivers Education Centre, was not on a semester system.

18 Mr. Cairnie mentioned he is currently aware that a particular continuing appointment teacher is scheduled to go off on an extended leave six months before the commencement of the leave. He has never posted a position under Article IV.2.2 so long before the commencement of the required

work.

19 Mr. Cairnie stated a key consideration for him in deciding when to post a position is the "educational soundness" of the various available options. In regards to the circumstances caused by the relatively short-notice absences of Ms. Rondinelli and Ms. Humphrey the Employer decided not to post and fill the position just prior to the conclusion of the semester, and subject the students to a third teacher at the very end. In the circumstances the Employer was content having TOCs fill the positions until the end of the first semester.

20 In specific regards to the Rondinelli grievance, Mr. Cairnie stated he was notified of her leave request on Tuesday, January 3, 2006 for leave commencing Monday, January 9. Mr. Cairnie then hired a TOC to pick up Ms. Rondinelli's position commencing January 9. At some point around this time Mr. Cairnie was in contact with the Principal at South Kamloops Secondary, Vic Bifano, who informed him that a teacher on staff wanted to pick up Ms. Rondinelli's Photography blocks. Mr. Cairnie told Mr. Bifano this could be accomplished as long as it was made clear that when Ms. Rondinelli returned from her leave the whole process would unravel so that she would return to her position.

21 Mr. Cairnie testified he has always allowed for in-school assignments with the consequence that he has on many occasions posted a different position than that held by a continuing appointment teacher who has been absent for two months or more. At these proceedings he cited a number of examples wherein a different position from that of the absent continuing appointment teacher was posted. He added the Association has been sent copies of all of the relevant documentation that clearly reveal this practice.

22 Mr. Cairnie added that he spoke directly to former Local Association President, Fawn Knox regarding the specific matter, and he understood her to agree with the Employer's interpretation regarding in-school assignment changes, particularly given their 2004 local agreement relating to the elimination of bands and increasing the ability of part-time employees to access work.

23 Specifically, Mr. Cairnie stated Section 4 of the parties' June 8, 2004 agreement quoted above was intended to permit a .5 FTE teacher to pick up additional work to increase their total FTE, without posting. Mr. Cairnie testified about the negotiations in 2003 and 2004 leading up to the agreement, adding that "on a couple of occasions" Ms. Knox brought Article XI.6 to his attention, and she expressed the position it needed to be considered.

24 Mr. Cairnie added he has "a clear recollection" of a discussion between himself and Ms. Knox regarding mid-year assignments where a posting included the statement "or upon return of teacher". Mr. Cairnie testified he and Ms. Knox agreed that upon return of the incumbent the posted position would be unraveled to reflect the position as it previously existed.

25 Ms. Knox was called as a witness at these proceedings, but could not recall having engaged in the discussions that Mr. Cairnie recounted. Ms. Knox testified she never indicated to Mr. Cairnie

that she or the Association wanted him to consider mid-year in-school assignment changes. She never spoke to Mr. Cairnie regarding Article XI.6 and mid-year changes. If anything was said on the topic it was in a totally different context.

26 Ms. Knox gave evidence to the effect she was unaware of mid-year shuffles having taken place, and she had never previously indicated to the Employer she was aware of these, or that she approved of the practice. She added that as far as she was aware, in-school assignment changes or shuffles were made only at the end of the school year.

27 Ms. Knox stated that when in-school assignment changes occurred during the school year, she considered this to be an "assignment addition", not an "assignment change". Ms. Knox further stated, "there can be in-school assignment changes at any time, but what constitutes an end of year change is different than a mid-year change." She added: "true" in-school changes only occur at the end of the school year.

28 Ms. Knox testified that Section 4 of the parties June 2004 agreement, regarding in-school assignment changes, applied only at the end of the school year, as did Article XI.6.

POSITIONS OF THE PARTIES

29 On behalf of the Association, Mr. Noonan argues that the terms of the Collective Agreement are clear and unequivocal in support of a conclusion that the Employer must immediately post a position once it is known that the duration of an absence is two months or longer and, further, that the posted position must be for the same as that performed by the continuing appointment teacher. Counsel asserts the Employer does not possess discretion as to when and what to post in the circumstances described in Article IV.2.2.

30 Mr. Noonan alleges Mr. Cairnie applies Article IV.2.2 in an arbitrary manner, and is not guided by any clear and consistent rules regarding what is educationally sound, or administratively convenient. The timing of postings is subject to Mr. Cairnie's decision on how quickly he and his staff should act in a given situation. Counsel states that in regards to the Rondinelli grievance it is equally plausible to have posted and filled the position immediately after having learned about her absence, with minimal relief from a TOC.

31 Counsel observes the Employer attaches no significance to the plain words of Article IV.2.2 and interprets it precisely the same as Article XI.4.2, notwithstanding the fact that the provisions are worded very differently, and on their face serve different purposes.

32 Mr. Noonan points out that the information upon which in-school assignments are considered is invariably held by a principal or Mr. Cairnie, and that the Employer might not be aware of all qualified individuals desiring certain work.

33 Mr. Noonan argues the past practice does not assist in determining the mutual intentions of the

parties, nor can it be used as the basis of an estoppel. He asserts there is no evidence upon which to conclude the Association was aware of the practice at all. The Association was never expressly informed of the Employer's intentions, and this intention is not apparent without very careful examination of cross-referenced documents received in bundles by the Association at different times. Counsel states, "to take this as an indication of mutual consent that clear language of the collective agreement means something other than what the words express is not fair". He adds the Association cannot be held to be aware of what the Employer is doing unless it is told so, or a member complains.

34 Mr. Noonan notes that the past practice is mixed to the extent that in most situations the Employer posted the precise position being vacated, and that often they are posted immediately after the Employer becomes aware of a leave of two months or more.

35 By way of remedy the Association seeks a declaration together with an order that the Employer comply with the Collective Agreement in the future.

36 In support of its position, the Union cites the following authorities: *Board of School Trustees of School District No. 39 and Vancouver Teachers Federation* (1996) 53 L.A.C. (4th) 33 (Hope); *Canadian Labour Arbitration*, Brown and Beatty, Fourth Edition; *Nova Scotia Teacher's Union and Nova Scotia (Minister of Education)* [2004] N.S.L.A.A. No. 18 (Kydd); *Public Service Employee Relations Commission and B.C.G.S.E.U.* [2002] B.C.C.A.A.A. No. 176 (Lanyon); *Southeast Kootenay School District No. 5 and Cranbrook Teachers Association (Hildebrant Grievance)* [2001] B.C.C.A.A.A. No. 43 (Kinzie); *Thunder Bay Regional Hospital and O.N.A.* (2002) 109 L.A.C. (4th) 234 (Solomatenko); *Central Okanagan School District No. 23 and Central Okanagan Teachers' Association* [1992] B.C.C.A.A.A. No. 150 (Chertkow); *Boundary School District No. 51 and B.C.T.F.* [1997] B.C.C.A.A.A. No. 753 (Devine); *B.C.P.S.E.A. and B.C.T.F. (Chilliwack) [2000] B.C.C.A.A.A. No. 45 (Dorsey); Nanaimo Times Ltd. and Graphic Communication International Union, Local 525-M* [1996] B.C.L.R.B.D. 40 (Hall); *University College of the Cariboo and C.U.P.E., Local 900* (2002) 108 L.A.C. (4th) 218 (Gordon); *United Steel Workers of America, Local 1005 and Steel Co. of Canada Ltd., et al* (1978) 87 D.L.R. (3d) 274 (Grange); *Int'l Ass'n of Machinists, Local 1740 and John Bertram & Sons Ltd.* (1967) 18 L.A.C. 362 (Weiler); *B.C.P.S.E.A. and B.C.T.F. (Central Coast)* [2006] B.C.C.A.A.A. No. 217 (Pekeles); *Cargill Ltd. and United Food & Commercial Workers, Local 1118* (1996) 54 L.A.C. (4th) 76 (Koshman); *Provincial Health Services Authority and P.E.I.U.P.S.E.* (2005) 141 L.A.C. (4th) 53 (Christie); *Halifax Regional School Board and N.S.U.P.E., Local 2* (2002) 110 L.A.C. (4th) 258 (Christie); and *Newfoundland (Department of Works, Services and Transportation) and N.A.P.E.* (1994) 40 L.A.C. (4th) 372 (Oakley).

37 On behalf of the Employer, Ms. Anderson argues the Employer has complied with the Collective Agreement in regards to both issues raised in the grievances. Counsel asserts the reference in Article IV.2.2 to XI.4.2 properly links absences to vacancies, and provides for a single posting process to be used notwithstanding whether a vacated position has an incumbent or not. Ms.

Anderson adds the Employer maintains its right to decide whether and what to post. Under Article XI.6 and the parties' June 2004 local agreement the Employer has an obligation to consider in-school assignment changes "prior to a position being declared available for transfer or vacant".

38 Regarding the specific matter of the timing of postings arising from teacher absences of two months or more, Ms. Anderson points out Article IV.2.2 is completely silent on this matter, and the Employer is properly entitled to take business and educational considerations into account when deciding when a posting is to go up. The management rights provision contained at Article II of the Collective Agreement clearly covers the matter of teacher assignments, and confers upon the Employer the discretion to do what it has done in the regards to the grievances at hand.

39 Ms. Anderson states the proper test regarding the timing of a posting is one of practicality and reasonableness, and that the Employer has complied with this. Counsel refers to the evidence of Mr. Cairnie and his good faith belief that teachers favoured the practice of a second semester cluster because it gave them more options. Management utilized a fair and transparent process, with the most compelling consideration to be the effect on the students.

40 Regarding the substance as opposed to the timing of the postings Ms. Anderson points out this is only an issue with one of the grievances, regarding Ms. Rondinelli, and it was barely raised initially. Counsel states the Employer properly relied on Article XI.6, which clearly requires the Employer to consider in-school assignment changes before declaring positions "available for transfer or vacancy" in accordance with the last paragraph of that provision.

41 Ms. Anderson states the past practice supports the Employer's position and reveals an intention by the parties in support of the Employer's interpretation of the relevant Collective Agreement language. Article XI.6 is not limited only to the end of the school year, but rather it applies throughout the year. The provision is to be used any time there is a vacancy, whether there is an incumbent in the position, or not. Counsel also notes that Section 4 of the parties' June 8, 2004 agreement necessarily refers to the filling of something other than vacancies, as that is what Section 5 specifically speaks to.

42 In support of its position the Employer cites the following authorities: *Health Employers Association of British Columbia and Hospital Employees' Union (Severance Allowance Grievance)* [2002] B.C.C.A.A.A. No. 130 (Gordon); *Board of School Trustees of School District No. 75 (Mission) and Canadian Union of Public Employees, Local 593 (Sick Leave for Term Employees During Spring Break)* October 4, 2002 (Foley); *Board of School Trustees of School District No. 61 (Greater Victoria) and Greater Victoria Teachers' Association* November 30, 1992 A-323/92 (Kinzie); *British Columbia Public School Employers' Association and British Columbia Teachers' Federation (Nyse Grievance)* [2001] B.C.C.A.A.A. No. 9 (MacIntyre); *Armstrong-Spallumcheen School District No. 21 and Armstrong Teachers' Association (Dubeski Grievance)* [1993] B.C.C.A.A.A. No. 89 (Kinzie); *British Columbia Public School Employers' Association (School District No. 61 (Greater Victoria)) and British Columbia Teachers' Federation (Greater Victoria*

Teachers' Association) (Maternity Leave - Date of Return) December 5, 2005 (Taylor); *Okanagan Skaha School District No. 67 and British Columbia Teachers' Association (Dunnett Grievance)* [2003] B.C.C.A.A.A. No. 138 (Dorsey); *Re Disabled and Aged Regional Transit System and Canadian Union of Public Employees, Local 839* (1985) 20 L.A.C. (3d) 354 (Solomatenko); *School District No. 23 (Central Okanagan) and Central Okanagan Teachers' Association (Posting and Filling of Vacancies Dispute)* June 23, 1992, A-150/92 (Chertkow); *British Columbia Teachers' Federation and Chilliwack Teachers' Association and B.C. Public School Employers' Association and Board of School Trustees of School District No. 33 (Chilliwack) (Posting and Filling Vacancies)* February 10, 2000, A-031/00 (Dorsey); *Cowichan Valley School District No. 79 and Cowichan District Teachers' Association (Frances Kelsey Secondary School Teacher-Librarian Position)* [1998] B.C.C.A.A.A. No. 135 (Dorsey); *Board of School Trustees of School District #51 (Boundary) and British Columbia Teachers' Federation (Kettle Valley) (Marrandino Posting Grievance)* November 17, 1997, A-410/97 (Devine); *B.C. Public School Employers' Association (Board of School Trustees of School District #51 (Boundary) and British Columbia Teachers' Federation (Kettle Valley) (Posting & Filling Grievance)* July 24, 1998, X-137/98 (Gordon); *British Columbia Public School Employers' Association/Board of School Trustees of School District No. 49 (Central Coast) and British Columbia Teachers' Federation/Central Coast Teachers' Association (Posting Grievance)*, December 1, 2006 (Pekeles); and *Canadian Labour Arbitration*, 3rd edition, Brown & Beatty (Canada Law Book, March 2006).

DECISION

43 The role of an arbitrator in a dispute over the interpretation of Collective Agreement language is to determine the intentions of the parties based on the language they have used to disclose their mutuality. In *Health Employers Association of B.C. and Hospital Employees' Union, supra*, Arbitrator Joan Gordon articulated the general arbitral principles in regards to interpreting collective agreement provisions. She observed:

> 14 The primary source for interpretation is the collective agreement. The search for the purpose of a particular provision may serve as a guide to interpretation. Significant benefits and obligations are likely to be clearly and unequivocally expressed in the language used by the parties. When interpreting two provisions, a harmonious interpretation will be preferred to a conflicting one. Wherever possible, all words and provisions should be given meaning. Words in the agreement should be viewed in their normal and ordinary source unless that would lead to some uncertainty or inconsistency with the rest of the collective agreement or unless the context establishes the words were used in another sense. The words used in the agreement should be read in the context of the phrase, sentence, provision and collective agreement as a whole. When faced with the choice between two linguistically permissible interpretations, the reasonableness and administrative feasibility of each may be considered. Additionally, the parties are presumed to be aware of the relevant jurisprudence.

44 The Collective Agreement language in the present case discloses a mutual intention to treat Article IV.2.2 situations differently than situations covered by the post and fill provision contained in Article XI. In Article IV.2.2 the parties expressly turned their collective mind to specific situations where there is a continuing appointment teacher in a position and it becomes known mid-year that the teacher will be absent for two months or longer. That article uses the mandatory "shall" to express the requirement to post, and it provides a right to the TOC who "serves in the position" to be "granted an interview and consideration for the position."

45 Article XI on its face pertains to the "Posting and Filling Vacant Positions". This provision addresses "vacant" positions, as opposed to ones that have been temporarily absented during the course of the school year as contemplated in Article IV.2.2. The reference in Article IV.2.2 to Article XI.4.2 is to the process for filling the job, that is, "shall be filled firstly with teachers identified in September as surplus to their school needs, and then with teachers from the recall list...."

46 I do not accept that the reference to Article XI.4.2 in Article IV.2.2 is somehow meant to completely negate the very differently characterized situation and rights and obligations contained in Article IV.2.2. The words of Article IV.2.2 constitute mandatory language about filling an absence, and the provision unequivocally refers to the precise position to be posted. It stands in stark contrast to the wording of Article XI.4.2 and the rights and obligations contained in that provision.

47 For ease of reference, Article IV.2.2 reads as follows:

> When it is known that a teacher on continuing appointment will be absent for two (2) months or more, that position shall be posted and advertised and filled as described in Article XI 4.2. A Teacher on Call who serves in the position shall be granted an interview and consideration for the position.

48 The language chosen by the parties notably does not contain an indication that the extended absence of a continuing appointment teacher may not be posted, or that something other than what was held by the continuing appointment teacher can now be posted. The phrase "that position shall be posted" does not on its face readily indicate some other position may or may not be posted, which would be the effective conclusion of having Article XI apply to the very specific situations expressed in Article IV.2.2. The two references to "the position" in the second sentence of Article IV.2.2 support a conclusion that it is what the incumbent held that must be posted.

49 In other words, the language agreed upon by the parties reveals a mutual intention to the effect that the precise position absented by the continuing appointment teacher is to be posted. The first sentence of the provision specifies it is "that" position which is to be posted, in direct reference to the position held by the continuing appointment teacher who is going to be absent. The second sentence Article IV.2.2 confirms this intention as it states a TOC "who serves in the position shall be granted an interview and consideration for the position". There is no suggestion in the words

used by the parties to show they intended something to be posted other than what the continuing appointment teacher held, and what the TOC was hired to replace prior to posting.

50 The Employer possesses broad rights regarding the determination and filling of vacancies. Article IV.2.2, however, constitutes an express exception to the Employer's discretion to deal with mid-year situations where a continuing appointment teacher is absent for two months or longer.

51 To conclude in favour of the Employer would essentially require turning a blind eye to the express words the parties have chosen to reflect their consensus. Such a ruling would make Article IV.2.2 effectively redundant or without any substantive meaning, and there is no indication the parties intended this result.

52 I agree with the Employer that as a general proposition there is no difference between a vacancy and an absence. In general parlance employees are absent and positions are vacant.

53 In regards to the present circumstances, however, the parties have indicated in their Collective Agreement that while the posting and filling of vacancies is covered by Article XI.4, the posting and filling of positions held by continuing appointment teachers who "will be absent for two months or more" is covered by Article IV.2.2. The parties themselves have drawn the distinction in the language they have chosen to reflect their consensus, and I am compelled to respect that.

54 Having made this finding, I am unable to conclude that the Employer has violated the Collective Agreement in relation to the timing of the postings at issue. Upon learning of a leave application the Employer is entitled to look into the situation and make certain determinations. In *School District No. 23 (Central Okanagan) and Central Okanagan Teachers' Association, supra*, the arbitrator commented that a position to be posted "as soon as reasonably possible", would have to go up "no more than a week or two after the vacancy has been identified". While the facts in that case deal with a permanent vacancy, I accept the time frame expressed for posting is appropriate for the filling of absences as provided for under Article IV.2.2.

55 Having arrived at this conclusion on the face of the Collective Agreement language, I also accept that the present circumstances warrant a determination that the Association is estopped from relying on its strict legal rights. All of the requirements of an estoppel are met.

56 The Association has, by its words and conduct, clearly led the Employer to believe it did not seek to pursue the rights of members affected by the consistent practice of Mr. Cairnie. By all accounts the Association was aware of the practice that had been taking place for many years, and it knowingly allowed it. The Association was copied on all of the relevant documentation that revealed when and what was being posted, and many postings did not correlate precisely to the position being performed by incumbents leaving for at least two months. The assertion made by Ms. Knox to the effect that she chose to not carefully review the documents, or ask questions about them is not, in the circumstances, a sufficient response to her claim that she was unaware of the clear longstanding practice.

57 My finding that the Association was aware of the Employer's practice is buttressed by the evidence of Ms. Knox in relation to her knowledge that her own daughter picked up an additional in-school assignment that had not been posted, when Ms. Knox was no longer President, but was still on the Association executive. Further, two examples cited by the Association in correspondence relating to these grievances as proper applications of the Collective Agreement language, involve factual situations (involving Rob Hogeveen and Harvey Daley) that would appear to support the Employer's interpretation.

58 Having been led to accept that the Association was not relying on the strict legal rights contained in Article IV.2.2, the Employer has relied to its detriment in not seeking to negotiate a change to the language. In the circumstances, all of the requirements of an estoppel are met.

59 The grievance therefore succeeds in part. The Association is entitled to the declaration it seeks to the effect that the Employer has violated the Collective Agreement as set out in this decision. I remain seized with jurisdiction to resolve any disputes that may arise out of the implementation of this decision.

60 It is so awarded.

Dated in the City of Vancouver in the Province of British Columbia this 24th day of November, 2008.

Christopher Sullivan