



Ius Laboris Canada Global HR Lawyers

MathewsDinsdale

National Labour Arbitration Competition 2021

January 29 – 31, 2021

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Introduction

Mathews Dinsdale is delighted to welcome all of you to the 23rd annual National Labour Arbitration Competition. This event is unique in the labour law community and we are, as ever, honoured to host it. It has grown from humble beginnings to a well-recognized mooted event, largely due to your participation.

Due to the COVID-19 pandemic restrictions we are hosting this year's event virtually. We will miss the annual gathering of participants, coaches, colleagues and friends but look forward to when we can meet again safely, in person. We also recognize the effort and time invested by all the participants and coaches, particularly in the unique circumstances of these times, and we thank everyone for their flexibility and patience as we have all learned to navigate new processes.

We trust that a number of you will choose labour and employment law as your career path and hope that you will look back on this event with fond memories.

We wish all of you an enjoyable and fulfilling experience.

The Partners, Associates and Staff of Mathews Dinsdale

Weekend Agenda

January 29 – 31, 2021

Friday, January 29

5.00 pm – 6.00 pm Welcome to the Schools and Competitors

Saturday, January 30

11.00 am Morning Competition

2.30 pm Afternoon Competition

5.30 pm Speech and Practice of Labour Law Round Table

6.30 pm Finalist Announcement

Sunday, January 31

1.00 pm Final Competition

[Zoom links to the above sessions will be available here.](#)

Board of Arbitration

Saturday Session

CHAIRS

Harvey Beresford	Arbitrator
Jasbir Parmar	Arbitrator
David Ross	Arbitrator
Laura Trachuk	Arbitrator

UNION NOMINEES

Tracey Henry	Wright Henry LLP
Stephanie Hobbs	Goldblatt Partners LLP
Ernie A. Schirru	Koskie Minsky LLP
Yu-Sung Soh	LIUNA, OPDC

MANAGEMENT NOMINEES

Lori Brienza	Mathews Dinsdale
Elizabeth Keenan	Mathews Dinsdale
Kyle MacIsaac	Mathews Dinsdale
Greg McGinnis	Mathews Dinsdale

Board of Arbitration

Sunday Session

Jacque de Aguayo

CHAIR

Labour Relations Board British Columbia

Ginette Brazeau

CHAIR

Canada Industrial Relations Board

Bernard Fishbein

CHAIR

Ontario Labour Relations Board

Rules of the Competition

SCHEDULE

There will be two rounds of arbitrations held on Saturday, January 30, 2021, lasting two hours each. The first arbitration will commence at 11:00 a.m. EST and the second at 2:30 p.m. EST. Each two-person team will argue either the Management or Union side in the morning and then the side opposite in the afternoon.

The two highest scoring teams will advance to the finals taking place at 1:00 p.m. EST on Sunday, January 31, 2021. A coin flip will determine which of the final teams will represent the Management and Union sides.

The competition will be held via videoconference this year. Videoconference instructions and the agenda for the competition weekend will be provided before the competition.

TIME LIMITS

Each team shall have a total of 50 minutes to present its case. In light of the nature of the issues raised in the problem the Union team shall have 30 minutes to present its case in chief. The Management team will then have 50 minutes to respond. The Union team will then have 20 minutes for reply. The Union team is permitted to reallocate their time between chief and reply as long as their total time is 50 minutes and as long as they don't split their case by raising improper reply arguments. If the Union team decides to reallocate its time, they will advise the panel before the start of their chief.

CONDUCT OF THE ARGUMENT

Participants should not present a recitation of facts to the Board of Arbitration and should presume that the Board of Arbitration is familiar with the Agreed Statement of Facts. However, participants should refer to facts relevant to their submissions. Both teams should be prepared to address the arguments raised by the side opposite and anticipate questions from the panel during the course of their presentations.

Teams are expected to have researched all the issues which are raised by the Agreed Statement of Facts and should be prepared to put forth all primary and/or alternate positions which are appropriate. Teams will be limited to presenting six authorities / cases to support the various legal arguments that they may wish to make. The Union team will be limited to presenting four authorities / cases during their argument in chief and two additional authorities / cases during their reply argument.

Teams are required to email or provide a download link for their authorities / cases to our firm no later than January 23, 2021 to ensure timely electronic delivery of such authorities / cases to the Board of Arbitration and their opponents.

Please send such authorities / cases to rsalazar@mathewsdinsdale.com and scarnevale@mathewsdinsdale.com

EVALUATION

The Board of Arbitration will not render a decision on the merits of the arbitration, but will evaluate the teams based on the effectiveness of their arguments and advocacy skills. At the conclusion of the second arbitration the marks for both arbitrations will be tabulated.

For reference purposes, the marks will be graded out of 100 and based on the following:

Oral Presentation_____	40
Ability to respond to questions raised by the panel and arguments raised by side opposite_____	30
Understanding legal issues_____	20
Quality of legal research_____	10

Statement of Facts

2021 AGREED STATEMENT OF FACTS

The Union and the Employer agree that the following facts constitute the entirety of the facts to be relied on in the Board of Arbitration's determination of this matter. Both parties reserve their rights to argue the relevance of any of the facts and evidence outlined herein. They further agree that either party may ask the panel to draw reasonable inferences from the facts as outlined.

1. J.C. Meat Packing Ltd. ("**J.C. Meats**" or the "**Company**") is a meat processing business located in the historic Stock Yard District in Toronto, Ontario. For over 30 years, the Company has specialized in the processing, packaging and distribution of grain-fed beef products to customers across Canada. More recently, the J.C. Meats business has expanded to include the export of its beef products to the United States and Mexico.
2. J.C. Meats employs approximately 250 employees, the majority of whom work in the Company's meat processing and packaging facility. Two thirds of the Company's employees work on the day shift, which runs from 7:00 a.m. to 5:00 p.m. The Company also operates a smaller evening shift which runs from 5:00 p.m. to 3:00 a.m. The Company operates a continental shift whereby employees work four consecutive days and then have four consecutive days off.
3. The J.C. Meats operation includes a series of fast-paced production lines within the refrigerated processing facility.
4. The Company has been certified by the Brotherhood of Ontario Butchers and Slaughterhouse Workers ("**BOBS**" or the "**Union**") as the exclusive bargaining agent of all employees of J.C. Meats save and except managers, and persons above the rank of manager, since 1982.
5. The Company and the Union are parties to a collective agreement, effective September 1, 2019 to August 31, 2022 (the "Collective Agreement").
6. Article 4 ("Management Rights") of the Collective Agreement provides:

4.01 The Union recognizes and acknowledges that (except as specifically modified by this Agreement) the management and direction of the workforce are fixed exclusively in the Employer and, without restricting the generality of the foregoing, the Union acknowledges that it is the exclusive function of the Employer to:

- (a) *Maintain order, discipline and efficiency;*
- (b) *Hire, discharge, classify, transfer, lay off, promote, demote, suspend or otherwise discipline employees, provided that a claim by an employee that he/she has been discharged, suspended, disciplined or has been subjected to disciplinary demotion without reasonable cause shall be subject to the provisions of the grievance procedure contained herein;*

- (c) *Make, alter from time to time, and enforce reasonable rules, regulations, policies and practices, to be observed by employees, which shall not be inconsistent with the provisions of this Agreement;*
- (d) *Plan, direct and control the work of the employees and the Employer's operations;*
- (e) *Determine the hours of work, scheduling, work assignment and methods of doing the work; and*
- (g) *Assign and reassign work to employees, and to change and vary at any time such work assignments.*

7. Article 24.01 (“No Discrimination”) of the Collective Agreement states:

24.01 The terms and conditions of this Collective Agreement shall be interpreted and administered by the Employer and the Union without discrimination against an employee contrary to the Ontario Human Rights Code. For clarity, the Employer and the Union agree that there will be no harassment or discrimination in the workplace because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, age, sex, record of offences, marital status, family status, sexual orientation, disability or any prohibited ground.

8. Article 26.01 (“Health and Safety”) of the Collective Agreement sets out the parties’ commitment to maintaining a safe workplace as follows:

26.01 The health and safety of employees is a matter of prime importance to both the Union and the Employer. Overall safety performance is also a critical element in the ongoing success of J.C. Meats.

The commitment of the Employer and the Union to health and safety builds upon the foundation provided by occupational health and safety legislation which establishes the basic rights and obligations of employees to work in a safe environment, to know about workplace hazards, to participate and contribute to the management of safety, and to refuse unsafe work.

9. The Company takes workplace safety very seriously. It provides a wide variety of health and safety training to both its bargaining unit and managerial employees. Such health and safety training is not only provided to new hires, but is also regularly provided to all Company employees on an ongoing basis.

10. Like many employers and employees around the world, 2020 has been an extremely challenging year for J.C. Meats and its employees. On March 17, 2020, the Province of Ontario declared a State of Emergency in relation to the COVID-19 pandemic within the province. J.C. Meats fell within the classification of an essential food processing and distribution business under the province’s COVID-19 emergency orders and so continued to operate throughout the pandemic.

11. Consistent with the Company's commitment to workplace health and safety, from the outset of the COVID-19 pandemic J.C. Meats introduced significant precautions and safety requirements to combat the spread of COVID-19 in its workplace. Before entering the J.C. Meats facility, all workers are required to conduct a self-screening assessment. While in the plant, employees are required to wear masks and maintain at least two (2) metres of physical distance on the plant floor, to the extent possible. Employees are not required to punch in their start and end times to eliminate "pinch points" during the start and end of the shift (instead, supervisors are required to monitor employee attendance). Employee breaks have been staggered in order to avoid overcrowding the employee break rooms and washrooms, and employees are assigned to conduct more frequent cleaning of high-touch surfaces throughout the plant. Employees are also frequently reminded through postings throughout the plant and by their supervisors in socially-distanced safety meetings of the importance of practicing proper hygiene in the plant and of staying home when ill.
12. Unfortunately, despite these precautions and safeguards put in place by the Company to combat COVID-19, in June 2020 J.C. Meats experienced a significant outbreak of COVID-19 amongst its employees. Between June 3 and June 19, 2020, 24 J.C. Meats' employees tested positive for COVID-19. As a result of these high case numbers, J.C. Meats was designated as being in "outbreak" and investigated by Toronto Public Health. J.C. Meats ultimately agreed to a voluntary two-week closure of the plant to enable exposed employees to self-isolate while the Company implemented additional safety measures as recommended by the public health unit. The plant was closed between June 20 and July 4, 2020 in accordance with this agreement.
13. Of the 24 employees who tested positive, 23 employees have fully recovered but one employee continues to remain on sick leave due to complications resulting from COVID-19.
14. The COVID-19 outbreak at J.C. Meats was highly publicized in local and national news. Further, the voluntary two-week shutdown, while successful in bringing the outbreak under control, resulted in significant wasted product, lost production and order delays.
15. Beverly Farms, a growing high-end grocery chain in the Toronto area that represented five percent (5%) of J.C. Meats' annual revenue in 2019, ultimately cancelled its contract with J.C. Meats as a result of delays flowing from the June 2020 shutdown and concerns about J.C. Meats' ability to safely meet demand going forward.
16. In order to comply with the recommendations identified by the public health investigation and to reduce the risk of another dangerous and costly outbreak in the plant, J.C. Meats used the two-week shutdown period to develop and implement further health and safety precautions and safeguards.
17. Pre-access screening of employees was expanded to include temperature testing using digital thermometer guns. In work areas where Toronto Public Health had concluded that maintaining appropriate physical distancing was not feasible, the Company installed floor markings and new Plexiglas barriers to assist employees in staying apart. The Company also installed ten (10) new handwashing stations and introduced once-per-hour cleaning of all high-touch surfaces in the facility by a third party contractor.
18. Accordingly, despite continuing operations during the pandemic, the additional health and safety measures for employees, supply chain disruptions, loss of business due to the outbreak, and increased food safety inspections have resulted in increased costs and lower revenue for J.C. Meats. J.C. Meats anticipates that its best case scenario would be to "break even" in 2020.

19. Since the outbreak in June, two additional employees contracted COVID-19 in August and September 2020 respectively (both employees have since recovered). Fortunately, no employees who were exposed to these two employees contracted COVID-19.
20. Toronto Public Health's investigation into the June 2020 outbreak had revealed that approximately one third of J.C. Meats' employees who tested positive for COVID-19 also participated in other paid employment outside of J.C. Meats. For privacy reasons, Toronto Public Health did not provide J.C. Meats with any information as to the types of outside employment that its employees were engaging in. Toronto Public Health assessed the high prevalence of outside employment at J.C. Meats as a non-workplace factor that may have contributed to the outbreak. However, ultimately the source of the outbreak was not definitively tied to the outside employment of any J.C. Meats' employee as Toronto Public Health could not successfully contact trace the source of the outbreak.
21. Based on this information from Toronto Public Health, and given the need for J.C. Meats to be able to continue to operate its essential business, the Company drafted a new "COVID-19 Outside Employment/Moonlighting Policy" (the "COVID-19 Moonlighting Policy"). Initially, the Company drafted a COVID-19 Moonlighting Policy that would impose a complete ban on all outside employment by its employees until such time as the COVID-19 pandemic was brought under control in the Toronto area.
22. On June 22, 2020, the Company provided the Union with a copy of its initial version of the COVID-19 Moonlighting Policy to review. On June 23, 2020, the Union advised the Company that it would challenge the implementation of the COVID-19 Moonlighting Policy. The Company invited the Union to suggest amendments to the COVID-19 Moonlighting Policy, but the Union declined to do so, indicating that it would object to the implementation of the Policy in any form.
23. The primary reason for the Union's objection to the COVID-19 Moonlighting Policy is that it would significantly impact the incomes of many of its members. The majority of BOBS' members at J.C. Meats are new Canadians or members of historically disadvantaged groups who work multiple jobs in order to earn enough income to support themselves and their families.
24. The Union is also aware that many of its members who moonlight work as personal support workers ("PSW") in the long term care or home health care setting. The Union is aware that its members who also work as PSWs generally receive wages that are greater than the wages they receive from J.C. Meats, and have received additional wage increases in 2020 due to the pandemic.
25. The Union advised the Company of these reasons for its objection to the COVID-19 Moonlighting Policy.
26. On June 25, 2020, the Company notified the Union that it would be implementing the COVID-19 Moonlighting Policy effective July 5, 2020 upon the re-opening of the plant, notwithstanding the Union's objections.
27. However, upon further reflection and based on the information that the Union had provided in response to the initial draft of the COVID-19 Moonlighting Policy, the Company amended the application of the COVID-19 Moonlighting Policy to outside employment in the health care sector only. The Company's amendment of the scope of the application of the COVID-19 Moonlighting Policy was based on its understanding from Canadian Public Health Agencies of the heightened COVID-19 exposure risk in health care settings.

28. The Union was aware that at least eleven (11) of its members at J.C. Meats also work as PSWs in a long term care home setting, and a further three (3) of its members at J.C. Meats work as PSWs in the home care setting but did not advise the Employer of these specifics.
29. The Company was aware anecdotally that at least ten (10) employees would be affected by the COVID-19 Moonlighting Policy at the time it implemented the policy.
30. The Company provided the Union with a copy of the amended COVID-19 Moonlighting Policy to review on June 30, 2020, but advised the Union that it would implement the Policy in its current form, which it considered to be reasonable, even if the Union continued to object. The final version of the COVID-19 Moonlighting Policy is attached as Appendix "A".
31. On July 1, 2020, the Union reiterated its position that it would not consent to the implementation of the COVID-19 Moonlighting Policy in its current form or any form.
32. On July 5, 2020, the Company unilaterally implemented the COVID-19 Moonlighting Policy over the Union's objections. The Company's HR department posted the new COVID-19 Moonlighting Policy on J.C. Meats' intraweb system for employees. Supervisors on both shifts also reviewed the new Policy with employees during daily safety talks throughout the week of July 5.
33. Ultimately, there were fourteen (14) members of the bargaining unit who held outside employment in the health care sector and who were therefore directly affected by the COVID-19 Moonlighting Policy.
34. Due to this significant impact of the Policy on the bargaining unit and consistent with its previous objections, on July 5, 2020, BOBS filed a group grievance (the "**Group Grievance**") on behalf of the fourteen (14) J.C. Meats employees who were directly affected by the COVID-19 Moonlighting Policy. The Group Grievance asserted that the COVID-19 Moonlighting Policy was an unreasonable exercise of management rights.
35. In order to avoid the time and expense of having the evidence of all of the affected employees admitted before the Board of Arbitration, the parties have agreed to argue the Group Grievance on the basis of the following facts pertaining to Tina Ambong ("Ambong"), whose situation is agreed to be representative of all of the grievors involved in the Group Grievance.
36. The parties specifically agree that the success or failure of the Group Grievance will be dependent only on Ambong's evidence.
37. Ambong has been employed by J.C. Meats since 1999, most recently as a full-time Production Operator on the day shift. This role is a bargaining unit position and, accordingly, Ambong is covered by the Collective Agreement between the parties.
38. Ambong is currently 52 years of age and is a single mother of a 18 year old son, Gene.
39. In addition to working at J.C. Meats, Ambong spent much of the last 20 years serving as the primary caregiver for her husband, Teddy. In 1998, Teddy was in a serious car accident from which he sustained a permanent traumatic brain injury. After the accident, Ambong was determined to provide Teddy the care he needed at home, and became Teddy's primary caregiver after he was released from the hospital.
40. Ambong enrolled in a PSW certificate program at Seneca College to learn how to provide more effective care and assistance to Teddy. At around the same time, Ambong accepted a part-

time position at J.C. Meats as a Production Operator to pay her tuition and help make ends meet for herself, Teddy, and their son.

41. Ambong provided full-time care to Teddy until Teddy's passing in 2018. Without Teddy to look after at home and with Gene now in high school, Ambong was able to take on a full-time Production Operator role at J.C. Meats in 2018. However, Ambong soon began to miss using her PSW skills to help others lead fulfilling lives. In early 2019, Ambong thus accepted a casual PSW position at Wagstaff Manor ("**Wagstaff Manor**"), a 72-bed long-term care home in Toronto whose residents are predominantly individuals living with severe cognitive impairments. Ambong generally works one (1) to two (2) shifts per week at Wagstaff Manor; however, since the onset of the COVID-19 pandemic she has regularly been called in to cover one (1) or (2) additional shifts per week. Ambong considers her work at Wagstaff Manor to be extremely rewarding and a fitting way to honour her husband Teddy. Her wages from her work at Wagstaff Manor have also allowed Ambong to put some money aside to help Gene pay for university next year.
42. Ambong attended at J.C. Meats for her first day shift after the June shutdown on July 5, 2020. She learned of the COVID-19 Moonlighting Policy from her supervisor at a daily safety meeting that took place on July 6, 2020.
43. Ambong immediately recognized that her work at Wagstaff Manor was captured by the Policy.
44. On July 6, 2020, Ambong thus sent the following email to Astrid Schnur ("**Schnur**"), J.C. Meats' Production Manager:

From: tina.ambong123@yahoo.com Sent: Mon 7/6/2020 9:04 PM
To: aschnur@jcmeats.ca
Subject: COVID-19 Outside Employment/Moonlighting Policy Question

Hi Astrid,

I hope you and your family are doing OK during these times.

This morning at our daily safety meeting, I was told that I'm supposed to tell the company if I am working anywhere that isn't J.C. Meats in a health care role. I am writing to tell you that I also work as a PSW at Wagstaff Manor, which is a small long-term care home for people with severe cognitive impairments. Right now I am generally working 3 or 4 shifts per week. I help residents at Wagstaff Manor with all of their personal care, including bathing, dressing and other personal tasks. I also try to take time to visit with my residents for a while each day as I know from my years caring for my husband Teddy how important those moments are to overall wellbeing. I love working for J.C.'s but my job at Wagstaff Manor is very important to me and to my ability to provide for my son and so I would appreciate if you could please make an exception to the new policy for me.

You can call me if you have other questions at 416-555-4377.

Thank you,

Tina Ambong

45. Ambong received the following response from Schnur the next morning:

From: aschnur@jcmeats.ca Sent: Tue 7/7/2020 8:13 AM
 To: tina.ambong123@yahoo.com
 Subject: RE: COVID-19 Outside Employment/Moonlighting Policy Question

Hi Tina,

Thanks for reaching out – all is well with us, thanks for asking, although my wife and I really hope that our kids can go back to school in September...

I also want to thank you for letting us know about your work at Wagstaff Manor. I've taken your request up the chain, and while the company understands you're in a difficult situation, the company has an obligation to take every reasonable precaution to protect employees' health and safety by controlling and prevent the spread of COVID-19 in the workplace, especially after the outbreak, and accordingly we aren't able to make any exceptions to the outside work policy at this time.

As you know from reviewing the policy, you can either cease engaging in your outside employment or take an unpaid leave of absence from J.C.s until the COVID-19 situation is under control. Let me know your plans by Friday. If I don't hear from you, you will be considered to be on an unpaid leave of absence starting on Monday, July 13 until further notice.

All the best,

Astrid

46. Ambong was distraught when he received Schnur's email. She did not want to quit her job at Wagstaff Manor and let down the patients who needed her, especially while locked down from friends and family during the ongoing COVID-19 pandemic, but an indefinite period of unpaid leave from J.C. Meats would result in significant financial hardship for her. As a compromise, Ambong attempted to make arrangements with Wagstaff Manor to take an unpaid leave of absence just until the COVID-19 situation improved and she could resume her PSW work without violating the J.C. Meats' COVID-19 Moonlighting Policy. However, her request for a leave of absence was denied by Wagstaff Manor.
47. After serious reflection, Ambong decided that she could not permanently abandon her work at Wagstaff Manor. On July 10, she advised Schnur by email that she would commence an unpaid leave of absence effective Monday, July 13.
48. On the same day, Ambong reached out to her Union steward, Tammy Larsen ("**Larsen**") to discuss her options. Larsen advised Ambong of the pending Group Grievance in relation to the COVID-19 Moonlighting Policy. Larsen also referred Ambong to Article 16 of the Collective Agreement governing layoffs, and specifically Article 16.09, which reads:

16.09 Advanced Notice of Layoff

- a) In the event of a proposed lay-off of three (3) weeks or shorter, the employer shall provide the affected employee(s), no less than two (2) weeks' notice or pay in lieu thereof.*
- b) In the event of a proposed indefinite layoff of longer than three (3) weeks, the employer shall provide the affected employee(s) with no*

less than three (3) weeks' per year of service to a maximum of twelve (12) weeks written notice or pay in lieu thereof.

49. The Union amended its Group Grievance on behalf of Ambong and the other grievors on July 10, 2020, as follows:

In addition to the fact that the grievors were held out of work pursuant to an unreasonable policy (the COVID-19 Moonlighting Policy that is the subject of our Group Grievance), BOBS grieves the Company's failure to provide the grievors with notice of layoff, or pay in lieu of such notice, in accordance with Article 16.09 of the Collective Agreement.

50. On July 14, 2020, the Company denied the Group Grievance and provided the Union with a written response, as follows:

The Company understands and appreciates the difficult situation that the Grievors find themselves in with respect to their outside employment.

Given the unprecedented nature of the COVID-19 pandemic, the critical need to ensure the safety of its food products to the public, and its obligations under Health and Safety laws to take every precaution reasonable in the circumstances for the protection of its workers, it is the Company's position that the COVID-19 Moonlighting Policy is a reasonable exercise of its management rights.

Further, it is the Company's position that the Grievors were appropriately placed on an unpaid leave of absence in accordance with the COVID-19 Outside Employment/Moonlighting Policy and have not been laid off. As such, notice or pay in lieu pursuant to Article 16.09 is not owing.

In the alternative, in the event that a violation of 16.09 is established, the Company's position is that no damages are owing and only a Declaration of breach is warranted in the circumstances. The grievance is denied.

51. The parties have agreed that the issue of the application of Article 16.09 will be before the Board of Arbitration as part of the Group Grievance.
52. The moonlighting employees were not the only J.C. Meats employees facing unexpected challenges as a result of COVID-19.
53. Louise Mensah ("**Mensah**") is 51 years old and was hired by J.C. Meats in 2018 as a part-time Production Operator. Pursuant to the Collective Agreement, as a part-time employee, Mensah works a maximum of twenty (20) hours per week.
54. Mensah was born and raised in Ghana and immigrated to Canada with her parents in 1990. In 2017, Mensah reconnected with Rudy, one of her first friends from when she initially moved to Canada, who was now living in Toronto where he owned and managed a grocery store franchise. After a whirlwind romance, Mensah and Rudy married in 2018, and Mensah moved to Rudy's townhouse in the west end of Toronto shortly after.

55. Upon moving to Toronto in 2018, Mensah applied for and was hired into the part-time Production Operator position recently vacated by Ambong. Mensah happily worked on the day shift throughout her entire period of employment with J.C. Meats, leaving her lots of time to enjoy married bliss with Rudy in the evenings.
56. Mensah loved her new home in Toronto, but missed her 80 year old mother, Ama Mensah (“Ama”), who was living by herself in an apartment building an hour outside of the city. In early 2020, Mensah was thus thrilled when Ama finally agreed to come live with her and Rudy.
57. Ama is a healthy and active 80 year old. However, since her mid-70s Ama has been living with a degenerative eye disease that will eventually result in total blindness. Ama has generally coped with her condition with her usual positivity and humour. Unfortunately, in 2019 her condition worsened to the point that she could no longer safely drive. Losing her license, which to Ama represented her independence, was a significant blow and caused Ama to become depressed. Mensah’s hope in encouraging Ama to come live with her – a hope shared by Ama’s physician - was that the move would help alleviate some of Ama’s feelings of isolation, and would allow Mensah and Rudy to help Ama in her day-to-day life now and as her eye disease progressed.
58. All of Mensah’s hopes for her mother were initially realized when Ama arrived in Toronto in January 2020. Ama took well to her new neighbourhood and was thrilled to be able to walk anywhere she needed to go, including to the local seniors’ centre where she immediately joined The Stitch Witches, a daily knitting circle. At home, Ama needed help with preparing meals, and had some trouble with the steep stairs in the townhouse, but Mensah’s work schedule meant that she was home to assist Ama with whatever she needed at least four days per week. On the days that Mensah had her shifts at J.C. Meats, Rudy was usually able to work from home or adjust his hours to be home with Ama. On a few occasions where neither Mensah or Rudy could be at home, Mensah had asked her neighbour, Linda Belcher (“**Belcher**”), to check in on Ama throughout the day. Belcher, who worked from home and had immediately taken to Ama, was happy to help and would drop in to the townhouse one or two times in a day to check on Ama and chat. All in all, Ama was happier after the move than Mensah had seen her in a long time.
59. Then COVID-19 hit. Mensah, Ama and Rudy took lockdown extremely seriously and stopped leaving the townhouse other than for Mensah and Rudy to attend at their essential workplaces. Ama stopped walking in the neighbourhood and The Stitch Witches migrated from the seniors’ centre to the virtual world of videoconferencing, which was impossible for Ama to navigate on her own due to the continued progression of her eye condition. On days that Mensah did not have shifts at J.C. Meats she was able to set Ama up on her laptop to join The Stitch Witches videoconference. However, on days that Mensah was at work, Rudy was now so busy at the grocery store dealing with unprecedented demand for toilet paper, Lysol and wine that he could no longer work from home or adjust his hours to be home with Ama during the day. On those days, Ama was left home alone and was unable to participate in her seniors’ centre activities. As the pandemic continued, seemingly without an end, Ama became increasingly depressed.
60. In June 2020 when J.C. Meats experienced a COVID-19 outbreak, Mensah was terrified for Ama. Fortunately, Mensah was not one of the J.C. Meats employees who tested positive for COVID-19. However, Mensah knew that the outbreak had been a close call for herself and her family.
61. When Mensah learned of the new COVID-19 Moonlighting Policy on July 5, 2020 from her supervisor, she became very concerned about her risk of another COVID-19 exposure. It had

never occurred to Mensah prior to learning of the Policy that other J.C. Meats employees would also be working at other places, including in health care, but it seemed to her to pose a huge risk to all J.C. Meats employees and their families.

62. On July 10, 2020, Mensah learned from a co-worker that Ambong, who she worked closely with on the same production line, had disclosed that she was also working as a PSW during the pandemic. The same day, Mensah sent the following email to Schnur:

From: louselovesbunnies@hotmail.com Sent: Fri 7/10/2020 6:32 PM
To: aschnur@jcmeats.ca
Subject: Shift Switch

Hi Astrid,

I would like to request to be transferred to the evening shift starting immediately. My 80 year old mother lives with me and my husband at home and I need to think of her.

Thank you for considering my request.

Louise Mensah

63. With her email to Schnur, Mensah included a medical note from Dr. Ken Yap of the Western Toronto Medical Centre. It simply said: *“Employee requires evening shift assignment only for personal reasons related to family member.”*
64. Mensah’s rationale for requesting a transfer to the evening shift was that significantly fewer employees worked on that shift than on the day shift and so the plant was less crowded at night. Mensah hoped this would allow for better social distancing and so would reduce her risk of COVID-19 exposure. Working the evening shift would also have the added benefit of enabling Mensah to be at home to assist Ama every day.
65. On July 13, 2020, Schnur responded to Mensah’s email as follows:

From: aschnur@jcmeats.ca Sent: Fri 7/13/2020 7:27 AM
To: louselovesbunnies@hotmail.com
Subject: RE: Shift Switch

Good morning Louise,

I hope you and your mother are keeping well. I have reviewed your request and unfortunately there are currently no vacant Production Operator positions on the evening shift. Should a vacancy arise, it will be posted in accordance with the collective agreement and I encourage you to apply.

Astrid

66. As a result of Schnur’s response, on July 13, 2020, Mensah requested and was granted an unpaid leave of absence pending an opening on the night shift or until the COVID-19 situation improved.
67. On July 16, 2020, BOBS filed a grievance on behalf of Mensah as follows (the **“Mensah Grievance”**):

BOBS grieves the Company's refusal to grant Louise Mensah's request for a transfer to the evening shift. The Company has violated both the procedural and substantive aspects of its duty to accommodate the Grievor's elder care/family status obligations and/or has discriminated against her on the basis of family status.

68. The Company denied the grievance on July 19, 2020.
69. The parties have agreed to consolidate the hearing of the Group Grievance and the Mensah Grievance. The parties have also agreed that both grievances are arbitrable and were referred to arbitration in a timely manner. The Union has agreed to proceed first in all matters.
70. In the interests of expediting the hearing of the Grievance, the parties have agreed not to call any additional evidence beyond the evidence set out in an Agreed Statement of Facts and its appendix, although they may make arguments with respect to the weight that this evidence is afforded.
71. With respect to the Mensah Grievance, the parties have agreed that the issue of "undue hardship" will not be before the arbitration panel. The Company has agreed that if the Union is found to have made out a *prima facie* case of discrimination, it would not constitute undue hardship to transfer Mensah to the night shift.

While counsel for both sides are free to choose which arguments and legal doctrines they will or will not rely upon in support of their respective positions, neither Employer counsel nor Union counsel are authorized by their clients to concede ANY of the outstanding ultimate issues at the arbitration hearing.

Appendix "A"



COVID-19 Outside Employment/Moonlighting Policy

PURPOSE:

Employees of J.C. Meats may decide to seek outside employment in addition to their regular work hours. Given the increased risk of COVID-19 exposure posed by outside employment in the health care sector, the purpose of this Policy is to ensure that outside employment in the health care sector does not interfere with the health and safety of J.C. Meats employees during the ongoing COVID-19 pandemic.

SCOPE:

This Policy applies to all bargaining unit employees of J.C. Meats.

DEFINITION OF OUTSIDE EMPLOYMENT:

Outside Employment (also known as "moonlighting") for the purposes of this Policy refers to holding a second job in the health care sector outside of the employee's regular working hours with J.C. Meats.

POLICY:

An employee may hold a job with another organization as long as he/she: 1) discloses such employment to, and receives approval from, J.C. Meats, and 2) satisfactorily performs his or her job responsibilities with J.C. Meats. Employees engaged in outside employment are held to the same performance standards and are subject to J.C. Meats' scheduling requirements, regardless of any outside work requirements.

However, due to the increased risk of COVID-19 exposure posed by outside employment in the health care sector, J.C. Meats prohibits employees from obtaining or maintaining outside employment in the following settings during the ongoing COVID-19 emergency:

- hospitals;
- physicians' offices or walk-in medical clinics;
- retirement homes;
- long-term care homes;
- communal living facilities;
- paramedicine services;
- home health care services; and

- any outside employment in the health care sector that interferes with and/or compromises an employee's ability to adhere to J.C. Meats' COVID-19 safety policies, guidelines and standards.

All employees currently engaged in outside employment in the health care sector as defined by this Policy must immediately inform J.C. Meats. If the Company determines that the employee's outside employment is contrary to this Policy, the employee will be required to cease engaging in the outside employment or commence an unpaid leave of absence until such time as the Company determines that no risk is posed to J.C. Meats' business and employees by such outside employment.

CONSEQUENCES OF NON-COMPLIANCE:

Failure to comply with this Policy could result in disciplinary action up to and including loss of employment.

List of Schools

Contacts and Participants for 2021

University of Alberta

Law Students: Elisa Carbonaro and Elias Jimenez Gonzalez
 Coaches: John Carpenter, Kristan McLeod and David Williams
 Student Coaches: Lauren Chomyn and Mitchell Hayward

University of British Columbia

Law Students: Sebastian Cooper and Alie Teachman
 Coaches: Bethany Hastie and Jennifer Russell

University of Windsor

Law Students: Joey Delazzari and Anita Osmani
 Coaches: Thomas Kuttner

Dalhousie University

Law Students: Erika Hertz and Ben Mosher
 Coaches: Liam McHugh-Russell and Eric Slone

University of Toronto

Law Students: Olivier Bishop and Braxton Murphy
 Coaches: Kathryn Bird, Amanda-Lawrence Patel, Lauren Pearce and Stephen Shore
 Student Coaches: Samantha Nault and Luka Ryder-Bunting

Western University

Law Students: Madelaine Douglas and Gabrielle Terry
 Coaches: Michael Lynk and Claudia Vicencio
 Student Coach: Brooklyn Hallam

York University – Osgoode Hall

Law Students: Jaime Rivera-Campos and Amrit Toor
 Coaches: Michael Hines and Shelley Kierstead

Queen's University

Law Students: Katie Frederickson and Brett Moritt
 Coach: Kevin Banks
 Student Coach: Sarah MacKay Marton

Previous Winners

1999	Western University	Caroline Feeley and Stacey Hawking
2000	University of Ottawa	Geneviève Debané and Trisha Gain
2001	Dalhousie University	Rebekah L. Powell and E. Mark Rogers
2002	Dalhousie University	Meghan E. Furey and Jodi Gallagher
2003	York University – Osgoode Hall	Jessica Dowling and Jessica Sickinger
2004	University of British Columbia	Jesse Nyman and Ryan Anderson
2005	Western University	Erica Richler and Justin Lambert
2006	University of Alberta	Vincent Kurata and Derek Lai
2007	University of Toronto	Tammy Jacobson and Todd Orvitz
2008	Dalhousie University	Jody Brown and Michelle McCann
2009	University of Toronto	Laura Johnson and Inie Park
2010	York University – Osgoode Hall	Reshika Dhir and Blake Moran
2011	University of Toronto	Tim Hughes and Andrew Vey
2012	University of British Columbia	Natasha Jategaonkar and Glen Tedham
2013	University of Alberta	Avril Fisher and Natasha Edgar
2014	University of British Columbia	Megan Coyle and Brendan Dawes
2015	University of Toronto	Hilary Grice and Alex Ognibene
2016	Dalhousie University	William McLennann and Andrew Mercier
2017	Queen's University	Stephanie McLoughlin and Geoffrey Tadema
2018	Queen's University	Geoffrey Dunlop and Adriana Zichy
2019	Dalhousie University	Calvin DeWolfe and Megan Thompson
2020	University of British Columbia	Jaclyn Salter and Braeden Stang



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