IN THE MATTER OF AN ARBITRATION
UNDER THE *CANADA LABOUR CODE*, RSC 1985 c. L-2

Between

BELL CANADA (BELL WEST)

(the “Employer")

-and-

COMMUNICATIONS, ENERGY AND PAPERWORKERS’ UNION
OF CANADA, LOCAL 950

(the "Union”)

(CEP Grievance #2009-03-19)

ARBITRATOR:	John B. Hall
APPEARANCES:	D. Robb Beeman and Kris Noonan, for the Employer Donald W. Bobert, for the Union
DATES OF HEARING:	November 25-27, 2009
PLACE OF HEARING:	Calgary, Alberta
DATE OF AWARD:	December 8, 2009

AWARD

I. INTRODUCTION

The Union grieves the Employer's decision to lay off about 30 employees who previously worked at its Technology Centres in Western Canada. The layoffs resulted in terminations of employment, and the affected individuals were provided with severance packages in accordance with the Employer's Severance Policy if they signed a release form.

The Union's position in support of the grievance is two-fold: first, it says the layoffs were not carried out in accordance with the occupations listed in Appendix A of the Collective Agreement; and second, it alternatively submits the process used by the Employer to determine who would be laid off was not fair or reasonable, and was also arbitrary. In response, the Employer contends it was not contractually obliged to adhere to the listed occupations when laying off employees; further, the process used was entirely fair and reasonable in the circumstances.

In order to provide a relatively expeditious answer to the grievance, I will not recount much of the general background which is familiar to the parties. This award will instead focus on the central facts, followed by my analysis of the parties' arguments.

II. THE FACTS

The layoff process was driven largely by Valerie Whalen, the Regional Manager of Customer Operations, in consultation with the Employer's Human Resources department. Ms. Whalen testified that the layoffs were the result of "financial pressures" being faced by the Employer in Western Canada, as well as in Ontario and Quebec. She prepared a proposal for a restructured Western Region that was ultimately accepted by

her superior, Farshad Kajouii. The Eastern Region was also affected, but that was not her responsibility.

Prior to the layoffs, there were five groups of employees (sometimes referred to as "buckets" during the arbitration) in the Western Region: the Data Test and Activation Team" ("DTC"), the Enterprise Business Help Desk ("EHD"), the Small/Medium Business Help Desk ("SHD"), the Data Service Assurance Team ("TST"), and the Voice Test Team ("VTST").

Ms. Whalen began the restructuring exercise in late December 2008. She worked on an entirely confidential basis, and did not inform anyone of the proposal she was developing, aside from consulting with Human Resources. Two managers who would be retained under the proposal were informed in late January after signing confidentiality agreements. It appears Ms. Whalen's plan was approved about the same time. The affected employees did not learn of the restructuring until March 5, 2009 which was the actual date of the lay offs. The employees were only told at the time that the Employer was "downsizing" and they were asked to leave the premises the same day.

Ms. Whalen stated that the Employer wanted to maintain a profile in Calgary, but to scale back its operation and target key customers. Further, some work could be transferred to the Eastern Region because of a 31% reduction in trouble ticket volume and improved productivity due to continuous improvement initiatives in that Region. The restructured Western Region has two groups: a DTC with somewhat realigned responsibilities; and a new group for Government of Alberta and banking customers ("GOA/Banking"). The Employer also retained one employee with expertise in the critical area of Telephony Translations, for a total of 15 employees.

The primary tool used by Ms. Whalen to determine who would be retained and who would be laid off was a spreadsheet setting out certain information for all employees. The document included: the employees' names; numerical values for their ratings on Objectives under their individual 2008 Objective Performance Evaluation

("OPE"); overall Objective ratings; numerical values for their ratings on Leadership Attributes under their 2008 OPE; overall Leadership Attribute ratings; Total Performance Scores (being the combination of their overall Objective and Leadership Attribute numerical values); and Skillsets. This resulted in a ranking based on Performance/Skills that in turn determined who was retained and who was laid off within each employee group.

It is important to note that the employees were ranked within each of the then existing five groups. Ms. Whalen testified she did this because the Objectives in the 2008 OPEs were the same for all employees within a group, but were different across the groups. Her methodology thus resulted in comparing "like to like" and not "apples to oranges" to use the expression of Employer counsel in final argument. Ms. Whalen also referenced other differences between the groups based on expectations (i.e. volume vs. customer relations), services (i.e. data/IP vs. voice), and scheduling (i.e. 24/7 vs. 7 am to 7 pm, Monday to Friday).

The numerical values assigned by Ms. Whalen for the employees' Objective ratings were as follows: M for "Meets Rating on an Objective" received a zero (0); E for "Exceeds Rating on an Objective" received a one (1); and DNM for "Did Not Meet Rating on an Objective" received a negative one (-1). The same numerical values were assigned the Leadership Attribute ratings of Satisfactory, Role Model, and Needs Development (i.e. zero, one, and negative one respectively). As indicated, the resulting figures were totaled for each category, and were then added together for the Total Performance Score. However, Ms. Whalen did not weight the values assigned to ratings under Objectives in accordance with weightings found in the OPEs. Under the latter, individual Objectives have a weighting of 10, 20, 30 or 40 (for a total of 100) depending on the employee group and its Objectives.

It is important to note as well that, while Ms. Whalen compared employees within each of the five groups, the goal was not to retain a certain number of employees in each group; rather, the intent was to retain a total of 15 employees in the restructured Western

Region as a whole. At the end of the day, four employees were retained in the DTC and five were laid off; three employees were retained in the EHD and six were laid off (with two others not actively employed at the time); one employee was retained in the SHD and five were laid off (with one other not actively employed); five employees were retained in the TST and seven were laid off; and finally, two employees were retained in the VTST and seven were laid off.

For all but the SHD group, Ms. Whalen prepared a supplemental document called "Selection Process - Additional Information" which repeated the skillsets found on the spreadsheet for certain employees. This supplemental document was intended to show why the last person retained in each of the four groups "was selected over" one or more employees who were laid off in the same group. For example, one page stated "Joe Brazil was selected over Alphonso Ng" in the DTC group and had boxes containing the skillsets recorded on the spreadsheet for those two employees.

Ms. Whalen used the Skillsets column on the spreadsheet to record skillsets for most employees. She testified she did not record all skillsets, but was well aware of each employee's experience and qualifications from her regular role as a manager working with the employees "on the floor" in Calgary, and her regular visits to the Vancouver Technology Centre. In some instances, she did not record any skillsets for employees because of where they had ranked after their Objective and Leadership Attributes ratings were combined.

I digress somewhat to record that the Union's grievance was presented on March 19, 2009 at Step 3 of the grievance procedure. However, neither the Union nor its members were aware of the foregoing process until the week prior to the arbitration, when the spreadsheet and other documents were produced to Union counsel. This is somewhat surprising given the statement in Article 5.02(a) of the Collective Agreement whereby the parties "are encouraged to resolve grievances through an open and informal discussion throughout the entire process described below". The grievance was also the

subject of a mediation pursuant to Article 5.06 of the Collective Agreement at some point prior to the disclosure.

Several references have been made to the OPEs. This performance evaluation tool has been used by the Employer throughout its operations for a number of years. It was explained during the negotiations which led to the current (and first) Collective Agreement between the parties. The Employer put on a powerpoint presentation that, among other details, advised that the OPEs are used to determine annual compensation and "AIP" bonuses. There was no reference to them being used for layoffs.

In practice, managers meet separately with each employee at the beginning of the calendar year to establish four or five Objectives with defined measures for each employee's annual OPE. Employees receive feedback by way of mid-year and year-end comments and ratings from their managers. All employee evaluations are reviewed at a "managers' roundtable" which Ms. Whalen also attends before the year-end comments and ratings are finalized. Employees then electronically sign off on their OPEs and the documents are "locked up" to preclude any further revision. Before signing off, employees have an opportunity to include their own comments. In some cases, employees have been critical of themselves in the sense of expressly acknowledging shortcomings and/or a need for improvement. Only OPEs for the most recent calendar year are kept in what Ms. Whalen described as each employee's "binder" (i.e. personnel file or record).

In addition to the Local President, the Union called four of the former employees who were laid off due to the Employer's restructuring of the Western Region: Alphonso Ng, who ranked fifth in the DTC, and was the first employee after the cut-off dividing those who were retained and those who were laid off in that group; Theodore Dobrer, who ranked sixth in the DTC, although for some reason was placed on the spreadsheet after the seventh and eighth employees in that group; Gerald Novlesky, who ranked third in the VTST, and was the first employee after the cut-off for that group; and Greg Dobry, who ranked sixth in the VTST. All four had Total Performance Scores that were equal to

or greater than some of the employees retained in different groups, and had greater "Net Credited Service" than some of the employees who were retained.

There were several common elements to the testimony given by these individuals. Among other things, they stated the Employer had only advised them at the time that the layoffs were due to "downsizing" and were "not their fault". The individuals were not aware of the selection process used by the Employer until shortly before the hearing, and were not aware their OPEs would be used in this manner. They each explained their diminished employment circumstances since the lay-off, and spoke primarily in direct examination to their respective employment histories, work experiences and acquired skillsets. In all cases, each witness identified several skillsets which had not been recorded on the spreadsheet. Mr. Dobry was one of the employees who had no information recorded in the box opposite his name in the Skillsets column.

III. ANALYSIS

The Union relies on the following Collective Agreement terms:

> WHEREAS, the parties have agreed to enter into negotiations with a view [to] the completion of a collective agreement;
>
> (a) To establish working conditions for employees employed in any of the occupations listed in Appendix A, …
>
> NOW THEREFORE, this Agreement witnessed that the parties thereto agree as follows:
>
> **ARTICLE 1**
> RECOGNITION AND SCOPE
>
> 1.02 The employees covered by this agreement will be those who are employed in any of the occupations listed in Appendix A of this agreement.
>
> 1.04 When the parties mutually agree that a new occupation established during the term of this agreement clearly has a number of

significant points in common with the other occupations covered by this agreement, the new occupation will fall within the scope of this agreement and Appendix A shall be deemed to be amended to include that new occupation.

The parties will then discuss and determine the appropriate compensation level for the new occupation.

If no agreement is reached on both of the paragraphs above, the matter may be submitted directly to step 3 of the grievance procedure.

Appendix A is headed "Occupation Titles" and states "the following occupation titles are covered by this Agreement [for the purposes of Article 1]":

Data Technology Specialist
Field Services Specialist
Network Analyst
Network Operations Specialist
Regional Help Desk Technician
Regional Help Desk Technician Prime
Regional Test Centre Technician
Regional Test Centre Technician Prime
Team Prime
Voice Services Specialist
Voice Technology Specialist

Lastly, Article 16.01 of the Collective Agreement is the term which applies most directly to the present difference:

Article 16
WORKFORCE MANAGEMENT

16.01 The parties agree that the Company's ability to manage its workforce to fluctuating business or customer needs is an essential element to the success of the Company and that this is part of its managerial rights.

Therefore, in the event it becomes necessary to reduce the number of employees, it is understood and agreed that the Company has complete discretion to:

> - determine when business or customer needs require a reduction of the number of employees;
> - identify the employees who will be part of the reduction based on the following criteria;
>   a. Individual performance levels; and
>   b. Individual skill sets.
>
> In cases where the Company determines that it must make a choice between two or more employees who, in its view, equally meet the above criteria, it will choose the employee with the least Net Credited Service.

It should be apparent immediately that Article 16.01 reserves an uncommonly broad discretion to the Employer in its management of the workforce. The term gives the Employer "complete discretion" to identify the employees who will be laid off in the event of a reduction based on "individual performance levels" and "individual skill sets". It is only where those two criteria are equal "in [the Employer's] view" that an employee with the least Net Credited Service (i.e. the least seniority) will be chosen for lay-off. Given the broad language of Article 16.01, many of the Union's arguments must fail because they would necessarily imply restrictions on the Employer's discretion that are not suggested by the parties' Collective Agreement and/or would hold the Employer to a level of perfection that is not required by the arbitral case law.

With respect to the appropriate scope of arbitral review, both the Union and the Employer refer to *Re Canadian Broadcasting Corp. and Assn. of Professionals and Supervisors* (2006), 150 L.A.C. (4th) 258 (M.G. Picher), which contains the oft-quoted statement of Professor Paul Weiler in *Re United Electrical Workers, Local 523 and Union Carbide Canada Ltd.* (1967), 18 L.A.C. 109, at pp. 117-18:

> This board does not find it necessary to decide the abstract question of whether the proper interpretation of the usual seniority clause requires that the board should not reverse a managerial decision about an employee's ability, merely because it believes the latter was wrong. … Although not completely consistent in wording or approach, [a] series of awards [between the parties] does seem to accept the principle laid down as long ago as 1948, by Mr. Justice Roach in *Re United Mine Workers of America,*

Local 13031 and Canadian Industries Limited, Nobel Works (1948), 1 L.A.C. 234, where he stated [at p. 237]:

> 'In this and every like case where there is room for honest difference of opinion, if it appears -- as here admitted to be a fact -- that the employer has acted honestly, we do not feel that a Board of Arbitrators would be justified in interfering by reversing the employer's decision, for the reason that to do so would result in management by arbitrators rather than management by the employer. In this and every such like case where there is evidence on which a reasonable employer, acting reasonably, could have reached the decision such as is here challenged by the Union, no Board of Arbitrators should interfere'.

It should be noted that this does not mean (as the company appeared to advocate in its brief) that the employer's responsibility to decide on employee ability and qualifications is untrammeled and completely un-reviewable. Rather, the company's decision must be non-discriminatory, and subject to the terms of the contract (including the seniority clause) in two senses: first, the judgment of the company must be honest, and unbiased, and not actuated by any malice or ill will directed at the particular employee, one which a reasonable employer could have reached in the light of the facts available. The underlying purpose of this interpretation is to prevent the arbitration board taking over the function of management, a position which it is said they are manifestly incapable of filling. Yet the managerial discretion to decide has been limited by the terms of the agreement and it is the duty of the arbitration board to ensure that it is exercised in the light of proper principles and criteria, that all relevant considerations have been adverted to, and that all irrelevant factors have been excluded from the process of decision.

As similarly stated in Brown & Beatty, *Canadian Labour Arbitration* (4th ed.), the primary function of arbitral review is to ensure that:

> … the judgment of the company must be honest, and unbiased, and not actuated by any malice or ill will directed at the particular employee, and second, the managerial decision must be reasonable, one which a reasonable employer could have reached in the light of the facts available. The underlying purpose of this interpretation is to prevent the arbitration board taking over the function of management, a position which it is said they are manifestly incapable of filling. (para. 6:3100)

Other awards indicate that an arbitrator must consider any relevant criteria in the collective agreement and determine whether "the criteria were assessed and applied fairly pursuant to a reasonable and unbiased procedure": *Telecommunications Employees Assn. of Manitoba, Inc. -and- Communications Inc.,* [2004] C.L.A.D. No. 574 (Graham), at paragraph 147; see also *Re Partek Insulations Ltd. and C.A.W., Loc. 456* (1989), 5 L.A.C. (4th) 253 (E.E. Palmer), at paragraph 10. Likewise, an employer must show that "reasonable criteria were used to determine the lay-off and that the lay-off was done fairly": *Re Strait Crossing Inc. and I.U.O.E., Loc. 721* (1996), 59 L.A.C. (4th) 426 (Sheridan), at paragraph 12. At the same time, arbitrators have long recognized that "management is in the best position to assess the requirements of the workplace … and is in the best position to judge the competency and efficiency of its employees": *Re Health Labour Relations Association and BCNU* (1985), 21 L.A.C. (3d) 114 (Greyell), at page 121; see also *Re Canadian Blood Services and Health Sciences Association of Alberta* (2009), 185 L.A.C. (4th) 258 (M.G. Picher), at paragraph 29.

The Union's initial arguments are premised on the notion that the selection process undertaken by Ms. Whalen to determine which employees would be laid off was a policy or rule imposed unilaterally by the Employer. I am unable to accept this premise. As the Employer counters, the process was "the how" and not "the why" of the layoffs. That is, the process was the method adopted by Ms. Whalen to choose the employees who would be part of the reduction under Article 16.01 of the Collective Agreement. Thus, the Employer was not required to satisfy the familiar elements of the *KVP* standard: see *Re KVP Co. and Lumber & Sawmill Workers' Union, Local 2537* (1965), 16 L.A.C. 73 (Robinson).

Next, and in any event, the Union submits the process was inconsistent with the Collective Agreement because the Employer did not assess and lay off employees in accordance with the occupation titles in Appendix A; instead, Ms. Whalen used the five existing employee groups which are not prescribed by, and are inconsistent with, the Collective Agreement. I will return to aspects of this submission below. But for now, the argument must fail to the extent the Union asserts the Employer should have

proceeded by way of the occupation titles. There is no such restriction in Article 16.01 and the Employer has "complete discretion" to identify the employees who will be part of a reduction based on the two criteria of individual performance levels and individual skillsets.

Nor am I persuaded by the Union's related argument that the use of the five employee groups established "new occupations" which the Employer was obliged to discuss with the Union by virtue of Article 1.04, and would have been subject to arbitration if the parties did not reach agreement. The five groups (and earlier variations) had been recognized in the Western Region for some period of time without any objection by the Union, and they were not equivalent to "occupations" for purposes of the Collective Agreement. That is to say, the groups were simply the Employer's organization of its employees working within the various occasions. In some cases, employees with the same occupation title worked in different groups. More specifically, Regional Help Desk Technician (or Prime) was the occupation title for employees in both the EHD and the SHD, and Regional Test Centre Technician (or Prime) was the occupation title for employees in both the TST and the VTST.

I also do not accept the Union's submissions that the Employer should have notified it and/or should have provided its members with an opportunity to put forward their individual skillsets for consideration before the layoffs were implemented. Determining when business or customer needs require a reduction in the number of employees, as well as identifying the employees who will be part of the reduction, are all matters reserved to the "complete discretion" of the Employer. Nor was the Employer required in these circumstances to canvas its operation more broadly (e.g. by consulting with the managers' roundtable) in order to assess employees against the criteria in Article 16.01(a) and (b). In other circumstances, the Employer might potentially be at peril if it does not consult more broadly because, among other things, Article 16.01 requires individual skillsets to be assessed in absolute terms; that is, the second criterion is not limited to what might be known by the manager responsible for the reduction. However, I am satisfied that Ms. Whalen had a reasonably sufficient awareness of the performance

levels and skillsets of employees in the Western Region based on the OPEs and, more importantly, based on her direct knowledge from having worked with the employees on a regular basis.

Next, I reject the Union's submission that the Employer should not have relied on the OPEs because the employees were never told the evaluation forms might be used to determine layoffs, and because the evaluations were only intended to be used for positive purposes which "benefited" employees. It is accurate to assert that the Employer's powerpoint presentation did not advise that OPEs might be used in the context of a reduction. But there is no evidence of a representation or statement that they would not be used for that purpose. Moreover, the OPEs are the single, accepted method for evaluating employee performance levels in this workplace. As the Employer rhetorically questioned during final argument, what else could it have used? Indeed, it would have been unreasonable for the Employer to ignore the OPEs from the prior calendar year.

There was, nonetheless, one aspect of the Employer's reliance on the OPEs which is open to criticism. As the Union submits, Ms. Whalen did not factor in the weightings for the employees' different Objectives. The Employer asserts this would not have made a difference because all employees were compared within their groups and therefore had the same Objectives. In my view, weighting the ratings could have potentially made a difference. By way of illustration, consider the hypothetical situation of two employees rated Meets for all but one Objective in their OPEs; assume further that the employees were each rated Exceeds for the remaining Objective, with the first employee receiving the higher rating for an Objective with a 40 weighting and the second employee receiving the higher rating for a different Objective with a 10 rating. The values assigned by Ms. Whalen would have scored the employees equally for Objectives on the spreadsheet, and would have overlooked the higher weighting for the apparently more important Objective in the OPE.

This brings me to a more thorough examination of the Union's submission that the Employer acted unreasonably when it assessed the employees in accordance with the

five working groups. In my view, the approach had the effect of the Employer doing what it acknowledges is not contemplated by Article 16.01; that is, the Employer correctly submits the term did not require it to assess employees by occupation title (as argued by the Union), but the Employer nonetheless adopted a different framework for purposes of identifying employees who would be laid off. The Employer maintains its framework was reasonable because it compared employees within their existing groups who had the same Objectives. It says any other alternative would have resulted in Ms. Whalen comparing "apples to oranges".

There is admittedly some logic to the Employer's position, and it would likely have been the correct approach had Ms. Whalen been targeting specific reductions within each employee group. However, her restructuring proposal called for an overall complement of 15 employees in the Western Region, and I was not provided with a rationale for the particular number of employees retained within each group. And, to use the Employer's terminology, it was in fact moving from an "apples" operation of five groups to an "oranges" operation of two reconfigured groups in the Western Region. As the Union alternatively argues, it might have been reasonable to assess the employees based on the resulting two groups. But leaving that aside, the more critical point is that Article 16.01 speaks to employees being assessed against the two criteria on a global basis. That is to say, the provision does not contemplate, either expressly or inferentially, that employees will be assessed within any sub-set of the workforce in the context of an overall reduction.

The groupings used by the Employer to carry out the reduction potentially disadvantaged some employees. For instance, Mr. Novlesky was the first employee to be laid off in the VTST group, despite having a higher Total Performance Score than both Austin Hector and David Stewart who were retained in that group. The Employer's grounds for retaining Mr. Hector (i.e. his strong relationship with the Government of Alberta) and Mr. Stewart (i.e. his expertise in Telephony Translations) were eminently defensible and reasonable. Nonetheless, while Mr. Novlesky had a Total Performance Score of seven (7), the framework adopted by the Employer meant that he was not

assessed against employees in other groups who were retained, such as: Joseph Brazil in the DTC, who had a Total Performance Score of two (2); Christopher Yau in the EHD, who had a Total Performance Score of one (1); and Luke Scipior in the TST, who had a Total Performance Score of zero (0).

As noted in the preceding paragraph, Mr. Novlesky had a Total Performance Score of seven (7) on the spreadsheet. This was equaled by one other employee (who was retained) and was the second highest Total Performance Score amongst the almost 50 employees who were then working in the Western Region. Mr. Novlesky's score was partially due to having been rated Exceeds for every Objective in his 2008 OPE. No other employee received that rating for all Objectives. In my view, the fact that Mr. Novlesky was slated for lay-off would have alerted a reasonable employer to the prospect that the selection process was producing a seemingly unreasonable outcome. I recognize that other employees with lower Total Performance Scores had different Objectives in their OPEs; it is also possible the Employer would have still retained them based, in part, on the second criterion of skillsets. However, and contrary to Article 16.01 of the Collective Agreement, the Employer never made those determinations before it decided to lay off Mr. Novlesky.

The manner in which skillsets were assessed was also problematic for several reasons. Once again, Article 16.01 allows the Employer to:

> - identify the employees who will be part of the reduction based on the following criteria:
>   a. Individual performance levels; and
>   b. Individual skill sets.

There is nothing in Article 16.01 to suggest "individual performance levels" and "individual skill sets" are either more or less important than one another. It seems evident as well that both criteria must be considered when the Employer identifies the employees who will be part of a reduction. This did not happen uniformly; for example, Ms. Whalen did not enter any of Mr. Dobry's extensive skillsets on the spreadsheet

because she eliminated him based on his Total Performance Score alone. Aside from failing to record Mr. Dobry's skillsets and assess him against both criteria even within the VTST group, the Employer did not consider the fact that his Total Performance Score was equal to or better than the scores of four employees retained in other groups. This, of course, was another consequence of the Employer's method of essentially running competitions within each employee group and not assessing employees on a global basis despite targeting an overall reduction in the Western Region.

Another equally serious shortcoming in the Employer's assessment of skillsets was the under-inclusive notations on the spreadsheet. Ms. Whalen testified she was well aware of the employees' broader work histories and qualifications, and did not overlook any positive attributes which she believed should be considered. Regrettably, that is not the impression left by an objective examination of the spreadsheet and the evidence at arbitration.

The omission of numerous skillsets identified by the four laid off employees who testified is even more significant when one recalls that the supplemental Selection Process document was prepared by Ms. Whalen was intended to explain why the last employee retained in each group "was selected over" one or more of their former colleagues. The document set out the skillsets for the employees as recorded on the spreadsheet, meaning the second criterion effectively became the determining factor or "tie-breaker". The latter is particularly evident for the DTC group where Mr. Ng had the same Total Performance Score as Mr. Brazil, but was laid off based on Ms. Whalen's assessment of their respective skillsets. Mr. Ng identified several additional qualifications during his direct evidence that were not recorded on the spreadsheet, and there is nothing in the Employer's submissions which persuades me that all of those additional qualifications were irrelevant to the work of the restructured Western Region.

The same observation applies to the qualifications of other laid-off employees called by the Union. At the very least, the omission of some qualifications from the spreadsheet suggests those skillsets were not valued as highly as others that were

recorded. However, I was not provided with any established basis for this delineation, such as a standard set (or sets) of desirable skillsets for the two groups in restructured operation. The inevitable result is a finding that the criterion of skillsets was not applied fairly and reasonably.

I have been mindful throughout of the Employer's admonition that an arbitrator should not assume the role of "Monday morning quarterback" when reviewing decisions of management. In this case, had the only defect been the failure to rate employees based on the weightings for the Objectives in their OPEs, the overall process might well have withstood the reasonableness standard. However, that defect was accompanied by the far more fundamental flaws examined above. At the same time, I have no hesitation in finding that Ms. Whalen completed the spreadsheet honestly and in good faith, and presumably relied on guidance she had received from the Human Resources department. I also appreciate that she was faced with an extremely challenging task. On the other side of the ledger, there were significant adverse consequences for any employee who was not retained. Accordingly, while accepting the uncommonly broad discretion reserved to management, it was imperative for the Employer to carry out the reduction in accordance with the negotiated terms of the Collective Agreement, and pursuant to a fair and reasonable process.

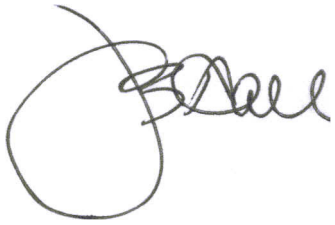
Lastly, the Employer asserts the grievance must fail because the Union has not demonstrated that there would have been a different outcome absent any shortcoming in the process. In this regard, I accept the Union's rejoinder that the authorities do not establish such an onus. It is sufficient for the Union to show that the criteria used were not reasonable, or that they were not applied in a reasonable manner: see *Re Homewood Health Centre and U.P.C.W., Loc. 175* (1995), 49 L.A.C. (4th) 300 (D.R. Williamson). In my view, whether the outcome would have been different is a question that need not be addressed until one turns to remedial consequences.

IV. CONCLUSION

I hereby declare that, when the Employer restructured its entire Western Region, the process used to determine which employees would be retained, and which employees would be laid off, breached Article 16.01 of the Collective Agreement in two respects: first, employees were assessed within their then-existing working groups instead of globally; and second, their individual skillsets were not assessed fairly.

At the Union's invitation, I refer the subject of any further arbitral remedy back to the parties for discussion, and reserve jurisdiction to provide a final resolution if they are unable to reach agreement.

Dated at Vancouver, British Columbia on December 8, 2009.



JOHN B. HALL
Arbitrator