

## MEMORANDUM OF AGREEMENT

BETWEEN:

**CANADIAN UNION OF PUBLIC EMPLOYEES,  
AIR CANADA COMPONENT**

(the "Union")

- and -

**AIR CANADA**

(the "Company")

**Re: CHQ-16-16 and related individual grievances**

### **WHEREAS:**

- (a) The Union is the collective bargaining agent for a bargaining unit of employees of the Company (the "Bargaining Unit");
- (b) The Union and the Company (the "Parties", each being a "Party") are parties to a collective agreement effective between March 1, 2015 and February 28, 2020 (the "Collective Agreement");
- (c) Employees of the Company in the Bargaining Unit (the "Bargaining Unit Members") are entitled to apply for and receive, if eligible, long-term disability ("LTD") benefits pursuant to a plan known as the Wage Indemnity Plan (the "LTD Benefits");
- (d) The Company sought to obtain information regarding approximately **XX** Bargaining Unit Members who were in receipt of LTD Benefits (the "LTD Employees") to determine whether such LTD Employees had a reasonable prospect of returning to work and maintaining regular attendance in the foreseeable future;
- (e) Subsequent to its attempt to obtain such information, the Company issued letters to approximately **65** LTD Employees advising that their employment would be terminated as of August 31, 2016 (the "Termination Notice Employees");
- (f) There remained the approximately **XX** LTD Employees who had received requests for information, but who had not been advised that the employment would be terminated (the "Information Notice Employees"). The Termination Notice Employees and the Information Notice Employees shall be referred to as the "Affected Employees";
- (g) The Union filed a policy and individual grievances alleging that the Company's actions violated the Collective Agreement and the *Canadian Human Rights Act*;
- (h) The Union sought and was awarded a cease and desist order on August 24, 2016.

Pursuant to this order, all notices of termination issued by the Company in relation to the CUPE ACC Members were rescinded and no further terminations were to be issued until the conclusion of the hearing on its merits or on further direction from him;

- (i) The Parties appointed Arbitrator William Kaplan to hear the Grievances commencing on October 14, 2016;
- (j) The Parties mutually desire to enter into this Memorandum of Agreement setting out the order and process by which the issues arising from the Grievances will be arbitrated;

**NOW THEREFORE THE PARTIES MUTUALLY AGREE AS FOLLOWS:**

**THRESHOLD QUESTION**

1. The Parties agree that, initially, Arbitrator Kaplan shall determine whether the Collective Agreement, the *Canadian Human Rights Act*, or some other justification as determined by the Arbitrator, precludes the Company from terminating the employment of a Bargaining Unit member who is totally disabled and where there is no reasonable prospect of such member returning to work because of disability (the "Threshold Question").
2. The procedure for making such determination shall be made in accordance with LOU 44. The dates for exchange of material shall be mutually-agreed by the Parties. The Parties agree to make best efforts in advance of the hearing to develop and put before Arbitrator Kaplan an Agreed Statement of Facts.

**INDIVIDUAL DETERMINATIONS**

3. In the event that the Threshold Question is answered in the Company's favour, Arbitrator Kaplan shall make a determination relating to the employment status of individual Affected Employees, including any bargaining unit employees in receipt of LTD whose employment the Company wishes to terminate.
4. The Company shall provide the Union with a chart setting out, for each Affected Employee whose employment might still be subject to termination the following information:
  - (i) Status;
  - (ii) Date started leave;
  - (iii) Date started LTD Benefits;
  - (iv) Length of time on leave;
  - (v) Length of time on LTD Benefits;

- (vi) Date of birth;
  - (vii) Age; and
  - (viii) Additional pertinent information relating to the Remaining affected Employee's disability or potential for a return to work (the "Disability Chart"). The Disability Chart shall include a blank column, titled Prospect for Return to Work in the Foreseeable Future (the "Prospect for RTW Column") in the Disability Chart.
5. Following receipt of the Disability Chart, the Union shall complete the Prospect for RTW Column indicating:
- (i) "No" where it has not been able to obtain evidence that there is a reasonable prospect of the Remaining Affected Employee returning to work in the foreseeable future; or
  - (ii) "Yes" where it has been able to obtain evidence that there is a reasonable prospect of the Remaining Affected Employee returning to work in the foreseeable future.
6. Within a reasonable period of time of receiving the Disability Chart, such time to be agreed upon by the Parties, the Union shall return the completed Disability Chart to the Company. Where the Union has indicated "Yes" in the Prospect for RTW Column with respect to a Remaining Affected Employee, the Union will provide the Company, at the same time, with written documentation from the employee's physician or treating specialist, whichever healthcare practitioner is able to provide the best information available, setting out:
- (i) all medical diagnoses;
  - (ii) that the employee will be able to return to work, with or without accommodation (and what those accommodations might be); and
  - (iii) if so,
    - a) the approximate time frame in which a return to work might be affected; and
    - b) any objective medical evidence in the form of test results and other clinical findings as determined by the physician or treating specialist to support the opinion that a return to work can be affected in that time frame (the "Questions").
7. Along with the Disability Chart, and the information and/or documentation in paragraph 6, the Union may provide any additional pertinent information relating to the Remaining Affected Employee's disability or potential for a return to work, with or without accommodation.

8. With respect to those Remaining Affected Employees for whom the Union has answered "No" in the Prospect for RTW Column, Arbitrator Kaplan shall be required to make a determination, based on all of the evidence (and along with further evidence provided through witness statements in accordance with LOU 44, argument or submissions from the Parties), whether the employment of such member may be terminated. In the event the Company decides to terminate the employment of those Remaining Affected Employees referenced in this paragraph, such individuals will be known herein as the "Terminated Non-Returning Employees". The Company shall prepare one or more letters, depending on the circumstances, to the Terminated Non-Returning Employees, setting out all of their rights and entitlements as a result of the termination of their employment (the "Notice of Termination Letters"). The Company shall provide the Union with copies of all Notice of Termination Letters at least two weeks prior to sending out the Notice of Termination Letters. Any disagreement with respect to the content of the letter(s) or with respect to what rights and entitlements such Terminated Non-Returning Employees may have shall be submitted to Arbitrator Kaplan for final and binding determination on an expedited basis in a manner to be determined by him, and the Company shall not send out the Notice of Termination Letters until any such dispute has been determined by Arbitrator Kaplan.
9. With respect to those Remaining Affected Employees with a "Yes" in the Prospect for RTW Column, the Company shall review the written documentation from the employee's physician or treating specialist (whichever healthcare practitioner is able to provide the best information available) and, within a reasonable period of time after receiving the completed Disability Chart from the Union, such time to be agreed upon by the Parties, inform the Union of the names of any Remaining Affected Employees it no longer considers subject to having their employment terminated on the basis that they have no reasonable prospect of returning to work.
10. The Remaining Affected Employees with a "Yes" in the Prospect for RTW Column whose names are not provided to the Union pursuant to the preceding paragraph shall be the "Employee(s) in Dispute".
11. The Parties shall meet for a mediation before Arbitrator Kaplan. Arbitrator Kaplan shall act as a mediator in respect of whether the Employees in Dispute have no reasonable prospect of returning to work or whether accommodation would constitute undue hardship. At the mediation, the Parties and Arbitrator Kaplan shall rely on the information in the Disability Chart and the physician or treating specialist's answers to the Questions.
12. In the event the Parties agree during the mediation there is a reasonable prospect of one or more Employees in Dispute returning to work in the foreseeable future, such employee or employees shall remain status quo for at least one year, subject to their returning to work, death, retirement, or no longer being entitled to receive LTD Benefits, after which their status may again be subject to review by the Employer.
13. In the event the Parties cannot resolve whether an Employee in Dispute has a reasonable prospect of returning to work or can be accommodated to the point of undue hardship,

the Parties shall agree upon a physician/specialist to whom all information will be provided with respect to each Employee in Dispute (the "Medical Reviewer"). The cost of the Medical Reviewer will be shared by the Parties or borne solely by Air Canada, as decided by Arbitrator Kaplan prior to the Medical Review.

14. The information provided to the Medical Reviewer shall include, among other things: age; diagnosis; length of time on disability; prognosis; medical information regarding the employee's disability; relevant portions of the LTD file; and the type of work available for accommodation. Any disputes relating to the type of work available for accommodation or the information to be provided to the Medical Reviewer shall be determined by Arbitrator Kaplan before the information is provided to the Medical Reviewer.
15. Within seven weeks after being provided with the information, the Medical Reviewer will provide an opinion to the Parties regarding each Employee in Dispute as to whether each employee can return to work in the foreseeable future and whether accommodation would be required to affect such return to work (the "Medical Opinion").
16. After receipt of the Medical Opinion, the Parties shall convene for an arbitration hearing before Arbitrator Kaplan in respect of any Employee in Dispute. Based on:
  - (i) the completed Disability Chart;
  - (ii) written documentation from the employee's physician or treating specialist (whichever healthcare practitioner is able to provide the best information) available;
  - (iii) the Medical Opinion; and
  - (iv) evidence (provided through witness statements in accordance with LOU 44) and brief oral submissions from each party with respect to each Employee in Dispute.
17. If a Party requires the examination of any of the physicians, specialists or author(s) of the Medical Opinion, the Party shall seek leave from Arbitrator Kaplan. It is expected that such examinations shall occur in exceptional circumstances.
18. Arbitrator Kaplan shall make a final and binding decision in respect of each Employee in Dispute as to whether there is a reasonable prospect of such Employee in Dispute returning to work, including whether it would constitute undue hardship to accommodate the Employee, and make such determinations as are appropriate in the circumstances.
19. In the event Arbitrator Kaplan determines that the Company is entitled to terminate the employment of some or all of the Employees in Dispute and the Company determines to terminate the employment of such individuals (the "Terminated Disputed Employees"), the Company shall provide the Union with copies of all Notice of Termination Letters at least two weeks prior to sending out the Notice of Termination Letters. Any disagreement with respect to the content of the letter(s) or with respect to what rights and entitlements such Terminated Disputed Employees may have shall be submitted to

Arbitrator Kaplan for final and binding determination on an expedited basis in a manner to be determined by him, and the Company shall not send out the Notice of Termination Letters until any such dispute has been determined by Arbitrator Kaplan. The Parties agree to convene before Arbitrator Kaplan on a date to be determined if evidence is required in this respect.

- 20. In the event Arbitrator Kaplan determines that the Company is not entitled to terminate the employment of some or all of the Employees in Dispute, such employee or employees shall remain status quo for at least one year, subject to their returning to work, death, retirement, or no longer being entitled to receive LTD Benefits, after which their status may again be subject to review by the Employer.
- 21. The Parties agree to schedule new hearing dates with Arbitrator Kaplan and establish timelines in order to implement this Agreement to resolve the Grievances in an accelerated, efficient and timely manner, including in respect of any arbitration hearing conducted in accordance with paragraph 16 of this Agreement.
- 22. Arbitrator Kaplan will retain jurisdiction regarding any dispute between the Company and the Union relating to the interpretation, application, alleged violation or implementation of this Agreement, and to deal with any process questions that arise from or are not covered by this Agreement, with all the authority of an arbitrator under the *Canada Labour Code* and the Collective Agreement.

**AGREED AND EXECUTED IN COUNTER-PARTS**

**AIR CANADA**

Date: February 22, 2019

Per: 

**CUPE, AIR CANADA COMPONENT**

Date: February 22, 2019

Per: 