GNWT

Casual Misuse Policy Grievance GNWT Justice Dept #02-582

Casual Employment - Appointment

The Union of Northern Workers filed this grievance on behalf of 6 members who had been hired as casuals for a period longer than 4 months. Several of these employees, in fact, had worked more than 2 years as casuals. The Appendix A-5 of the collective agreement required that where the employer contemplates hiring for a period in excess of four months, the employee shall be appointed on a term basis.

Employer Argument:
Appointment has a specific definition under the *Public Service Act* and *Regulations*, such that only the Minister has the authority to appoint someone to a position. As such, the grievors had not been appointed but had received benefits to which they were entitled.

Union Argument:
The grievors had worked beyond 4 months, and were entitled to appointment. The Minister is bound by the terms of the collective agreement.

Decision:
The arbitrator found that the collective agreement, due to lack to definition of the words "appointed" or "appointment", contemplates a distinction between appointment pursuant to the *Public Service Act* and the words used in Appendix A 5. Thus, where rights are granted in the agreement that rely on appointment pursuant to the *Act*, those rights are not automatically granted to long serving casuals. However, long serving casuals, pursuant to A5, are entitled to all other rights in the agreement

Grievance Denied **Jolliffe, Tom**
November 19, 2004

IN THE MATTER OF AN EXPEDITED ARBITRATION

B E T W E E N:

GOVERNMENT OF THE NORTHWEST TERRITORIES
as represented by the Minister responsible
for the *Public Service Act*

Employer

-and-

THE UNION OF NORTHERN WORKERS

Union

Grievances re: Owen Macdonald, Jesse Kurszewski,
Margo Ziemann, Brad Brake, Rainer Semsch, Susie Wegernoski (#02-582)

MEMORANDUM

BEFORE:	Tom Jolliffe
FOR THE EMPLOYER:	Rodger Snow
FOR THE UNION:	Laurin Mair
HEARING LOCATION:	Yellowknife, NWT
HEARING COMMENCED AND REFERRED TO FORMAL ARBITRATION:	April 1, 2004

DATED MEMORANDUM ISSUED:
April 23, 2004

This arbitration matter (grievance file no. 02-582) was scheduled under the expedited arbitration procedure as set out in art. 37.27 of the collective agreement and was commenced in Yellowknife on April 1, 2004.

There was no *viva voce* testimony. The parties had filed an Agreed Statement of Facts in respect to the grievance as follows:

1. **At all material times, the Grievors were employed by the Department of Justice as Casuals at the River Ridge Young Offenders Facility in Fort Smith.**

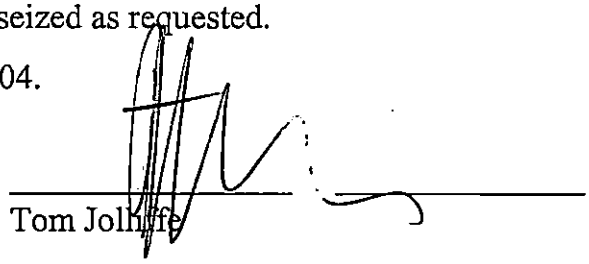
2. **Pursuant to A5.01 of the Collective Agreement, the Grievors became entitled to all provisions of the Union of Norther Workers Collective Agreement by reason of employment being greater than four months.**

3. **The Minister responsible for the Public Service appoints employees to the Public Service either by direct appointment or competition pursuant to Sections 17 and 18 of the *Public Service Act*.**

4. **The applicable article in the Collective Agreement between the Union of Northern Workers and the Minister Responsible for the Public Service is A5.01.**

Subsequent to presenting the agreed facts and relevant documentary materials concerning this matter and having noted the Union's position that it raised issues related to possible deemed appointments, and whether the collective agreement could have application to employees not appointed under the *Act*, the parties decided to refer the matter for a fuller hearing in the formal arbitration procedure. They further requested that I remain seized and are currently looking at setting the matter down for an expected two days of hearing. I look forward to proceeding on that basis, remaining seized as requested.

DATED this 23rd day of April, 2004.



Tom Jolliffe

IN THE MATTER OF AN ARBITRATION

BETWEEN:

THE UNION OF NORTHERN WORKERS

The Union

-and-

THE MINISTER RESPONSIBLE FOR THE PUBLIC SERVICE

The Employer

AWARD

Grievance re: **Misuse of Casuals (02-582)**

BEFORE:	Tom Jolliffe
FOR THE UNION:	Laurin Mair
FOR THE EMPLOYER:	Brad Patzer
HEARING LOCATION:	Yellowknife
HEARING DATE:	October 20, 2004

DATE AWARD ISSUED:
November 19, 2004

In its grievance document entitled "Misuse of Casuals (02-582)" filed on November 22, 2002, the Union grieved on behalf of employees Owen MacDonald, Jesse Kurszewski, Margo Ziemann, Brad Brake, Rainer Semsch and Susie Wegernoski that the Employer had violated the collective agreement by employing them as casuals working at the River Ridge Young Offender facility, as it was then, in Fort Smith for longer than four months without being appointed on a term basis as per Appendix A5. They wanted redress in the nature of being made whole, which here, the Union asserted, required that they be forthwith formally appointed to term positions. The Assistant Deputy Minister, Solicitor General, responded at the final level that the "appointment" reference contained in Appendix A5 requires that casual employees hired or extended in excess of four months become entitled to the provisions of the collective agreement on a term basis, which is not to say that they are "appointed" to the Public Service which would be in contravention of the *Public Service Act*. The Employer holds to the view that it is the *Act* which provides the Minister with the exclusive right to appoint persons to the Public Service either through competition or through direct appointment on recommendation from the executive counsel which does not include the grievors. Appendix A5 in its entirety reads as follows:

CASUAL EMPLOYEES

A5.01 The Employer shall hire casual employees for a period not to exceed four (4) months of continuous employment in any particular department, board or agency.

Where the Employer anticipates the period of temporary employment to be in excess of four (4) months, the employee shall be appointed on a term basis and shall be entitled to all provisions of the Collective Agreement from the first day of his/her employment.

A5.02 The Employer shall ensure that a series of casual employees will not be employed in lieu of establishing a full-time position or filling a vacant position.

The Employer shall consult with the Union before a former casual employee is rehired on a particular division if that former casual employee had worked in that division as a casual employee performing the same duties at any time within the 30 working days immediately preceding the date of rehire.

A5.03 A casual employee shall be entitled to the provisions of this Collective Agreement except as follows:

(a) Clause 2.01(f) "Continuous Employment" in respect of a casual employee shall include any period of employment with the Government of the Northwest Territories which has not been broken by more than thirty (30) working days. Provided always that there will be no systematic release and rehire of casuals into the same positions primarily as a means of avoiding the creation of indeterminate employment or paying wages or benefits associated therewith.

(b) The following Articles and Clauses contained in this Collective Agreement do not apply to casual employees:

(i) Article 18 - Entire Article except Clause 18.05
Article 20 - Sick Leave Clauses 20.09 and 20.10

(ii) Article 21 - Other Types of Leave - Clause 21.04

(iii) Article 33 - Lay-off

(iv) Article 39 - Superannuation

(v) Article 35 - Employee Performance Review and Employee Files

(vi) Article 48 - Entire Article

(c) The following Article in the Collective Agreement shall apply as follows:

(i) Article 16 - Designated Paid Holidays shall apply to

a casual employee after fifteen (15) calendar days of continuous employment.

A5.04 A casual employee shall upon commencement of employment be notified of the anticipated termination of his/her employment, and shall be provided a one day notice of lay-off for each week of continuous employment to a maximum of ten (10) days notice.

A5.05 Casual employees are entitled to be paid of a bi-weekly basis for services rendered at the appropriate pay range of the Casual Step set out in Appendix B.

It is necessary to note the "employee" definitions contained in art. 2.01(n), and in particular, the following:

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

(vi) 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.

Also, the definition language dealing with "employer", "probation", and "public service":

(o) "Employer" means the Government of the Northwest Territories as represented by the Minister responsible for the Public Service Act or his/her designate.

(aa) "Probation" means a period of six (6) months from the day upon which an employee is first appointed to or promoted within the

Public Service of the Northwest Territories except that for an employee first appointed to a position at Pay Level 13 or higher, it shall be a period of one (1) year. An employee who is appointed to a position which has the same duties, as his/her previous position shall not serve an additional probationary period. If an employee does not successfully complete his/her probationary period on transfer or promotion the Employer will make every reasonable effort to appoint him/her to a position comparable to the one from which he/she was transferred or promoted.

(cc) "Public Service" means the Public Service of the Northwest Territories, as defined in the Public Service Act.

Also the language from the *Public Service Act* dealing with appointments and collective agreements, and in particular the following:

16. Subject to subsections 16.1(1) and 17(2) and (3), the Minister has the exclusive right and authority to appoint persons to positions in the public service.

17.(1) The Minister may make appointments by competition to positions in the public service.

(2) Pursuant to the regulations, the Staffing Appeals Committee may hear an appeal of an appointment by competition under subsection (1).

(3) Where the Staffing Appeals Committee grants an appeal, the appointment made under subsection (1) shall be revoked by the Minister.

18. Where, in the opinion of the Minister, it is necessary, the Minister may, on the recommendation of the Executive Council, make appointments without competition to positions in the public service.

41.(1) In this section and sections 42 to 47,

"bargaining unit" means a unit of employees established by subsection 41(1.4) for the purpose of collective bargaining;

"collective agreement" means an agreement in writing entered into under this section between the Minister and its employees' association respecting terms and conditions of employment and related matters and shall be deemed to include any award made by an arbitrator;

41(6) A collective agreement made between the Minister and an employees' association is binding on the Government of the Northwest Territories, the employees' association and the members of the bargaining unit to which the collective agreement applies.

The parties filed an agreed statement of facts, as amended, in respect to the grievance as follows:

1. **At all material times, the Grievors were employed by the Department of Justice as Casuals at the River Ridge Young Offenders Facility in Fort Smith.**

2. **(As amended)**
   The grievors were employed for a period of time more than four (4) months on a casual basis.

3. **The Minister responsible for the Public Service appoints employees to the Public Service either by direct appointment or competition pursuant to Sections 17 and 18 of the *Public Service Act*.**

4. **The applicable article in the Collective Agreement between the Union of Northern Workers and the Minister Responsible for the Public Service is A5.01.**

The parties entered in evidence by consent sixteen previous successive collective agreements setting out the terms and conditions of employment existing between

1970 and 2002. These previous agreements all contemplated the Employer using casual employees for work of a temporary nature. From the 1972 contract onward, there existed an appendix dealing with casual employees which included the provision that they be hired for a period not to exceed four months and from 1976 contained the current pertinent language now numbered as Appendix 5.01 with its second paragraph indicating that where it was anticipated that the period of temporary employment would be in excess of four months, the employee was to be appointed on a term basis and entitled to all the contract provisions from the first day of employment.

In opening remarks, Mr. Maier on behalf of the Union, indicated that this grievance was filed on behalf of the six named bargaining unit members following the Union's receipt of this arbitrator's interim award in Brian Tessier dealing with preliminary issues, unreported June 26, 2002. I dealt there with the release on probation of a term employee who prior to accepting the formal appointment to the Public Service had worked continuously as a casual for some considerable period of time well in excess of four months. In my having noted the interplay between the *Public Service Act* and the collective agreement, and the fact that it must have been long since anticipated that the aggrieved employee's previous casual employment was going to last more than four months, I remarked as follows:

> **I accept that in looking at the grievor's status at the time of his dismissal, it is necessary for me to note the interplay between the collective agreement and the *Public Service Act*, although in these circumstances I do not see that the collective agreement equates periods of casual employment, which is to say continuous periods under Appendix A5.03 as opposed to broken and intermittent, as being tantamount to an employee at some point already having been appointed on a term basis to a position within the Public Service. Albeit, on one passing the gatepost of continuous employment he/she may well have created the right to be appointed, even to have created the opportunity to present a grievance based on not yet having been appointed as a violation of Appendix A5.01. The fact that the Employer after four months of continuous employment extends aspects of the collective agreement to casuals from which they are**

supposed to be excluded, suggests some knowledge of treading a fine line in not choosing to appoint them to term positions in a timely manner. However, in these circumstances, there never was a grievance filed with which I am seized while the grievor was working his continuous periods of casual employment that he should be considered at some point to have been appointed to a position within the Public Service, or seeking a direction for the Employer to have him duly appointed. Nor did he grieve on accepting the term appointment to the Public Service in July 2001 that he should by then already be considered as holding a term position and should not be subject to any probationary period attaching thereto. There was a clear indication in the offer letter of its existence to last six months, which letter he received some ten days prior to his starting in the position. It was not until the grievor's rejection on probation six weeks into his term employment that in addition to alleging in the grievance document that the dismissal was not in good faith and did not come after appropriate steps to alert and guide the grievor under the human resource manual, the Union also asserted that the grievor had been first appointed to the Public Service of the Northwest Territories when he entered casual employment in September 1999.

Without having any caselaw to the contrary and not seeing any language in the collective agreement to which I am referred strictly defining the appointment concept, although I note the "employee" definitions under article 2.01(n) of the collective agreement, the definition of "probation" under article 2.01(aa), also the *Public Service Act* sections 16 to 18, and to some extent the explanatory testimony from Mr. Chapman, I am unable to equate hiring into continuous periods of casual employment, or even over holding in casual employment so as to arguably create a right to be appointed, with "first appointed to....the Public Service of the Northwest Territories". The appointment itself obviously carries with it certain requirements under the *Public Service Act*. One would have to deem that somehow an appointment took place at some point during the casual employment relationship without there having been a grievance lodged questioning the grievor's understood status at any appropriate time, and even though he was eventually appointed to a term position in the Public Service by accepting the offer letter of June 22, 2001 in a manner understood at the time to be effective and carrying with it a six month probationary period. I conclude that the offer letter is valid and I cannot find that for purposes of this arbitration proceeding the grievor should be considered to have been appointed to the Public Service other than on the

date said to be effective in the employment letter which he accepted, namely July 2, 2002 and providing him with the status of "first appointed to,...the Public Service of the Northwest Territories" on that date, carrying with it a six month probationary period.

Shortly put, I do not see that casual employment in the context of this collective agreement constitutes an appointment to the Public Service.

Union witness Roxanna Baisi, is currently the Union's director of membership services through whom the Union introduced its uninterrupted series of collective agreements dating back to 1970. She testified that the Employer's use of casuals has remained an issue between the parties for many years, with a joint committee having been struck to attempt to work out the remaining differences. She was careful to point out that the Union currently is not in agreement with the way the Employer uses casuals, which presumably includes extending their periods of continuous service past four months without formally appointing them to Public Service positions. The Memorandum of Understanding included in the collective agreement dealing with setting up a joint committee to consider retention and usage of casuals, reads as follows:

The Employer and the Union acknowledge that casual employees are being used differently in different situations and in different departments.

The Employer and the Union agree to form a Joint Committee comprised of three representatives of the Union and three representatives of the Employer. This Joint Committee will meet, within 60 days following the date of the signing of this Collective Agreement, to review the Employer's practice with respect to recruitment, retention and usage of casual employees by the Employer. This will include consideration of:

- **(i) the use and definitions of different situations where casual employees are used;**
- **(ii) the extension of casual employment;**
- **(iii) conversion of casual employees into term employees;**
- **(iv) casual employment bypassing the competition process;**
- **(v) use of casuals rather than hiring indeterminate employees.**

This Joint Committee will make recommendations for approval by the Union and the Employer. Upon approval, the recommendations will be included in an Memorandum of Understanding or in the Employer's casual employment policy.

At conclusion of Ms. Baisi's evidence, Employer counsel, Mr. Patzer, advanced a non-suit application on the basis that the Union had not presented any *prima facie* case showing that the Employer was obligated to appoint casuals to Public Service positions, there being no evidence that at the time of hiring the Employer was anticipating that the period of temporary employment would be in excess of four months. Mr. Patzer said that there was not even any evidence that a series of casuals had been employed in lieu of establishing full-time positions, it having agreed to stipulate only that the aggrieved employees had worked for longer than four months on a casual basis. Mr. Maier on behalf of the Union, submitted that the necessary intent could be inferred from the admitted Employer action of using the six casuals past the four month cut-off date without any suitable explanation being yet provided. I ruled that on the admitted facts, there was at least sufficient evidence of a *prima facie* breach of Appendix A5.01 in that the aggrieved employees were not terminated after four months, with the real issue seeming to relate to determining their status thereafter or their ability to achieve another status. In my view, the factual situation admitted to exist reasonably called for some explanation from the Employer on how it dealt with their employment status from that point forward or even initially if they were known to be required for longer than four months, and whether its actions could be seen to comply with the collective agreement, all things considered. And if not, what is the appropriate remedy to apply?

The first witness called on behalf of the Employer, Blair Chapman, has been its manager of labour relations over the past year, following his being a senior labour relations officer for most of the previous seven years. He provided his understanding of the long time workings of Appendix A5.01 as managed by the Employer. In so doing, Mr. Chapman pointed out that casual employees are considered a significant component of the

work force for a variety of reasons, including the need to replace indeterminate, full-time and part-time employees during periods of extended leave for illness or other reasons on an "as and when" basis. They are hired in a variety of ways on the basis of individually submitted applications outside the formal competitive interview process contemplated under the *Public Service Act* for employees being appointed to the Public Service. It may be as simple as requiring short term coverage for someone who has quit his or her position, needed during the time when the Employer has not yet had the opportunity to complete the competition process before formally filling the vacancy by another indeterminate employee. It can be a relatively lengthy process in some circumstances, which requires the successful candidate to be assigned into a position as the new incumbent taking the position number attaching to the competition. In the meantime, the casual who has been hired to perform the duties may have gone through only an informal half hour interview, has been given no position number, no job description, and is paid as an employee without any home position. As stated by Mr. Chapman, this person is "not an incumbent of anything" although often encouraged to apply for the available position through the open competition process. Casual employees are paid at the listed casual step in Appendix B4 being a level below Step 1 and within a stipulated pay range determined by their points assessment. Mr. Chapman testified that during their first four months of employment, casual employees' access to the provisions of the collective agreement is governed by Appendix A5.03.

Further, Mr. Chapman testified, where workplace history shows the need to have people available on an ongoing basis to work positions for a time due to the absence of the incumbent, the situation could lead to extended periods of employment. He said that where it is anticipated at some point that the employment could last longer than four months, by the Employer's interpretation of Appendix A5.01, from the four month point onward, he or she is viewed as a term casual meaning that the person is seen to qualify for all the collective agreement entitlements as would a term employee appointed by the Minister under the *Public Service Act* but without this kind of appointment. The person is

given access to all those articles and clauses contained in the collective agreement said not to apply to casual employees by operation of art. A5.03. However, not having been appointed to a position under the *Public Service Act* he or she is are not deemed to be on probation at any point, probation being a statutory requirement under Sec. 20 of the *Act* for any employee appointed into a position from outside the Public Service. In short, coming within the entitlements and benefits' language of the collective agreement as if they were term employees, these term casuals, as they were called by Mr. Chapman, are not by reason of length of service appointed into a numbered Public Service position; they do not receive any job description related to a numbered position; and they are not placed on probation. They are also not entitled to file a job evaluation appeal, not having been appointed to an actual position in the Public Service and in that respect, he acknowledged, it can be seen that some entitlements, those which depend on being in a Public Service position, are not available. Some of them move into regularly scheduled hours with the change in status to term casual, and others not as they are satisfied with picking up shifts here and there on an as required basis as they have always done. Continuing to have no official job description, tied as it is to one having a numbered Public Service position, there are no formal job evaluations conducted. Further, he said, the Employer continues to apply A5.04 to these term casuals, in providing them one day of notice of lay-off for each week of continuous employment to a maximum of ten days, which it would have to do with someone appointed into a Public Service term position. At the same time, he said, someone working past one year traditionally has the severance option available as would a term position appointee at that point. Mr. Chapman also remarked briefly on the budgeting considerations which come into play, the situation being that casuals or term casuals are associated with short-term usage and are funded differently than Public Service positions whether term or indeterminate. While a facility director might look to his overall departmental budget with respect to hiring a summer student or an on-call casual, whether extended past four months or not, the process of gaining permission for creating a new Public Service position requires

specific budgetary approval unless made by Cabinet as a direct appointment.

In turning to his understanding of the specifics facing the six aggrieved employees at the River Ridge Young Offender Facility, Mr. Chapman said that it may well be they were expected to perform ongoing duties which varied from those of the youth officers appointed into a Public Service position, or it may have been a situation where management in anticipating that a competition would be held had some or other of them there to fill gaps in staffing while the process unfolded. Others may have been needed purely for relief staffing purposes and were not working a full schedule as would be the case with weekend coverage, or were working longer periods of relief in covering periods of illness or vacation. They constitute a pool of available employees, some of whom would have had jobs elsewhere for much of their working week. Mr. Chapman is, however, short of information respecting the actual ongoing circumstances relating to the six named grievors. For example, he is not advised how long grievor Brake has worked at the facility although suspecting that it might be as long as a year or two prior to the grievance, possibly longer, depending on whatever needs have surfaced. If such be the case, he would expect that Mr. Brake and others in his situation at the facility have received incremental pay increases from year to year, which is to say were treated as term employees except for the fact they were not appointed to a Public Service position under the *Act*. He would expect that Mr. Brake and the other grievors may well have been performing a significant portion of the duties of those appointed to Public Service positions at the facility, but not all their duties on a case by case basis. He also testified that over time there have been numerous discussions with the Union on how to deal with casuals passing by the four month employment mark, which has led to a joint committee being struck without any resolution as yet to change what he considers to be the longstanding practice of providing term employee entitlements after four months, and specifically not applying any period of probation at that point, which attaches only in a situation where the employee has been first appointed to or promoted within the Public Service as stipulated by definition in art.

2.01(aa), whether or not that be considered a benefit to the individual employee.

The other Employer witness to testify, Gloria Villebrun, joined the hearing by conference telephone call from her office at the River Ridge facility where she currently is the warden. Prior to September 2003, she was the manager of the same facility when it housed only young offenders, fourteen or more at a time, which is no longer the case. She has had a lengthy involvement with scheduling employees, including during the time period when the grievance was filed, when it housed only young offenders. It was a matter at that time of always having four bargaining unit persons on shift during the day, meaning three on floor and one working in the control room. On night shift it was usual to have only two bargaining unit employees working who would take turns in the control room. From her experience, it was usual for a time for casuals to be used only to cover annual, special or discretionary leave, and sick leave. However when the resident count was higher than usual, there would be additional work for some casuals as a matter of having sufficient staff available for supervision requirements. She said that generally the majority of casuals on staff were able to work throughout a given scheduled month, but not every shift. Later, when the facility converted to housing adult offenders, the resident count was reduced to as few as four or five, currently six, being inmates who were considered to be lower risk to flee than young offenders who require a higher degree of supervision as translated into available work hours. Certainly, she said, casuals worked more shifts when the facility housed young offenders than is the current situation. As it presently stands, she has scheduled five bargaining unit employees on one shift and four on the other to supervise six inmates. She also brings in casuals "as and when" needed. The facility currently employs eight casuals, two of which are students working weekends or the odd evening shift. The other six provide more flexibility in terms of the hours they are available, although two of them have outside jobs. She said that the last time someone was hired into a declared vacant position as an appointee to the Public Service was in December 2000.

Ms. Villebrun also testified that in her view the facility could not continue as

presently staffed without the availability of some casuals providing the wide range of relief and weekend coverage required and who have shown a willingness to fill in for absent indeterminate employees on a part-time or "as and when required" basis, with no promises given concerning the number of shifts they might ultimately work each month. Looking back at her practice over the years, she said, she has hired them in casual staffing actions for six months at a time in order that they could receive all the benefits of a term employee, so long as they had a class 4 driver's licence. She recalled that the start of Mr. Brake's employ went back to March 2000, as did Ms. Ziemann, while Mr. Semsch was hired at least as far back as 1996. The other grievors, she said, have all left their employment at the facility whether for reasons of going back to school, or resigning to take a position at another facility, or simply retiring. Two provided notice, one did not, leaving me with the impression that it was left up to them when to terminate the employment relationship.

The positions taken by the parties' respective counsel in argument are relatively straight forward. Mr. Maier on behalf of the Union asserted that the language Appendix A5 is clear and unambiguous in requiring that the Employer not hire casuals for a period longer than four months of continuous employment within any particular department, and where it anticipates its period of temporary employment is going to be in excess of four months must appoint the individual on a term basis and to be entitled to all provisions of the collective agreement from the first day of his/her employment. Whether or not it can be said that the first four months of casual employment at the very least constitute a threshold time period after which the term appointment should be made, which here would have easily applied to the grieving employees, the Union relies in Ms. Villebrun's testimony to the effect that as facility manager she anticipated from outset that their employment was going to last longer than four months as it was her usual practice to hire them initially for six months in order for them to qualify for term benefits. Indeed by the time of the grievance being filed in November 2002, at least three of them still there today had been working in excess of two years. Further, in one sifting through the evidence

of Mr. Chapman, it can be noted that not all term entitlements have been applied, for example, there being no probationary period attached as would be the case were they formally appointed. It would seem, he said, that the Employer has created a type of employment status unknown to the collective bargaining relationship, namely a casual term employee, which is found nowhere in the definitions' section. Some form of actual appointment is required, as dictated by art. 5.01, there being a difference by definition contained in art. 2.01(n) between a "casual employee" and a "term employee". He said that the situation described should require an appointment to an actual job as amounting to a "regularization of some nature" relative to the term employment concept and not just slipping workers into some blended status situation whether or not it wants to continue using them on-call or part-time, which is to say working less than full-time hours, which the Union does not dispute at this juncture. At the least, the Union wants these individuals to be able to say that they have passed any probationary period which might be applicable, whatever job they are doing on an ongoing basis. It requires some resolution of this issue in the short term while it awaits resolution of whatever issues have been taken before the joint committee contemplated by the MOU.

Mr. Patzer submitted that whether or not there are several ongoing issues relating to casuals which are now before the joint committee contemplated by the MOU, the immediate issue was whether appointments have to be made, and in what fashion, pursuant to Appendix A5. It has been previously remarked upon by this arbitrator in Tessier where I was unable to equate hiring into continuous periods of casual employment, even over holding casual employment, with "first appointed to....the Public Service of the Northwest Territories", whatever the arguable right to be appointed in some fashion at that point. Further, he said, arbitrator Chertkow many years earlier in the Commissioner of the Northwest Territories and the Northwest Territories Public Service Association (Status of Casual Employees' Grievance), unreported November 10, 1982, examined and remarked upon the identical language now contained at A5.01 except for the change in reference from

"any particular division or department" to "any particular department, board or agency" in line with Employer's current divisions. In that case, as I now read Mr. Chertkow's award, the issue was whether the Employer had breached the applicable appendicized language when it employed a series of casual employees at a correctional centre in lieu of establishing full-time positions or filling vacant positions with term or indeterminate employees. The evidence indicated that some employees were maintaining their casual status past four months. His analysis bears repeating at this point as taken from pages 6 through 8. It reads as follows:

> **It would appear on reading the first sentence of Appendix A7.01 (now A5.01), that it is a mandatory provision barring the Employer from hiring any casual employee for a period of more than four months. However, Appendix A7.02 (now worded as first sentence of A5.02) which requires the Employer to ensure that a series of casual employees will not be employed in lieu of establishing a full time position or filling a vacant position, seems to indicate that there are circumstances where a casual employee could be given continuous employment of more than four months provided that it was not done for the purpose set out in A7.02. The second sentence in A7.01 also appears to modify the structures of the first sentence because, by implication it recognizes a situation where a casual employee might be employed for a longer period.** ***If it could have been anticipated by the Employer that the period of temporary employee would be in excess of four months, then the casual employee must be appointed for a term certain with all benefits under the Collective Agreement retroactive to his T.O.S. date. One would have thought that if the first sentence was to have the strict application as appears on its surface, then the Employer would have been required to appoint an employee on a term basis who might be required for work for more than four months, whether it anticipated at outset that the employment could exceed four months, or not.***
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> ***After carefully considering the provisions in Appendix A7.01 and A7.02, and in an effort to glean the real intention of the parties as expressed in the wording of these provisions, it is my view that the Employer cannot under A7.01, at the commencement of the hiring of any casual employee, knowingly hire that employee for a period in excess of four months of continuous employment without offering a term appointment. Where,***

however, the Employer cannot reasonably anticipate that the period of employment will exceed four months, nothing in A7.01, in my judgment, bars the Employer from either hiring the casual employee in the first instance or continuing his or her employment after four months, provided that, the full benefits of the Collective Agreement accrue to the employee after four months of employment.

As to Appendix A7.02, the question of whether or not the Employer hired a series of casual employees in lieu of establishing a full time position or filling a vacant position, as a matter of fact which would have to be established in each case. The Association bears the onus when alleging a breach of Appendix A7.02, of establishing its case on a preponderance of the evidence in any given fact situation.

In respect to the application of Appendix A7.01 and A7.02 to the facts as adduced in evidence at this hearing, *I am satisfied on the evidence that the Employer did not, at the commencement of hiring of the casual employees during the period in question, do so with the intent of continuing their employment for more than four months.* The evidence is clear, in my judgment, that the Employer made every reasonable effort to fill the vacant C.O.I positions by an extensive recruitment program in the north and in the south of Canada. Had it been successful in the normal course of its first recruitment effort in the summer of 1980, then the vacancies would have been filled by other than casual employees. My conclusion on the evidence is that the Employer could not reasonably have anticipated that both the first and second recruitment efforts would be unsuccessful. I therefore find that the Employer did not have the original intention of hiring casual employees for more than four months nor could it have anticipated that such employment would continue for more than four months and thus, it is not in breach of the provisions of Appendix A7.01. (Italics added)

Arbitrator Chertkow found that there was no reasonable anticipation at time of hire that the employment would last longer than four months. He reasoned that there was no language which barred the Employer from continuing a casual employee's employment after four months, providing that the contractual benefits "accrue" after that time. In such a case, benefits need not be made retroactive to the time of one having been taken on strength, but only after being employed for a period of four months. This is the approach,

if one were to encapsulate the testimony of Mr. Chapman, that the Employer was currently utilizing with respect to casual employees still employed after four months. Mr. Patzer submitted that in looking to understand the Employer's obligations in light of the two arbitration awards (Chertkow and Jolliffe), there is no indication that an arbitrator exercising jurisdiction within the confines of this collective agreement necessarily has any authority to create a term position within the meaning of the *Public Service Act* which provides for the Minister to have the exclusive right and authority to make such appointment. Further, he submitted that the fact that the parties have operated over at least the last twenty years through successive identically worded collective agreement on the basis described by Mr. Chapman, which is to say affording casual employees after four months the entitlements associated with holding a term position, raises the issue of *estoppel*. The current process is further solidified by their choice of convening a joint committee "to review the Employer's practices with respect to recruitment, retention and usages of casual employees by the Employer", then to make recommendations which upon approval will be included by memorandum or in the Employer's casual employment policy.

In reply, Mr. Maier pointed to the evidence of Ms. Villebrun to the effect, he said, that she easily anticipated at point of hire a working relationship which would be in excess of four months, as indeed proved to be the case with these grievors, although only three of them remain employed at this point. There was no evidence that the Employer's practice elsewhere anticipated more than four months' employment tenure at time of hire.

In now having recapitulated the evidence and argument from the parties' respective counsel, it is appropriate to note that although the Union has characterized the issue in this matter as "abuse of casuals", the six named grievors were all employed at the same location, apparently pursuant to the same circumstances and likely on the same basis as described by the facility's manager, Ms. Villebrun, in her testimony. This award, whether or not one would like to apply it for purposes of some broader interpretive meaning must center on the employment situation in which the grievors found themselves and what can be

taken from Appendix A5, and any other relevant provisions of the collective agreement, as applicable to their situation. In determining this matter as I must do, I should remain consistent with the previous two awards authored by Mr. Chertkow (1982) and by myself (2002), in so far as they can be seen to set out applicable principles. Firstly, and crucially, I point to the fact of Ms. Villebrun having readily admitted to understanding at the point of hiring her long-term casuals, which I take to include the grievors, that the employment relationship was going to last longer than four months. This was her uncontradicted testimony respecting her dealing with casuals at her facility at point of hire, including the aggrieved employees. Her testimony easily places the Employer within the "anticipates" language of the second sentence of Appendix A5.01. It requires that employees shall be appointed on a term basis, to be entitled to all provisions of the collective agreement from the first day of his/her employment, where it is anticipated that the period of temporary employment will be in excess of four months. In arbitrator Chertkow's award, he was careful to distinguish the factual circumstances before him from such a situation, having pointed out in the portion of his award which I have italicized, that it does not rest with the Employer at commencement of hiring of any casual employee to knowingly hire that employee for continuous employment of more than four months without offering term employment, which, on Ms. Villebrun's evidence is a statement with which she was attempting to comply by hiring the grievors for at least six months at a time in order that they would qualify for the same entitlements as would a term employee from outset. There is no evidence to the contrary with respect to the grievors, with the real issue materializing in terms of what is meant by the second paragraph of A5.01 relative to their situation.

In the Chertkow award, the learned arbitrator ultimately determined that the Employer could not reasonably have anticipated, had no original intention, hiring the casual employees for more than four months, nor was it intending on hiring a series of casual employees in lieu of establishing a full-time position or filling a vacant position, leading to his finding no breach of the Appendix. In the Jolliffe award, I accepted that for a casual to

work past four months was not tantamount to an appointment to the Public Service of the Northwest Territories, whether or not such a situation at least "arguably" created a right to be appointed, leaving one in appropriate circumstances to consider the nature of such appointment given that Section 16 of the *Public Service Act*, subject to other sections which have no applicability here, provides the Minister with "the exclusive right and authority to appoint persons to positions in the public service".

In this regard, I observe that whatever the nature of such appointment contemplated by Appendix A5.01, one's employment at that point must be consistent with the definition of a "term employee" within the collective agreement with reliance on art. 2.01(n)(vi). Broadly worded, as it is, it makes no reference to the *Public Service Act* or the appointment requirements contained therein. Further, one might consider this language to be juxtaposed against the definition of "probation" under 2.01(aa) which clearly references only an appointment or promotion within the Public Service of the Northwest Territories being the situation which requires a period of probation following one's appointment unless the position has the same duties as the previous position held. It would seem that the definition language is consistent with the parties for some time having a collectively bargained relationship which contemplates that there can be term employees or long term indeterminate employees appointed by the Minister into a position within the Public Service, while other term employees can only take on an "appointed on a term basis" status as contemplated by Appendix A5.01 and consistent with art. 2.01(n)(vi). This latter group, it seems, need not be appointed to positions within the Public Service under the *Act* which is restrictive to the degree of providing that jurisdiction and authority solely to the Minister, there being no suggestion therein that it also rests with an arbitrator despite the acknowledgment in Section 41(6) that the collective agreement is binding on the Government. Frankly, given the exclusivity set out in Section 16, I see no means of requiring the Minister to appoint to a position within the Public Service, and despite it being apparent that there are term positions within the Public Service to which the Minister makes

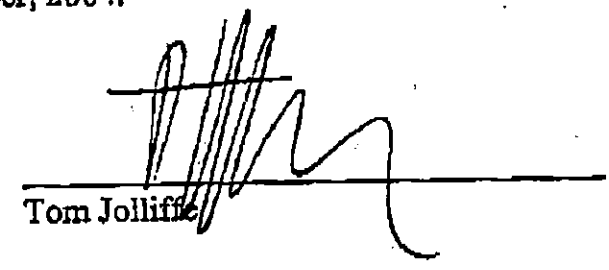
the appointment, those kinds of appointments under the *Act* being subject to "probation" as defined by art. 2.01(aa) in the collective agreement.

On the whole then, I conclude that the aggrieved employees in question were entitled from outset of their employment to have been appointed on a term basis, at least for purposes of the collective agreement, and entitled to all its provisions from the first day of his or her employment. This, I conclude, could not have included a probationary period as the collective agreement hinges that entitlement/benefit/obligation solely on an appointment or promotion within the Public Service which, as I have said, I cannot find that Appendix A5.01 covers. In that regard, it is interesting to note that the term "appointed" or "appoint" as used either in the *Public Service Act*, or in Appendix A5.01, is not itself separately defined in art. 2.01. I conclude that this collectively bargained relationship contemplates that there can be term employees appointed by the Minister into positions within the Public Service and other employees who take on that term status by operation of Appendix A5.01, which sets out requirements for their being "appointed on a term basis", but without dictating appointments to positions within the Public Service as contemplated by the *Act*. Once applicable, they are still entitled to all the provisions of the collective agreement from the first day of his or her employment. In the current circumstances, with Mr. Chapman realistically having to testify in generalities with respect to the situation facing casual employees who over-hold past four months, thereafter considered entitled to all provisions of the collective agreement from that point forward, excepting probation, his approach was seeking to be in accordance with Mr. Chertkow's award. However, Ms. Villebrun's testimony discloses that she hired casuals through a staffing action which fully anticipated from outset that they would be working for at least six months in order for them to receive all their benefits. At this point, I am assuming that the six grievors fell into that category and may well have been treated as term employees from outset with respect to their entitlements under the collective agreement. However, I am not sure that this was necessarily the case. Accordingly, at this point I propose to deal with the matter as a declaratory award indicating

that the Employer could have met its obligations under Appendix A5.01 towards the six grievors, it having been anticipated that their periods of temporary employment at the point of hiring would be in excess of four months whether or not the hiring was precipitated by a casual staffing action, by having provided them with entitlement to all provisions of the collective agreement from the first day of his or her employment. For purposes of Appendix A5 they are to be considered as holding a term appointment under the collective agreement from outset. Such entitlement is also controlled by reference to the wording of some particular provisions. By example, no period of probation can apply as it requires by definition that one's appointment or promotion within the Public Service must occur which has not occurred here. By further example, while the *Public Service Superannuation Act* is a term or condition of employment under art. 39, the *Act* also has length of employment requirements for it's terms to apply.

At this point I will remain seized over whether the individual grievors have received their entitlements from the first day of his or her employment, and any remaining issues arising therefrom. In light of my conclusion it is not necessary that I deal with the Employer's estoppel position concerning appointment to the Public Service and should refrain from doing so.

DATED this 19th day of November, 2004.



Tom Jolliffe