IN THE MATTER OFAN ARBITRATION

BETWEEN:

Teamsters Local 847

And

Easton's Group of Hotels

(Formerly Holiday Inn Markham)

Regarding Grievance No.4866- recall rights.

Before: Arbitrator Brian McLean

Date of Hearing: February 20, 2014

Date of Decision: May 13, 2014

Appearances:

For the Union: Marisa Pollock

For the Employer: Robert Bayne

This is a grievance which alleges that the employer violated the collective agreement (or will violate the collective agreement) when it terminated the employment of all of the Hotel's employees after some months of being off work. Although at the time of the hearing the terminations had not yet occurred, the parties agree I have jurisdiction to determine the issue in its entirety.

There is no dispute about the facts. Accordingly, the parties made argument without calling oral evidence. The relevant facts are as follows.

In May 2013 new owners, The Easton's Group, acquired the Holiday Inn hotel in Markham. The new owners recognized that on the purchase of the business the Union's bargaining rights continued.

At the time of purchase the Hotel was in a poor financial and physical state. In fact, the physical premises were so poor that a number of floors had been closed and Holiday Inn terminated the right of the Hotel to operate under its banner. The new owners have arranged to operate under two new banners, one of which was a suites hotel. The new owners operate a number of such hotels in Ontario, but only one other which combines a suites and regular room environment.

On or about July 23, 2013 the Hotel was closed for the purpose of a complete renovation. The renovation would restore the quality of the hotels premises and also create the new room configuration of a suites hotel. All of the employees were "laid off" at that time. They were given 8 weeks' notice of mass termination under the *Employment Standards Act* and paid severance pay. Each employee was provided with the following letter on June 3, 2013:

> Re: Notice of Employment Termination- Closure of Holiday Inn Markham

> As you may know, the hotel sale was completed on May 31, 2013. As a result of its current condition, the hotel must undergo significant renovations to both its interior and exterior.
>
> Effective July 31, 2013 the hotel will be closed for the foreseeable future. As a result, all employees will be laid off for an indefinite period. Since the layoff will be longer than seven months this will constitute a termination of your employment. This is formal notice that your employment will terminate effective July 31, 2013.
>
> This letter constitutes eight weeks working notice as required by the Employment Standards Act, 2000("ESA"). If you have five or more years of service and continue to work until July 31 or otherwise satisfy the requirements of the ESA, you will be entitled to receive severance pay in accordance with the ESA.
>
> Between now and July 31, you will receive wages and benefits in accordance with applicable provisions of the Collective Agreement.
>
> If you are entitled to any vacation pay as of your employment termination date, it will be provided to you at that time.
>
> We are happy to provide you with a reference letter so that you can seek employment with another employer. Please let us know if you would like such a letter.
>
> We thank you for your work on behalf of the hotel and we wish you every success in your future endeavours.

Employees were provided with a record of employment which indicated the reason they were no longer working was for "K" – other. The comment section of the ROE stated: "Hotel closed for renovations, employment terminated in accordance with layoff clause of collective agreement".

After the Hotel was closed the parking garage was refurbished. It took some time for the Hotel to obtain building permits for the interior space, but after they were obtained, the Hotel was substantially gutted and construction commenced on the rooms and common areas. Because of the change to the character of the hotel, many of the rooms have to be completely refurbished into a suites layout. It is anticipated that the work will not be completed until the summer of 2014 at the earliest and the hotel will not reopen until sometime in late summer at best.

The union filed a grievance which states: "Unfair severance package including recall rights due to unforeseen change of ownership and Hotel closure for renovations". The Hotel responded that the grievance did not allege a violation of the collective agreement and is not arbitrable.

The issue before me is somewhat different than the one set out in the grievance. At the hearing of this matter the issue argued was, assuming employees were off work for more than seven months, whether the terminations of employees will be valid under the collective agreement. There is no dispute that the employees will be off work for more than seven months or that the Hotel was closed for legitimate business reasons. What is at issue is whether the employees' employment is terminated as a result. The parties agree that issue must be determined based on whether the employees have been "laid off" within the meaning of Article 12.09(e) of the collective agreement which provides:

> 12.09 Loss of seniority-An employee shall lose his seniority and his employment shall be deemed to be terminated for all purposes if he:
>
> (e) is laid off for more than seven (7) consecutive months;

There is no definition of the term "lay- off" in the collective agreement. However, the parties referred me to other provisions of the collective agreement which might aid in interpretation of the term. In this regard Article 3.01 (d) (the Management Rights clause) and articles 12.03 and .04 state:

> (d) generally to manage the business in which the Company is engaged and without restricting the generality of the foregoing to determine the nature and kind of business conducted by the Company; the services to be provided an the quality thereof; the kinds and locations of facilities, equipment and materials to be used; the control of materials and parts; the methods and techniques of work; the content of jobs; the schedules of

production; the number of employees to be employed; the schedules of production; the number of employees to be employed; the schedules and hours of work and direction of the workforce; the extension, curtailment or cessation of operations or any part thereof

12.03 When lay-offs or recalls from lay-off of full-time employees in excess of three (3) working days occur, they shall be handled as follows:

(a) Lay-offs and recall from lay-off shall be by classification within a department. Departments and classifications for purposes of lay-off and recalls shall be as set forth in Article 13.08 hereof.
(b) In all cases of lay-off or recall from lay-off, the following factors will be considered :
(i) Departmental seniority;
(ii) Skill, ability, competence, efficiency and reliability; (remainder omitted)

12.04 Part-time employees have separate seniority rights from full-time employees and shall not be considered to be on lay-off during periods of time during the regular work week that they are not scheduled to work;

The Union's main argument, at its most basic, is that the way the parties have chosen to use the term "lay- off" in this collective agreement is closely connected to the exercise of seniority rights. Seniority rights only matter if one or more employees continue to work while others are not working. Here all employees were affected in the same way and there was no exercise of seniority rights since the Hotel simply closed, putting everyone off work. Accordingly, under the union's argument, seniority rights were not affected, the employees were not laid off and Article 12.09(e) has no application.

The Union notes that the management rights clause refers to "cessation of operations or a part thereof". It does not refer to lay-offs suggesting there is something different between the two concepts.

The Union relies on the fact that Article 12 is the seniority clause and there can be no doubt that seniority is one of the most important benefits of unionization. The concept of seniority is important to lay-offs because they are relational rights. When the employer has to reduce the workforce relative seniority of employees can be critical. When such relativity does not exist because all employees are being treated equally, there are no seniority rights to exercise and no seniority rights to lose.

According to the union the assumption behind Article 12.03 is that someone is working. All of the rules which the parties have agreed to apply to lay-offs make no sense if no one is left in the workplace.

This idea is reinforced by the fact that each of the circumstances described in Article 12.09 contemplate the continuation of work in the bargaining unit. For example 12.09 (a) resign; 12.09 (b) discharge; 12.09 (c) absent without leave are all circumstances where work continues in the bargaining unit at the time that seniority of the employee ends.

The cases relied on by the union involve circumstances where an employer has been closed for a period of time, affecting all of the employees equally. According to the union these cases stand for the proposition that such circumstances are not a "lay-off " and do not trigger seniority and other rights which apply when a lay-off occurs.

In *Imperial Tobacco Products (Ontario) Ltd. and Tobacco Workers' International Union, Local 323 [1975]* 8 L.A.C. (2d) 388 (Weatherill) an employee was informed that, as a result of a partial rotating plant shut down agreed to by the parties, no work was available for him and he was without pay for one week. During that period a new employee was hired to do work the grievor could have

done. The majority of the board of arbitration found that the employees affected by the shut- down were not on lay-off. It was, according, to the board, akin to a short work week where all employees were treated equally. However, ultimately, the majority of the board of arbitration found that the issue turned not so much on whether the grievor was laid off but rather on an assessment of whether the grievor's seniority rights had been violated (see para 26 and 28) which it found it had. The case is therefore of limited assistance .

In *United Steelworkers, Local 5595 and Mannesman Tube Co. Ltd*. [1965] 16 L.A.C. 347 (Arthurs) a majority of a board of arbitration held that employees were not laid off when the company instituted a partial plant shutdown and required some employees to take a vacation. The majority noted that not all cessations of work are a lay-off (ie weekends and statutory holidays) and that a lay-off usually implies that the employee is not being paid, whereas in that case the employees were in receipt of vacation pay. Again this case does not deal with the issue of whether the lay-off of the whole employee complement constitutes a "lay-off" even though all employees are affected in the same way.

In *United Electrical, Radio and Machine Workers of America, Local 533, In Re Belleville Lock Company Limited*, [1950] 2 L.A.C. 454 (Lewis J.), the employer closed its plant for stock taking for a week. The union claimed this was a lay-off and grieved the employer's failure to provide notice of the lay-off. Judge Lewis held:

> "SENIORITY". The wording of this Article is wholly devoted to expressing the intention of the parties in protecting senioiryt rights. It is not devoted to an extension or modification of the intention as expressed in Article 15. However, certain provisions with respect to "lay-off" have been inserted in this Article. All of these provisions were clearly intended for protection of seniority. Junior employees shall be laid off first and rehired last. One week's notice of such a layoff is required in order to permit time to

> check and adjust any misapplication of seniority rules. In the case where all employees are laid off at the same time, seniority is not affected.
>
> By accepting existing conditions prior to the Agreement, and reading the Agreement as a whole, I find that the closing of the plant for the purpose of stock taking, and the discountenance of the general production operation, does not affect the seniority of any employee. Consequently, the provisions provided for "lay-off" under Article 21 "seniority" do not apply.

Arbitrator Jackson considered these issues in *Re Burvic Holdings Ltd. and Office and Technical Employees Union, Local 15[1998]* 73 L.A.C. (4th) 147. In that case the union represented a bargaining unit of 25 employees employed at a large doctors' office. The employer decided to protest certain government actions by closing the office for three days. The employer advised the employees they were being laid off for the three days and provided the notice of lay- off prescribed by the collective agreement. The union took the position that what occurred was not a lay- off and grieved, seeking the payment of wages for the three day period.

Arbitrator Jackson decided that what occurred was not a lay-off and after citing cases which are discussed below stated at p.159:

> The reasoning in both those decisions reflects the view that for there to be a layoff, absent a collective agreement definition to the contrary, it is generally accepted that there must be a decrease in the work requirements of the employer and a period of time when employees are off work because of that decrease.
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> While the matter is not an easy one, I believe the better view in all the circumstances of this case is that what occurred was not a lay-off. In reaching this conclusion I have relied upon the reasoning in Re Ferguson Industries, supra, and Re Northern Electric, supra, which illustrate the general assumption of many arbitrators that a layoff involves suspending the services of employees because of a lack of available work.

Even though Arbitrator Jackson found the circumstances before him did not constitute a lay-off that did not mean that the union's grievance succeeded. According to the Arbitrator, the employer had the management right to suspend its operations and the employees had no right under the collective agreement to be paid when they were not working as a result of such suspension.

In *Re Ferguson Industries Ltd.and U.S.W., Loc.4702 [1975], 8 L.A.C. (2d) 232 (Richard)* , referred to in *Burvic*, the employer closed the plant as a result of employees booking off sick allegedly as part of a tactic to pressure the employer. The Company indicated it would not resume operations until the tactics of the union members ceased. The arbitrator found at p. 237 that the closure did not create a lay-off: "the work stoppage which took place at the instance of the company on October 21 did not constitute a lay-off. It was rather a temporary cessation of production which affected all employees, but did not affect any of the seniority rights". In the arbitrator's view there was no lay-off because there remained ample work for the employees.

In *Vernon Schools District No. 22 v. CUPE, Local 5523* the union grieved the fact that work had been given to a junior employee while a senior employee was off work during Christmas and Spring break. This was alleged to violate the collective agreement restriction about giving work to a junior employee while a senior employee was laid off. The arbitrator stated, prior to finding that the parties practice determined the issue, :

> 7 The grievance turns on the status of employees during the Christmas and Spring Break. The Union alleges they are on "layoff". The Employer's position is that Ms. Frerichs is a term employee who is not scheduled to work during Spring Break and Christmas. That says the Employer, is not synonymous with being laid off.
>
> 8 The term "layoff", according to Brown and Beatty, Canadian Labour Arbitration, is a flexible word which can reasonably bear several different meanings depending on the

> circumstances". The position of the Union, for example, is the Employment Insurance recognizes the periods of Christmas and Spring Break as layoffs for the purposes of Employment Insurance.
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> 9. But that does not mean it is necessarily a layoff within the meaning of the Collective Agreement. The normal meaning of layoff is a downsizing by the Employer for economic reasons. Here, at Christmas and Spring Break, there is no economic downsizing. Rather, it is a time when students are not at school and certain staff are not scheduled.

The employer has two main arguments. The first involves the *Employment Standards Act* and is discussed below. The second is that these facts fit squarely within the plain meaning of the term "lay-off". Since the parties did not define the term, the ordinary meaning should be applied. The meaning advanced by the union is tortured, overly restrictive and leaves the employees without any status under the collective agreement. In short, if the employees are not on lay-off, what are they?

The cases relied on by the employer for its second argument all discuss the meaning of the word "lay-off" in closure situations but involve slightly different issues than the case before me. The factual circumstances in *C.J.A., Local 579 and Silverbirch No.30 Operations Ltd. Partnership* [2011] 111 C.L.A.S. 136 (Oakley) were virtually identical to those before me. In that case the employer operated a hotel, The Traveller's Inn, which closed for renovations on September 6, 2011. At the time of the arbitration the employer anticipated the hotel would close for more than 12 months. That was important because the collective agreement provided that employment would terminate after 12 months of lay off in a clause essentially identical to the one in the Holiday Inn collective agreement. The employer sent each employee a letter terminating their employment effective September 6, 2011.

The Union argued that it was inappropriate for the employer to terminate the employees on September 6 since there was no just cause. The employer

acknowledged that it should not have used the phrase "termination" in its letter to employees since what was really occurring was that the employees had been laid off.

Arbitrator Oakley agreed with the employer and in doing so discussed the other decisions which are also relied on by the employer in front of me and accordingly I have reproduced the entire passage at length:

> 16 The employment status of an employee when there is a shortage of work has been considered by arbitrators. Whether an employee is laid off or terminated from employment has been considered in relation to an employee's entitlement to severance pay, pension credits, and other benefits. The arbitral authorities indicate that, where an employer does not have the right to terminate employment except for just cause, an employer may lay off employees for shortage of work, subject to a right if recall, and in accordance with the layoff, recall, seniority and other articles of the collective agreement.
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> 17 In Motorways (1980) Ltd. v. Teamsters, Locals 979, 990, 395 & 362 (1998), 70 L.A.C. (4th) 165 (Can. Arb. Bd.) (Soronow) ("Motorways"), the closure of a business was found to result in a layoff of employee, and not a termination of employment. The arbitrator stated the following, at page 186:
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>> Simply put, this Collective Agreement neither creates nor purports to preserve the common law right to discharge without just (or proper) cause. In the absence of a right to discharge without just or proper cause, there cannot logically be implied a common law notion of reasonable notice.
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>> One of the cases cited by the Union, during the course of its argument, was Re Canadian Broadcasting Corp. and N.R.P.A. (1991), 22 L.A.C. (4th) 40. At page 48 Arbitrator Burkett said:
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>>> More importantly for our purposes, it is universally accepted that the requirement for just cause as a pre- requisite to the termination of en employee under a collective agreement relates to individual conduct. Management business decisions, unrelated to the conduct of the individuals, that result in the termination of an employee do not satisfy the requirement of just cause. Terminations resulting from these types of decisions are dealt with under the layoff provisions of a collective agreement.
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>> [emphasis added]

> The comments of Arbitrator Burkett are applicable to the Collective Agreement before us. In reality, the Employer's actions at the time of closure are not a termination under the Collective agreement, but rather a lay off. Admittedly, at the time of such layoff, the layoff was likely to be permanent in character, unless the Employer thereafter chose to restart its operations. Their Collective Agreement recognizes the right of the Employer to layoff employees, although such right is conditioned by considerations of seniority. No issue has been raised that the layoff was out of order of seniority.

18. The finding in the Motorways case, with respect to employment status after a business closure, was followed in C.E.P., Local 117 v. Bowater Maritimes Inc., December 15, 2008 (Bruce) (upheld in C.E.P., Local 117 v. Bowater Maritimes Inc. (2010), 193 L.A.C. (4th) 169 (N.B. Q.B.) and C.E.P., Local 117 v. Bowater Maritimes Inc.,, 2011 NBCA 22 (N.B.C.A.) (CanLII) ("Bowater"). The arbitrator found that, upon closure of a paper mill, the employees were laid off and were not terminated. The arbitrator stated as follows, at paragraphs 23 and 24:

> The Employer's position, as stated in the letter to employees advising of the closure of the Mill, is that the permanent and definitive closure results in the termination of their employment as of the last day of their work. Given the Employer's acknowledgement that employees, following their last day of work, were placed on layoff under the provisions of the applicable Collective Agreement, it follows that the Employer's letter to employees, advising that their employment was terminated was incorrect unless it was intended to refer to the termination of their scheduled work as opposed to the termination of employment status. A somewhat similar situation regarding a termination notice was addressed in the arbitration case [Motorways] where there was a closure of the whole of the operations of the employer.
>
> …
>
> As stated in the Motorways case (at page 178), employees under a collective agreement are protected from dismissal unless the dismissal meets the requirement of just cause. Proper cause must be seen as referable only to cause arising from wrongful or inappropriate conduct of an employee. If there is lack of work, employees are placed on layoff for a period of time. On the expiry of that time period on layoff, mill service (and, therefore, employee status) is lost. The reference in paragraph (iii) of Sub article 5.02(c) confirms that Mill service continues while an employee remains on layoff.

19. Having regard to the arbitral authorities and the relevant Articles of the Collective Agreement, the employees at Travlellers Inn were laid off as a resultof the closure of the hotel, effectoive September 6, 2011. Their employment was not terminated as of that date. The employees were laid off and continue to have status as employees with a right of recall.

DECISION

The employer's first argument was that since there is no specific definition of "lay-off" in the collective agreement I am obliged to apply the definition of "lay-off" in the *Employment Standards Act*, that is, a weekly period where an employee earns less than half his/her regular pay. No authority was provided for this proposition and I disagree with it.

My obligation is to interpret the terms of the collective agreement and to apply employment related statutes as required. On the latter point, there is no dispute that the Hotel has complied with the ESA. However, the term "lay-off" found in the collective agreement has little, if anything, to do with the definition found in the ESA. The rights in the collective agreement respecting lay-offs are stand-alone rights. Absent evidence of an intention that the meaning of lay-off set out in the ESA shall govern the meaning in the collective agreement, of which there is none, it is my obligation to determine the parties' intentions respecting the meaning of the phrase as found in the collective agreement.

The parties have not defined the term lay- off in their collective agreement. I must, therefore determine the parties' intentions. I agree with the union that the parties' intentions must be gleaned from the collective agreement. That being said, given that "lay- off" is a common labour relations term found in almost every collective agreement, it is useful and important to start with its commonly understood meaning. (See *Canada Safeway Ltd. v. RWDSU*, Local 454, [1998] 1 SCR 1079 at para 71)

One of the most oft cited definitions of lay off is found *in Re Northern Electric Co. Ltd.*,[1971], 23 L.A.C. 104 (Weatherill) where the work of a number of office employees was interrupted during a strike by the plant employees. The former employees were off work, as a result, for a period of approximately three weeks. The issue in that case was whether the office employees were laid off and thereby entitled to a layoff allowance. The Arbitrator, in that instance, found that a lay-off did occur and that the seniority provisions of the collective agreement should have been resorted to. In deciding the issue, he adopted the following definition of layoff:

> 8 In my view, 'layoff' involves a temporary severance of the employment relationship (in the narrow, technical sense of that phrase) for the purpose of reducing the employment force in order to meet the manning requirements of the employer…While the temporary severance of all employees would come within this definition, such a severance might not involve the seniority provisions of a collective agreement, since there would remain no jobs to be claimed.

This approach has been adopted by the Supreme Court of Canada in *Canada Safeway Ltd., supra,*:

> 71 The labour agreement in the case at bar does not define "layoff". We must therefore look at the cases to see how courts and labour arbitrators have defined it. They suggest that "layoff" is used in the law of labour relations to describe an interruption of the employee's work short of termination. A "layoff", as the term is used in the cases, does not terminate the employer-employee relationship. Rather, it temporarily discharges the employee. The hope or expectation of future work remains. But for the time being, there is no work for the employee. Such an employee, it is said, is laid off.
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> …
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> 74 The suspension of the employer-employee relationship contemplated by the term "layoff" arises as a result of the employer's removing work from the employee. As stated in Re Benson & Hedges (Canada) Ltd. and Bakery, Confectionery and Tobacco Workers International Union, Local 325 (1979), 22 L.A.C. (2d) 361, at p. 366:

> Arbitrators have generally understood the term "lay-off" as describing the situation where the services of an employee have been temporarily or indefinitely suspended owing to a lack of available work in the plant. . . .

Given the generally understood meaning of the word lay- off, and the lack of a specific alternate definition in the collective agreement, in order for the union to succeed it must convince me that the parties intended a different (and narrower) meaning. In my view it has not done so.

First, the fact that the sub clause at issue is situated in the seniority Article says nothing about what the word "lay-off" means. Article 12.01(e) simply states what happens to seniority rights on the lay-off of an employee. In this regard, the Article gives two sets of rights, which are together two sides of the same coin. It says that an employee who is laid off for more than seven months loses his/her seniority and his/her employment is terminated. On the other hand, by implication, an employee who is laid off for less than seven months retains his/her seniority and employment.

The fact that the other loss of seniority circumstances in the list (arguably) involve situations where employees remain at work is not, in my view, persuasive evidence for the union's position. This Article is not about lay-offs and does not assist in the definition of the term. The Article simply lists those situations where seniority is lost and the employee's employment is terminated. The fact that an employee loses seniority after they resign or is fired or is absent without leave has little or nothing to do with whether there are employees remaining in the workplace. I also note that the union's underlying premise is not really supported by the Article 12.01 list in any event. It is at least theoretically possible that all employees would be discharged or that all would resign leaving no employees left. It could not be

seriously argued that in such a circumstance the employee(s) retained their seniority and were not terminated simply because they had resigned or were discharged when no other employees were left.

Second, the presence of the recall provisions of Article 12.03 leads in practical terms to the opposite conclusion than the one advanced by the union. Article 12.03 provides that recalls from lay-off are to be made on the basis of seniority. Were the renovations completed in less than seven months it would be a surprising result that since what occurred was not a lay-off, the employer was permitted to recall junior employees first or simply hire new employees off the street.

Third, if the employees are not on lay-off, what is their status? In argument the union suggested that there was simply a gap in the parties' agreement. While that is possible, it is clear that the parties contemplated, at least to some extent, that there could be a cessation of operations (see the management rights clause) and they also contemplated there could be lay-offs. Under the union's theory the parties did not contemplate what would happen to employees on a cessation of operations. This seems a stretch. It is much more natural and consistent with normal labour relations that employees be considered on lay-off if the employer's operations cease, particularly temporarily. I note that the only reason this is an issue at all is because of the seven month loss of seniority clause. Moreover, even if there is a "gap" in the collective agreement as the union suggests that does not assist the employees. If there is gap then there is nothing in the collective agreement to compel the employer to recall the employees at all- the recall obligation is tied to a lay off.

Fourth, although the union relies on its cases in a clever way, in my view they are ultimately fundamentally distinguishable from the facts before me (to the extent they were all correctly decided, which is not clear to me). None of the cases relied on by the union involve a lengthy period of time off work. *Imperial Tobacco* and *Mannesman* involved a two week vacation shut down; *Belleville Lock* and *Vernon Schools* involved a shut down over the Christmas period; *Burvic* involved a three day office closure. What these cases were really about was the effect on employees of employer scheduling decisions. They did not involve situations during normal work time where there was simply no work to be done.

The employer's cases are much more on point. In particular, and although Arbitrator Oakley in *Silverbirch* did not decide the specific issue before me (that being whether the employees' employment is terminated after the required period of lay off) since the period in the collective agreement had not run, once he determined that the employees were on lay-off and the lay-off extended beyond the loss of seniority period set out in the collective agreement, it is difficult to see how he would have come to any other conclusion than the employees were terminated. In any event, he did decide that the employees were on lay-off, the main issue that is before me. On the face of that award I see nothing to cause me to come to a different conclusion. In addition to the fact that the underlying factual circumstances are virtually identical to those before me, the collective agreement provisions are also very similar. Like the collective agreement before me, the Silverbirch collective agreement contained a seniority clause which recognized seniority in lay-offs (at least) and like the collective agreement before me, the Silverbirch collective agreement had a list of circumstances where seniority would be lost which appears to be the same or at least quite similar to the one at the Holiday Inn. I agree with the reasoning in that award.

Fifth, the circumstances before me fall squarely into the definition of "lay-off" as that term has been interpreted by arbitrators over many years. A "lay-off" occurs where the services of an employee (or employees) are no longer required because of a lack of work. That is what happened here. The parties did not define "lay-off" in a different way and the mere fact that the collective agreement provides for certain seniority rights on lay-offs does not alter whether a lay-off has occurred even if, because of the magnitude of the lay-off, those seniority rights do not come into play.

Sixth, there is no doubt that a reduction of work hours uniformly applied to employees is not a lay-off (See Re *Ballycliffe Lodge and SEIU*, Local 204 14 L.A.C. (3d) 38 (Adams)). There is also no doubt, as the Supreme Court of Canada case discussed above suggest, that if the reduction is applied unequally that may constitute a constructive layoff. However, it does not follow that an equal reduction of hours to zero hours means there is no lay-off. It is critical to recognize that the unequal reduction of hours caselaw is an expansion of the definition of the concept of a "lay-off" beyond the normal understanding of the term as described by the Supreme Court. That expanded definition, does not however, replace the normal definition. In this context the equal reduction cases, like *Air-Care Ltd. and U.S.W. et al* (1974) 49 D.L.R. (3d) 467, which is cited in *Ballycliffe*, represent an effort to ensure that the definition of lay-off does not expand too far beyond its normal meaning. In *Air-Care* the Supreme Court held at p.468:

> The Company had the right, in my view, under the terms of the agreement, to reduce the hours of work for a period, rather than impose a lay-off. When the Arbitration Board held otherwise it added to the agreement by imposing upon the Company a duty, not assumed through collective bargaining, to lay off employees whenever there was a shortage of work, and in doing so the Board acted in violation of Art. 7.03 which expressly limited

> the jurisdiction of the Board to deciding the matter within the existing provisions of the agreement and explicitly denied it the power to add to, subtract from, alter or amend the agreement in any respect.

As can be seen, the Court recognized that a lay-off was different from a reduction of hours of work, especially when the reduction in hours was applied equally. The elimination of all hours is a lay-off. The interpretation advanced by the union turns the concept of lay-off on its head.

Finally, I acknowledge that this is a terrible blow to the many long service employees who have given their lives to the Hotel. However, it is not the function of an arbitrator to award rights which were not bargained by the parties when they settled their agreement. The arbitrator's task is to apply and interpret the agreement, not to rewrite it. My job as arbitrator is to give effect to the agreement of the parties, and in my view the parties' agreement regarding employees laid off for more than seven months, and the effect of Article 12.03, are clear in this case.

For all of these reasons I find and declare that the employees were laid off on July 23, 2013 and that Article 12.03 (e) applies to the situation. Unfortunately, therefore, employees on layoff from July 23, 2013 for seven months lose their seniority and their employment effective the date that seven months runs.

Accordingly, the grievance is dismissed.

Brian McLean

"___________

Brian McLean

Toronto, Ontario