IN THE MATTER OF AN ARBITRATION, PURSUANT TO THE
B.C. LABOUR RELATIONS CODE, RSBC 1996 c. 244 (the "*Code")*

BETWEEN:

BC HYDRO AND POWER AUTHORITY

the "Employer"

AND:

MOVEUP (CANADIAN OFFICE AND PROFESSIONAL
EMPLOYEES UNION, LOCAL 378)

the "Union"

Remaining Claims of Carved Out Employees

Arbitrator:	Gabriel Somjen, KC
For the Employer:	Graeme McFarlane, Christopher Munroe Gabrielle Berron-Styan and Morgan Baker
For the Union:	Jodie Gauthier and Rachel Sombach
Date of Award:	January 2, 2025

1. I have issued 4 decisions regarding the Employer's Covid 19 Vaccination Policy and its application to employees in the Union's bargaining unit. Many of the required payments were made for employees who were "carved out" of the Policy. Some issues remain in contention. In a Memorandum of Agreement ("MOA"), set out below, the Parties agreed to a process for resolving these issues. Over the course of several days of mediation/arbitration, I heard from the Parties how these remaining issues should be resolved. This decision reflects the resolution to all remaining issues, except those resolved in decisions I have already made or in settlements of the individual claims of grievors.

2. To resolve the remaining issues the parties signed a MOA which stated:

> 2.1 Provided that the Carved-Out Employees establish their entitlement through the document and attestation process below, the Employer shall make Carved-Out Employees whole for:
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> a) lost wages during the duration of their unpaid leave pursuant to the Policy (the "**Leave**"), and
> b) any out-of-pocket benefit expenses the Carved-Out Employees incurred during the Leave that would have been covered by employee benefit plans had the Carved-Out Employees been at work.
> c) Upon application by the Union and if so ordered by Arbitrator Somjen, any financial damage and or tort damages incurred as a result of being placed on leave without pay. Example: Interest accrued on loans or lines of credit to sustain necessities. (emphasis added)

3. The principle of 2.1 is that employees be "made whole" for lost wages and certain other losses due to being on leave without pay ("LWOP") during the pandemic.

4. The Union argued on behalf of various employees for compensation under the categories summarized below:

(a) Interest incurred on debt for living expenses due to unpaid leave;
(b) Annual vacation;
(c) RWWL;
(d) Shift premiums;
(e) Tort/General damages;
(f) Missed meals and overtime;
(g) Benefits expenses;
(h) Tax on benefits;
(i) RRSP withdrawal fees;
(j) Tax due to RRSP withdrawal;
(k) Loss of investment value/interest;
(l) Home buyer's program penalty;

(m) Difference in tax rate due to retroactive payment;
(n) Accountants fees;
(o) Loss due to inability to pay down mortgage;
(p) Loss of autonomy and independence (no summary provided); and
(q) Loss of rental income

5. Some of these claims have been resolved through an earlier decision or by agreement. I will address each category in the order of the claims listed above.

6. I have considered the submissions of the parties in the mediation/arbitration and their detailed written submissions.

7. This decision is short in some instances, reflecting the need to be brief in light of the many types of claims addressed in these proceedings.

8. For several of the remaining claims I have considered the Employer's submission regarding "remoteness" or "certainty".

9. It is summarized in their written response to several of these claims.

> 14. In Chapter 2:13 of Canadian Labour Arbitration, 5th Edition [ER BOA Tab 1], the authors Brown & Beatty set out the general principles arbitrators follow in assessing damages for breach of a collective agreement (emphasis added):
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> > Unless the agreement provides otherwise, in assessing damages arbitrators have utilized the same common law principles as are applied in breach of contract cases. Thus, the basic purpose of an award of damages is to put the aggrieved party in the same position he or she would have been in had there been no breach of the collective agreement. This general principle is subject to three basic qualifying factors. In the first place, the loss claimed must not be too remote, that is, it must be "reasonably foreseeable" in the Hadley v. Baxendale sense. Second, the aggrieved party must act reasonably to mitigate his loss. Finally, apart from nominal damages, the loss or damages must be certain and not speculative. As expressed by one arbitrator:
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> > > Stated in the abstract, the relevant principle is quite clear. The purpose of damages for breach of contract is not to punish but to compensate, and the function of compensation is to place the aggrieved party in a monetary position as near as possible to that in which he
> > > would have been had the contract been performed.
> > > [Footnotes omitted.]
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> 15. The oft-cited quote from *Hadley v. Baxendale* (1854), 156 E.R. 145, 9 Exch. 341 (Eng. Ex. Div.) [ER BOA Tab 2] regarding foreseeability and remoteness provides as follows (at 151):
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> > ... Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of

> things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. [Emphasis added.]
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> 16. Damages are too remote if they were neither reasonably within the contemplation of the parties as a likely result of the breach of the contract, nor the immediate and natural consequences of that breach. The loss must be something immediately flowing from the breach of contract, something immediately connected with it, and not merely connected with it through a series of causes intervening between the immediate consequence of the breach and the damages or injury complained of. This test is not a question of fact; it is a question of what might "reasonably be supposed to have been in their contemplation.": Canadian Encyclopedic Digest (Westlaw Next) cited in *British Columbia Emergency Health Services v. Ambulance Paramedics of British Columbia, CUPE Local 873 (Beasley Grievance)*, [2017] B.C.C.A.A.A. No. 73 (Sullivan) at para. 5 [ER BOA Tab 3].

10. I agree with these general principles regarding how closely the claim is related to the breach. Damages that clearly result from the LWOP itself are compensable; for example, lost wages, or the interest incurred on a necessary debt, as in (a) below. Other claims which are not directly attributable to the LWOP are not compensable; for example, loss of rental income in (q) below. Such a loss, while indirectly connected to the LWOP is not a consequence that would be foreseen as a result of the LWOP. Where these principles apply to a claim, I will refer to them but not repeat the arguments or the analysis of “remoteness”, “foreseeability”, or the speculative nature of the claim.

(a) Interest incurred on debt

11. In some cases, carved out employees had to borrow to cover necessary expenses during their LWOP. The interest on these loans during the LWOP was an expense that resulted directly from the LWOP and, in some cases, for a time after return to work. These interest costs are compensable. I have considered all submissions on this claim and conclude that this issue will be resolved as follows: An amount was calculated based on interest paid during the LWOP and in the case of employees 1, 2 and 5, a further amount for a portion of interest paid after their return to work. The amounts to be paid are set out in Appendix “A” to this award. The names of members have been anonymized.

(b) & (c) Vacation and RWWL

12. In considering the issue of vacation pay and RWWL, I have been assisted by the Parties' Agreed Statement of Facts and the evidence of David Graves, Manager, Compensation & Payroll for the Employer.

13. Some employees are entitled to vacation with pay as well as RWWL days with pay or pay in lieu. Depending on their status, employees are paid vacation pay and RWWL pay during a particular year. Part time and casual employees are paid vacation pay and RWWL pay on each pay, while full time employees are scheduled for vacations and RWWL days, with pay, during the year.

14. The Union has referred to some cases in which arbitrators have ordered reinstatement for employees unjustly terminated or improperly required to be on a leave. In those cases, the Employer had not paid for vacation pay during the absence and that was part of the remedy ordered by the arbitrator. I must look at the circumstances in the present case and what the Employer did after receiving my earlier awards.

15. What would employees have received if they had worked normally through the 10-month period they were on leave without pay? Part time and casual employees would have received their regular pay which includes a percentage for vacation pay and RWWL pay. Full time employees would have received their regular pay and been scheduled to take vacation with pay and paid RWWL days during the year.

16. What did the Employer do when it paid these employees pursuant to the MOA?

17. The evidence of David Graves is:

> 4. In general terms, the Employer has paid carved-out employees … all of their wages they would have earned had they worked for the duration of the unpaid leave, including salary or hourly pay (with applicable general wage increases and length of service increases), shift differentials/premiums (where applicable and based on the Employer's schedule), gain sharing payments (where applicable and until March 31, 2023), less mitigation earnings as disclosed by the employees.
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> 6. In calculating and paying retroactive wage loss, the Employer paid "carved out" regular full-time employees on the basis that they worked 37.5 hours per week for each of the weeks of their unpaid leave.

18. The Employer paid part time and casual employees during the leave as they would normally be paid. Full time regular employees were paid as if they worked throughout the leave period, even though they would normally have taken paid vacation and paid RWWL days during this time. Therefore, in the unique circumstances here, the employees have all been paid the same amounts with respect to vacation and RWWL as if they had not

been on leave. They have received all the wages they would have received if they had worked and taken vacation and RWWL time off during their LWOP. There is no additional loss to compensate. They have been "made whole" within the meaning of the MOA.

19. The grievance with respect to vacation and RWWL is dismissed.

(d) Shift premiums

20. These have been paid.

(e) Tort/General damages

21. Sometimes tort or general damages are awarded, particularly where the Employer acted in bad faith. In this case, the Employer's policy was generally reasonable, except for carved out employees. BC Hydro was acting in good faith, responding to the difficult circumstances unique to this pandemic.

22. To the extent these damages are claimed based on breach of privacy, I conclude that the only basis for this would be the Employer's request for disclosure of vaccination status. This was a minimal invasion where no intrusion to the employees' body occurred. Furthermore, all the employees here refused vaccination and disclosure of their vaccination status; therefore, there was only a request to disclose but no disclosure. I find no basis to award tort or general damages.

(f) Missed meals and overtime

23. The affected employee has received payment from the Employer for the claimed amount.

(g) Benefits

24. The Employer's benefits provider has reimbursed employees for eligible expenses they incurred during their unpaid leave.

(h) Tax on benefits

25. There was no tax on benefits. Reimbursements were shown on employees' paystubs, but no tax was withheld.

(i) RRSP withdrawal fees

26. Some employees withdrew from their RRSPs to cover necessary expenses. While this was a practical response to being on LWOP it was not required as a direct result of the LWOP. Any withdrawal fees would ultimately be paid at some time. This claim is not directly related to the LWOP and is too "remote" to be awarded in this case.

(j) Tax Due to RRSP withdrawal

27. Similarly, this was a liability the employee had because eventually the tax would have to be paid. The rate of taxation would be impossible to calculate now but would be incurred. For this reason, tax on withdrawal of RRSP amounts has been considered not related to these types of claims. For example, in the Employer submission:

> 39. In *British Columbia v. British Columbia Government and Service Employees' Union (Provost Grievance)*, [2000] B.C.C.A.A.A. No. 352 (Burke) [ER BOA Tab 11], the grievor was dismissed for cause, then reinstated with a three-day suspension. The grievor claimed damages from the employer for $4,765 in income taxes payable as a result of withdrawing $15,000 from an RRSP to meet some of his ongoing expenses while he was without work. The union argued that the tax consequences suffered by the grievor were a foreseeable result of his dismissal (para. 3):
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> > 3 The Union argues that the income tax consequences suffered by the Grievor were caused by the Grievor's dismissal and were a foreseeable result of the Grievor's dismissal. The Union points out that had the Grievor continued working full-time during July 7 - December 31, 1999 his total net income would have been $9,240 and his gross income $14,200. When he withdrew $15,000 from an R.R.S.P. during this time, $1,500 was withheld and remitted to Revenue Canada. The amount available to him from deregistering the R.R.S.P. was $13,500. If he had worked, his gross pay would be $14,200; so de-registering the R.R.S.P. left him $700 less in terms of gross pay. When filing his return in 2000, he was required to pay an additional amount of $1,816 in taxes and lost a tax refund of $2,949. The Union claims the total of this amount in damages.
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> 41. Arbitrator Burke agreed with the employer, finding that the tax on a RRSP was a pre existing liability and that this head of damage was too remote a consequence of the discharge (para. 24): 24 In short, the claim in this case suffers from two essential problems. The first is that the tax on a R.R.S.P. is a pre-existing liability to the termination. Damages must naturally flow from the breach. Here the claim suffers from a causation issue in that it cannot be considered attributable to the wrongful discharge. It is a pre-existing liability. As set out in *Tri-Line Expressways, supra*, while the Grievor was no doubt placed in a difficult financial circumstance, the loss, if one characterizes the income tax remittance as a loss, arose from the Grievor's impecunious circumstances. Even if one could characterize the claim as being in a higher tax bracket, this suffers from its fundamentally speculative nature . One cannot know when the Grievor would have otherwise collapsed the R.R.S.P. and incurred liability. It is therefore too remote a consequence of the discharge.

28. The tax liability arose because of withdrawing these funds from an RRSP and not because of the LWOP. This tax would be payable whenever funds would be withdrawn from an RRSP which would eventually occur regardless of the reason for the withdrawal. Therefore, this claim is not allowed.

(k) Loss of investment value/interest

29. Any such loss is speculative and too remote to consider as related to the LWOP.

(l) Home buyer's program penalty

30. I do not find that any penalty was incurred, and this claim is too remote to be considered a consequence of being on LWOP.

(m) Tax rate due to retroactive payment

31. The Employer assisted employees in mitigating this claim. Employees are required to make reasonable efforts to mitigate any loss and could have done so in this case. No further damages are appropriate for this claim.

(n) Accountant's fees

32. These fees were not incurred directly because of the LWOP and are too remote to consider.

(o) Inability to pay down mortgage

33. This claim has not been proven; it appears the required payments were made and, in any event, it is too remote to consider as a consequence of the LWOP.

(q) Loss of autonomy and independence

34. In an earlier decision I concluded the employee making this claim should not be "carved out".

(r) Loss of rental income

35. The employee making this claim was not "carved out".

36. These remaining claims are dismissed, except as provided above.

Dated at Vancouver, BC this 2nd day of January 2025.

" Gabriel Somjen "

Gabriel Somjen, KC, Arbitrator

APPENDIX A

Member	Interest Payout Total
Member 1	$ 1,287.65
Member 2	$ 1,979.34
Member 3	$ 990.07
Member 4	$ 182.63
Member 5	$ 2,487.87