

IN THE MATTER OF AN ARBITRATION

BETWEEN :

OVERWAITEA FOOD GROUP

("Employer")

AND :

UNITED FOOD AND COMMERCIAL WORKERS UNION,  
LOCAL 1518

("Union")

RE :

INTERPRETATION GUIDELINES MANUAL  
SPECIALTY DEPARTMENT CLOSURE INTERPRETATION

COUNSEL :

FOR THE UNION: Chris Buchanan

FOR THE EMPLOYER: Michael H. Korbin

DATE OF HEARING: October 17, 2011  
New Westminster, BC

COLIN TAYLOR, Q.C.  
Arbitrator

## I

[1] This arbitration is constituted under Letter of Understanding #6 of the parties' collective agreement which provides that disputed interpretations within the parties Interpretation Guide Manual are referred to expedited arbitration for resolution.

[2] This dispute relates to the interpretation to be given to Article 14.10 of the collective agreement. In particular, the parties have asked me to address two issues:

1. What is a "Specialty Department closure" for the purposes of Article 14.10?
2. Do the Specialty Department store closure options outlined in Article 14.10 apply to "Key Personnel"?

[3] On the first issue, the Employer argues that when the required elements that make up a Specialty Department under Article 14.22 are eliminated, there has been a closure of that Specialty Department. The Employer also argues it has the discretion to deem that a Specialty Department has been closed. The Union argues that a Specialty Department closure must be defined as occurring only when there has been a physical change such that a spatially separate

department no longer exists, and when the products and services formerly available in a separate specialty department are discontinued or only available in-line on a significantly reduced basis.

[4] On the second issue, the Employer argues that Key Personnel are to be given the options under Article 14.10 upon the closure of a Specialty Department. The Union argues that Article 14.10 does not apply to Key Personnel and the step-down and demotion process set out in Article 14.22 must be used for Key Personnel when a Specialty Department closes.

## II

ARGUMENT: WHAT IS A "SPECIALTY DEPARTMENT CLOSURE" FOR THE PURPOSES OF ARTICLE 14.10?

[5] The Employer argues that management has the right to decide when to have a Specialty Department and when to close a Specialty Department in a store. The Employer says this flows from its right to "plan, direct and control store operations", as set out in Article 16.01, the Management Rights provision of the collective agreement. The Employer further says the use of the word "deemed" in Article 14.10 shows the parties invested the Employer with the ability to deem that a Specialty Department is closed, even without the usual

and normal elements of a Specialty Department closure being present.

[6] The Employer says that Article 14.22 provides a definition of when there is a full Specialty Department. The Employer submits that when the required elements that make up a Specialty Department under Article 14.22 are eliminated, there has been a closure of that Specialty Department.

[7] The Employer says Article 14.22 sets out that a Cosmetics Specialty Department has a "bullpen", cash register and staff classified as Beauty Advisors. As such, when a store removes its bullpen and till in the bullpen area (if it had one), and moves to a model where cosmetics are handled like all other merchandise in the store rather than through specialty Beauty Advisors, the Employer says the Cosmetics Specialty Department has been closed.

[8] The Employer says Article 14.22 sets out that a Books Specialty Department will include a full mix of hardcover books, paperbacks, magazines and typically have a service counter. The Employer says a closure of a Books Specialty Department occurs when a store that has had a Books Specialty Department with a full mix of hardcover and paperback books and magazines significantly reduces its mix and the space allocated to books and magazines, handles books and magazines in-line like all other merchandise in the stores and no

longer employs Bookstore Clerks or a Head Bookstore Clerk to handle or sell this merchandise.

[9] For a Floral Specialty Department, the Employer notes the language in Article 14.22 is different than for Cosmetics and Books. In the Employer's submission, Article 14.22 provides that a Floral Specialty Department will have the ability to produce floral arrangements in-store and a service counter. Where a store has one or more of the following: FTD service, a cash register, the ability to produce floral arrangements in-store or a service counter in the Floral area, it may have a Floral Specialty Department if the Employer deems it to be in its best interest to do so. If the store has none of these features, then the store does not have a Floral Specialty Department.

[10] The Employer says its interpretation provides a harmonious interpretation between the various collective agreement provisions, and particularly between Articles 14.10 and 14.22. Article 14.10 contemplates circumstances where a Specialty Department is deemed to be closed. Article 14.22 describes the features of Specialty Departments. When a store that used to have a Specialty Department removes all of the features of a Specialty Department, such that the store no longer has the features described in Article 14.22, then there has been a closure of that Specialty Department. If one or more, but not all, of the essential features exist, then the Employer has the

discretion to decide whether there is a Specialty Department or not, and whether a Specialty Department is deemed to be closed.

[11] The Employer also relies on past practice in the event I find that the collective agreement is ambiguous on this point. The Employer says there have been ten previous Cosmetics Specialty Department closures and six Book Specialty Department closures without any objection from the Union and sometimes with the Union's agreement and sometimes at the Union's specific urging. The Employer says the Union has clearly agreed to, or at the very least acquiesced in the Employer's interpretation that when a store removes the bullpen (and till if it has one) and changes its model for selling cosmetics to the drug store or in-line model, that the Cosmetics Specialty Department has been closed and the options under Article 14.10 are triggered for all employees in the closed department. Similarly, when a store significantly reduces its mix of books and the space allocated to the sale of books, that is a Specialty Book Department closure that triggers the options under Article 14.10 for all of the employees in the closed department. The Employer has expressly notified the Union of these Specialty Department closures on a number of occasions and the Union has agreed to the application of Article 14.10 in these circumstances.

[12] The Union argues that a department closure must be defined as occurring only when two criteria are met: first, there has been a physical change such that a spatially separate department no longer exists; and second, the products and services formerly available in a separate specialty department are discontinued or only available in-line on a significantly reduced basis.

[13] The Union argues this definition accords with the plain meaning of the words "department closure" in the grocery industry. Relying on *Canada Safeway Ltd.* (2010), 191 L.A.C. (4<sup>th</sup>) 7, the Union says the term "department closure" must have an objective meaning - namely the end of meaningful operations in the department. The Union says that what constitutes the end of meaningful operations depends on the factual context - a mere reduction of hours or reduction of product is not sufficient. The end of meaningful operations in the department must also refer to the physical space occupied by the department prior to the closure. If the department remains physically the same as it was prior to the closure, and the same product is being offered in that physical space, there has not been a department closure.

[14] The Union argues that relying on the Employer to determine when there is a closure has led to unfair, inconsistent and arbitrary results. For example, a department may have a gradual reduction in hours and

product over a period of time until a point where the Employer says there is a department closure. The Union says there has been no consistency in the number of hours that have to be reduced or how long it has gone on before it is considered a closure.

[15] The Union also asserts the Employer is basing its decision of when a closure occurs on the impact to Key Personnel - when Key Personnel are negatively impacted by changes, the Employer is invoking the department closure language. To support this assertion, the Union points to correspondence where the Employer stated "the store couldn't continue 'padding' the hours in [the Cosmetics] department and did not want to reduce the Key Personnel to 20 hours." In another example cited by the Union, the Employer said "the method, style and concept of the operation have changed dramatically within these specialty departments, causing adverse effects on our team members' scheduled hours of work, especially on the team members who today, hold Key Personnel roles." The Union says it is unreasonable to suggest that the parties intended the term "department closure" to mean any situation in a department which negatively affects Key Personnel.

[16] The Union agrees the Employer has the discretion to close a department, but argues that the finding that a department has been closed should be based on objective facts. The Union says its definition is consistent with the plain meaning of the words in the

collective agreement, and would lead to a more fair, consistent and reasonable result.

ARGUMENT: DO THE SPECIALTY DEPARTMENT STORE CLOSURE OPTIONS OUTLINED IN ARTICLE 14.10 APPLY TO "KEY PERSONNEL"?

[17] The Employer argues that Article 14.10 clearly states that the options set out are to be given to "all employees" in the closed department. The Employer says Article 14.10 applies to Key Personnel as they are employees who "reside" in the Specialty Department. In support of its position that Key Personnel "reside" in the Specialty Department to which they are assigned, the Employer says Key Personnel are scheduled in the Specialty Department, they perform all their work in the Specialty Department, and they are often the face of the Specialty Department.

[18] The Employer also says that Key Personnel continue to be members of the bargaining unit while they are Key Personnel. Collective agreement provisions that apply to all employees apply to Key Personnel. Where the parties intended to exclude Key Personnel from a provision, they did so expressly. The Employer says this has not been done in Article 14.10 as it has been done in other collective agreement provisions and, in fact, Article 14.10 expressly states the options apply to "all employees" in a closed department.

[19] In the event that I find Article 14.10 to have an ambiguous interpretation, the Employer says that the past practice establishes that Key Personnel have been given Article 14.10 options, without any grievance from the Union, on seven prior occasions. The Employer says this establishes a uniform and frequently repeated course of conduct that has been expressly or implicitly accepted by the parties as the proper or normal application of the collective agreement.

[20] The Employer says that the step-down and demotion process in Article 14.22(7) is a separate and distinct process from the Specialty Department closure process and does not apply to department closure situations.

[21] The Union submits the options set out in Article 14.10 do not apply to Key Personnel. Rather, the specific procedure outlined in Article 14.22 to deal with Key Personnel step-downs and demotions must be used. The Union says this interpretation is consistent with the special status of Key Personnel, the scheme of the collective agreement and arbitral principles.

[22] The Union says Key Personnel have special status and are treated differently than other employees. Key Personnel have a number of significant advantages over other employees - they are scheduled out of seniority, the layoff procedure does not apply to them and they are eligible for certain bonuses. The Union says there are trade-offs as a result of these advantages. For

example, Key Personnel do not have the right to work in the stores they work in, or even in the departments where they are Key Personnel. Their status in the stores is separate and apart from the employees who reside in the departments. As well, the Employer has the discretion to transfer Key Personnel, meaning they would have to move stores or step-down. Further, Key Personnel cannot post into vacancies in stores without stepping down. The Union says this clearly shows that Key Personnel have no right to a department or store and no ability to change their position without going through the process set out in Article 14.22 (7).

[23] The Union says the only way individuals working in Key Personnel positions stop being Key Personnel, besides their employment being terminated, is through the process set out in Article 14.22(7). The Union says in every other situation where Key Personnel are moved, there is a mechanism in the collective agreement to protect other employees from the impact. The Union says the Employer has not provided any reason why a department closure would be different than the situation where a department continues to exist but no longer merits Key Personnel.

[24] The Union says Article 14.10 does not apply to Key Personnel for several reasons. The Union says the parties did not use the term "all employees" in the department in the preliminary words of the Article, which they could have easily done if they intended

Article 14.10 to apply to Key Personnel. In any event, the Union says there are many instances in the collective agreement where the parties say a provision applies to "all employees" but do not intend that provision to apply to Key Personnel. For example, Article 14.19, job postings, applies to "all employees" but that provision does not apply to Key Personnel. Article 14.05 deals with scheduling and contains a list of "classifications" to which it applies. While Article 14.05 does not explicitly exclude Key Personnel, Article 14.22 provides that Key Personnel cannot have their hours claimed by those within their classification, even those with higher seniority, meaning the scheduling rules in Article 14.05 do not apply.

[25] As well, the Union says the parties used the phrase "employees residing in the department" in Article 14.10. The Union says "residing" means that the individual has some right to employment in the department. The Union says that while Key Personnel are scheduled in the department, they have no right to work or remain in the department and therefore do not reside in the department.

[26] The Union says that when the Employer decides to close a department, Key Personnel are demoted. Article 14.22 sets out the requirements for departments to merit Key Personnel. When those requirements are no longer met, the people filling the Key Personnel

positions are demoted and the step-down procedure in Article 14.22 of the collective agreement must be followed.

[27] The Union, relying on arbitral jurisprudence, says the Key Personnel have been demoted because they have been adversely impacted, their positions have been eliminated, they have been removed from a discretionary appointment, and they have lost their "superseniority" and their preferential wages, including bonuses. As Article 14.22 references Key Personnel demotions and sets out the procedure to follow, Article 14.22 applies. Because this provision deals specifically with Key Personnel and specifically deals with Key Personnel moving from their position to another position, if Article 14.22 is in conflict with Article 14.10, which only deals with employees generally, Article 14.22 must prevail because it is the more specific provision. The Union says the Employer's interpretation is not only inconsistent with the collective agreement, but it would provide the Key Personnel with the option of choosing the options under Article 14.22 or Article 14.10. The collective agreement does not contemplate that Key Personnel would have access to both avenues, at their election.

[28] With respect to the Employer's past practice arguments, the Union says the documents do not establish that the Union was put on notice that Key Personnel were being offered the options available

under Article 14.10. In some cases, the Union did not know that Article 14.10 options were being offered at all; in other cases, the Union knew Article 14.10 options were being offered but didn't know the people being provided with the options were Key Personnel.

### III

[29] The two key collective agreement provisions at issue are as follows:

#### *14.10 Closure of a Department*

*As a result of a Specialty Department closure, the following options are available to employees residing in the department deemed to be closed. For the purpose of this document common seniority shall mean a date of August 15, 1993 or after.*

#### *OPTION A – All Employees in Closed Department*

- *All employees may exercise their Specialty Department classification seniority within the bargaining unit in order to maintain employment in their current classification.*
- *Employees exercising their seniority within the bargaining unit will retain their current rate of pay and maintain credit for all experience hours within the Specialty Department classification.*
- *Employees exercising their seniority to move into another store will then be scheduled by classification seniority in their new store.*
- *Will maintain Group Common seniority date.*

#### *OPTION B – All Employees in a Closed Department*

- *Employees may make a written request for transfer to another classification exercising their Common seniority date in their current store.*
- *Request will be given first consideration by the Employer, and if approved by the Employer, the transfer will commence.*
- *When/if transfer to new classification would receive fifty percent (50%) credit for experience in their previous Specialty department for hours worked to a maximum of nine (9) months credit (one thousand, five hundred and sixty [1560] hours.*
- *Rate would be at next highest rate in their new classification. Will progress to the next highest rate once having worked the number of hours required to meet the scale requirements (red-circled at next highest rate until having completed the necessary hours to progress through the scale).*
- *Employees exercising their Common Seniority and moving to a new classification will be subject to a sixty (60) day familiarization period. If within the sixty (60) day familiarization period it is determined that the employee cannot perform the duties required, the parties agree to meet and evaluate other opportunities to exercise Common Seniority within the employee's current store.*
- *Where the request to exercise Common Seniority to a new classification is not approved, the parties agree to meet and evaluate other opportunities to exercise common seniority within the employees' current store.*

***OPTION C – All Employees in Closed Department***

- *May request transfer to Junior Clerk department within their store with full seniority.*
- *Will progress from Junior Clerk to other classifications as per the Collective Bargaining Agreement.*
- *Wage rate would be corresponding Junior Clerk rate.*

***OPTION D – All Employees in a Closed Department***

- *Severance pay for those employees electing to leave the Company's employ as a result of their department closure.*
- *As per Section 15.01 of the Collective Agreement for full-time employees.*
- *As per the Employment Standards Act for part-time employees.*
- *Employees selecting the severance package shall forfeit all rights to continued employment with the Employer.*

#### *14.22 Key Personnel*

*The Employer and the Union agree the following positions shall be considered "Key Personnel" positions:*

*Produce Manager      Floral Manager\*      Bakery Manager\*\*  
Meat Manager          Deli Manager          Bookstore Manager\*  
Cosmetic Manager\*    Senior Clerks\*\*\*  
Assistant Pharmacy Manager\*\*\*\*  
Assistant Department Managers\*\*\*\*\**

*\*Only when a full department mix exists as defined below:*

- a) *Cosmetics will include a "bullpen", cash register and staff classified as Beauty Advisors.*
- b) *Floral may include FTD service and a cash register and will include the ability to produce floral arrangements in-store and a service counter.*
- c) *Books will include a full mix of hardcover books, paperbacks, magazines and typically have a service counter.*

*A mini-deli where the deli products are displayed in the meat counter does not qualify for a Deli Manager. Further, when a Bakery and Deli are combined into one department (all employees on one schedule) then only one department manager will be designated.*

*\*\*Only when on-site baking occurs.*

**\*\*\*Senior Clerk as follows:**

- a) *In stores that average less than \$200,000 in sales per week, one (1) Senior Clerk may be designated by the Employer.*
- b) *In stores that average \$200,000 or more in sales per week, up to two (2) Senior Clerks may be designated by the Employer unless the store is open to 10:00 p.m. or later then the Employer may designate up to three (3) Senior Clerks.*
- c) *In stores that average \$700,000 or more in sales per week, up to three (3) Senior Clerks may be designated by the Employer unless the store is open to 10:00 p.m. or later then the Employer may designate up to four (4) Senior Clerks.*

*The sales averages referred to above shall be based on yearly sales averaged over the fiscal calendar (fifty-two [52] to fifty-three [53] weeks) after the end of Period 12 with changes taking place by the end of Period 2 of the following year.*

*When the Employer is able to designate more than two (2) Senior Clerks in a store then the Senior Clerks in excess of two (2) shall be scheduled in their classification using their "Company Seniority".*

*The Employer will ensure the Union is kept up to date, in writing, on which Senior Clerks are scheduled using their "Company Seniority".*

**\*\*\*\*The Employer may designate an Assistant Pharmacy Manager in stores with larger volume Pharmacies.**

**\*\*\*\*\*Assistant Department Managers as follows:**

- 1. a) *In stores that average \$200,000 or more in sales per week, the Employer may designate one Assistant Department Manager in each of the Bakery and Produce Departments.*
- b) *One Assistant Department Manager in each of the Meat and Deli Departments except:*

- (i) *If the store is open 16 hours or more per day and the hours in the Meat Department average 275 or more per week or if the store is open 14 hours or more per day and the hours in the Meat Department average 325 or more hours per week then the Employer may designate two (2) Meat Department Assistant Department Managers.*
- (ii) *If the store is open 16 hours or more per day and the hours in the Deli Department average 175 or more per week or if the store is open 14 hours or more per day and the hours in the Deli Department average 225 or more hours per week then the Employer may designate two (2) Deli Department Assistant Department Managers.*
- (iii) *The hours worked averages referred to above shall be based on yearly hours worked averaged over the fiscal calendar (52 or 53 weeks) after the end of Period 12 with changes taking place by the end of Period 2 of the following year.*

*The Employer may elect to keep a "Key Personnel" position vacant and transfer management responsibilities to another "Key Personnel" or management position, however, this does not give the Employer the right to shift the "Key Personnel" position to another department in the store.*

*The Employer is required to phase in changes in stores where Key Personnel do not exist so that no current employees will lose hours due to the implementation of the new positions.*

2. *Effective Sunday after ratification, 1997, employees in positions that are no longer considered "Key Personnel" positions shall be red-circled (including wage hourly wage rate) and continue to be scheduled as a full-time employee provided they remain in their current position.*
3. *There shall be no claim against an employee's hours of work within employee's classification as long as the employee holds a "Key Personnel" position, except those*

*employed in key personnel positions being scheduled by Company Seniority.*

4. *The Employer will provide all employees with equal opportunity to fill vacant "Key Personnel" positions.*
5. *The parties agree that a vacated "Key Personnel" position shall be filled as follows:*
  - a) *The Employer will first determine if any internal applicants are suitable for the position based on criteria established by the Employer.*
  - b) *In the case of a step-down or demotion, if there is no suitable internal candidate, then the Employer will determine if there is a full-time employee in the affected store willing to transfer to another store to assume the responsibilities of a "Key Personnel" position for which the employee is suited.*
  - c) *If neither (a) or (b) is available, the Employer may transfer a suitable candidate from another bargaining unit.*
6. *When an Employee in a "Key Personnel" position is promoted into an excluded management position with the Employer it is agreed that the employee will be considered to have taken a two (2) year leave of absence from the Contract Area. This leave of absence is granted one time only. In the event the employee elects to return to the Contract Area within the two (2) year leave of absence time period the Union and the Employer shall meet to determine where the employee will be returned, following the general principles outlined below:*
  - a) *The parties will attempt a placement that provides the least impact on other Contract Area employees.*
  - b) *The employee will be granted full B.C. company seniority for the scheduling in hours when the employee is placed into a classification within a Contract Area.*
  - c) *The parties will consider the employee's request(s) with respect to which store(s) to examine.*

- d) *New Stores will be given first consideration, then the store where the employee is currently working, then the employee's original Contract Area and lastly other stores where the employee worked with the Employer.*
7. *When an employee in a "Key Personnel" position decides to step-down or is demoted from the "Key Personnel" position the Employer and the Union shall meet to determine where the employee will be returned following the same general principles outlined above in point #6. Employees who transfer into "Key Personnel" positions from out of Province shall commence their "Company Seniority" on the first day they commence their employment in B.C.*

#### IV

#### WHAT IS A "SPECIALTY DEPARTMENT CLOSURE" FOR THE PURPOSES OF ARTICLE 14.10

[30] The parties agree that when a store that used to have a Cosmetics Specialty Department removes its bullpen, its till in the Cosmetics area (if it had one), and no longer has staff classified as Beauty Advisors, the Cosmetics Specialty Department has closed.

[31] The parties also agree that when a store that used to have a Books Specialty Department with a full mix of hardcover books, paperbacks, magazines (and typically a service counter) significantly reduces the space in the

store devoted to books and magazines and the mix of books, the Books Specialty Department has closed.

[32] The parties do not agree as to what constitutes a closure of the Floral Specialty Department.

[33] The Employer says when a store that used to have a Floral Specialty Department no longer has the ability to produce floral arrangements in-store and no longer has a service counter, then the Floral Specialty Department has been closed. The Employer also relies on its discretion to decide whether there is a Floral Specialty Department. Where a store has one or more of the following: FTD service, a cash register, the ability to produce floral arrangements in-store, or a service counter in the Floral area, the Employer says it may have a Floral Specialty Department, if the Employer deems it to be in its best interest to do so, or it may not. The Union says that if the Employer's interpretation is accepted, there could be two Floral Departments, in two different stores, with identical physical structures, identical amounts of product, identical sales, staffing and hours, yet one could be considered an open department, and one could be closed. As the effects of either finding are wide-ranging, this result would be unreasonable, unfair and could not have been intended by the parties.

[34] "Department closure" is not defined in the collective agreement. The Employer has advocated for an

interpretation that relies on definitions provided for in the collective agreement and on its management discretionary rights as set out in the collective agreement. The Union has advocated for a definition that would be consistent for all departments - a closure occurs when there is a physical change such that a spatially separate specialty department no longer exists, and the elimination or a significant reduction in the products and services formerly available.

[35] In determining the interpretation to attribute to these provisions, I must look for the mutual intention of the parties. I have considered the language of the collective agreement provisions cited, the collective agreement as a whole and looked for a harmonious interpretation between the various provisions: *Pacific Press*, [1995] B.C.C.A.A.A. No. 637. I find I do not need to go beyond the words of the collective agreement to determine the interpretation the parties intended.

[36] While the Union argues that the definition of what constitutes a "full department mix" in Article 14.22 is only for the purpose of determining whether a department merits Key Personnel, I find the fact that the parties have specifically turned their minds to what constitutes a full department mix is persuasive. To ignore the fact that the parties have defined what constitutes a full department, in favour of a more general definition that is not based on the language

the parties negotiated in the collective agreement would not be giving effect to the parties' mutual intention. The Union's proposed definition does not take into account the language the parties negotiated into their collective agreement, and in particular, the fact that the parties specifically negotiated a definition of a full department.

[37] While the purpose of the definitions in Article 14.22 is to determine when there can be Key Personnel in certain departments, the parties have decided that there can only be Key Personnel if there is a "full department mix". The parties negotiated a definition of what constitutes a "full department mix". Further, the parties chose to define "full department mix" in different ways for the different Specialty Departments. I find the definition of "full department mix" to be relevant to determine when a Specialty Department has been closed. When a store that used to have a Specialty Department removes all of the essential features of a Specialty Department described in Article 14.22, then there has been a closure of that Specialty Department.

[38] While the parties essentially agree on what constitutes a closure of the Cosmetics and Books Specialty Departments (because they say it is consistent with the interpretations they have each advocated for), there is no agreement on what constitutes a closure of a Floral Specialty Department.

[39] A "full department mix" for Floral is defined as "... may include FTD service and a cash register and will include the ability to produce floral arrangements in-store and a service counter." The wording of this definition is different than that for Cosmetics and Books in that some elements are essential and some are not. I find, relying on the words of this provision, when a Floral Specialty Department no longer has the ability to produce floral arrangements in-store and a service counter, the essential features of the department, the Floral Specialty Department is closed.

[40] The Employer also relies on its ability to deem that there has been a closure in a Specialty Department. The opening language of Article 14.10 states "as a result of a Specialty Department closure, the following options are available to employees residing in the department *deemed* to be closed." (emphasis added)

[41] The Employer argues that if one or more, but not all, of the essential features of a Specialty Department exist, then the Employer has the discretion to decide whether there is a Specialty Department or not and whether to deem a Specialty Department closed. The Employer says support for this discretion is found in the wording of Article 14.10, the management rights provision of the collective agreement and the Black's Law Dictionary definition of "deem".

[42] The Union agrees the Employer has the discretion to decide to close a department, however, it says the discretion to close a department, is not the same as the discretion as to what constitutes a closure. The Union argues that I should consider the ordinary definition of the word "deem" and find the parties used the term "deemed" to mean "decided" and not find the Employer has the discretion to deem Specialty Departments closed. The Union points to the opening words of the Article and says that because the Article begins with "as a result of a Specialty Department closure", there is no room for discretion. It sets a precondition. If a discretion was intended, the parties could have said, "as a result of a Specialty Department deemed closed by the Employer..." Alternatively, the Union says any discretion to deem a department closed must be exercised mutually.

[43] In interpreting the provisions of a collective agreement, I must give meaning to all of the words in a provision, if possible. The parties agree that the Employer can decide whether to close a Specialty Department, but the Union says the Employer cannot deem that a Specialty Department has closed.

[44] The fact that the parties used the word "deemed" in Article 14.10 must have some meaning. The Union says the parties intended a plain and ordinary meaning for the word deem and argues the word "deem" is akin to "decided". The Union argues Article 14.10 does not give

the Employer any discretion to deem a Specialty Department closed. However, I find that to accept the Union's interpretation would essentially only give meaning to the words, "as a result of a Specialty Department closure, the following options are available to employees residing in the department". The words "in the department deemed to be closed" would be unnecessary and/or wouldn't have meaning. I am also persuaded that by using the word "deemed", the parties intended to confer discretion to determine that a Specialty Department has been closed. This interpretation gives meaning to all of the words in the Article and is also consistent with the Management Rights provision in the collective agreement. Even accepting the Union's definition of "deem", this does not preclude the Employer exercising its discretion to "decide" that a Specialty Department should be closed.

[45] The Union argues that if I find there is discretion in this Article, then it must only be exercised mutually. The Union also argues that permitting the Employer to have unilateral discretion in this regard will lead to inconsistent results and uncertainty. The Management Rights provision, Article 16.01, states in part: "The Union agrees that the management of the Company, including the right to plan, direct and control store operations ... are the sole rights and functions of the Employer." I find the right to have a Specialty Department and the right to deem a Specialty Department closed are part of management's

right to plan, direct and control store operations. I also find the discretion to deem a department closed is not a discretion that can only be exercised by the Employer and Union together. I also note that the definition of department closure advocated by the Union could also lead to inconsistency and uncertainty. For example, how would the parties determine what amounts to a significant reduction of products and services?

[46] While the Union also asserts that the Employer is basing its decision to close a Specialty Department on the impact to Key Personnel, I do not find this is established in the evidence. The Employer is informing the Union of the impact on Key Personnel. I am not satisfied the Employer is acting unreasonably or taking the position that a Specialty Department closure occurs when Key Personnel are negatively impacted.

[47] As such, I find that when a store that used to have a Specialty Department removes all of the essential features of a Specialty Department described in Article 14.22, then there has been a closure of that Specialty Department. I also find the Employer has the discretion to deem that a Specialty Department has closed, even if all of the essential features of the Specialty Department have not been eliminated.

[48] In the event that I had found that the collective agreement language was ambiguous, I would have found that the parties' past practice supports the Employer's

interpretation that when all of the essential features of a Specialty Department have been eliminated, the Specialty Department has closed. The law is clear that where there is an ambiguity in collective agreement language, extrinsic evidence may be used as an aid to interpretation.

[49] There have been 16 Specialty Department closures between 2007 and the present. On each occasion, the Employer has eliminated the essential features attributed to the Specialty Department in Article 14.22 of the collective agreement and treated that as a closure of the Specialty Department triggering the Article 14.10 options for the affected employees. While these closures related only to Cosmetics and Book Specialty Departments, the evidence is that the Union had notice of numerous Specialty Department closures and did not grieve the closures and the application of Article 14.10 to the closures. This points toward a mutually accepted interpretation and application of the collective agreement over the course of many years.

DO THE SPECIALTY DEPARTMENT STORE CLOSURE OPTIONS OUTLINED IN ARTICLE 14.10 APPLY TO "KEY PERSONNEL"?

[50] I find the options set out in Article 14.10 apply to Key Personnel for the reasons which follow. Article 14.10 states "... the following options are available to employees residing in the department deemed to be closed." Each of the options state they are for "all

employees" in the closed department. Key Personnel are not excluded employees. Provisions in the collective agreement that apply to "all employees" apply to Key Personnel. Where the parties have intended to exclude Key Personnel from provisions in the collective agreement, they have done so expressly - see, for example, Articles 5.19, 5.24(6) and 14.04(B)(1). Key Personnel are not specifically excluded from Article 14.10.

[51] The Union argues Article 14.10 only applies to employees "residing" in the department. The Union says that by using the word "reside", rather than "employees scheduled in a department" or "employees in a department", the parties intended the provision to only apply to employees who have some right to employment in that department and in that store. The Union says that Key Personnel do not have such rights and therefore do not "reside" in the department. The Union says this is a result of trade-offs that give Key Personnel significant advantages over other employees and protect non-Key Personnel employees from the impact when Key Personnel are moved from their positions.

[52] I find the Union has not established that Key Personnel do not "reside" in the Specialty Department to which they are assigned. The Union has not established that Key Personnel are not considered part of a Specialty Department. To the contrary, the evidence shows that Key Personnel perform all their

work in their Specialty Department and are not assigned to other departments. The fact that Key Personnel have certain negotiated benefits that other employees do not have and that the parties have negotiated some provisions that protect employees from being adversely impacted when Key Personnel are moved from their positions, does not establish that Key Personnel do not "reside" in their departments.

[53] The Union argues that Article 14.22(7) ought to apply to Key Personnel in a Specialty Department closure situation. The Union says Article 14.22(7) applies any time Key Personnel are removed from their positions, whether voluntary or involuntary. The Union argues that a Specialty Department closure amounts to a demotion.

[54] It is clear on the face of the language that Article 14.22 applies in situations where Key Personnel step-down or are demoted from their position. I find a Specialty Department closure is not the same as a demotion or step-down situation. Even applying the broad definition of "demotion" the Union encourages me to apply, I find the closure of a Specialty Department does not necessarily amount to a demotion for Key Personnel. Key Personnel will not necessarily be adversely impacted by a Specialty Department closure, one of the key indicia of a demotion. For example, they may transfer into a higher paying position or another Key Personnel position. While there will likely

be situations where Key Personnel are adversely affected, there are also likely to be situations where they are not. While Key Personnel positions are eliminated as a result of a Specialty Department closure, this does not necessarily mean that a decision has been made to downgrade or remove those in the Key Personnel positions.

[55] The Union says while Article 14.22 does not specifically reference Specialty Department closures, Article 14.22(7) also does not reference situations where a department continues to exist but no longer merits a Key Personnel or where an Employer decides it no longer wants a Key Personnel in the department, however Article 14.22(7) applies to those situations. I find the key difference with those situations, however, is that those situations are not captured by another more specific provision in the collective agreement.

[56] The parties have negotiated specific provisions to provide options to "all employees" when a Specialty Department closes. Specific collective agreement provisions must prevail over general provisions when there is a conflict. I find Article 14.10, which deals specifically with Specialty Department closures is the more specific provision and must be preferred to the more general provision in Article 14.22 that does not reference the process to be followed in a department closure. While Article 14.22 deals specifically with

Key Personnel, it does not specifically address a department closure situation.

[57] With respect to the special status afforded to Key Personnel by virtue of several provisions of the collective agreement, I am not persuaded that this is a factor that is relevant to this analysis. The parties have chosen to give certain benefits to Key Personnel. For example, the layoff provisions also do not apply to Key Personnel. However, these are provisions that have been specifically negotiated by the parties in Article 14.04 (B) (1).

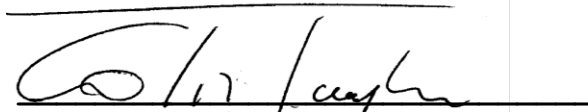
[58] While the parties in Article 14.22 have designed a process that has an overriding principle of least impact when Key Personnel move from their position to another position, I am not persuaded that Article 14.22 was intended to apply in situations where a Specialty Department closes. If the parties had intended to exclude Key Personnel from Article 14.10, they would have expressly done so, as they did in other provisions. Alternatively, the parties could have referenced department closures in Article 14.22 but did not.

[59] As such, I find that the Specialty Department store closure options outlined in Article 14.10 apply to Key Personnel.

[60] Had I found the collective agreement language to be ambiguous, I also would have found the past practice supports the Employer's interpretation. There was evidence that Key Personnel have been offered Article 14.10 options on several occasions without grievance from the Union. While the Union says it did not have knowledge that Key Personnel were being offered Article 14.10 options, I am not persuaded on the evidence that the Union did not have notice of these actions.

[61] In the result, the Employer's position on both issues is upheld.

DATED at Vancouver, British Columbia, this 12th day of December 2011.

  
Colin Taylor, Q.C.