

**IN THE MATTER OF AN ARBITRATION**

**BETWEEN:**

**THE UNION OF NORTHERN WORKERS**

**- and -**

**GOVERNMENT OF THE NORTHWEST TERRITORIES**

**Re: Policy Grievance – Relief Employees**

**AWARD**

**BEFORE:**

**John Moreau, Q.C.            - Arbitrator**

**IN ATTENDANCE FOR THE UNION:**

**Rebecca Thompson        - Grievance & Adjudication Officer, PSAC**  
**Anne Marie Thistle        - Director, Membership Services, UNW**

**IN ATTENDANCE FOR THE EMPLOYER:**

**Jana Shoemaker            -Counsel, GNWT**  
**Cheryl McKay                -Adjudication Advisor, Labour Relations, GNWT**

**The Hearing was held in Yellowknife, NWT on March 14, 15, 2017.**

# AWARD

## INTRODUCTION:

The Union alleges in a policy grievance that the Employer has breached the collective agreement by improperly hiring employees as Term/Relief employees instead of as indeterminate Relief employees, as defined in the collective agreement.

The Union requests that the Employer conduct and provide an audit dating back to August 2013 of all Relief employees who may have been improperly misclassified as Term/Relief employees. The Union further requests that any Relief employee who has been without work between casual or term contracts be made whole for any losses of compensation or other collective agreement benefits to which they are entitled.

The Employer asserts that an audit is not necessary as the issue has been addressed in the case of the one individual who was mistakenly hired into a Term/Relief position instead of an indeterminate Relief position.

The Union called Anne Marie Thistle, Director of Membership Services for the Union. The Employer called two witnesses: Walter Gora, Compensation and Collective Bargaining Advisor; and, Coralee Round, Manager Business Performance Unit.

## RELEVANT COLLECTIVE AGREEMENT PROVISIONS

### ARTICLE 2

#### INTERPRETATION AND DEFINITIONS

2.01 For the purpose of this Agreement:

(m) "Employee" means a member of the Bargaining Unit and includes:

(i) a "casual employee" who is a person employed by the Employer for work of a temporary nature pursuant to the provisions of Appendix A5;

(ii) an "indeterminate employee" who is a person employed for an indeterminate period;

(iii) a "part-time employee" who is an employee who has been appointed to a position for which the hours of work on a continuing basis are less than the standard work day, week or month;

(iv) a "professional employee" who is an employee appointed to a position in an area of work where there is a requirement for a highly developed or specialized body of knowledge acquired through University education or a member of a group governed or regulated by a professional body;

(v) a "relief employee" is an employee appointed to a position for which there are no established hours on a daily, weekly or monthly basis and may be required to report to work on an as-and-when required basis for operations where services operate on a daily basis throughout the entire year.

(vi) a "seasonal employee" who is an employee appointed to a position which is not continuous throughout the year but recurs in successive years;

(vii) a "term employee" who is a person other than a casual or indeterminate employee who is employed for a fixed period in excess of four (4) months and includes employees hired as a leave replacement, employees hired in relation to programs of a fixed duration or without ongoing funding, or employees hired in relation to or in support of training.

### ARTICLE 14

#### INFORMATION

14.01 (1) The Employer agrees to continue the past practice of providing the Union, on a monthly basis, with information concerning the identification of each member in the Bargaining Unit. This information shall include, but not be limited to, the name, location, job evaluation, and social insurance number of all employees in the Bargaining Unit. The Employer shall indicate which employees have been

recruited or transferred and those employees who have been struck off strength during the period reported.

- 2) The Employer agrees to provide the Union with monthly staff movement reports in a form mutually agreed to between the Union and the Employer.

14.02 The Employer shall provide each employee with a copy of the Collective Agreement.

14.03 The Employer agrees to provide each new member of the Bargaining Unit with a copy of the Collective Agreement upon his/her appointment.

14.04 The Employer shall provide a translated version of the Collective Agreement in one of the official languages of the Northwest Territories, as requested by an employee. In the event of any dispute concerning a proper interpretation of any provision of this Agreement the English version shall govern.

14.05 The Employer shall provide the Union with a monthly report of all positions excluded from the Bargaining Unit as per criteria 41(1.7) of the Public Service Act. This report shall include position number, position title, settlement code and the names of the employees. In addition, the Employer shall provide the Union with a monthly report of all employees that were included or excluded from the bargaining unit during that month. This report shall include employees' names, position number, position title, settlement code, position descriptions and exclusion criteria for those employees in positions not specifically named in the Act (i.e., 41(1.7)(a), 41(1.7)(d)(legal officer), and 41(1.7)(h).

## **APPENDIX A1**

### **RELIEF EMPLOYEES**

A1.01 The Employer shall hire relief employees into positions for which there are no established hours on a daily, weekly or monthly basis and may be required to report to work on an as-and-when required basis for facilities where services operate on a daily basis throughout the entire year.

A1.02 (a) An employee may not be appointed as a relief employee to perform a job in the same facility (which includes a hospital, health centre, correctional facility, young offenders facility, or college residence) as the employee performs in the employee's other position.

(b) An employee in a nursing position may be appointed as a relief employee in the same facility providing that the position is more than 2 pay ranges apart from the employee's other position.

A1.03 The Employer shall ensure that a series of relief employees will not be employed in lieu Of establishing a full-time position or filling a vacant position.

....

## **SUMMARY OF THE EVIDENCE**

Ms. Thistle testified regarding the bargaining unit membership information provided on a monthly basis to the Union by the Employer pursuant to article 14. The Union currently receives three reports: a “Membership Report” which lists all the bargaining unit members; a “Movement Report” which indicates personnel changes such as transfers, new hires and terminations; and, an “Excluded Report” which shows employees who are excluded or included in the bargaining unit.

Ms. Thistle went on to refer to article 2.01(m)(v) which defines a “relief employee” as one who holds an indeterminate position for which there is no established hours and who are required to report to work on an as-and-when basis where services operate on a daily basis throughout the year (i.e. a hospital or correctional facility). Ms Thistle referred to a FAQ document entered into evidence which explains that the Relief employee category was established for the first time under the current collective agreement to replace as-and-when Casual employees who were not indeterminate employees. An indeterminate Relief employee provides coverage in two situations: first, last minute coverage for a single shift (i.e. when the scheduled employee calls in sick); second, shift coverage for up to 21 days (i.e. to cover for holidays).

Ms. Thistle indicated that the current issue arose as a result of a contact from Ms. Maureen Bernard, a Relief Personal Care Attendant at the Inuvik Hospital who was hired as a Term/Relief employee rather than as an indeterminate Relief employee. An individual grievance was filed on her behalf concurrent with the present policy

grievance. Ms. Thistle noted that reference was made to Ms. Bernard's grievance in the Employer's Step 2 Response to the policy grievance:

I acknowledge receipt of your second-level policy grievance dated June 20, 2016 regarding the Employer's alleged policy of inappropriately hiring relief employees into a casual or term contract.

As a remedy the Union of Northern Workers (UNW) is seeking that the Employer conduct an audit to demonstrate if any relief employees were inappropriately hired into a term or casual position and in any instances where it is found that a relief employee was hired into a term or casual position that they be made indeterminate.

The Employer was able to confirm through the Human Resources Information System (HRIS) that there are no relief employees who presently hold a term contract. The Employer recognizes that prior to the filing of this policy grievance the UNW had filed an individual grievance (Grievance #16-E-01914) as a result of a Relief Worker being inappropriately hired into a term position. To resolve this discrepancy, the Employer changed the employee's type of employment to that of an Indeterminate Relief Employee in which the employee had accepted.

Moving forward, I can confirm that as Deputy Minister of Human Resources all Human Resource staff will be provided with clear instruction that relief employees can only be hired into Indeterminate Relief positions. There is no ability to hire a relief employee as a casual or into a term contract.

I wish to thank-you for bringing this matter to my attention. I trust that the above will address the Union's concerns and ensure that the Union is aware that the Employer has taken steps to ensure that the inappropriate hire of a relief employee into a casual or term contract does not occur again in the future.

Browyn Watters  
Deputy Minister  
Human Resources

Ms. Thistle testified that the assurances of the Employer that the one improper classification error would not be repeated is insufficient to satisfy the Union that the issue has been resolved. The monthly reports provided by the Employer only show employees who work specific hours for the Employer but do not identify those who may have not been called in to work.

Under cross-examination, Ms. Thistle testified that the Union receives all the reporting information from the Employer required under article 13 (“Check Off”) but not article 14 (“Information”). With respect to article 14, the Union has not in the past regularly received the information report regarding Relief employees. She confirmed there were ongoing general discussions with the Employer at the time of the hearing with respect the issue of the Reports.

Mr. Gora indicated that his duties include both compensation and collective agreement matters. He stated that he met with Ms. Thistle subsequent to the filing of the present grievance with instructions to try and streamline the five monthly reports provided to the Union pursuant to article 14.01<sup>1</sup>. The goal is to consolidate the essential information set out in the five reports into one report that would satisfy the requirements of article 14.01. Any other reports required for bargaining purposes, for example, would be prepared on an *ad hoc* basis.

Mr. Gora indicated that he first met in December 2016 with the Union to discuss their “wish list” for the single report. Further meetings were scheduled for later dates to try and manipulate all the required information into one report. Prior to these meetings, Mr. Gora was only familiar with the monthly Relief report. He was not familiar with the other four reports. For example, he does not consult with anybody preparing the “Movement” report as part of his duties. Mr. Gora confirmed that he began sending the Union the monthly Relief report containing all the relief workers hours starting in May/June 2016. They had not been sent to the Union since 2013.

---

<sup>1</sup> “Movement” Report, “Excluded” Report, “Casual” Report, “Member” Report and “Relief Worker Hours” Report.

Mr. Gora was not involved in the internal review of the reports after the grievance of Ms. Bernard was filed.

Mr. Gora was shown the May 2016 Member Report. He confirmed that it shows items such as the name, status (i.e. “active”), location, seniority date and hourly pay rate. It does not, however, indicate the status of an employee i.e. relief or part-time. The Relief Worker Hours report, he further noted, only indicates the names and positions of employees who have been paid for hours of work for the specified pay period. It does not indicate whether the employee is a term, casual or indeterminate employee.

Ms. Round has held numerous positions in the GNWT and has been the Manager of the Business Performance Unit (“BPU”) since January 2015. The BPU is engaged in finding ways to manage and improve human resources in the GNWT. The BPU relies on the information obtained through *PeopleSoft*, the computer software system employed by the GNWT, to establish the metrics required to assess its employees and delivery of services.

Ms. Round testified that she was tasked by Georgina Kaiser, Labour Relations Officer for the Employer, to inquire and report back to her on the concerns expressed by the Union over the issue of Term/Relief employees. Ms. Round in turn requested one of her staff to conduct a *Quare* (search) through *PeopleSoft* using both the “relief” and “temporary” fields. Only one employee’s name turned up from her understanding, using the Member Report as a point of reference. The individual employee was Ms. Bernard. This *Quare* took place on May 31, 2016.

A second verification *Quare* took place at the end of June, 2016 after Ms. Bernard's classification was rectified in the system to show her as an indeterminate Relief employee. No further Term/Relief names turned up. Ms. Round acknowledged that she was one of the many GNWT employees copied with an email sent by Maureen Connolly on August 24, 2016 on behalf of the Deputy Minister, Ms. Bronwyn Watters. The email reads as follows:

Good afternoon,

A grievance was recently filed by the Union of Northern Workers with respect to a situation where a Relief Employee was hired into a Relief Term position. An internal audit was conducted and we were able to confirm that it was an isolated incident which was resolved by changing the employee's employment status from term to indeterminate.

However, in resolution of the grievance, I have committed to provide clear instruction to staff that Relief Employees can only be hired into **indeterminate** Relief positions. There is no ability to hire a Relief Employee as a Casual or into a Term contract.

If you have any questions regarding the appropriate use of Relief Employees when providing recruiting advice I would ask that you please raise these directly with your Supervisor.

Thank you all.

Under cross-examination by the Union, Ms. Round indicated that she also had her staff review the data in *Peoplesoft* for a few months prior to May 2016 to verify if there were any other Term/Relief employees besides Ms. Bernard, but no names appeared on the books. Ms. Round was asked whether one of the five reports shows data fields for Term/Relief employees. Ms. Round could not identify any data field for Term/Relief employees from the various Reports placed in evidence (Member Reports, Relief Worker Reports, Movement Reports). Ms. Round indicated that the Member's

Report would indicate under the “*Reg/T emp*” column if an employee like Ms. Bernard moved from a Regular (indeterminate) to a Term position.

Ms. Round also explained that the data for any position change originates with the Management and Recruitment Services and is passed on to Employee Services who prepare the various Reports. Prior to the current discussions regarding combining the five Reports, Ms. Round stated that she only received the Relief Worker Hours Report. The Pay Roll/Business Processing Unit generated the other reports which were to be supplied directly to the Union. Ms. Round, for example, did not review or consult anyone with respect to the Movement Report.

Ms. Round was asked in further cross-examination how it was possible to hire into a designation of “Term/Relief” employee, as occurred with Ms. Bernard. Ms Round indicated that all software like *PeopleSoft* has its limitations and added that data entry does not fall within the purview of her duties.

Ms. Round added that she was unaware of what kind of software technology would be required for combining the reports. Ms. Round was only aware that meetings had taken place involving the Union and the Employer subsequent to the filing of the policy grievance to try and consolidate the monthly reports.

## **SUBMISSIONS OF THE UNION**

The Union submits that the Employer has acknowledged that it has breached the collective agreement when it categorized Ms. Bernard as a “Term/Relief” employee. There is no such category of employee under the collective agreement; a Relief

employee like Ms. Bernard has indeterminate status while a Term employee, such as a casual employee who performs work of a temporary nature, does not have indeterminate status.

The Union, in support, reviewed Appendix A which sets out all the rights available to Relief employees. For example, at A1.10, Relief employees earn 16% of their base salary as supplementary compensation in lieu of vacation, sick leave, special leave and mandatory leave.

The issue for the Union concerns taking the necessary steps to ensure that there are no other bargaining unit employees classified as Term/Relief employees.

The evidence is that no Relief Worker Hours reports have been provided to the Union pursuant to Article 14 since August 2013. This is the point in time when it was clear that there was at least one employee, Ms. Bernard, who was improperly classified as a Term/Relief employee. It was only after another issue arose with Ms. Bernard that the problem surrounding her employment status was discovered by the Union. It was not the Employer's system that flagged the error, nor did the Employer realize they had made a mistake until the Union brought the matter to the Employer's attention. Had previous efforts been made to combine the reports, as is being currently discussed, the issue concerning Term/Relief employees may have surfaced earlier and been rectified.

Ms. Round confirmed that the review undertaken by the Employer subsequent to the Union raising the misclassification of Ms. Bernard only reaches back as far as May and June, 2016. There are no records or other avenues available to the Union to

determine whether there were other employees who were similarly misclassified as Term/Relief employees prior to that time. This information is not disclosed from the data provided by the Employer in the form of the Movement Reports, the Member Reports or otherwise. For example, the original coding in the Member Report dating back to Ms. Bernard's date of hire in August 2013 shows her coded as "3413R". A comparison with the August 2014 Member Report, one year later, shows that she was coded as at "3413T", which continues through to the May 2016 Member Report. There is also no reference to Ms. Bernard's date of hire in either the August 2013 or August 2014 Movement Reports.

Accordingly, in the absence of receiving Relief reports to compare with the Member or Movement reports, there is no reasonable way for the Union to establish that other employees like Ms. Bernard have been misclassified as a Term/Relief employees. The ongoing discussion about consolidating the reports still does not resolve the issue of ensuring there are no other employees who were hired as Term/Relief employees.

The Union submits that the proper course of action is to undertake an audit through *PeopleSoft* and determine whether there are other employees besides Ms. Bernard who were misclassified as Term/Relief employees since Ms. Bernard's date of hire on August 1 2013. An audit like the one the Union proposes would assure employees that their collective agreement rights are being protected. Indeed, the Union's request is a reasonable one given it is limited to Relief employees for the period beginning on August 1, 2013. That request from the Union's understanding only requires the Employer to run a *Query* in *PeopleSoft* involving two fields: the one which

identifies Relief worker hours and the other which identifies employees who are regular or temporary employees.

The Employer has asserted that it has dealt with the Union's concern but has not provided sufficient proof that those concerns expressed by the Union have been properly addressed. Going forward, it must ensure that their systems have adequate built-in safeguards which provide the necessary assurances that mistakes of this kind do not reoccur. The Union referred to two authorities in the course of its submissions: *JFS Waste Management Corporation v. IWA Canada Local 1-217* (unreported) (Longpre)(May 7, 1999); *RF Klein & Sons Ltd. v Teamster's Local Union No. 213* (unreported)(Germaine)(September 18, 1998).

## **SUBMISSIONS OF THE EMPLOYER**

The Employer first submits that the Union has not met its onus to prove a breach of the collective agreement because there is no active controversy. The Step 2 Reply from the Deputy Minister raised in the policy grievance has been addressed by changing Ms. Bernard's employee status from Term to indeterminate Relief. Ms. Round confirmed in her testimony that it is not her responsibility to perform the data entry tasks that form the basis for the various reports. It lies with the Union, the Employer argues, to adduce evidence of Ms. Bernard's employment history, including her date of hire which is not evident on any of the five reports, and to lead evidence as to the source and the timing of data entry that forms the basis of the five reports. Indeed, not all of the five reports, which were available to the Union were placed into evidence to support the Union's case.

The Employer further submits that the substance of the grievance is a moot issue. As noted in the *Welland (County) R.C. Separate School Board v O.E.C.T.A.* decision, the arbitrator, citing Justice Sopinka, points out at para. 17 that a tribunal may “...decline to decide a case which raises merely a hypothetical or abstract question.” The Employer notes that the matter of the Union not receiving some of the reports between 2013 and 2016 was not raised in either the current grievance or otherwise. The Union did have the ability to request and check for the existence of Term/Relief employees had they requested all the reports. Accordingly, the Employer maintains that the Union has not demonstrated that the issue concerning Term/Relief employees continues to occur nor will the furnishing of more data resolve the issue as the Union does not appear to trust the data which has been provided to date.

The Employer also submits that jurisdiction should be declined in this case as it is premature and may have a harmful effect on ongoing bargaining discussions. No practical purpose would be served by reviewing more data obtained from the same source. Negotiations could be derailed as a result of such a request. Accordingly, the Employer requests that jurisdiction over this matter be declined on the basis of prematurity and harmfulness.

As noted in *Royal Inland Hospital v. H.E.U., Local 180* (1987) CarswellBC 3119 at para. 31 the onus of proof rests primarily on the party who asserts the claim and they have failed to do so in this case.

For these reasons, the Employer submits that the grievance should be dismissed.

## DECISION

The focus of this grievance is whether the Employer has acted with due diligence and met its requirements under the collective agreement with respect to the hiring of Relief employees. The issue is important as, unlike Term employees, Relief employees hold indeterminate positions. The concern over whether there are Relief Employees who incorrectly appear on the books as Term/Relief employees surfaced as a result of a chance identification by the Union of Ms. Bernard as a Term/Relief employee on an unrelated grievance<sup>2</sup>.

The Employer acknowledged the mistake in the memorandum issued on behalf to the Deputy Minister of Human Resources on August 24, 2016. It conducted what it argues was a proper audit by checking for employees in Term/Relief positions in the month of May 2016 (where Ms. Bernard's name was identified) and June 2016. The Union argues that was an insufficient review and requests that the audit start from August 2013 when Ms. Bernard was hired.

This grievance is neither premature nor moot, as the Employer argues. The Union has properly identified that the rights and obligations of Relief Employees are set out in Appendix 1 and article 2.01(m)(v). It has been acknowledged in both the August 24, 2016 memorandum and the Step 2 Reply to the current grievance that there was an improper hiring of a Relief employee into a Term position, that the problem had been

---

<sup>2</sup> Once notified of the error, the Union paid for a "Call Out" advertisement to other Relief Employees in the *Yellowknifer* newspaper (September 16, 2016). The advertisement indicated that it was investigating grievances for those individuals who may have been classified as Term Relief employees.

corrected and that all staff were instructed that Relief employees could only be hired into indeterminate relief positions.

Article 14.01 requires the Employer, on a monthly basis, to provide information concerning each member of the Bargaining Unit. The Employer in my view has contravened article 14.01 by failing to provide the required bargaining unit information in the form of monthly reports (particularly for 2013 and 2014) which would show that there are no other Term/Relief employees in the system. The breach remains ongoing until it can be reasonably demonstrated that there are no other bargaining unit employees in a similar position to Ms. Bernard.

Much of the evidence adduced from the Union's side relates to the matter of the appropriate remedial relief. The Union submits that the Employer's "internal audit" of the Member Reports for May and June 2016, which was conducted in conjunction with the grievance of Ms. Bernard, does not provide a reasonable assurance that there are no other employees who find themselves in Term/Relief positions. The Union argues that it could have determined whether there were other Term/Relief employees on the books if it had been provided with all the Relief Worker Hours reports that date back to August 2013 (when Ms. Bernard was hired) and compare the names on those reports them with the names on the Member Reports.

The Union notes, however, that there were unfortunately two years of Relief Worker Hours Reports from 2013 and 2014 that were not provided to the Union as part of the monthly reports identifying member working relief hours. Nor is the Union able to

identify if there are any Term/Relief employees from a review of the Member Reports or Movement Reports for the period beginning August 2013.

I agree with the Union that a two-month internal audit falls short of the breadth of audit review required under the circumstances. A reasonable start date for such an inquiry is August 2013 given that is the date the mistake involving Ms. Bernard occurred. This should not prove to be an onerous task. As I understand it, it would be a matter of running a *Quare* in *PeopleSoft*, primarily using the Relief Worker Hours field.

There is one further matter which should be addressed. It concerns the ongoing discussions to consolidate the five Reports into one Report. Those meetings were ongoing at the time of the hearing and should certainly be encouraged into the future. The *Quare* to be conducted in *PeopleSoft* to ensure there are no other Term/Relief employees on the books should not disrupt those meetings, or for that matter, any ongoing bargaining negotiations.

## **CONCLUSION**

The grievance succeeds to the extent that there has been a breach of article 14.01 as a result of the Employer's failure to provide adequate information to the Union that there are no other Term/Relief employees in the system. The Employer is directed to conduct a supplementary audit to determine whether there are any further misclassifications of indeterminate Relief employees as Term/Relief employees. Similar to the earlier audit which took place under the direction of Ms. Round for the months of May and June 2016, the audit shall be conducted by initiating a *Quare* (search) using

the *PeopleSoft* software for the period starting August 2013 through to the date of this award.

It is understood that the information requested concerning Relief employees should be readily available using the *PeopleSoft* software and the Employer should not be required to conduct any manual searches of employee records to determine if there are any other Term/Relief employees.

As a last word, it should also be made clear that the mistake that occurred with Ms. Bernard may simply be the result of a one-off data entry error by a staff member. An audit going back to August 2013 will hopefully not uncover any other mistakes of this kind.

I will retain jurisdiction should any issues arise in the implementation of this award.



JOHN M. MOREAU, Q.C.

June 21, 2017