

IN THE MATTER OF AN ARBITRATION

BETWEEN:

UNIVERSITY OF BRITISH COLUMBIA

(the "University")

AND:

FACULTY ASSOCIATION OF THE UNIVERSITY OF BRITISH COLUMBIA

(the "Association")

(Re: Policy Grievance - Contributions to Pensions)

AWARD

Arbitration Board: **Joan M. Gordon**

For the University: Tom Roper, Q.C. & Julie Menten

For the Association: Allen Black, Q.C. & Michelle Blendell

Dates and Place of Hearing: October 9, 10 & 23, 2013
Vancouver, British Columbia

Date of Award: December 9, 2013

I. Introduction

This policy grievance (the “Grievance”) involves the Association’s claim that the University is not fully complying with its contribution obligations under the parties’ pension agreement. The parties agreed I am properly constituted as an arbitration board and have the jurisdiction to hear and determine the issues in dispute, including the University’s preliminary objections to the arbitrability of the Grievance.

The dispute between the parties involves the interpretation of the following provision of the Collective Agreement:

II. BENEFITS

A. Pension Plan and Canada Pension Plan Contributions

Effective January 1, 1989, and subject to any ratifications that may be required by the provisions of the relevant Pension Plan documents,

- (1) Each member of the bargaining unit who is also a member of the Pension Plan for Academic Staff and Academic Executive Staff shall make required contributions monthly *to the Pension Fund*, by means of payroll deductions, *equal to five per cent (5%) of his or her basic salary less an amount equal to one point eight per cent (1.8%) of the difference between the basic exemption and the yearly maximum pensionable earnings under the Canada Pension Plan.*
- (2) The University shall make regular contributions monthly *to the Pension Fund* in the amount that is *equal to ten per cent (10%) of the basic salary of each member of the bargaining unit who is also a member of the Pension Plan, less an amount equal to one point eight per cent (1.8%) of the difference between the basic exemption and the maximum yearly pensionable earnings under the Canada Pension Plan.*
- (3) The University and each member of the bargaining unit shall each contribute to the Canada Pension Plan the amounts that each is required by law to contribute.

(emphasis added)

The essence of this dispute involves the interpretation of the italicized words in this provision.

Three pension plans will be addressed in this award, and it is helpful at the outset to identify those plans by their initials which appear throughout the documents and evidence: the Faculty Pension Plan -- the "FPP"; the Canada Pension Plan -- the "CPP"; and the Supplemental Arrangement -- the "SA".

The Grievance provides in relevant part as follows:

Re: CPP and FPP Premiums

The Faculty Association hereby initiates a grievance pursuant to Article 21 of the Agreement on the Framework for Collective Bargaining in the matter of the Administration withholding Faculty Pension Plan contributions from members who are collecting their pension under the Canada Pension Plan.

... the Faculty Association contests the practice of withholding a portion of some members' Faculty Pension Plan contributions for the purpose of remitting Canada Pension Plan contributions when the members are in fact no longer contributing to the Canada Pension Plan. The result is that the Administration is deducting [CPP] premiums that are not being remitted [to CPP] and the members' FPP contributions are reduced.

The remedy sought is that all members affected by the practice be made whole, including but not limited to retroactive monetary compensation.

The University's response to the Grievance provides in part as follows:

As discussed ... the contribution rates to the FPP for eligible faculty and the University were confirmed in the 88-89 Faculty Agreement awarded by an arbitration board in 1989. Under that agreement, the contribution rate to the FPP for an eligible faculty member was established at "five per cent (5%) of his or her basic salary less an amount equal to one point eight percent (1.8%) of the difference between the basic exemption and the yearly maximum pensionable earnings under the Canada Pension Plan", and for the University "in an amount equal to ten percent (10%) of the basic salary of each member of the bargaining unit who is also a member of the Pension Plan, less an amount equal to one point eight percent (1.8%) of the difference between the basic exemption and the maximum yearly pensionable earnings under the Canada Pension Plan". The language of the Faculty Pension Plan reflects this formula.

As was discussed, while the contribution rates to the FPP were in part based on the contribution rates to the CPP at the time the language was imposed, the language of the agreement setting out the contribution rate is mandatory and is not conditional upon the faculty member continuing to contribute to the Canada Pension Plan.

...

Given that the University's practice is in compliance with the contractual agreement between the parties, there is no merit to the grievance and it is denied.

II. The Parties' Positions

The Association claims the University is withholding a portion of some faculty members' pension contributions and is not remitting that amount to the CPP when the member no longer contributes to the CPP. The Association alleges that the University's pension contribution practice fails to fully comply with an ongoing obligation under a broad pension agreement, which the Association says is referred to in various pension-related documents dating back more than 25 years, to make an overall contribution of 10% of a faculty member's basic salary for pensions. The Association asserts that the parties have never agreed to amend this broad obligation. The Association claims that since 1989, when the parties agreed to the provision set out above, the University has been withholding and "pocketing" 1.8% of faculty members' basic salary when they no longer contribute to the CPP. The Association's position is that the provision of the Collective Agreement does not support the University's practice because it is obliged under paragraph 2 of that provision to deduct 1.8% of members' basic salary and contribute that amount to the CPP, in addition to its obligation under paragraph 3 to contribute the amount required by law to the CPP.

The Association further claims the University owes a common law fiduciary duty to faculty members regarding the administration of contributions to their pensions, and the Association maintains the University has breached that duty. As well, says the Association, the University committed the tort of negligent misrepresentation when it failed to advise faculty members who were deciding whether to stop making contributions to the CPP that if they did so, the University would no longer comply with its obligations under the broad pension agreement.

The University's first position is that it objects to the arbitrability of the Grievance. It contends that, given the Association's acquiescence to the University's longstanding, open and consistent administrative practice reflecting its interpretation and application of the pension contribution provision, the Grievance should be dismissed due to the Association's breach of the time limits under the Collective Agreement and/or on the basis of section 89(f) of the *B.C. Labour Relations Code* (the "Code") and the equitable doctrine of laches.

As to the merits of the Grievance, the University contends that this dispute calls for a determination of what the parties agreed to, and did not agree to, in the pension contribution provision of the Collective Agreement. The University's position is that the broad pension agreement on which the Association relies dates back to 1966, and was supplanted in 1989 by the negotiated pension contribution agreement captured in the disputed provision of the Collective Agreement and reflected in the amended text of the FPP. The University maintains that it made two promises under the provision of the Collective Agreement: 1) the contribution rate to the FPP would not be less than 8.2%; and, 2) it would satisfy its legal obligation under the CPP legislation to contribute what is statutorily required from time to time. The University asserts that ever since then, it has openly and consistently administered its contributions to the FPP in accordance with the clear and plain language of the contribution formula in the Collective Agreement. The University also asserts that it has consistently complied with the requirements of the *Pension Benefits Standards Act*, R.S.B.C. 1996, c.352 (the "PBSA") and the Pension Benefits Standards Regulations, B.C. Reg. 433/93 (the "Regulations").

Alternatively, the University contends that if the Association's interpretation of the pension contribution language is upheld, the Association should be estopped from relying on it.

The parties agreed to bifurcate the arbitration hearing into two stages. At this stage, the issues are the University's objection to the arbitrability of the Grievance, whether the University is liable for the breaches as alleged by the Association, and whether the Association should be estopped from relying on its interpretation of the contribution formula under the Collective Agreement. The second stage will, if necessary, address remedial issues.

III. Background

This dispute has its genesis in an email that an Association member, who will be referred to in this award as “Dr. W”, sent to Dr. Nancy Langton, President of the Association, in 2008. That email and associated emails will be set out below. Suffice it to say at this point that the concern raised in Dr. W’s email motivated Dr. Langton and the Association’s staff to conduct research into the Association’s pension-related files as well as other archival resources in an effort to trace the history of pensions at the University. In her evidence at the arbitration hearing, she reviewed the documents that were uncovered during the Association’s research, and Dr. Langton acknowledged that she had no personal knowledge of the matters referred to therein prior to the pension-related vote that occurred in 1989, which will be discussed below. As no witness who was involved in pension-related matters for the Association prior to 1989 was called to testify in the Association’s case, the following background information as recorded in various historical documents must be considered in that context.

A pension has been a feature of faculty members’ compensation at the University for decades. From 1948 to 1966, the University and faculty members contributed to a multi-employer pension plan known as the TIAA-CREF (the “TIAA”). As at 1966, the University contributed 10% of a member’s basic salary to the TIAA, and members contributed 5% of their basic salary to that plan.

Effective January 1, 1966, the CPP came into effect and required each employee and employer to make a regular contribution of 1.8% of earnings in excess of \$600.00 per year (the year’s basic exemption - “YBE”) up to a maximum of \$5,000.00 per year (the year’s maximum pensionable earnings - “YMPE”).

The impact of the introduction of the CPP on the University’s pension plans was addressed by the University’s Board of Governors in a meeting on January 6, 1966. The Minutes of that meeting reflect the following discussion and resolution relating to the “integration” of the University’s pension plans with the CPP:

Integration of Canada Pension Plan
with University Pension Plans

On January 1, 1966, the Canada Pension Plan came into effect and required a regular contribution by each employee of 1.8 percent

of all earnings in excess of \$600. per year up a maximum of \$5,000. per year. A similar 1.8 percent was required from each employer.

The Staff Committee had considered the proposal put forward by the Office of the Bursar and Treasurer. Until December 31, 1965, the University of British Columbia had contributed 10 percent of an employee's salary to the Pension Plan and 5 percent had been contributed by the employee. It was proposed that the Canada Pension Plan should be integrated with the University's regular pension plans so that the percentage contribution in total by the University and its employees should not exceed the previous rate of 10 percent and 5 percent respectively. The Staff Committee recommended the Board's approval of a plan whereby the University's contribution to the regular pension plan would be reduced by 1.8 percent, the required contribution to the Canada Pension Plan. The University would then contribute 1.8 percent to the Canada Pension Plan and 8.2 percent to the regular University plans. Similarly, the employee would contribute 1.8 percent to the Canada Pension Plan and 3.2 percent to the regular University plans. The employer and employee contributions would revert to 10 percent and 5 percent of salary respectively when the maximum premiums payable to Canada Pension Plan were reached in each calendar year.

RESOLVED, That the method of integrating the Canada Pension Plan with the University Pension plans be approved, with effect from January 1, 1966.

Carried.

Following that meeting, the University took the position during Joint Pensions Committee meetings that with the introduction of the CPP, the University was not willing to increase its overall contribution for pensions beyond 10% at a time when the Canadian government was taking over part of the function that the Board of Governors had previously performed. This position was acknowledged in the Report of the Joint Pensions Committee dated March 31, 1966 as follows:

We can scarcely object to this when we believe that members of our university plan should not be compelled to increase their total pension contribution by the amount required for the Canada Pension Plan. We also believe that other objectives of university spending have a higher priority than raising the university contribution above 10 percent of basic salaries. We conclude that some form of integration of our university pension plan with the Canada Pension Plan is desirable. There are, however, a variety of possible methods of integration.

(at page 43)

This Report of the Joint Pensions Committee led to the creation of a new pension plan, and in May 1966, University employees who had been contributing to the TIAA were asked to vote on a number of alternative pension plans for purposes of integrating contributions to the University's pension plans with contributions to the CPP.

In a Memorandum dated May 6, 1966, addressed to "All Members of the Administrative Executive Staff and those Faculty members and Professional Librarians who are currently contributing to TIAA-CREF but not members of the Faculty Association", those members were provided with a "ballot on pension plans" for purposes of "obtain[ing] some consensus of opinion as to the type of pension plan [they] preferred". A series of documents was enclosed with the ballot, and these "General Remarks from the executive the Faculty Association to its members" were recorded on page 1 the Memorandum:

Members are reminded that for any of the proposed alterations to TIAA-CREF, the pension fund of the new plan would be managed by one or more of the large Canadian Life insurance trust companies, and would be subject to the federal regulations and safeguards of a registered Canadian pension plan. The selection of the fiduciary and matters of broad policy would be determined by a university committee on which faculty should have a major voice. Members should also be reassured that introduction of a new pension plan would in no way affect our present group insurance and disability insurance plans. *All plans, including TIAA-CREF, would be integrated with Canada Pension Plan (CPP) and deductions for CPP would be made from the amount available for pensions.* In almost all cases it would appear that introduction of CPP will increase the member's pension at retirement.

Following these "General Remarks", a brief description of the several proposed pension plans was set out in the Memorandum.

The May 1966 vote favoured the establishment of a new pension plan -- the FPP -- to replace the TIAA, and pursuant to a Pension Trust Agreement, the FPP was established as a jointly-trusted pension plan. The Trustees of the FPP have always included members of the Association. The terms of the new FPP, which became effective April 1, 1967, were appended as Schedule A to the Pension Trust Agreement, and the University's and members' required contributions to the FPP were set out at page 6 of Schedule A as follows:

IV. MEMBER CONTRIBUTIONS

1. Required Contributions by Members

During his membership in the Plan, each member shall make required contributions monthly to the Pension Fund, by means of payroll deductions, equal to five per cent (5%) of his basic salary less the contributions required to be made by the member to the Canada Pension Plan.

* * *

V. UNIVERSITY CONTRIBUTIONS

1. Regular Contributions

The University shall make regular contributions monthly to the Pension Fund in an amount that is equal to ten per cent (10%) of the basic salary of each member in the employ in the University, less the contributions required to be made by the University to the Canada Pension Plan in respect of such member.

This will be referred to hereafter as the 1966 pension contribution agreement.

Cheryl Neighbour is the current Executive Director of Operations for the FPP, and she testified in the University's case at the arbitration hearing. Her evidence was that when the new FPP became effective in April 1967, the University's total contribution for both the FPP and the CPP added up to 10% of a faculty member's basic salary, and the University sent the actual amount of the deduction for the CPP contribution to the CPP. The initial CPP contribution rate was 1.8% of defined earnings under the CPP legislation, and that 1.8% was only calculated on certain earnings -- i.e., earnings falling between the YBE and the YMPE. The terms YBE and YMPE are defined under the CPP legislation.

In early 1987, the CPP legislation was amended to allow employees to stop making CPP contributions when they reached 60 years of age, stop working for a short period of time, start working again, and then, despite their return to work, make no CPP contributions. Under cross-examination Ms. Neighbour testified that she understands that prior to 1989, if a faculty member chose to adopt this option under the CPP legislation, the University contributed 10% to the FPP.

The 1.8% CPP contribution rate remained constant from 1966 to 1986. Then, in 1987, the CPP contribution rate began to increase on a yearly basis: i.e., it rose to 1.9% in 1987; to 2% in 1988; and, to 2.1% in 1989. (The CPP contribution rate was projected

at that time to increase to 3.8%, but in fact, it increased to 4.95% in 2003.) Thus, given the integrated scheme under the 1966 pension contribution agreement, as the CPP contribution rate increased, the University's contributions to the FPP decreased concomitantly to 8.1%, 8.0% and 7.9% in 1987, 1988 and 1989 respectively.

This erosion of contributions to the FPP was of concern to the Association and its members, and this concern is recorded in an Association document entitled "1987/88 Brief on Salaries and Economic Benefits". The Association's response to this concern, as recorded at page 28 of that document, was to propose that "amendments be made to the [FPP] to ensure that the University's contribution to the Plan would not decrease as the rate of required contributions to CPP increases."

The documents tendered into evidence in the Association's case reflect the fact that the Association's concern regarding the erosion of contributions to the FPP was addressed as an issue of collective bargaining during negotiations between the University and the Association for the 1988-89 Collective Agreement. Dr. Langton was not involved in the negotiations for the 1988-89 Collective Agreement, and she testified that she did not know who was involved in those negotiations. However, during her testimony, a document dated May 27, 1987, and entitled "Minutes of the Meeting of the Administration's Salary Negotiating Team 1987-88", was tendered into evidence. That document provides in part as follows:

PROPOSAL: EB 3. That amendments be made to the UBC Faculty Pension Plan to ensure that the University's rate of contribution to the Plan would not decrease as a result of increases in the rate of the Canada Pension Plan.

CHANGE FROM PREVIOUS YEAR: New Item.

COST: Unknown.

ASSOCIATION'S ARGUMENTS:

- 1) Recent and proposed changes to the *Income Tax Act* and *Canada Pension Plan Act* require University to review Faculty Pension Plan.
- 2) Bill C-116 [*CPP Act*] plans to increase the rates of contribution from 1.8%. Thus, commencing in 1987 the rate will increase each year to 3.8% in 2011. [In fact, the rate increased to 4.95% in 2003.] This will have the

effect of reducing contributions into the Plan from the University and individual faculty members.

POINTS MADE IN COLLECTIVE BARGAINING:

1) **June 10.** There is strong sentiment from the membership to do something here. The rate of contribution by both the faculty and the University should not decrease. In the case of sessionals, membership in the Plan should be allowed at the option of each sessional.

COMMENT:

1) It is difficult to respond to this request at present because the government plans to put a ceiling on the amounts that employees may put into pensions plans.

2) If one compares our plan with those extent at other universities it is still, with the exception of Regina, the richest in Canada. Even though contributions to CPP will increase over the next few years, deducting this amount from a member's contribution (currently 5%) will still result in more money going into the pension plan (14.5%) than is the case with other universities (except Regina and possibly Toronto - Bertie to check latter).

...

ACTION:

1) In respect of comment 1, we need more detail on government intentions. In particular we need to decide what is to happen of earnings of those members who are precluded from putting money into the Plan because it would exceed the ceiling. Should this be given as straight salary? Do tax implications make this impractical and if so should it be designated for research purposes if the faculty so wishes?

2) Given comment 2 above, we should resist this proposal but provide facilities for individual faculty to increase their contributions to make up the difference caused by allocations to CPP.

(italicized statutes in original)

The reference in "Comment 2" to "Bertie" is a reference to Dr. Bertie McClean, the then Associate Vice-President (Academic) of the University, who was representing the University in that round of collective bargaining.

No further Minutes of the Salary Negotiating Team were tendered into evidence at the arbitration hearing. The evidence pertaining to that round of collective bargaining, and more specifically the pension contribution issue, skips to early December 1988. By letter dated December 1, 1988, Dr. McClean wrote to Dr. Dennis Capozza, the then President of the Association, who was representing the Association during the negotiations, setting out a proposal for a salary settlement for the year July 1, 1988 to June 30, 1989. One component of the University's salary settlement proposal was "Proposal IIA", which concerned the issue of pension contributions to the FPP and the CPP. In a letter dated December 8, 1988, Dr. Capozza, for the Association, "accept[ed] Proposal IIA concerning our Pension Plan and C.P.P. contributions." (The language of Proposal IIA is set out at page 1 of this award.)

The University and the Association were unable to settle all bargaining issues for the 1988-89 academic year. Consequently, interest arbitration proceedings were conducted under the parties' Agreement on the Framework for Collective Bargaining. An interest arbitration board chaired by Leon Getz convened proceedings on various dates in December 1988 and January 1989, and the interest arbitration award was published on April 17, 1989 (the "Getz Award"). The earlier agreed-to Proposal IIA was set out at pages 6 and 7 of the Getz Award, which additionally settled other outstanding issues between the parties.

As the agreed-to pension contribution language under the Collective Agreement, which will also be referred to herein as the "1989 pension contribution agreement", differed from that provided for under the 1966 pension contribution agreement that was reflected in the text of the FPP, an affirmative vote of a majority of the members of the FPP voting by mail was required in order to proceed with the amendment of the FPP text. For this purpose, Dr. McClean and Ms. Pat McCann, the Association's Acting Executive Director at that time, agreed on the language of a "Background" statement, which was sent to FPP members with the ballot for that vote. That Background statement was as follows:

BACKGROUND

1. The Pension Plan currently provides that faculty members make a contribution to the Plan of 5% of their salary less an amount required to be contributed to the Canada Pension Plan (C.P.P.). The Pension Plan also requires that the University make a contribution to the Plan equal to 10% of a member's salary less the amount required to be paid to the C.P.P.

2. The amount required to be paid by an individual to C.P.P. is calculated on a percentage of the difference between the basic exemption and the maximum yearly pensionable earnings of an individual under the C.P.P. The percentage had remained unchanged at 1.8% from inception of the C.P.P. in 1966 to 1986.
3. The contribution rate to C.P.P. was increased on a sliding scale, beginning in 1987 at 1.9% of the difference between the basic exemption and the maximum yearly pensionable earnings of an individual under the C.P.P. and will increase to 3.8% of the difference by the year 2011. [As noted earlier, it increased to 4.95% in 2003]
4. As a result of the increase in the contribution to C.P.P., contributions by both the members and the University to the Pension Plan under its current provisions will decrease each year.
5. The proposed amendment therefore, will assure that the contribution to the Pension Plan will not decrease, on the part of an individual, to a sum less than 5% of that individual's salary less the 1.8% of the difference between the basic exemption and the maximum yearly pensionable earnings of an individual under the C.P.P., and on the part of the University, to not less than 10% of an individual's salary less the above difference.
6. The member and the University will each contribute to the C.P.P. the amount that each by law is required to contribute.

Dr. Langton participated in the 1989 vote regarding the required amendments to the FPP, and in her evidence she was asked to provide her "understanding" of both the above-quoted "Background" statement and the 1989 pension contribution agreement. I accept the University's characterization of Dr. Langton's testimony in this regard as "interpretive argument", but Dr. Langton's evidence will be excerpted here as it illuminates the central difference between the parties in the Grievance.

The thrust of Dr. Langton's evidence in direct examination regarding the 1989 pension contribution agreement was that, in her view, it did not amend the University's obligation to make an overall contribution of 10% for pensions. She noted that the Association's research failed to uncover "any document saying that if no money is sent to CPP, the University got to pocket it", and she opined that in 1989:

...the parties came to an agreement to lock into place the 1.8% contribution as part of the overall [10%] pension contribution ... the understanding was

that this offset was some of the money required to be paid to CPP; and further, in the event that no money was being paid to CPP, the overall contribution to pensions was 10% by the University and 5% by faculty members.

Under cross-examination Dr. Langton was questioned about her understanding of the meaning of paragraphs 2 and 3 of the pension contribution agreement set out in the Getz Award. She testified that her understanding was that under paragraph 2, the University must contribute 10% to the FPP and CPP, and that in addition to that contribution, the University was obliged under paragraph 3 to satisfy “any remaining obligation to make CPP payments as they increased.”

Also under cross-examination Dr. Langton was taken to the Background statement for the 1989 vote. She was asked to agree that paragraph 5: explained that contributions to the FPP would not be more than 10% minus 1.8% for the University; made no reference to any “contribution to CPP”; and made no reference to whether or not a member was actually contributing to the CPP. In response, Dr. Langton stated that paragraph 5 had to read together with paragraphs 3 and 6, and her understanding was that, when so read, it meant that: under paragraph 5, the University is required to actually “contribute the 1.8% offset to CPP”; and, under paragraph 6, the University is required to contribute “the rest of the money to CPP in addition to” the 1.8% contribution to the CPP under paragraph 5, because paragraph 6 is “unrelated to” the 10% contribution requirement under paragraph 5.

Returning to the background chronology, the majority of the ballots cast in the 1989 vote regarding the amendment of the pension contribution language in the FPP favoured the amendment. The Minutes of the FPP Board of Trustees meeting on May 23, 1989 record, among other things, this motion, which was carried at that meeting:

On a motion from Dr. Hamilton, seconded by Dr. Wood, it was agreed that the Pension Plan be amended to incorporate the changes negotiated between the Faculty Association and the University of British Columbia as outlined in Mr. J.C. Carphin’s letter of May 1, 1989 and Dr. McClean’s letter of May 19, 1989.

(Mr. J.C. Carphin was not identified in the evidence, and his letter of May 1, 1989 was not tendered into evidence.)

At the FPP Board of Trustees meeting on September 8, 1989, a motion to approve “the amendment regarding contribution rates” was carried; and, in the Minutes of the FPP Board of Trustees meeting on December 11, 1989, the following is recorded under the heading “Update on Amendment on Contribution Rates”:

The Trustees discussed the result of the members’ vote regarding the change in contribution rate to the pension plan. It was noted that ballots were mailed to 3,072 members. Of those, 905 ballots were returned. Four ballots were [un]identifiable and three ballots were spoiled. These were not counted. Of the returned ballots, 879 voted in favour of the amendment.

On a motion from Dr. Mindess, seconded by Dr. Hamilton, it was approved to implement the change in contribution rates.

It was agreed to have Legal Counsel examine the feasibility of changing the section of the Trust [Agreement] regarding which members vote on a contribution rate increase. Concern was expressed that currently, terminated members are eligible to vote on such an amendment when there may be no benefit to them to vote.

The FPP prepares an Annual Report for its members. In the 1989 Annual Report, the following information regarding faculty member and University contributions to the FPP is set out at page 13:

Required Contributions

During 1989, the faculty member made monthly contributions of 5% on the first \$225 of a gross monthly income, 3.2% on the next \$2,083.33 of monthly income, and 5% on monthly income above \$2,308.33.

During 1989, the University made monthly contributions for each member of the 10% of the first \$225 of gross monthly income, 8.2% on the next \$2,083.33 of monthly income, and 10% on monthly income above \$2,308.33.

In her evidence under cross-examination Dr. Langton did not agree that the 1989 Annual Report “contained nothing” that would lead a member to conclude that a different pension contribution formula applied to faculty members who were not contributing to CPP. Her evidence in this regard was that, “the words you’ve read exist, and the assumption would be that the 1.8% is sent to CPP.” Dr. Langton similarly did not agree that the 1989 Annual Report about monthly FPP contributions “reflects the contribution formula in the Collective Agreement.” Her response to this proposition was that “the

Collective Agreement has no formula”, and she stated that she “disagrees with” the University’s “interpretation of the Collective Agreement.”

Dr. Langton also testified that from 1989 onward, a number of faculty members took advantage of the option under the CPP legislation to receive their CPP benefits while still contributing to the FPP but not making any contributions to the CPP. And, she agreed under cross-examination that from 1989 onward, no such faculty member ever complained to the Association about the University’s pension contributions to the FPP on their behalf.

On February 16, 1990, the University’s Manager of Employment and Benefits Services, Marcelle Sprecher, wrote to the Chief Pension and Profit Sharing Plan Department of Revenue Canada Taxation, enclosing the amendments to the FPP for members of the academic and administrative executive staff. (The Minutes of the Board of Trustees meetings reflect the fact that Ms. Sprecher was also the “Acting Secretary” at the FPP’s Board of Trustees’ meetings.) In her correspondence with Revenue Canada Taxation, Ms. Sprecher reported the above-quoted resolution passed at the Board of Trustees meeting on September 8, 1989, and the amendments to the contribution formula under the FPP were described as follows:

A. Section IV.1. of the Plan is deleted and the following new Section IV.1. of the Plan is substituted therefore:

IV. Member Contributions

1. Required Contributions by Members

During his membership in the Plan, each member shall make required contributions monthly to the Pension Fund by means of payroll deduction of an amount equal to 5% of his basic salary, minus, if the member’s basic salary exceeds the year’s basic exemption under the Canada Pension Plan, 1.8% of the difference between:

- (a) the year’s basic exemption under the Canada Pension Plan and,
- (b) the lesser of:
 - (i) the year’s maximum pensionable earnings under the Canada Pension Plan, and
 - (ii) the member’s basic salary.

B. Section V.1. of the Plan is deleted and the following new Section V.1. [is] substituted therefore:

V. University Contributions

1. Regular Contributions

The University shall make regular contributions monthly to the Pension Fund in an amount equal to 10% of the basic salary of each member in the employ of the University, minus, if the member's basic salary exceeds the year's basic exemption under the Canada Pension Plan, 1.8% of the difference between:

- (a) the year's basic exemption under the Canada Pension Plan, and,
- (b) the lesser of:
 - (i) the year's maximum pensionable earnings under the Canada Pension Plan, and
 - (ii) the member's basic salary.

By letter dated September 12, 1990, the Pension Officer for the Registered Plans Division of Revenue Canada Taxation accepted these amendments to the FPP.

The 1991 FPP Annual Report for the years ending December 31, 1990 and 1991 includes the following at page 17:

1. Description of Plan as at December 31, 1991:

The following description of the University of British Columbia Pension Plan for Academic and Administrative Executive Staff (the "Plan") is a summary only. For more complete information, reference should be made to the Plan document.

...

(b) Funding policy:

The Plan document requires members to make the following contributions:

- 5% of basic salary up to YBE
- 3.2% of basic salary between the YBE and the YMPE
- 5% of yearly salary over the YMPE

The University is required to make the following contributions:

- 10% of basic salary up to YBE
- 8.2% of basic salary between the YBE and the YMPE
- 10% of basic salary over the YMPE

YBE is the “year’s basic exemption” under Canada Pension Plan requirements while YMPE is the “year’s maximum pensionable earnings” under the Canada Pension Plan requirements.

The FPP also produces and distributes to plan members an annual publication entitled “Pension News”. In the 1991 Pension News, the amended contribution formula is described in the same terms as it is described in the above-quoted FPP Annual Reports. In addition, the 1991 Pension News included specific “illustrations” of the required pension contributions for both faculty members and the University applying the 5%, 3.2% and 5% contribution percentages and the 10%, 8.2% and 10% contribution percentages respectively.

In 1991, the *Income Tax Act* (the “*ITA*”) was amended. One effect of that amendment was to impose a monetary cap of \$15,500.00 per year on an individual’s contributions to a registered pension plan, such as the FPP. That limitation negatively impacted high-income-earning member(s) of the FPP, and in or about May 1992, the University responded to this impact by voluntarily establishing a non-registered supplemental pension arrangement -- i.e., the SA -- for high income earners. Under the SA, when high income earners reach their statutory limit for contributions into the FPP, the University makes a contribution to the SA on their behalf.

The parties disagree about the basis on which the University contributes to the SA. Dr. Langton expressed the view in her evidence that when the *ITA* was amended in 1992, the University was “required” to contribute 10% to the SA “because once it reached the cap, no more money could be put into the [FPP].” Dr. Langton opined that this requirement applied in order for the University to “fulfill” its obligation to make an overall contribution of 10% for pensions. Dr. Langton further opined that if a faculty member makes no contributions to the CPP, either by choice or by law, the University must contribute 8.2% plus 1.2% of that member’s basic salary to the SA. Whereas Ms. Neighbour, the Executive Director of Operations for the FPP, testified that when a faculty member reaches the maximum contribution level under the FPP as a result of the limitation under the *ITA*, the University’s contribution to the SA is governed by the terms

of the SA, and more particularly, Section III, SUPPLEMENTAL CREDITS, which provides as follows:

III SUPPLEMENTAL CREDITS

- 3.1 The University will establish a Supplemental Credit under this Plan for a Member for each month in which the University's contribution to the Pension Fund for that month for that Member is reduced or limited as a result of the application of the maximum annual limit on the aggregate of such contributions by the Member and the University prescribed under the *Income Tax Act (Canada)*.
- 3.2 The amount of the Supplemental Credit for a month will be the amount that the University would be required to contribute to the Pension Plan on behalf of the Member for that month if the maximum annual limit on the aggregate of contributions to the Pension Plan by the University and the Member did not apply, less the amount of any University contributions to the Pension Plan with respect to that month on behalf of the Member.

In her evidence Ms. Neighbour explained that the University's payroll system includes a formula for calculating the statutory limit on contributions to the FPP for high income earners, and she stated that at the end of each year, a manual reconciliation is performed for the contribution formula in the FPP. Ms. Neighbour emphasized that under the Supplemental Credits provision of the SA, the annual contribution to the SA for each high income earner is "what is left over based on the contribution formula in the [FPP]." Ms. Neighbour testified that the University "sends [to the SA] the amount that can't go into" the FPP.

Under cross-examination, Ms. Neighbour disputed Dr. Langton's evidence that the University is required to contribute 10% of a member's basic salary to the SA. Ms. Neighbour confirmed her earlier evidence that under the terms of the SA, the University only contributes the "excess" over the YMPE (as defined in the CPP) "that cannot be contributed to the FPP." She reiterated that:

At the end of the year, we determine the amount the University should have contributed to the [FPP] based on the contribution formula for the [FPP], and the excess goes to the Supplemental Arrangement. That is, the Supplemental Arrangement receives the excess contribution over and above the FPP. That is not 10%."

Where the evidence of Dr. Langton and Ms. Neighbour differs in this regard, I find I must prefer Ms. Neighbour's evidence. I conclude that Ms. Neighbour's evidence reflects, and is consistent with, the plain meaning of the clear language adopted under Section III of the SA; whereas, in my view, Dr. Langton's evidence reflects a misunderstanding of those clear terms based on her opinion that the parties have never amended the University's obligation to make an overall contribution of 10% for pensions. (This latter issue will be further discussed below.)

In 1992, the FPP text was restated to ensure compliance with the enactment of the *PBSA* and associated *Regulations*. One provision of the *PBSA* requires member and employer contributions to registered pension plans to use contribution "formulas" complying with prescribed criteria. And, one section of the *Regulations* requires such formulas to be "uniform" unless the Superintendent approves a variation based on "age" or "length of service" or "some other criteria the Superintendent considers reasonable."

Ms. Neighbour testified that in the 1992 restatement of the FPP text, the 1.8% offset contained in the contribution formula under the Collective Agreement became a defined term -- i.e., "Contribution Offset". She explained that the FPP has a uniform contribution formula because it is the same for all members, and the only variable in the contribution formula is the member's actual salary. Ms. Neighbour also explained how the Association's position in the Grievance would interfere with the uniformity of the contribution formula under the legislative scheme by creating two different formulas and two different classes of members -- i.e., for members contributing to the CPP, the 1.8% offset in the contribution formula would be applied to salary between the YBE and the YMPE for purposes of calculating contributions to the FPP; whereas for those members not contributing to the CPP, the University would make a 10% contribution to the FPP. Ms. Neighbour testified that since its inception, the FPP has had only one class of members, and she emphasized that in her "30+ years of experience in pension management", she has never seen a pension plan that has different classes of members depending on whether or not they contribute to the CPP.

The amendments to the FPP text became effective July 1, 1992. As noted in Ms. Neighbour's evidence, the concept of the "Contribution Offset" was now a defined term:

2.01.10 "CONTRIBUTION OFFSET" means,

- (a) if SALARY exceeds the Year's Basic Earnings as defined in the Canada Pension Plan, 1.8% of the difference between:

- (i) The Year's Basic Earnings as defined in the Canada Pension Plan, and
 - (ii) the lesser of the Year's Maximum Pensionable Earnings as defined in the Canada Pension Plan and SALARY, and
- (b) otherwise, nil;

Employee and employer contributions to the FPP are addressed under Article 5 of the amended FPP text in this way:

REQUIRED EMPLOYEE CONTRIBUTIONS

5.02 An ACTIVE MEMBER, who is not on APPROVED LEAVE OF ABSENCE or receiving benefits under an INCOME REPLACEMENT PLAN shall, in respect of each calendar year, contribute 5% of SALARY minus the CONTRIBUTION OFFSET to the PENSION FUND, which CONTRIBUTION shall be allocated to the MEMBER'S EMPLOYEE CONTRIBUTION ACCOUNT.

(capitalization in original)

Article 5.07 describes the "Employer Contributions" as follows:

REGULAR EMPLOYER CONTRIBUTIONS

5.07 The UNIVERSITY shall for each ACTIVE MEMBER who is:

- (a) not on APPROVED LEAVE OF ABSENCE or receiving benefits under an INCOME REPLACEMENT PLAN, contribute to the PENSION FUND in respect of each calendar year, within the time specified in section 5.11 an amount being 10% of SALARY minus the CONTRIBUTION OFFSET; and, ...

In the 1992 Pension News publication, the amendment process for the FPP text was discussed in detail, and at page 3, the following information is set out:

Contributions - Present Situation (remaining unchanged)

During your working career at UBC, you are required to contribute monthly to your pension plan. Individuals contribute according to the following formula:

- 5% of your basic salary up to the YBE*

- 3.2% of your basic salary between the YBE and the YMPE**
- 5% of your basic salary over the YMPE

* YBE - Year's Basic Exemption under the Canada Pension Plan requirements (currently \$3,200.00)

** YMPE - Year's Maximum Pensionable Earnings under the Canada Pension Plan requirements (currently \$32,200.00)

The University is required to contribute as follows:

- 10% of your basic salary up to YBE
- 8.2% of your basic salary between the YBE and the YMPE
- 10% of your basic salary over the YMPE

Also at page 3 of the 1992 Pension News, the federal government's limits on registered pension plan contributions are noted.

Dr. Langton agreed in her evidence that she occasionally receives the Pension News publications. With respect to the 8.2% contribution rate for the University specified therein, she expressed the view that "this meant that the University should be shipping off 1.8% to CPP", and she further stated that "if they are not doing so they can't keep it."

In April 1994, the University applied to register the FPP under the *PBSA*, and registration was granted effective June 21, 1996.

In addition to the FPP Annual Reports and the Pension News publications, the University's Pension Administration Office maintains a Pension Plan Website. One page of that website is entitled "FPP at a Glance", and under the heading "FPP Basics", the following information is set out:

- How much do I Contribute to the Plan?

Your Contributions are deducted each pay period as follows:

- 5% of your basic salary up to the YBE, plus
- 3.2% of your basic salary between the YBE and the YMPE, plus
- 5% of your salary above the YMPE

YBE is Canada Pension Plan's (CPP) yearly basic exemption (YBE); \$3,500 for 2013

YMPE is Canada Pension Plan's (CPP) yearly maximum pensionable earnings (YMPE); \$5,100 for 2013

Use your Calculator tool to determine your own required contributions.

- How much does UBC Contribute to the Plan?

UBC or a participating employer contributes each pay period as follows:

- 10% of your basic salary up to the YBE, plus
- 8.2% of your basic salary between the YBE and the YMPE, plus
- 10% of your salary above the YMPE

YBE is Canada Pension Plan's (CPP) yearly basic exemption (YBE); \$3,500 for 2013

YMPE is Canada Pension Plan's (CPP) yearly maximum pensionable earnings (YMPE); \$5,100 for 2013

(underlining in original)

IV. Other Aspects of the Association's Evidence

As noted earlier, the genesis of this dispute is identified in an exchange of emails between the Association and one of its members, Dr. W. The email exchange began on December 22, 2007 when a Member's Services Specialist for the FPP wrote to Dr. W as follows:

Just a quick e-mail to let you know that if you have applied to receive your Canada Pension Plan (CPP) pension payment, your CPP contributions deducted from your pay should cease. However, this does not happen automatically. To put this into effect you need to send the UBC Payroll Department a copy of the letter you receive from CPP confirming that your pension payments have been approved and therefore you are requesting that your future CPP contributions cease to be made from your bi-weekly pay.

On October 20, 2008, Dr. W wrote to the Member's Services Specialist as follows:

I am sure there a number of people like me who are still working but receiving our CPP. UBC has been notified and no deductions were taken out for me this year.

However, I still believe that UBC reduced payments made to my UBC Pension Plan as if I (and UBC) were making CPP contributions.

Is this assumption correct? If so, shouldn't UBC be contributing the full amount to my pension plan?

The following day, the Member's Services Specialist responded to Dr. W as follows:

The Faculty Pension Plan text defines the contribution formula in terms of earnings "as defined in the Canada Pension Plan". It does not refer to contributions made by the member to the CPP. Thus, there is no distinction made for those who would be receiving CPP benefits and not contributing as opposed to those who are contributing. As well, the agreement worked out between the Faculty Association and the University last year when the moratorium was placed on mandatory retirement did not mandate any changes to the formula for those working beyond normal retirement age and collecting CPP.

Having received that response, Dr. W forwarded the above-quoted email exchange to Dr. Langton, President of the Association, saying as follows:

As you can see from the emails below, the University is saving about \$2,000 per post-65 faculty member who is not retired but taking CPP. I think this should be corrected, if not now, then in the next contract.

Dr. Langton testified that Dr. W's email showed that he had detected a problem from looking at his paycheque. Dr. Langton forwarded Dr. W's email chain to the Association's former President, Liz Hodgson, and the Association's Chief Negotiator, Jim Johnson, seeking their help in addressing Dr. W's concern. Dr. Langton, Mr. Johnson, and Association's staff then conducted their research, and the Association decided to grieve because it concluded that the University was not fully meeting its 10% pension obligation. (The specific source of the Association's conclusion that the University is not meeting its pension contribution obligation -- i.e., a person(s) or document(s) -- was not identified in the evidence.)

The Association was not content with the University's earlier-quoted response to the Grievance because, as noted in Dr. Langton's evidence, that response did not explain why the University "gets to pocket the offset" if the University is not actually paying the offset to the CPP. During cross-examination, it was put to Dr. Langton that after 1989, the University had contributed well over 10% for pensions -- i.e., 10% up to the YBE, 8.2% for that portion of the salary between the YBE and the YMPE, 10% above the YMPE, plus 4.95% to the CPP. Dr. Langton initially responded that she "did not know",

but when pressed, she agreed. She also agreed that the University's contribution for pensions "adds up to almost 14%", but added that she did not "see the relevance [of that]."

IV. Other Aspects of the University's Evidence

Kent Matthewson, a Technical Analyst in the University's Finance and Payroll Department, testified in the University's case. He explained in his evidence how the University's payroll system is programmed for purposes of making contributions to the FPP and the CPP. He stated that for contributions to these pension plans, appropriate percentages and threshold salary amounts are entered into the payroll system, which then calculates the pension contributions each time a paycheck is generated. For the University's contributions, the percentages are 10% of basic salary below the YBE of \$3,500.00, 8.2% of basic salary falling between the YBE and the current YMPE amount, and 10% above the YMPE. He noted that the terms YBE and YMPE are defined by the CPP, and that the YBE has remained constant at \$3,500.00 from 1997 to today. He explained that the CPP issues "Releases" each year setting out the increase in the YMPE. For instance, in 2007 the YMPE was \$43,700.00, in 2011 it was \$48,300.00, and in 2012 it was \$50,000.00. In terms of the CPP contribution rate, Mr. Matthewson testified that it is currently 4.95% for both employees and employers, and has remained constant at 4.95% since 2003. Mr. Matthewson emphasized in his evidence that the amount the payroll system deducts from employees' paycheques and remits to the FPP is not calculated on the basis of whether they are, or are not, contributing to the CPP; and, he testified that this has been the case during the entire time he has been working in the Payroll department, commencing in 1993.

For purposes of this Grievance, Mr. Matthewson prepared a list for the Association recording all faculty members of the FPP who had opted out of making CPP contributions. That list went back as far as the University's payroll system allows -- i.e., for the period from 1992 to 2013. He testified that there was "no change to the contributions to the [FPP]" for members on the list based on their decision to opt out of making CPP contributions. He also explained that members who stop making CPP contributions because they are receiving CPP benefits are still able to contribute to the FPP, and in such circumstances, "no changes are made" to the way FPP contributions are calculated.

Mr. Matthewson further explained that there are other circumstances where employees do not contribute to the CPP but still make contributions to the FPP: e.g., when they are on an unpaid authorized leave and when they are on maternity leave or personal leave. Another example is when a sessional instructor does not earn income during the summer. His evidence was that from at least 1992 onward -- the period he was able to investigate in the payroll system -- the calculation of employer and employee contributions to the FPP "did not change" for employees in one of these circumstances depending on whether or not they were contributing to the CPP. I find that Mr. Matthewson's evidence in this regard is confirmed in the payroll documents generated by the University's payroll system.

For the purposes of testifying at the arbitration hearing, Mr. Matthewson extracted a large number of pay stubs from the University payroll system showing contributions to the FPP before and after faculty members had taken such leaves. These payroll documents establish that there was no change to the employer or employee contributions to the FPP before or after the members stopped contributing to the CPP. Mr. Matthewson testified that the pay stubs show the same information as that shown on members' pay statements. In other words, the pay statements show that the same amount of money was deducted and contributed for both employee and employer contributions to the FPP irrespective of whether the employee was making CPP contributions.

Mr. Matthewson acknowledged under cross-examination that the University's pension contributions are not separately shown on the pay stubs in terms of the pre-YBE amount, the post-YMPE amount and the percentage in between. He noted, however, that for contributions to the FPP, the Pension Administrator posts the contribution formula, as well as the way those calculations are made, on the FPP website "for anyone to refer to" for this purpose. He agreed that the "facsnaps" document, which the Payroll Department sends to the Association, does not show the members' pension contributions, and he said he is not aware of any document the Payroll Department sends to the Association showing the pension contributions broken down by employee and employer.

Several of Dr. Langton's pay statements were tendered into evidence in the Association's case, and Mr. Matthewson was questioned about them under cross-examination. Dr. Langton had earlier agreed in her evidence under cross-examination that FPP members receive pay statements showing the FPP contributions being made on their behalf by the University. She had stated that she does not "look at" her pay statements, but when pressed to agree that "it was all there to be seen if you looked at it",

she had replied “correct.” When Mr. Matthewson was asked to review these pay statements during his cross-examination, he was asked to agree that they do not show “the 1.8% contribution paid to CPP”. In response, Mr. Matthewson said “you mean the 4.95% paid to CPP.” He then explained how the 4.95% CPP contribution is calculated and sent to the CPP, and he explained how the YMPE is taken into account in the University’s payroll system. When then asked if there is any way for an employee to know how much is being contributed to the FPP based on the YBE and YMPE figures, Mr. Matthewson answered: “Yes. The contributions to the FPP are shown in the deductions section of the pay statements, and for the 1.8% breakdown, they need to access information from the pension office.”

Also under cross-examination, Mr. Matthewson was asked about his understanding of the issue in dispute in the Grievance. He said he understands the Association believes the 1.8% offset for the mid-portion of the FPP contribution formula is “linked to” actual CPP contributions so that if a member opts out of making CPP contributions, that part of the calculation should increase from 8.2% to 10%. He emphasized, however, that based on his many years of experience in the University’s payroll department, no such contribution formula has ever been applied. Mr. Matthewson’s evidence was that the changes to the University’s payroll systems that would be required if this arbitration board decides that two sets of calculations must be made for FPP members on the basis that they do, or do not, make CPP contributions would “make lots of work.”

Ms. Neighbour testified that if the contribution formula under the 1966 pension contribution agreement was in effect today, the contribution rate for the FPP for basic salary falling between the YBE and the YMPE would be 10% minus 4.95%, or only 5.05%, as opposed to the 8.2% contributed since 1989 under the Collective Agreement. She also explained that the effect of the previous integrated contribution formula would have been to significantly reduce the benefit payable to members of the FPP. When asked in her evidence what the University’s current “effective contribution rate” to the FPP is, Ms. Neighbour said that “on average, it is 9.3% or 9.4% depending on an employee’s basic salary”, and she emphasized that in addition to this contribution rate to the FPP, the University contributes 4.95% to the CPP.

Ms. Neighbour presented calculations of the difference between contributions to the FPP under the 1966 pension contribution agreement and the 1989 pension contribution agreement. She testified that if the offset in the contribution formula had not

been “frozen” in 1989 at 1.8% of the difference between the YBE and YMPE, deductions from contributions to the FPP would have been significantly greater. She estimated that when the revenue earned by the FPP since 1989 is included in the calculations, each FPP member received on average \$26,960.30 more under the 1989 Agreement contribution formula in the 1989 pension contribution agreement than s/he would have received under the 1966 pension contribution agreement. Ms. Neighbour further testified that the total additional University contributions paid into the FPP from 1989 to 2011 due to the fixed 1.8% contribution offset under the 1989 pension contribution agreement was almost 50 million dollars. This estimate is based on the assumption that all members earned over the YMPE, and according to Ms. Neighbour, all but 5% of faculty members earn a salary over the YMPE.

In terms of the administrative implications and costs associated with having two contribution formulas for the FPP depending on whether or not a member is contributing to the CPP, Ms. Neighbour estimated that it would cost \$200,000.00 to make the significant required system changes to the current pension system and its various tools. Ms. Neighbour accepted in her evidence in cross-examination that such changes “could be done.”

With respect to who would bear such costs, her uncontradicted evidence was that it would be the members of the FPP, 17% of whom are not even members of the Association. She also noted that two streams of contributions, rather than one, would have to be reconciled annually; and, the FPP text would have to be amended and then approved by the Board of Governors, the members and the Pensions Standards Branch.

Under cross-examination Ms. Neighbour testified that her “understanding” of the parties’ pension contribution agreement between 1966 and 1989 was that the contributions to the FPP were integrated with the actual contributions to the CPP, and that then, under the terms of the Getz Award, the parties agreed to two things: they each agreed to pay the CPP whatever CPP required; and, they agreed to a “defined offset” in the contribution formula for the FPP, the “purpose” of which was to “freeze” that percentage and “ensure there would never be more than a 1.8% deduction from the contribution going into the FPP for any part of the salary between the YBE and the YMPE.” When pressed in cross-examination, Ms. Neighbour refused to agree with the proposition that, absent the 1989 pension contribution agreement, the University would have had to contribute 10% to the FPP plus an additional 1.8% to the CPP. Her evidence was that prior to 1989, it was “10% minus 1.8% or the actual CPP contributions” that was

contributed to the FPP; and then, from 1989 onward, the 1.8% simply became a specified offset in the contribution formula for FPP contributions for that part of a member's basic salary between the YBE and YMPE, as defined in the CPP. Like Dr. Langton's evidence regarding her "understanding" of the disputed provision, this aspect of Ms. Neighbour's evidence during cross-examination must also be viewed as "interpretive argument".

V. Analysis

Counsel's thorough submissions on all issues, plus the numerous authorities on which they rely, have been considered and will not be separately summarized in this award. The salient features of the parties' submissions and some of the cited authorities will be set out in the following analysis.

A. Timeliness of the Grievance

The first issue to be determined is whether the Grievance should be dismissed on the basis of a breach of the time limits in the Collective Agreement and/or on the basis of section 89(f) of the *Code* and the equitable doctrine of laches. The delay the University relies on is a period of approximately 20 years from 1989, when the pension contribution language of the Collective Agreement was settled, until 2008, when Dr. W's concern about the University's application of the contribution formula came to the Association's attention.

Article 21.07(a), Policy Grievance, provides as follows:

21.07 Policy Grievance

a) A policy grievance is defined as a difference arising between the University and the Faculty Association involving a general question of application, interpretation or alleged violation of a specified provision or provisions of this Agreement. A policy grievance shall be signed by the Provost or the President of the Association and submitted to the other party *within twenty-eight (28) days after the occurrence of the matter that is the subject of the grievance.*

(emphasis added)

With respect to a breach of the time limit under Article 21.07(a), the University contends that the language of Article 21.07(a) is mandatory, and says that the "occurrence" at issue is the University's consistent practice since 1989 of applying the

contribution formula in the Collective Agreement to the Association's members who are no longer contributing to the CPP. The Association, on the other hand, contends that this is a continuing grievance. It says the University has breached its pension contribution obligation each pay period, and as such, the Grievance is timely because the time limits under Article 21.07(a) run from the most recent occurrence.

I accept the Association's characterization of its claim as a continuing grievance. I find the Grievance relates to a continuing course of conduct where a collective agreement duty to make pension contributions arises at periodic intervals, and has allegedly been freshly breached each time. See *British Columbia Public Service Agency v. British Columbia Government and Service Employees' Union (Heinrich Grievance)*, [2010] B.C.C.A.A.A. No. 120 (McConchie) ("*Heinrich*"), and cases cited therein. At the same time, I do not accept the Association's submission that this finding renders the equitable doctrine of laches and section 89(f) of the *Code* inapplicable.

It is the case that certain arbitrators have held that the equitable doctrine of laches is not applicable to continuing grievances. However, I find the *Heinrich* award of Arbitrator McConchie and the cases cited therein -- i.e., *Wabi Iron & Steel Corp. v. United Steelworkers, Local 2020 (Neil Grievance)* (2009), 184 L.A.C. (4th) 144 (Marcotte); and, *Peel District School Board v. Canadian Union of Public Employees, Local 1628 (O.H.I.P. Premiums Grievance)*, [2010] O.L.A.A. No. 160 (Springate) -- to be persuasive in their reasoning. Even if a grievance is of a continuing nature, an arbitrator must nonetheless assess all of the circumstances of a given case in order to determine whether they make it "inequitable" to permit a grievance to proceed on its merits on any basis (paragraph 134). See also the reasoning in *National Automobile, Aerospace, Transportation and General Workers Union of Canada, Local 1015 v. Scotsburn Dairy Group (Pension Funds Grievance)*, [2008] N.S.L.A.A. No. 1, 92 C.L.A.S. 104 (Christie) ("*Scotsburn*"); *Re Board of Commissioners of Police for the City of Owen Sound and Owen Sound Police Association* (1984), 14 L.A.C. (3d) 46 (M.G. Picher) ("*Owen Sound*"), cited in *Scotsburn*; and, *Re Extendicare (Canada) Inc. and Ontario Nurses' Association* (2004), 135 L.A.C. (4th) 359 (Harris) ("*Extendicare*") and the cases cited therein. On the basis of all these authorities, I conclude that despite the continuing nature of the Grievance, I must assess all of the circumstances of this case, including whether the University has been prejudiced by the delay and cannot properly defend its case, to determine whether it would be inequitable to permit the Grievance to proceed on its merits on any basis.

The University contends that the doctrine of laches should prevent the hearing of the merits of the Grievance due to the Association's extreme and unreasonable delay in filing the Grievance and the severe prejudice the University has suffered due to the delay. The University submits that from 1989 onward, the Association should have known that the contribution formula under the Collective Agreement and the FPP was being administered uniformly to all FPP members irrespective of whether or not they were contributing to the CPP.

Further, the University submits that its ability to make its case has been severely prejudiced due to the Association's unreasonable delay in failing to grieve for more than 20 years. The University argues that a delay of this length creates a presumption of prejudice to its ability to make its case. Among other things, the University notes that no witnesses to the negotiations leading up to the parties' agreement to Proposal IIA and the Getz Award were called to testify because they are either unavailable or unlikely to have any clear memory of events that occurred almost 25 years ago. Therefore, argues the University, it is not appropriate for the arbitrator to use her discretion to relieve the Association from any issues of timeliness because the prejudice to the University is substantial, particularly in the light of the Association's reliance on historical events and documents dating back to the 1940s.

The Association contends that this is not appropriate case in which to apply section 89(f) of the *Code* and the equitable doctrine of laches because the delay is not unreasonable. The Association argues that until October 2008, its officials were unaware of the University's practice and breach of its pension contribution obligations. The Association maintains the University bears the onus of proving that Association officials responsible for the interpretation and application of the Collective Agreement knew, or should have known, about the University's practice, and knew, or should have known, that the practice conflicted with the Collective Agreement.

Additionally, says the Association, the University has suffered no prejudice or detriment in its ability to effectively respond to the Grievance because of the delay. The Association contends that prejudice cannot be established where witnesses are available even if they are no longer working for the University, as is the case with Dr. McClean. Moreover, says the Association, the mere fact that the University will be required to pay money owed does not constitute detriment.

Section 89(f) of the *Code* provides as follows:

89. Authority of arbitration board — For the purposes set out in section 82, an arbitration board has the authority necessary to provide a final conclusive settlement of a dispute arising under a collective agreement, and without limitation, may

...

(f) dismiss or reject an application or grievance or refuse to settle a difference, if in the arbitration board's opinion, there has been *unreasonable delay* by the person bringing the application or grievance or requesting the settlement, *and the delay has operated to the prejudice or detriment of the other party to the difference*,

(emphasis added)

In *Juan de Fuca Home Support v. British Columbia Government and Service Employees' Union (Billy Grievances)*, [2004] B.C.C.A.A.A. No. 92 (Gordon), section 89(f) of the *Code* was discussed at paragraph 35 in these terms:

Section 89(f) of the Code effectively codifies the equitable doctrine of laches. It authorizes arbitrators in British Columbia to apply the doctrine on a showing of unreasonable delay operating to the prejudice or detriment of the other party: *British Columbia Institute of Technology, supra*. The relevant factors for consideration by an arbitrator in exercising this discretionary jurisdiction are: the reasons for the delay; the consequential prejudice or detriment to the other party; and, any other relevant circumstances: *British Columbia Institute of Technology, supra*. As with the exercise of other forms of discretionary jurisdiction, each case will turn on its own particular facts.

In his award in *Teamsters Joint Council No. 36 v. Canadian Office and Professional Employees' Union, Local 15 (Morrison Grievance)*, [2009] B.C.C.A.A.A. No. 34 ("*Morrison*"), Arbitrator Lanyon determined two preliminary objections to the arbitrability of the union's grievance, which alleged that the employer had for many years failed to make appropriate pension contributions on employees' behalf. The second preliminary objection was that the union should be estopped because it had been silent in the face of the employer's pension contribution practice for many years. Arbitrator Lanyon upheld the estoppel objection. In reaching that determination, he noted at paragraph 52 that the B.C. Labour Relations Board (the "Board") in *B.C. Rail Ltd.*, [1992] B.C.L.R.B.D. No. 133, relying on the British Columbia Court of Appeal's decision in *Litwin Construction (1973) Ltd.* (1988), 29 B.C.L.R. (2d) 88, concluded that

the strict categories of equitable remedies such as promissory estoppel, waiver, election, laches and acquiescence have been replaced by a more broad principle designed to prevent unfairness and avoid inequitable detriment.

In response to the first element of the test under section 89(f) of the *Code* and the doctrine of laches -- unreasonable delay -- the Association claims the reason for the lengthy delay in filing the Grievance is its officials' lack of knowledge or awareness of the University's practice and breaches of its pension contribution obligations. In this regard the Association relies on, among other authorities, the Board's decision in *Maverick Coach Lines*, [1997] B.C.L.R.B.D. No. 435 ("*Maverick*"). I find the Board's reasoning in *Maverick* stands for the proposition that, in the context of the doctrine of laches and the defence that a party had no knowledge of the material facts, an adjudicator should assess the point at which the party had "the means of knowledge":

The doctrine of laches is based on the delay or acquiescence of a party in enforcing its lawful rights. The critical factors in assessing a claim of laches are the length of delay and the conduct of the parties during that period of delay: *3269 Enterprises Ltd.*, IRC No. C151/92. The assessment of the period of delay begins *from the point at which the party has the means of knowledge*.

(para. 55; emphasis added)

This approach of assessing the delay from the point at which the delaying party has "the means of knowledge" is reflected in somewhat different terminology in several other helpful awards on which the University relies in its submissions here. I find one of the most helpful awards is Arbitrator Innis Christie's *Scotsburn* award. There, among other things, the union claimed in 2004 that the employer had been breaching the collective agreement for 16 years by failing to contribute a "likeable amount" to employee contributions to the company pension plan. The union sought a make whole remedy for all affected employees. The employer sought the dismissal of the grievance on basis of the doctrine of laches. The employer contended that the delay was unreasonable. The employer also maintained that the manner by which contributions to the pension plan had been calculated was first implemented in 1992, and that the information relating to its calculation method had been available to the employees and the union from that point on.

Arbitrator Christie found that such a lengthy period of delay will typically be found to be unreasonable unless it arose because one party was unaware of the breach.

Arbitrator Christie stated that the effect of unawareness is “heavily” contextual (paragraph 78). On the facts before him, which will be discussed in more detail below, he concluded that union officials knew or should have known about the basic facts relating to the pension plan, and that the employer had not been making contributions to the pension plan in a manner consistent with the union’s interpretation. The learned Arbitrator explained that, in the context of the flexible doctrine of laches, his finding of deemed or constructive knowledge by the union’s officials involved the arbitral application of the “discoverability doctrine”: i.e., “... a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or *ought to have been discovered by the plaintiff by the exercise of reasonable diligence*” (para. 16; emphasis added).

Arbitrator Christie then turned to the issue of prejudice or detriment to the employer. He noted at paragraph 117 that due to the union’s delay, extrinsic aids to interpretation were unavailable. He then proceeded to rely heavily on the reasoning in Arbitrator Michel Picher’s *Owen Sound* award. Arbitrator Christie found the *Owen Sound* award was an appropriate example of the application of the doctrine of laches due to prejudice arising from delay. There, the employer had for 25 years calculated sick leave credits in alleged violation of the collective agreement. At paragraph 118 of *Scotsburn*, Arbitrator Christie quoted the following excerpts from the reasoning in *Owen Sound*, where Arbitrator Picher applied the doctrine of laches to bar the grievance before him from proceeding on its merits:

In my view it is significant that *the formula* by which the Board of Commissioners calculated sick-leave credits *was at all times readily accessible to the members of the association*. This is not a circumstance where a complex calculation was left entirely in the hands of management and implemented through the workings of a computer: cf. *Re Goodyear Canada Inc. and United Rubber Workers, Local 232* (1980), 28 L.A.C. (2d) 196 (Picher). *There is no reason why a diligent employee or representative of the association could not, by the application of a reasonable degree of care, have scrutinized and fully understood the interpretation of art. 14 which was at all times reflected in the records of the Board of Commissioners*. ... The provisions of art. 14 were equally available. Consequently, *the association and its members had all the tools necessary to monitor and, where appropriate, to object to the application of art. 14 by the Board of Commissioners*. ...

It is reasonable for any employer in a collective bargaining relationship to expect that the application of any part of the collective agreement which

does not meet with the approval of the opposite party will either give rise to a grievance or become a point of contention in the periodic renegotiation of the collective agreement. In this case the association has made no objection to the way in which the Board of Commissioners apply art. 14 over a great number of years.

...

In my view, in these circumstances, *it would be most inequitable to allow the association to assert successfully an interpretation of the sick-leave credits provision that is inconsistent with its many years of apparent acceptance of a contrary interpretation applied by the Board of Commissioners.* To give full effect to the grievance would subject the Board of Commissioners to the substantial cost of retroactively crediting all of the officers in its service in a manner consistent with the correct interpretation of art. 14. ...

(emphasis added)

In *Owen Sound*, Arbitrator Picher also found the employer would suffer inequitable detriment because during several rounds of collective bargaining, the union had made no objection about the way the employer had been applying the sick-leave credit calculation formula under the collective agreement.

Applying the reasoning in *Owen Sound*, Arbitrator Christie found at paragraph 119 of the *Scotsburn* award as follows:

... the Union “had all the tools necessary to monitor and, where appropriate, to object to the application of art. [12.4]”. *The Employer did not mislead the Union or withhold information in response to any reasonably diligent request by the Union, because the Union did not make any [request] about the Employer’s failure to make equal annual contributions to the Pension Plan.*

(emphasis added)

In further considering the issue of detriment or prejudice, Arbitrator Christie found as follows at paragraph 120:

... clearly “*transactions have been completed in reliance upon the premise that the engaged issues have been satisfactorily settled between the parties*”, “detrimental reliance or prejudice to the Employer has been established” and it would be very difficult for the subject matter of the first aspect of the Grievance to be “rectified [because of] the passage of time”.

The Union's failure to grieve in a timely fashion led to the Employer continuing to contribute to the Pension Plan as if it were a standard defined benefit plan right up to the advent of the new Scotsburn Plan in 1988. Were I to decide in the Union's favour, and rule that the Employer should have been contributing an amount equal to the employee's contributions from 1977 to 1988, *the financial and regulatory complications caused by the Union's delay in grieving would be great.*

(emphasis added)

In dealing with the issue of prejudice in *Scotsburn*, Arbitrator Christie additionally quoted from Brown & Beatty, *Canadian Labour Arbitration*, 4th ed., at 2:3214, for the proposition that prejudice includes "a change in position such as entrenching a practice."

The facts in *Scotsburn* were that the employer had provided a defined benefit pension plan for its employees for 15 years. Section 5 of the pension plan document defined the concept of "contributions" by both the employee and the company. Approximately five years after the pension plan was instituted, a certificate of registration for the plan was issued under the applicable pension legislation. As well, the plan insurer had prepared a pamphlet about the pension plan, and the pamphlet set out the contribution definition from Section 5 of the plan. There, no employee or union witness testified that they had ever received the pamphlet before 1988, and no employer witness could say that he had brought it to the union representative's attention before 1988. Despite these facts, Arbitrator Christie found as follows at paragraph 99: "Nevertheless, I find that the [union] ... either knew, or should have known and must be treated as having known, what Section 5 of the Pension Plan stated about Employer contributions." Then, at paragraph 104, Arbitrator Christie concluded as follows:

The fact that the Union did not know the amounts the Employer was contributing to the Fund, does not detract from the fact that it was obvious that the Employer did not consider itself under any obligation to contribute an amount equal to that contributed by employees and was not doing so.

(emphasis added)

Further, in response to the union's suggestion that the employer had failed to make adequate disclosure to the union of the sources of information about the contributions it was making, Arbitrator Christie disagreed, stating at paragraph 110: "... but there was no legal obligation on the Employer to do more than it did, and the Union failed to ask for any record of contributions under the old EDC Plan, even when the Plan was merged with, and its liabilities transferred into, the Scotsburn Plan in 1988."

Turning to several other awards wherein detriment due to delay is discussed, in *Extindicare*, where the doctrine of laches was applied, Arbitrator Harris found as follows at paragraphs 25-26:

I turn now to the second chief point to be considered, has there been any change of position on the Employer's part? I agree with Arbitrator Adell at page 159 that it is not a change of position that is required so much as suffering a detriment:

“Change of position” terminology is perhaps unfortunate all around. *It is easy to imagine a party suffering detriment through not changing anything but simply through carrying on with and entrenching a previous practice that now must be discontinued.*

(emphasis added)

In the *Morrison* award, Arbitrator Lanyon upheld the employer's estoppel argument, thereby preventing the union from claiming a retroactive remedy for the employer's failure for many years to make pension contributions for casual and temporary employees. In applying that equitable doctrine, Arbitrator Lanyon found at paragraph 65 that the union's lengthy silence in the face of the employer's pension contribution practice had been relied on by the employer to its detriment because the employer had “repeatedly lost the opportunity to negotiate” the issue of pension payments for such employees during a number of rounds of collective bargaining.

Earlier in his reasoning in *Morrison*, Arbitrator Lanyon addressed the relationship between longstanding employer practices involving “fundamental terms” of the collective agreement and “administrative practices involving members of the bargaining unit”, and the arbitral discretion to bar delayed claims that such practices are contrary to the collective agreement on the basis of one of equitable doctrines such as laches and estoppel. He found at paragraph 58 that if an employer's longstanding practice involves “compensation or some other fundamental employee right or interest, it is more likely that estoppel will be recognized.” Then, Arbitrator Lanyon found as follows:

It may well be that *an employer's practice in regard to such core issues as wages and/or benefits* would go undetected, either by the employees or the union, during the term of one collective agreement. Such a circumstance would be highly unusual but still plausible. However, *it is extremely unlikely that such a practice would continue over 3 rounds of*

collective bargaining, as well as the day-to-day administration of the collective agreement over a great number of pay periods, and no issue ever arise. ...

... if [the union official] did not know, he ought to have known, and/or someone else in the Union knew, or ought to have known, that the Employer was not making pension contributions on behalf of temporary and casual employees for a period of 9 years.

... In terms of the conduct of the parties, we conclude that the equities of this matter persuade us that an estoppel has been established. Any other result, as stated in *Litwin, supra*, would be contrary to a “sound sense of the equities, rights and conduct of the parties.”

(paras. 63-65; emphasis added)

The Association relies on the award of Arbitrator Hope in *West Fraser Electrical Services Ltd. v. International Brotherhood of Electrical Workers, Local 2203*, [1994] B.C.C.A.A.A. No. 4 (“*West Fraser*”). That case involved a continuing grievance wherein the union alleged that over the course of three collective agreements, the employer had improperly interpreted and applied the wage rate provisions for apprentices. Two of the three employers covered by the collective agreement agreed with the union’s method of calculating and paying apprentices wages, whereas the third employer relied on its consistent practice of calculating and paying apprentices under the prior collective agreements.

I find the facts in *West Fraser* are particularly distinctive and distinguishable from the facts of the case at hand. There, in the prior collective agreements, only percentages had been included in the wage schedules, whereas in the third collective agreement, the union had used a new computer program to calculate actual rates for apprentices. In that distinctive factual context, Arbitrator Hope found that a review of a sample recording of the contribution figures was not sufficient to place the union on notice of the employer’s practice. At paragraph 58, Arbitrator Hope also found that the issue regarding how apprentice wage rates were to be calculated had not been raised expressly or by necessary implication during collective bargaining.

Applying the reasoning and principles in these authorities to the case before me, I am satisfied that from 1989 onward, the Association and its members had ready access to a range of information that clearly reflected the University’s interpretation and application of the pension contribution language in the Collective Agreement and the

FPP. I find that from 1989 onward, the Association's officials should have known that the University was not deducting and sending contributions of 1.8% of basic salary between the YBE and the YMPE to the CPP when faculty members were not contributing to the CPP. On the basis of all that is before me, I find there is no reason why an Association representative or faculty member could not have, by the application of a reasonable degree of diligence, investigated and fully understood the University's interpretation of the contribution formula under the 1989 Agreement. In my view, the University's interpretation of, and practice under, the dispute provision was at all times clearly reflected in several readily-accessible sources of information as identified below. After all, unlike the facts in *West Fraser*, here, a change to the pension contributions to the FPP was undoubtedly in issue during the 1988-89 round of collective bargaining. I find it is therefore reasonable to conclude that Association officials and FPP members would pay close attention to, perhaps scrutinize, all subsequent pension-related publications and other sources of information to ensure they reflected the parties' intentions when the new pension contribution provision was incorporated into the Collective Agreement and formed the basis for the amendment to the FPP text.

I find paragraphs 5 and 6 of the parties' agreed-to Background statement, which was attached to the 1989 ballot for the amendment to the FPP, clearly put the Association and all FPP members on notice that the former integrated approach to pension contributions described in paragraphs 1 and 2 of the Background Statement was being changed in such a way as to separate, or de-integrate, contributions to the FPP and the CPP, and to replace the previous integrated contribution scheme with a new and different approach to pension contributions. In my view, Dr. Langton's evidence relating to her contrary interpretation of the Background statement did not withstand scrutiny under cross-examination; it reflects a mistaken interpretation of the language and structure of that document. Additionally, it is notable that the Background statement was negotiated by Ms. McCann for the Association. Yet, Ms. McCann did not testify at the arbitration hearing in support of either Dr. Langton's interpretation or a contrary interpretation from that which I find is supported by the plain meaning of the language and structure of that explanatory document.

The FPP is a jointly-trusted pension plan, and the evidence is that since its inception, members of the Association have acted as Trustees of the FPP. I find that as reflected in the Minutes of the Board of Trustees meetings from 1990 onward, the Association's Trustees would undoubtedly have been aware of the University's interpretation and application of the new pension contribution provision that was

incorporated into the Collective Agreement and the text of the FPP. I accept the University's contention that the text of the FPP was amended to reflect the language of the Collective Agreement, and there is no evidence that any Association-member Trustee who was involved in the amendment of the text of the FPP at that time ever questioned or challenged the specific expression in the FPP text of the new contribution language in the Collective Agreement.

The FPP publishes Annual Reports and the Pension News for FPP members. In my view, beginning with the 1989 Annual Report, it would have been readily apparent to the Association and its members that the University was only contributing 8.2% of basic salary between the YBE and the YMPE to the FPP for all faculty, regardless of whether they were contributing to the CPP. If the Association or a faculty member had any concern about the 1.8% difference in this portion of the contribution to the FPP, appropriate inquiries could have been made.

When the FPP text was restated in 1992 to comply with the *PBSA and Regulations*, I find the same pension contribution policy was clearly described therein for the Association and FPP members. As well, the 1992 Pension News publication plainly set out the University's interpretation and application of the pension contribution language for Association officials and FPP members.

Further, an amended FPP text was registered in 1996, and a review of the FPP text at that time by Association officials and/or FPP members would have confirmed the earlier clarifications of the University's interpretation and application of the pension contribution language under the Collective Agreement and the amended FPP.

Moreover, I find the FPP Website unequivocally specifies the University's contribution formula and encourages FPP members to "Use [their] calculator tool to determine [their] own required contributions". And, for that purpose, all necessary information is set out on the Website such that Association officials and members alike could make their own calculations and/or contact the Pension Plan office with any concerns, questions or misunderstandings they may have had.

In my view, the evidence does not support a finding that the University or the Pension Plan office ever misled the Association or its members in any way regarding its interpretation of, and practice under, the pension contribution language in the Collective Agreement. Nor does the evidence support a finding that the University or the Pension

Plan office ever withheld information, or ever provided incorrect information to the Association or a FPP member regarding the interpretation and application of the pension contribution language that was agreed to during collective bargaining for the 1988-89 Collective Agreement. Indeed, there is no evidence that the Association or a faculty member ever made such an inquiry.

Finally, I find the pay statements for the Association's numerous members who opted to stop paying CPP contributions when that option became available under the CPP legislation constituted notice of the University's interpretation of, and practice under, the pension contribution language in the Collective Agreement and the FPP. The uncontradicted evidence is that there was no change to the deductions recorded on such members' pay statements for FPP contributions before and after they stopped making CPP contributions. This finding is not weakened by the absence of calculations for the University's contribution because I am satisfied that it was obvious from the information on the pay statements that there was no change to the FPP contributions before and after faculty members stopped contributing to the CPP.

In all of these circumstances, I conclude that from 1989 onward, the Association's officials and FPP members had access to all of the necessary tools to ascertain, with a reasonable degree of diligence, that the University's interpretation and application of the pension contribution language under the Collective Agreement and the FPP did not distinguish between members who were contributing to the CPP and members who were not. I do not agree with the Association's contention that the University was obliged to approach faculty members who were deciding whether to stop making CPP contributions, or to "negotiate" in this regard. In my view, the University had no obligation to do more than it did to bring its interpretation and application of the changed pension contribution language to the Association's and members' attention. I am satisfied that the Association's officials should have known, and must be taken to have known, about the University's interpretation and administration of the pension contribution language in the Collective Agreement and the FPP, including its approach to pension contributions for members who stopped making CPP contributions. I therefore find the Association's 20-year delay was unreasonable.

Did the unreasonable delay operate to the University's prejudice or detriment? I find that it did for several reasons.

Firstly, the Grievance raises an interpretive issue -- i.e., what did the parties mutually intend in 1989 when they agreed to the language that was incorporated into the Collective Agreement? As the evidence set out in part III of this award establishes, for the most part, the usual extrinsic aids to interpretation were not presented during the evidentiary stage of the arbitration hearing. The Association's negotiator, Dr. Capozza, was not called as a witness to testify about the Association's intentions in December 1988 when he accepted the University's Proposal IIA for inclusion in the Collective Agreement. Nor, as I have already noted, did the Association call Ms. McCann to testify about the negotiation of the language included in the Background statement for the 1989 vote. There was no evidence to the effect that Dr. Capozza, Ms. McCann or, for that matter, Dr. McClean for the University, were "unavailable" to testify at the arbitration hearing, as that concept is discussed in the authorities. However, I am satisfied that even if these witnesses had been called to testify, their memories would have faded to a significant degree given the passage of 24 years, plus the apparent absence of any complete record of bargaining notes for the 1988-89 round of collective bargaining, as appears to be the case here.

Secondly, given the Association's apparent acceptance for at least two decades of the University's contrary interpretation of the pension contribution language in the Collective Agreement, the University's associated administrative systems and practice became entrenched. As well, the uncontradicted evidence is that regulatory complications would arise due to the Association's delay in grieving. In addition, the evidence is that there would be significant costs associated with the required changes to the University's administrative systems if the Association's interpretation were to be upheld at this time. Those costs would be borne by all FPP members, 17% of whom are not Association members.

Thirdly, the parties' Collective Agreement has been renegotiated a number of times since 1989, and there is no evidence the Association ever asserted its interpretation in the collective bargaining context. Nor is there any evidence that the Association ever put the University on notice that the Association intended to revert to what it claims are its strict rights under the Collective Agreement. Thus, on a number of occasions the University has lost the opportunity to address the pension contribution language at the bargaining table.

Fourthly, and importantly, I find the University has suffered detriment due to the delay in terms of the significant voluntary commitment it made to the Association and its

members under the SA. It will be recalled that, in or about May 1992, and in response to the amendment to the *ITA*, the University voluntarily established and implemented the SA for the Association's members who were high income earners. I have accepted Ms. Neighbour's evidence relating to the linkage between the pension contribution formula in the Collective Agreement and the application of the Supplemental Credits provision under the SA. In my view, the University's significant voluntary commitment under the SA constitutes its completion of a valuable monetary transaction on behalf of the Association's members in reliance on the premise that the pension contribution language had been satisfactorily settled between the parties in 1989, and on the understanding that its interpretation and application of the pension contribution language under the Collective Agreement and the FPP was accepted by the Association. The University's voluntary implementation of this significant benefit for the Association's members provided a clear opportunity for the Association to examine and, if appropriate, challenge the University's interpretation of, and practice under, the amended pension contribution language. Having heard no objection thereto, I find the University was entitled to conclude that its approach was correct, and to proceed to implement the SA on that basis. In my view, for the University to be told more than 20 years later that the Association disputes its interpretation of the pension contribution language, which is linked to the calculation of the University contribution to the SA, constitutes detriment to the University. See *Scotsburn*. I accept the University's contention that the prejudice cannot be ameliorated or compensated such that it would not constitute an appropriate exercise of my discretion to relieve the Association from any issue of timeliness or deal with this issue in relation to remedy.

Regarding the authorities on which the Association relies, I find the *Juan de Fuca* award, and *Bullmoose Operating Corp. v. Communications, Energy & Paperworkers Union, Local 443*, [2002] B.C.C.A.A.A. No. 26 (Jackson), are distinguishable. Those awards determined timeliness objections in the context of delay at the latter stage of the grievance procedure when the grievances were referred to arbitration. In Arbitrator Carter's award in *Imperial Tobacco Canada Ltd. v. Bakery, Confectionary, Tobacco Workers and Grain Millers International Union, Local 3237 (McIlwraith Grievance)*, [2001] O.L.A.A. No. 725, it is the case that he found financial detriment alone cannot support the application of the doctrine of laches where the employer has had the use of money it should have contributed to the employees' pension plan for many years. However, there, Arbitrator Carter found that the employer had for 30 years negligently misrepresented to the aggrieved employee by failing to tell him about his eligibility for

the pension plan. On the evidence before me, I find there is no support for any claim of negligent misrepresentation.

In summary, for all of the foregoing reasons, I conclude that the Association's delay in filing the Grievance was unreasonable, and I find it would be unfair and inequitable to the University to permit the Grievance to proceed on its merits after 20 years of apparent acceptance by the Association of the University's interpretation of, and practice under, the pension contribution language in the Collective Agreement. The University has satisfied the requirements for the application of section 89(f) of the *Code* and the equitable doctrine of laches, and I conclude that the Association should be barred from proceeding with the merits of the Grievance at this time.

B. The Interpretation of the Collective Agreement

Regardless of whether section 89(f) of the *Code* and the equitable doctrine of laches should be applied in all of the circumstances of this case, I find the Association's Grievance does not succeed on its merits in any event. As the interpretive issue was fully argued by the parties, I will set out below my full reasoning in response to the parties' arguments in this regard.

What did the parties intend when they agreed to the pension contribution provision, which was set out at pages 6 and 7 in the Getz Award and incorporated into the Collective Agreement? The language in question is repeated here for ease of reference:

II. BENEFITS

A. Pension Plan and Canada Pension Plan Contributions

Effective January 1, 1989, and subject to any ratifications that may be required by the provisions of the relevant Pension Plan documents,

- (1) Each member of the bargaining unit who is also a member of the Pension Plan for Academic Staff and Academic Executive Staff shall make required contributions monthly *to the Pension Fund*, by means of payroll deductions, *equal to five per cent (5%) of his or her basic salary less an amount equal to one point eight per cent (1.8%) of the difference between the basic exemption and the yearly maximum pensionable earnings under the Canada Pension Plan.*

- (2) The University shall make regular contributions monthly *to the Pension Fund* in the amount that is *equal to ten per cent (10%) of the basic salary* of each member of the bargaining unit who is also a member of the Pension Plan, *less an amount equal to one point eight per cent (1.8%) of the difference between the basic exemption and the maximum yearly pensionable earnings under the Canada Pension Plan.*
- (3) The University and each member of the bargaining unit shall each contribute to the Canada Pension Plan the amounts that each is required by law to contribute.

(emphasis added)

Briefly, the Association contends that the parties intended the italicized words in paragraphs 1 and 2 to be a CPP contribution offset agreement, requiring the University to deduct the 1.8% amount from a faculty member's basic salary and contribute that amount to the CPP, even when members are no longer contributing to the CPP. The Association maintains that this CPP contribution offset agreement is an additional obligation to that provided for under paragraph 3. As well, the Association contends that the parties did not intend the pension contribution provision to amend the broad pension agreement, which requires the University to make an overall contribution of 10% of basic salary for pensions.

Again briefly, University contends that this new pension contribution agreement was intended to supplant the 1966 pension contribution agreement. The University asserts that from 1989 onward, the parties intended the contribution formula for FPP contributions under paragraphs 1 and 2 to operate independently from each member's and the University's obligation to make contributions to the CPP under paragraph 3. The University maintains that this mandatory obligation is not conditional on whether the member is, or is not, contributing to the CPP, and the University argues that there is no evidence the parties agreed to revert back to the integrated contribution approach under the 1966 pension contribution agreement when a member stopped making CPP contributions. The University submits that the italicized language under paragraphs 1 and 2 was not intended to require the University to deduct and contribute 1.8% of a faculty member's basic salary to the CPP. Rather, this contribution formula for FPP contributions was intended to freeze the offset percentage in the mathematical formula at 1.8% of the difference between defined terms in the CPP legislation. This, says the

University, constitutes a promise that the University's contribution to the FPP would not be less than 8.2%.

In resolving this interpretive dispute I have considered all of the authorities on which the parties rely in advancing their differing contentions including: Arbitrator Bird's "rules of interpretation" at paragraph 99 of his award in *Pacific Press v. Graphic Communications International Union, Local 25*, [1995] B.C.C.A.A.A. No. 637; Arbitrator Hall's reasoning regarding the issue of onus in collective agreement interpretation disputes in *Catalyst Paper (Elk Falls Mill) v. Communications, Energy and Paperworkers Union of Canada, Local 1123 (Grievance 2010-3 Retiree Benefits)*, [2012] B.C.C.A.A.A. No. 73 ("*Catalyst*"); and, the summary of the arbitral approach to collective agreement interpretation in *Health Employer's Assn. of British Columbia v. Hospital Employees' Union (Rothenburger Grievance)*, [2013] B.C.C.A.A.A. No. 21 (Gordon) ("*Rothenburger*").

Regarding onus of proof in interpretive disputes where a significant monetary benefit is in issue, Arbitrator Hall held as follows at paragraph 25 of the *Catalyst* award:

The notion that a party has a special onus or burden to establish its interpretation of a collective agreement has been overtaken by subsequent authorities in this Province. Most (and perhaps all) of the leading arbitrators who once espoused that approach have expressly charted a different course. See, for instance, *Pope and Talbot -and- CEP, Local 1092*, [2006] B.C.C.A.A.A. No. 224 (Hope), at paragraph 92. The current state of the law is exemplified by the *Board of Education of School District No. 36 (Surrey)/BCPSEA -and- BCTF/Surrey Teachers' Association* (March 6, 2009), unreported, (Korbin):

With respect to the Employer's reliance on the *Wire Rope* and *Noranda* line of cases, arbitrators have not, in recent history, strictly adhered to the notion that the union bears any additional onus or burden in cases such as this. It is my view that as this is a matter of interpretation, *my role is to find the mutual intention of the parties within the competing interpretations put forward by the parties*. In such an analysis, neither party bears any special onus of proof. (p. 13)

(emphasis added)

The summary of interpretive principles set out at paragraph 82 of the *Rothenburger* award is as follows:

... The principles associated with the arbitral approach to answering this question were reviewed in one of the Employer's authorities, *Health Employer's Assn. of British Columbia v. Hospital Employees' Union (Nicolette Grievance)*, [2010] B.C.C.A.A.A. No. 101 (Gordon, et.al.) where, at para. 79, the following excerpt from pp.11-12 of *HEABC v. HEU (Severance Allowance Grievance)*, [2002] B.C.C.A.A.A. No. 130 (Gordon, et.al.), is quoted:

The primary resource 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. Where possible, all words and provisions should be given meaning. Words in the agreement should be viewed in their normal and ordinary sense unless that would lead to some uncertainty or inconsistency with the rest of the collective agreement or unless the context establishes that 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 a 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 relevant jurisprudence.

Where extrinsic evidence shedding light on the parties' mutual intention is proffered, arbitrators consider both the language of the disputed provision and the extrinsic evidence when determining whether there is any *bona fide* doubt or ambiguity about the meaning of the language in the agreement. *If, after considering the language and the extrinsic evidence, the arbitrator finds there is no doubt about the proper meaning of the provision, the arbitrator will reach an interpretive judgment without regard to the extrinsic evidence.* On the other hand, if the arbitrator finds there is some doubt about the proper meaning of the disputed provision, the arbitrator is entitled to, but need not, use the extrinsic evidence to resolve the ambiguity. See *Nanaimo*

Times Ltd. -and- Graphic Communications International Union, Local 525-M, B.C.L.R.B. No. B40/96 (upheld on reconsideration BCLRB No. B151/96).

(emphasis added)

Having considered the disputed language and the extrinsic evidence before me, I find no *bona fide* doubt about the intended meaning of the pension contribution provision arises. In my view, the plain and ordinary meaning of the language adopted in the provision, as well as the structure of the provision, clearly reflects an intention to: 1) de-integrate FPP contributions from contributions to the CPP; 2) provide a uniform formula for the calculation of the required amount of FPP contributions by freezing the offset at the initial CPP contribution rate of 1.8% of defined terms under the CPP legislation; and, 3) replace the former pension contribution agreement with a new and different three-part pension contribution agreement under the parties' Collective Agreement.

My first finding is based on two factors. Firstly, in paragraphs 1 and 2, there is no reference whatsoever to any "deductions for" or "contributions to" the CPP. The only contributions provided for under those paragraphs are expressly limited to "contributions to the Pension Fund" -- i.e., the FPP. Secondly, CPP contributions are provided for separately and independently under paragraph 3. The parties included no words in any of the paragraphs expressing an intention that the CPP contributions required under paragraph 3 are "in addition to", or are linked in any way, to any actual CPP contributions under paragraphs 1 and 2.

My second finding is based on the plain and ordinary meaning of the clear words the parties adopted to express their agreement under paragraphs 1 and 2. I find that in paragraphs 1 and 2, the parties agreed to define required FPP contributions as an amount that is "equal to" a uniform contribution formula. The contribution formula refers to members' and the University's 5% and 10% of basic salary contribution obligations respectively, and then the words "less an amount equal to ... (1.8%) of the difference between the basic exemption and the maximum yearly pensionable earnings under the Canada Pension Plan" serve to fix, or freeze, an offset from the 5% and 10% obligations at the initial contribution rate under the CPP legislation. Nowhere in the words adopted to define the new uniform contribution formula did the parties express an intention that the amount of the fixed 1.8% offset was to be "deducted" or "contributed to" the CPP.

It is the case, as the Association argues, that if the parties had intended to de-integrate CPP and FPP contributions they could have simply specified amounts for the

required monthly contributions to the FPP, rather than referring to the 1.8% initial CPP contribution rate and defined terms under the CPP legislation. However, the parties clearly chose instead to adopt a contribution formula for FPP contributions that operates uniformly irrespective of a faculty member's particular salary.

As no witness who was involved in the negotiation of the language in this provision testified about the parties' intention, or rationale for, adopting the chosen approach, I am left with the primary interpretive resource -- the language of the Collective Agreement. I find that language clearly expresses the parties' agreement to a new uniform formula for calculating contributions to the FPP, which adopts a fixed percentage separate and apart from contributions to the CPP. In my view, the words the parties agreed to include in the 1989 pension contribution agreement do not support a finding that a different contribution formula was intended to apply when a faculty member makes no CPP contributions. A finding such as that would require significant qualifying words to be read into the provision absent any basis for doing so.

This interpretation is reinforced when the disputed language is considered in the context of the purpose of the provision. The purpose of amending the pension contribution language was to protect contributions to the FPP from erosion, or "decrease", due to the increasing contribution rates under the CPP legislation. Under the former integrated scheme, contributions to the FPP were decreasing concomitantly with the increasing CPP contribution rates. By 1988, when the parties were engaged in collective bargaining, the University's contribution to the FPP had decreased from the initial amount of 8.2% to 8.1%, and it was projected to decrease to 7.9% in 1989. In this context, the Association's desire to staunch the decrease in FPP contributions was satisfied by the new de-integrated, or de-linked, approach, and the parties' agreement to freeze the offset in the FPP contribution formula at 1.8%, which, by December 1988, when the Association accepted the University's Proposal IIA, was a smaller percentage than the prevailing 1.9% CPP contribution rate. If the parties had not agreed in 1989 to de-integrate CPP contributions from FPP contributions, their FPP contributions would not have been protected from erosion by the ever-increasing CPP contribution rate. I find the parties' agreement to Proposal IIA was intended to, and did, ensure that the University's FPP contributions would not decrease below 8.2% of basic salary between the YBE and the YMPE.

My findings based on both the plain and ordinary meaning of the words included in paragraphs 1, 2 and 3, and the structure of the provision, are further reinforced when

the language of the provision is compared and contrasted with the language of the 1966 pension contribution agreement, which was this:

IV. MEMBER CONTRIBUTIONS

1. Required Contributions by Members

During his membership in the Plan, each member shall make required contributions monthly to the Pension Fund, by means of payroll deductions, equal to five per cent (5%) of his basic salary *less the contributions required to be made by the member to the Canada Pension Plan.*

* * *

V. UNIVERSITY CONTRIBUTIONS

1. Regular Contributions

The University shall make regular contributions monthly to the Pension Fund in an amount that is equal to ten per cent (10%) of the basic salary of each member in the employ in the University, *less the contributions required to be made by the University to the Canada Pension Plan in respect of such member.*

(emphasis added)

Under the former agreement, the language and integrated structure of the two paragraphs reflects the parties' intention that the actual "contributions required to be made ... to the Canada Pension Plan" by the member and the University would be deducted from the monthly contribution to the FPP. Under that integrated scheme, member and University contributions to both the FPP and the CPP were provided for in one paragraph each. In contrast, under the 1989 pension contribution agreement, the parties instead agreed to de-integrate FPP contributions from contributions to the CPP, and they structured their promises in three paragraphs, one each for faulty member and University contributions to the FPP, and a third for contributions to the CPP.

For these reasons, I conclude that the University's interpretation of the pension contribution provision of the Collective Agreement reflects the parties' mutual intention; and, as the evidence establishes, the University has fully complied with this interpretation of the provision since 1989.

I have already found that the new pension contribution agreement, which was incorporated into the Collective Agreement and reflected in the terms of the amended FPP text, was intended to supplant the 1966 pension contribution agreement. If the pension agreement for which the Association contends is broader still than the 1966 pension contribution agreement, I find the Association failed to make out a case that the parties agreed in 1989 that the broad pension agreement continued to exist as a free-standing University obligation to make an overall contribution of 10% of basic salary for pensions. The Association's evidence does not support a finding that, when the parties agreed to address the issue of pension contributions as a subject of collective bargaining and had their pension contribution agreement incorporated into the Collective Agreement, they also agreed that a broad pension agreement of the nature for which the Association contends would continue to bind the University. This would have placed a significant additional obligation on the University, and the reasonable expectation is that such an additional obligation would have been recorded in clear and unequivocal terms at that time. Yet, no such agreement to an additional obligation was established in the evidence. See rule 5 in Arbitrator Bird's *Pacific Press* award at page 14.

The Association claims that the SA supports its contention that the University continued after 1989 to be bound by a broad pension agreement to make an overall contribution of 10% of basic salary for pensions. However, to reiterate, the evidence does not support this claim. The evidence instead establishes that under the SA, after applying the FPP contribution formula in the Collective Agreement, the University only contributes the excess to the SA. Ms. Neighbour's uncontroverted evidence was that the excess "is not 10%."

The Association submits that a negative inference should be drawn against the University due to its failure to call Dr. McClean to testify. I cannot uphold the Association's position in this regard. Given the clarity of the contractual language on its face, I find the University was entitled to argue its case as it did. Given the clarity of the language in question, it was for the Association to present extrinsic evidence to raise a *bona fide* doubt about the intended meaning of the words the parties adopted to express their agreement. As the Association did not do so, I conclude that there was no need for the University to call its negotiator to support the clear language in the Collective Agreement.

C. Breach of Fiduciary Duty and Tort of Negligent Misrepresentation

Assuming, without deciding, that the University is bound by a common law fiduciary duty in connection with its administration of the pension fund, I find the Association's claim that the University breached that duty cannot succeed. The foundation for this claim is the Association's contention that the University continued to be bound by an obligation to make an overall contribution of 10% of basic salary for pensions. I have not upheld the Association's interpretation of the Collective Agreement, and I have found that the Association has failed to establish that a broad pension agreement continued to bind the University following the parties' agreement in 1989 to the new pension contribution provision in the Collective Agreement. Accordingly, no foundation for this claim has been established.

With respect to the Association's claim in tort for alleged negligent misrepresentation, I conclude that the evidence does not support a finding that at any time from 1989 onward, the University made any false, untrue or misleading representation(s) to the Association or any one of its members regarding its interpretation and administration of the contribution formula under the Collective Agreement or the FPP. Nor does the evidence support a finding of any consequential loss suffered by the Association or a faculty member. The evidence establishes instead that the University has fully complied with its pension contribution obligations under the Collective Agreement, the FPP, the CPP and the SA.

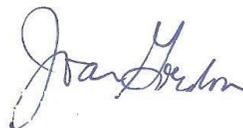
The instant case is therefore factually distinguishable from the authorities on which the Association relies in advancing these claims.

VII. Decision

For all of the foregoing reasons, I uphold the University's objection to the arbitrability of the Grievance on the basis of section 89(f) of the *Code* and the equitable doctrine of laches. In any event, I uphold the University's interpretation and administration of the pension contribution provision in the Collective Agreement. As well, I find no case has been made out that the University breached any fiduciary duty or committed the tort of negligent misrepresentation.

The Grievance is hereby dismissed.

DATED this 9th day of December 2013 at Vancouver, British Columbia

A handwritten signature in blue ink, appearing to read "Joan M. Gordon". The signature is written in a cursive style with a large initial "J".

Joan M. Gordon
Arbitrator