Canadian Blood Services and Health Sciences Assn. of Alberta (Camat) (Re)

Re Canadian Blood Services and Health Sciences Association of Alberta (Camat)

185 L.A.C. (4th) 69
2009 CLB 9233, [2009] agaa 34, 98 C.L.A.S. 124

Alberta
J.L. Wallace, D. Leclair and D. Heale
Heard: October 30, 2008
Decision rendered: April 27, 2009

Skill and ability -- Use of seniority -- Relatively equal qualifications -- Job selection clause containing broad range of factors for consideration including "other relevant attributes" -- Clause also giving management broad discretion to decide whether relative equality exists -- Interview team concluding grievor's skill and experience in several areas not current -- Reasonable interpretation of job selection material -- No basis for interfering with selection of junior candidate.

Skill and ability -- Use of seniority -- Relatively equal qualifications -- Grievor scoring less than five percent below successful junior candidate -- Relatively junior position governed by detailed operating procedures -- Union establishing prima facie case that grievor relatively equal -- Onus shifting to employer to demonstrate it complied with collective agreement notwithstanding close scores and nature of position -- Employer satisfying onus.

Skill and ability -- Use of seniority -- Arbitral review -- Relative equality clause -- Arbitrator's function to scrutinize application of employer's judgment in context -- Context in this case informed by selection clause that is both broad in factors for consideration as well as broad in discretion given to management -- Not arbitrator's function to second-guess reasonable management judgment that was otherwise reached in compliance with collective agreement.

Skill and ability -- Assessment -- Interviews -- Relative equality clause -- Difference in interview scores between grievor and junior candidate less than five percent -- Collective agreement contemplating wide range of factors for consideration and conferring broad discretion on employer to determine whether candidates relatively equal -- Structured interview and resulting scores key evaluation tool but not exclusive determinant -- Employer entitled to consider other information -- Conclusion that grievor's skill and experience not current was reasonable -- No basis for interfering with selection of junior candidate.

[See *Brown & Beatty* , 6:3100 ; 6:3220]

Cases referred to
Canadian Blood Services and Health Sciences Assn. of Alberta (Amin) (Re) (2001), 64 C.L.A.S. 178, [2001] A.G.A.A. No. 23

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Edmonton (City) and C.U.P.E., Loc. 30 (Szymiec) (Re) (2002), 68 C.L.A.S. 87, [2002] A.G.A.A. No. 12
Elisabeth Bruyere Health Centre and O.N.A. (Re) (1982), 6 L.A.C. (3d) 119
Halifax (City) and I.A.F.F. (Re) (1991), 19 L.A.C. (4th) 392 , 21 C.L.A.S. 571; quashed 107 N.S.R. (2d) 401, 30 A.C.W.S. (3d) 73, *sub nom. Mosher v. Halifax (City)* [affd 114 N.S.R. (2d) 18, 34 A.C.W.S. (3d) 78]

Lever Brothers Ltd. and Teamsters, Loc. 132 (Re) (1994), 39 L.A.C. (4th) 299 , 34 C.L.A.S. 508
Northern Telephone Ltd. and C.E.P. (Samson) (Re) (2000), 90 L.A.C. (4th) 146 , 61 C.L.A.S. 206
Ottawa Civic Hospital and O.N.A. (Re) (1989), 9 L.A.C. (4th) 348
Ottawa Hospital and O.P.S.E.U. (Jamal) (Re) (2002), 109 L.A.C. (4th) 168 , 70 C.L.A.S. 54
University of British Columbia and C.U.P.E., Loc. 116 (Re) (1982), 5 L.A.C. (3d) 69
Westeel Products Ltd. and U.A.W. (Re) (1960), 11 L.A.C. 199

Authorities referred to
Brown, Donald J.M., and David M. Beatty, *Canadian Labour Arbitration* , 4th ed. (Aurora, Ont.: Canada Law Book, 2006) (looseleaf)

EMPLOYEE GRIEVANCE concerning job selection. Grievance dismissed.

D. Bennett and others, for the union.
C. Neuman , Q.C., and others, for the employer.

AWARD

I. Introduction

[1] Elizabeth Camat (the "Grievor") works as a Laboratory Attendant at the main Edmonton laboratory of Canadian Blood Services ("CBS" or the "Employer"), the successor to the Canadian Red Cross as the statutory manager of Canada's human blood supply. She is in a bargaining unit represented by Health Sciences Association of Alberta ("HSAA" or the "Union"). HSAA and CBS, or the Red Cross before it, have had a collective agreement for many years. The collective agreement has a seniority clause that is a variant of what is commonly referred to as a "relative ability" or "competitive" clause, in which seniority is the governing factor for promotions and transfers only when the candidates' qualifications and abilities are deemed to be relatively equal.

[2] Ms. Camat applied for a job posting for a Laboratory Attendant in the Transfusion Medical Services ("TMS") area of the laboratory. This would have been a lateral transfer for Ms. Camat. She lost the job competition when she scored 4.8% lower than the

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successful junior candidate in the employer's selection process. There is no issue taken with the design or relevance of the interview questions, with the fairness of the process, or with the award and calculation of scores to the candidates. The narrow issue in this arbitration is this: given the close scores, was Ms. Camat "relatively equal" to the successful candidate such that she could invoke her seniority to claim the job? There is another issue embedded in this, however: Who gets to decide whether there is relative equality between candidates? Or, what is the appropriate scope of arbitral review in the context of this particular collective agreement's treatment of seniority in job selection cases?

II. Facts

[3] The Union and Employer submitted an Agreed Statement of Facts and several agreed documents. The important portion of the Agreed Statement of Facts reads as follows:

> (...)
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> 3. The Grievor commenced employment with the Employer on April 7, 1982. She is currently employed as a regular, full-time Laboratory Attendant at Canadian Blood Services, Edmonton, in Component Production. A job description for her position is attached (Exhibit 4). She is a member of the bargaining unit represented by the Bargaining Agent, and her terms and conditions of employment are governed by the collective agreement (Exhibit 1).

> 4. In February, 2007 a Notice of Vacancy was posted for the position of a regular, full-time Laboratory Attendant at Canadian Blood Services, Edmonton, in Patient Services (Exhibit 5). A job description for this position is attached (Exhibit 6). This is a position in the bargaining unit, to which the terms of the collective agreement (Exhibit 1) are applicable.
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> 5. The Grievor submitted an application for this vacant position (Exhibit 7), as did four other employees in the bargaining unit, including Deborah Wichinski (Exhibit 8) and Liane Berube (Exhibit 9).
>
> 6. The Grievor and all other applicants were interviewed and rated by representatives of the Employer. Interview notes and rating forms were compiled for all applicants, including the Grievor (Exhibit 10), Deborah Wichinski (Exhibit 11) and Liane Berube (Exhibit 12).
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> 7. The Employer initially offered the disputed position to Deborah Wichinski, but she declined to accept it. The Employer then appointed Liane Berube to the position, effective March 19, 2007. She remains the incumbent in the position, and she has received notice of her entitlement to attend and participate in the arbitration hearing pertaining to this grievance.
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> 8. The Employer notified the Grievor that she was not the successful applicant for the disputed position (Exhibit 13).

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> 9. The Grievor's bargaining unit seniority date is April 7, 1982. The bargaining unit seniority dates of Deborah Wichinski and Liane Berube are February 20, 1994 and July 4, 2005 respectively.
>
> (...)

[4] The collective agreement contains a typical management rights clause that reserves to management the right to hire, promote and transfer employees except as specifically restricted by the terms of the agreement. The key provision of the agreement for purposes of this grievance is Article 12.04(a):

> *12.04 (a)* In filling vacancies, skill, education, training, knowledge, efficiency and other relevant attributes shall be the primary consideration. Where these factors are considered by the Employer to be relatively equal, seniority within the Centre/satellite site will be the deciding factor.

[5] Two things about this clause are worthy of note at the outset: it specifies "skill, education, training, knowledge, efficiency *and other relevant attributes* " as the primary considerations in the filling of a vacancy. The mention of "other relevant attributes" gives the Employer some latitude to go beyond the common and core attributes of skill, education, training, knowledge and efficiency in assessing the employee's likelihood of success in the posted job. Second, this clause specifies that seniority governs when the primary factors " *are considered by the Employer* to be relatively equal". We examine the significance of these words to the case later.

[6] The CBS Edmonton laboratory comprises three principal areas: production, which receives and stores blood from collection sites and processes it into its components for use; distribution, which distributes blood and components to hospitals and other users; and Patient Services, which performs cross-matches of blood for all northern Alberta hospitals and pre-natal screening tests for all of Alberta and the Northwest Territories. The distribution area dates from 1995 as a separate part of the laboratory. The Patient Services area was established as a stand-alone part of the laboratory in 1999.

[7] Ms. Camat is a Laboratory Attendant in the first of these areas, in the Employer's Manufacturing, Component Production Department. In that role she receives, documents and assesses blood shipments coming to the laboratory from collection centres; prepares blood components; sorts blood and components and releases them to inventory; monitors and maintains the laboratory equipment used in production; and helps ensure regulatory compliance. All this is

done

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under the immediate supervision of a Laboratory Technologist and following established written procedures.

[8] In February, 2007, CBS management posted the vacancy in dispute, for a regular full-time Laboratory Attendant-Patient Services, in the Transfusion Medicine Services area of the laboratory. As the name suggests, this is a position in the third area of the laboratory listed above. As earlier noted, this would have been a lateral transfer for Ms. Camat. The posted position reported to Laboratory Supervisors responsible for Crossmatch/Reference and Prenatal Testing. The posting stated the job's key responsibilities to be: specimen preparation, blood component inventory management, equipment and supplier issues, and process control, improvement and documentation.

[9] There are obviously some similarities between the posted job and Ms. Camat's present job, but as we understand the evidence there are some significant differences too. Specimen preparation is a major responsibility of the posted job not required in the Production area. The posted job requires significant direct telephone contact with customers, especially for the crossmatch function, that is absent in the Production area.

[10] Six candidates applied for the job posting. Each provided an application letter and resumé in support. Five met the stated basic requirements and received interviews. All were internal candidates, so the agreement's preference for internal candidates (Art. 12.02I) did not come into play. We will be concerned with only the top three candidates. They were Deborah Wichinski, a Laboratory Assistant in the Special Red Cells Lab part of Product Distribution, the second area of the laboratory; Liane Berube, a part-time Laboratory Attendant in Patient Services, in fact doing part-time the same job as the posted job; and Ms. Camat.

[11] Ms. Camat had much the greatest seniority of the three, 26 years. Ms. Wichinski had 13 years of interrupted service with CBS. Ms. Berube had two years of seniority.

[12] We heard from the two members of management who administered the competition and sat on the interview panel: Senior Human Resources Advisor Veronica de Freitas, and Patient Services Laboratory Manager Jean Ashdown. They described their roles in the process as follows. Ms. de Freitas acted as the human resource professional, providing HR expertise, ensuring compliance with the

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collective agreement, and advising line management on screening, scoring and selection. Ms. Ashdown, who would be the successful applicant's manager, acted as the member of the panel with substantive expertise about the job. She had, in Ms. de Freitas' words, the final say in selection.

[13] Ms. de Freitas prepared the interview guide, the principal selection tool, for this competition. Ms. Ashdown led the development of the technical questions in the interviews. The resulting interview guide comprised 25 questions worth five points each, divided into seven skill categories with points distributed as follows:

General (2 questions)	**10 points**

Skills/Education (7 questions)	**35 points**
Training (2 questions)	**10 points**
Attention to Detail/Documentation	**10 points**
Problem Solving/Technical Knowledge	**25 points**
Teamwork/Interpersonal Skills	**10 points**
Adaptability/Initiative/Organizational Skills	**25 points**
Total	*125 points*

[14] Ms. de Freitas and Ms. Ashdown conducted the interviews. They asked the candidates identical questions, following the interview guide. Each interviewer kept handwritten notes of the answers given on her interview guide. At the close of the interviews they commenced scoring the interviewees, proceeding question by question and arriving at an agreed score for each question. No scores were cumulated until all candidates were scored for every question. At the end of the process, Ms. Wichinski, Ms. Berube and Ms. Camat finished first, second and third of the five candidates, in that order, with the following scores:

Skill	*Wichinski*	*Berube*	*Camat*
General	7	8	6.5
Skills/Education	26	25	19
Training	8	8	5
Att'n to Detail, Documentation	5.5	6	5
Problem Solving, Technical	15	16	17
Knowledge			
Teamwork, Interpersonal Skills	6	5	5

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Adaptability, Initiative ,	17	13.5	18
Organizational Skills			

TOTAL (/125)	84.5	81.5	75.5
VARIANCE (%, x/125)	0.0%	-2.4%	-7.2%

[15] Ms. Ashdown and Ms. de Freitas agreed that these scores reflected the candidates' overall rankings. Wichinski was the top candidate, but Ms. Ashdown did not know her or her work; she did know Berube, who worked part-time in her lab. They resolved to check Ms. Wichinski's references. When those came back positive, Ms. Ashdown, with Ms. de Freitas' concurrence, decided to offer the position to Wichinski, who was also the more senior candidate.

[16] Ms. Wichinski, however, declined the job. Ms. de Freitas and Ms. Ashdown met again and reached a common conclusion that Ms. Berube was the better candidate and should be offered the job. Both testified that they did not consider Ms. Camat, the senior employee, to be "equal" or "relatively equal" to Ms. Berube. Berube accepted the job and this grievance followed.

[17] The parties entered as agreed exhibits the interview score sheets kept by each interviewer for each of Ms. Wichinski, Ms. Berube and Ms. Camat. Ms. de Freitas and Ms. Ashdown both testified about their reasons for awarding certain scores and about their overall line of reasoning in making the decision they did. Their testimony was broadly in agreement. They said that the interview scores reflected the fact that although Ms. Camat was senior to Ms. Berube, her experience in some of the aspects of the job was not current experience. She received one of five possible points on a question measuring "customer service" abilities because it had been over ten years since she had had direct face-to-face or telephone dealings with customers. The same was true of specimen preparation experience. Ms. Ashdown explained that she scored only the minimum acceptable score on the question having to do with computer experience because, although she was a home user of several applications, she lacked training and experience in the inventory management application and two other applications that are used in the posted job. Her marks for training were lower than the other candidates because she did not have the ISTP course, which we understand to be a variety of "train the trainer" program that Ms. Ashdown considered particularly important.

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[18] Ms. Berube's scores in the areas of "Skills/Education" and "Training" were significantly better than Ms. Camat's in large part because she was already doing the posted job. Her previous experience in other laboratories offset some of Ms. Camat's experience advantage, and Berube's previous work in a veterinary lab earned her high marks in the customer service question. The skill category that allowed Ms. Camat to close most of the gap between herself and Ms. Berube was the last one, "Adaptability/Initiative/Organizational Skills", where Ms. Camat had an advantage of 18 points to 13.5 points. Ms. Ashdown testified that Ms. Berube lost points for giving answers less complete than her interviewers had expected, and less complete than Ms. Camat's. But Ms. Ashdown, for her part, said that she was not terribly concerned about Berube's lower scores in that part of the interview "because I knew her, and knew that she had adaptability, initiative and organizational skills". She noted that generally, Ms. Berube was not as verbose in her answers as the other candidates; she speculated that Ms. Berube might have scored higher had her interview style been more forthcoming.

[19] Overall, both Ms. Ashdown and Ms. de Freitas said that Ms. Camat's scores reflected her disadvantage relative to Ms. Berube (and Ms. Wichinski, for that matter) of having worked in the component manufacturing area of the laboratory for such a time that her training and skills in some of the important aspects of the posted job were not as current as for the other candidates. Ms. Ashdown noted as well that there had been technological change in some parts of the job

since Ms. Camat's previous experience; she gave the example of inventory control, which had become entirely computerized in the meantime. It was therefore their judgment that Ms. Berube, along with Ms. Wichinski, had demonstrated a strong and current familiarity with the tasks of the posted job -- Ms. Wichinski from doing similar work in her area of the lab, Ms. Berube from doing the posted job itself. This led them to conclude that Ms. Berube and Ms. Camat were not "relatively equal" candidates and Ms. Berube should get the job.

[20] In cross-examination, the witnesses agreed that the Laboratory Attendant classification does not require professional licensure, that Laboratory Attendants occupy the less skilled part of the spectrum of technical jobs at CBS, and that they generally follow written standard operating procedures in their work rather than exercise discretion. Interestingly, the witnesses differed on the

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question, hypothetical in view of their relative seniorities, whether Ms. Berube and Ms. Wichinski were "relatively equal". Ms. de Freitas answered no, while Ms. Ashdown answered yes.

III. Argument

[21] As we noted at the outset of these reasons, the Union takes no issue with the design of the competition, the selection of the interview questions, the fairness with which the process was administered, or the way that the candidates' scores were awarded and calculated. It says that the only breach of the collective agreement was management's conclusion that Ms. Camat was not "relatively equal" to Ms. Berube in the face of an interview score that put her within 4.8% of Ms. Berube's score.

[22] "Relative equality", the Union argues, is a phrase that recognizes the subjective nature of job competitions and allows for some variance from absolute equality. Relative equality is to be judged by the scores from the selection process, because the employer by developing the selection tool committed itself to the skills, qualifications and qualities it considered necessary to success. Within that framework, relative equality exists unless the junior candidate's abilities and qualifications exceed the senior's by a "substantial and demonstrable margin". Management must be able to show a "discernible, material difference" between the candidates.

[23] What amounts to a "discernible, material difference" depends upon the nature of the job in question. Arbitrators treat jobs rated lower in skills and qualifications as being less sensitive to small differences in perceived abilities; so larger margins must exist before the senior candidate is considered not to be "relatively equal" to the junior candidate. This job, it notes, was in a less skilled classification, in which new incumbents have the benefit of a training period (Article 12.05) and in which employees follow standard operating procedures rather than exercise discretion. This suggests that a relatively large variance should be required in this case to uphold management's decision.

[24] The Union points to the difference in opinion between the witnesses on whether Ms. Berube and Ms. Wichinski were "relatively equal" as demonstrating the ambiguity of that phrase in the collective agreement and the need for certainty. It relies on various arbitral awards that suggest that a variance of five percent, or even up to ten percent, constitutes "relative equality", and asks this board

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to find accordingly. Last, it asks that we grant the remedy of directing that Ms. Camat be awarded the job, because a new job competition after the incumbent has had almost two years in the position would be a hollow remedy for the Grievor.

[25] The Employer argues that this board should consider that its task is to apply the actual wording of this collective agreement. We should, it says, steer away from simplistic conclusions that this is an ordinary relative ability clause, or that there is a specific degree of variance that may be applied as a bright line test of relative ability. The proper approach is to look for the reasonable application of managerial judgment in the context of the agreement and the facts of the case.

[26] Using such an approach, the Employer says, it is important to remember that Article 12.04 allows it to take into account a list of attributes that is broadly drawn and flexible in concept; that allows it to consider "other relevant factors"; and that contains the words "where these factors *are considered by the employer* to be relatively equal". The latter words should be interpreted as an agreement that the Employer's opinion is to govern, so long as it is reasonable. The Employer relies upon awards that emphasize deference to management's judgment so long as a reasonable judgment is made based upon a fair selection process.

[27] By the standard of reasonableness, the Employer says, the result of this competition should be upheld. The difference between Ms. Berube and Ms. Camat was discernible -- meaning capable of being recognized and articulated -- and material -- meaning real and relevant. Ms. Camat, though a valued, long service employee, did not have either actual or transferable current experience in the tasks required in the Transfusion Medicine Services job, while the two higher-rated candidates did. This difference was apparent in the candidates' resumés and was only amplified by the interview assessments. The difference was not overcome by Ms. Camat's advantage in what might be called the "soft" factors of adaptability and initiative. And while these soft skills may not be ignored, it was a reasonable conclusion to draw that recent experience was more valuable than old experience where aspects of the job had changed over time. The Employer urges us to dismiss the grievance.

IV. Decision

[28] In deciding the narrow issue presented to us, we note some well-established principles that are not in dispute. In a competitive

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or "relative ability" clause of this type, the words "relatively equal" connote approximate, not absolute, equality between candidates. Indeed, even without the word "relatively", arbitrators look only for approximate equality between candidates because precise equality is impossible to measure by an assessment process that can never be entirely free of subjectivity: see, e.g., *Re Elisabeth Bruyere Health Centre and O.N.A.* (1982), 6 L.A.C. (3d) 119 (Saltman); *Re Westeel Products Ltd. and U.A.W.* (1960), 11 L.A.C. 199 (Laskin). "Relative equality" exists where the differences relied upon are insignificant. Several formulations are used in the cases to express this idea. The differences required to justify awarding the job to a junior candidate must be "discernible" and "material": *Re University of British Columbia and C.U.P.E., Loc. 116* (1982), 5 L.A.C. (3d) 69 (Munroe). Relative equality exists where the differences are "less than substantial": *Re Lever Brothers Ltd. and Teamsters, Loc. 132* (1994), 39 L.A.C. (4th) 299 (Knopf). The junior employee must possess more ability than the senior by a "substantial and demonstrable margin" to be entitled to the job: *Re Ottawa Civic Hospital and O.N.A.* (1989), 9 L.A.C. (4th) 348 (Mitchnick).

[29] But while these tests demonstrate arbitrators' willingness to give substance to collective agreement seniority rights, arbitral power in selection grievances is tempered by deference to management's knowledge of the workplace and of the employer's needs, and to management's superior ability to assess employee skills, qualifications and aptitudes. This underlying deference is described by Brown & Beatty, *Canadian Labour Arbitration, 4th ed.* (Canada Law Book:

Looseleaf: 2006) in this way (at 6:3100):

> Notwithstanding the many variations in the type and language of seniority clauses that may be included in collective agreements, there has been little dispute among arbitrators as to the general scope of their review of managerial decisions that are made according to any of the standard promotion and layoff regimes. In the first place, there is a consensus that regardless of the language of the agreement, the standard of arbitral review of managerial decisions that involve an assessment of the abilities of employees is less demanding than that used in discipline cases. As a general rule, arbitrators have been reluctant to interfere with managerial decisions of this kind unless there is evidence of arbitrariness, discrimination, bias and/or bad faith, or an indication that the employer's judgment was unreasonable in some basic and significant respect. (...) From the earliest awards it has been said that the primary function of the arbitrator's review is to ensure that:
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> > ... 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

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> > 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. (citations omitted)

As Arbitrator Herman writes in *Re Northern Telephone Ltd. and C.E.P. (Samson)* (2000), 90 L.A.C. (4th) 146 at 154:

> [A]n arbitrator does not determine whether the employer selected the candidate(s) that the arbitrator would have chosen, and the employer need not have conducted the competition precisely as the reviewing arbitrator would have conducted it. The employer in this respect is only required to have acted reasonably in how it filled the position.

[30] The third and obvious general consideration to note is that it is the function of the arbitration board to ensure that the parties' particular collective agreement is properly applied. The arbitration board must be alive to the differences among collective agreements on the subjects of seniority and job selection, and must strive to reasonably interpret the particular collective agreement language that the parties have chosen to record their agreement.

[31] With that in mind, we note first that Article 12.04 of this collective agreement says that "skill, education, training, knowledge, efficiency and other relevant attributes shall be the primary consideration" in filling vacancies. We do not consider this to be a case in which the words "and other relevant attributes" come into play. Arguably "adaptability", "initiative" and "teamwork" are "other relevant attributes" within this framework, though they might also be described as a gloss upon "efficiency". If they are "other relevant attributes", they were considered explicitly and fairly in respect to all candidates within the Employer's formal assessment process, and on balance they were beneficial to Ms. Camat's candidacy. The root of the Employer's judgment on Ms. Camat was that her skill, education and training made her not relatively equal to Ms. Berube because they were either missing (in the case of the ISTP training) or not current. The grievance therefore succeeds or fails depending upon our view of this judgment.

[32] Without a doubt, this was a close competition. The scores recorded for Ms. Camat and Ms. Berube fall in a zone of variance that arbitrators have been sometimes prepared to find amounts to relative equality. See, e.g., *Edmonton v. CUPE, Loc. 30 (Szymiec)* , [2002] Alta. G.A.A. 2002-012, 68 C.L.A.S. 87 (P.A. Smith) (variance of <10% established a *prima facie* case of relative equality

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for that job); and *Re Halifax (City) and I.A.F.F.* (1991), 19 L.A.C. (4th) 392 (Outhouse), quashed

on other grounds [30 A.C.W.S. (3d) 73 (N.S.S.C.T.D.)] (reference to 5% -- 10% "rule of thumb"). Further, we accept the principle noted by Arbitrator Kaplan in *Re Ottawa Hospital and O.P.S.E.U. (Jamal)* (2002), 109 L.A.C. (4th) 168 , that the more senior, complex or technical the position, the lesser a margin of superiority will generally be required to uphold the selection of the junior candidate. The competition in this case being one for a relatively junior position governed by detailed operating procedures, relative equality of candidates is easier to establish. We are therefore prepared to say that the Union in this case established a *prima facie* case that Ms. Camat was relatively equal to Ms. Berube and should be able to invoke her seniority to claim the job. The evidentiary *onus* shifts to the Employer to establish that in fact it complied with the collective agreement notwithstanding the close scores and the nature of this position.

[33] In evaluating the Employer's case, we accept its argument that there is no bright-line test of relative equality to apply: the function of the arbitration board is to scrutinize the application of the Employer's judgment in context. The context here is a collective agreement job selection clause (Article 12.04) that is both broad in the factors that may be considered by management ("... and other relevant attributes") and broad in the discretion that it gives management to decide whether relative equality exists ("... and where these factors are considered by the Employer to be relatively equal"). In this case, the latter words are particularly important. They express a mutual intention in the parties that in close cases, the Employer's opinion about relative equality of candidates is controlling. This is not to say that management's decision is beyond arbitral review. It should go without saying that the Employer's opinion must be reasonable, that it must be arrived at in good faith, and that it be the product of a fair evaluation process. But if it satisfies those conditions, the intent of the collective agreement is that the Employer's selection should stand.

[34] Within this framework, the only issue in this case is whether the Employer's opinion that Ms. Camat was not relatively equal to Ms. Berube, despite the close scores, was a reasonable one. We adopt the view of Arbitrator Moreau, in a selection grievance involving these parties and a predecessor collective agreement, that the structured interview and resulting scores were a "key" evaluation

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tool, but not the "be all, end all" by which management could reach its decision: *Canadian Blood Services v. HSAA (Amin Grievance)* [2001] Alta. G.A.A. 01-022 at para. 61, 64 C.L.A.S. 178. As Arbitrator Moreau noted in that case, the interviewers could rely on their own experiences of the candidates as well. Here, Ms. Ashdown, whose opinion would govern in a close case, was prepared to discount somewhat Ms. Camat's advantage in the "soft" category of "Adaptability, Initiative and Organization Skills" because she was familiar with Ms. Berube's performance in the very job in question.

[35] More importantly, an Employer operating under a collective agreement selection clause like this one is entitled to look beyond the bare scores resulting from the structured interview process. It is entitled to analyze the interview results and any other information at hand, like resumés, to see if they reveal patterns or tendencies from which it could draw conclusions about the candidates' likelihood of success in the job. In this case, the interview team concluded that the information before them revealed that Ms. Camat's skills and experience in several areas of the job were not current, while Ms. Berube's skills and experience were very current. In our opinion, this was a reasonable interpretation of the material in front of the interview team. And overall, it was within the range of reasonable conclusions to draw from the information in their possession that Ms. Camat's likelihood of success in the position was less than Ms. Berube's, and by a significant enough margin that they were not "relatively equal".

[36] This is not to say that Ms. Camat was not qualified for the job. The Employer did not take

that position, and from all that we understand, Ms. Camat is an experienced and valuable employee who was likely to succeed in that role. Had the Employer elected to treat her as relatively equal, that might from the vantage point of an arbitrator have been equally within the range of reasonable conclusions it could draw. But it is not the function of an arbitration board applying this kind of collective agreement selection clause to second-guess reasonable management judgments that were otherwise reached in compliance with the collective agreement. For that reason, the grievance must fail.

[37] The grievance is dismissed.

[38] Mr. Heale concurs in this Award. Mr. Leclair dissents for reasons that follow.

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Dissent (D. Leclair)

I respectfully dissent with the arbitral award in this case.

I do not concur with the finding that the Employer's decision ought to be given the deference to which the award finds. There was evidence and jurisprudence presented by the Union to establish that a Board of Arbitration does indeed have the ability to review and, at times, overturn the outcome of a selection decision. This would be more reasonable and compelling in this case than the Employer's argument and its cited jurisprudence. I would submit that overturning the disputed competition result and awarding the grievor the disputed position would be a more appropriate outcome in this case.

I do not concur with the reliance on the wording "as judged the Employer" to be the foundation not to overturn the selection decision. I would submit instead that such wording does nothing further than to reinforce the reality of the selection process in question being run, applied, and concluded by management personnel (ie. "the Employer") versus the Union. These case facts viewed in conjunction with the article in question should not preclude a decision to grant the grievor's remedies.

As the decision notes, the nature of this matter turns to the narrow focus of what is "relative equality". It is noted there was Employer consideration both to individual and aggregate variances in scored factors. Nevertheless, the Union presented compelling argument through its cited arbitral jurisprudence showing a requirement for a substantial and demonstrable difference between candidates to be the basis to award positions to more junior candidates. As with those cited cases, there was minimal difference between the grievor and the initial successful candidate. This was also evidenced in relation to the candidate scoring the highest in relation to the eventual successful candidate. I would submit there is not sufficient impact from the nature/hierarchy of the disputed job to reach the "substantial and demonstrable" standard.

A similar yet slight difference between another candidate and Ms. Berube was determined to be "relative equal" by the hiring manager. The eventual hiring decision was given deference to by the Human Resources representative. The difference in their respective testimony ought to have been given more weight in this award. t would be reasonable to conclude that another candidate with only a few more points' difference in score would also be "relative equal".

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It would be reasonable to extend such minimal additional difference in results to the grievor. A finding in this award where such minimal difference is established, contrasts noticeably with the more applicable findings of the Union's cited cases.

I would submit there ought to have been greater consideration to the variance in Employer witness testimony regarding their divergent views of candidates' "relative equality". This point was reinforced by inconsistencies between the hiring manager and human resources representative. The hiring manager's evidence ought to establish a reasonable standard of assessing "relative equality" amongst candidates and that such standard ought to have applied to Ms. Camat. In relation to the reasonable use of the Employer's selection tool, it would also be reasonable to look at the listed scoring factors in that context. In relation to the reasons the award gives as to giving deference to the Employer's decision, the result too ought to be reasonable. From a procedural and outcome context, the standard of 'relative equality' should be established with consistency in how results are determined. It would be reasonable to expect an outcome whereby the Employer's interview panel would be consistent as to what was determined to be "relative equality" amongst candidates. I would submit the evidence shows that was not the case insofar as the two personnel involved with the Employer's selection decision.

I would conclude from the evidence before this Board that while Ms. Berube and Ms. Camat were assessed using the Employer's selection tool, there were demonstrated variances relied on by the Employer when it made a decision as to what was "relatively equal". It is on that basis that it would not be reasonable to reach the conclusions the Employer did in this case. Given Ms. Camat's significant seniority, I would submit that she should have then been the successful application for the competition in dispute. Further, the granting of her requested remedies would have been another appropriate outcome.

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