IN THE MATTER OF A GRIEVANCE ARBITRATION

BETWEEN:

GOVERNMENT OF THE NORTHWEST TERRITORIES
(REFERRED TO AS THE “EMPLOYER” OR “GNT”)

AND:

UNION OF NORTHERN WORKERS (PUBLIC SERVICE ALLIANCE OF CANADA)
(REFERRED TO AS THE “UNION”)

GRIEVANCE # 12-G-01496

Use of Casual Employees at Sutherland House

ARBITRATOR: Allen Ponak

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AWARD OF THE ARBITRATOR

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For the Union: Michael Penner

For the Employer: Tricia Ralph

Hearing at Yellowknife, Northwest Territories
December 9, 10 & 11, 2014

Award Issued: April 18, 2015.

**ISSUE**

Sutherland House is a 10-bed women's shelter located in Fort Smith which traditionally has been operated by non-government third parties. In 2008, the organization that had been operating Sutherland House gave notice that it could no longer operate the shelter. The territorial government took over the operation of Sutherland House and spent the following six years running it while seeking a non-government operator. The YWCA signed a contract to operate Sutherland House in 2014.

The grievance arises from the use of casual employees in the period during which the government was directly responsible for Sutherland House. The Union filed a group grievance in August 2012 alleging that "the Employer has violated the Collective Agreement by using a series of casuals in lieu of establishing full time positions in Sutherland House" (exhibit 2-20). Attached to the grievance was an addendum listing seven allegations with respect to the grievance. At the arbitration hearing, the Union withdrew six of the addendum allegations, maintaining its position only on the first item in the addendum (violation of the contract and/or statute).

The Employer denied the grievance, taking the position that it had not violated the collective agreement through its use of casual employees while it sought a non-government operator for Sutherland House. The Employer submitted that it had two choices – either use casuals or close the facility. It chose to keep Sutherland House open, the right decision, and used casual employees in a way that was permitted by the collective agreement. The Employer also advanced two preliminary objections regarding the scope of the grievance. First, it argued that the Union's failure to provide particulars about any of the items listed in the addendum

rendered the allegations set out in the entire addendum non-arbitrable. Second, the Employer objected to the inclusion of article A5.01 in the arbitration hearing, arguing that this provision had not been raised either directly or indirectly in the grievance. Only article A5.02 was within the scope of the grievance according to the Employer. The Union disagreed, submitting that the grievance covered both articles A5.01 and A5.02 of Appendix A of the collective agreement. I ruled that I would decide the scope of the grievance in my award; the parties then called evidence with respect to all matters in dispute.

**COLLECTIVE AGREEMENT**

ARTICLE 2
INTERPRETATION AND DEFINITIONS

(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; and

(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.

APPENDIX A5
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 that 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 the 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.

An employee will not be hired as a casual employee to perform the same job as the employee performs in the employee's position. Any hours in excess of or outside of the employee's regularly scheduled hours of work in the same job shall be paid as overtime.

An employee who is on leave for greater than 14 calendar days may accept casual employment within the same Authority provided the employee is not performing the tasks within the same facility as their substantive position.

The Employer shall consult with the Union before a former casual employee is rehired in 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.

## UNION GRIEVANCE

**Claim**

The Union of Northern Workers hereby files a grievance on behalf of employees of Sutherland House under authority of Article 37 of the Collective Agreement, any other related Articles of the Collective Agreement, pertinent legislation, and/or regulations, policies and past practices.

**Request**

1. A declaration that the Employer has misinterpreted, misapplied, and/or violated the Collective Agreement.

2. To be made whole in all respects without restriction, including being awarded interest on monies owing or made part of the redress, and further to be awarded monetary damages.

3. Any other remedy that is deemed just to address the concerns that present and as are disclosed through the evidence the Union will adduce at any stage of the grievance process, including arbitration.

4. Cease the practice of using casuals in order to avoid offering full-time positions.

**Details**

The Union alleges that the Employer has violated the Collective Agreement by using a series of casuals in lieu of establishing full time positions at Sutherland House.

The details of concern to the Union also include matters enumerated on the addendum to the grievance form.

**Addendum to Grievance Form**

The details of fact to be advanced through this grievance include, to the extent disclosed through the evidence to be tendered at the grievance hearing or arbitration, the following:

1. The Employer's action or treatment of the Grievor is contrary to the provisions of the Collective Agreement and/or the legislation that applies to this territory.

2. The Employer has failed to observe the discipline process or the grievance procedure in the manner prescribed in the Collective Agreement, or in the Human Resources Manual, or in past practice and procedure, and/or is contrary to the rules of natural justice.

3. The Employer has by its actions violated occupational health and safety protocol as set out in policy, practice, or legislation.

4. The Employer has failed in its dealing with the Grievor to observe the rights of the Union in terms of notice, representational rights, concurrence, or consent to a course of action.

5. The Employer's action is unwarranted, untimely, and to the prejudice of the Grievor.

6. The Employer has failed to provide full disclosure to the Grievor and not permitted the Grievor the ability to make a full answer, with or without the assistance of the Union.

7. The Employer has failed in its obligation to accommodate the Grievor and has thereby discriminated against the Grievor contrary to the Collective Agreement and/or the legislation applicable to the Northwest Territories.

## EVIDENCE

The Union called two witnesses: Ms. Lynette Blesse, a shelter worker at Sutherland House, and Ms. Roxanna Baisi, Director of Member Services for the Union. Two witnesses testified on behalf of the Employer: Mr. Blair Chapman, Director of Administration, GNT, and Ms. Phyllis Mawdsley, CEO, Fort Smith Health and Social Authority. Five exhibits were tendered at the outset and during the course of the hearing:

1. Collective agreement, expiring March 31, 2016.

2. Binder of documents, Tabs 1 - 22.

3. Letter from S. Bassi-Kellett, Deputy Minister, GNT, to T. Parsons, President, UNW, July 16, 2013.

4. Letter to S. Bassi-Kellett, Deputy Minister, GNT, from T. Parsons, President, UNW, August 12, 2013.

5. Requests for Proposals, Management and Operation of Sutherland House, February 7, 2008 - March 24, 2014.

Very little of the material facts were in dispute. Sutherland House is a Fort Smith women's shelter that provides housing and refuge for women in crisis. Like other women's shelters in the Northwest Territories, Sutherland House was expected to be run by a non-government organization (or "NGO") under a contract with the territorial government. Ms. Mawdsley, who was Director of Fort Smith Social Programs at the material time, explained that under this arrangement employees of the shelter would be employees of the NGO rather than government employees. Sutherland House was operated by an the YWCA until 2008, but the YWCA's priorities changed and it declined to renew its contract to operate Sutherland House. Ms. Mawdsley testified that rather than let Sutherland House close down, the government made the decision to operate the facility on a temporary basis while it looked for an NGO to assume responsibility. In her view, had the government not taken over operations, Sutherland House would have had to close.

It was not until 2014 that the government was able to relinquish its operational control of Sutherland House. Entered into evidence were twelve Request for Proposals issued by the territorial government between 2008 and 2014 to recruit an NGO to manage and operate Sutherland House (exhibit 5). Ms. Mawdsley stated that she and other senior administrators

were optimistic that an operator would eventually be found, but also looked at other options. These included establishing a local board or society in Fort Smith to take over Sutherland House, working closely with the YWCA to see if it could re-assume operating responsibility, and developing a business case, complete with budget, organizational structure (exhibit 2-18), and job descriptions (exhibit 2-19), for the government itself to absorb Sutherland House into the public service. Ms. Mawdsley said that absorption of Sutherland House by the government never materialized because of financial constraints. However, efforts to attract the YWCA eventually came to fruition and it took over Sutherland House operations in 2014. Sutherland House staff now are employed by the YWCA.

In the meantime, Ms. Mawdsley testified, Sutherland House had to be staffed. Because the government's operation of Sutherland House was seen as temporary, casual employees were hired on four month contracts. When the four month term of each contract ended, the employees were re-hired for another four month casual contract. After the first four months, each casual employee received the same collective agreement benefits as regular employees, backdated to the first day of casual employment. After six months, casual employees became eligible for the pension plan.

The position of the GNT is set out in its response to the grievance on October 23, 2012 as follows (exhibit 2-21):

> Historically, Sutherland House has been operated by a non-government organization (NGO). The Authority [Fort Smith Health and Social Services Authority] assumed the operations of Sutherland House on an interim basis while it sought an NGO to once again assume this role. The Employer has issued a number of Requests for Proposals (RFP's) in this regard and has unfortunately, received no response to date from any individual(s) or organizations in terms of assuming responsibilities for this operation.
>
> In an effort to keep Sutherland House operational, the Authority offered casual employment contracts to individuals until such time as an NGO could be found to manage the day-to-day obligations of this facility on a long term basis. It was never the intention of

> the Authority to assume permanent responsibility of Sutherland House. With that said, given the difficulty the Employer has experienced in finding a NGO, the Authority is preparing a submission to absorb Sutherland House into its core operations effective April 1, 2013.
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> Provided the submission is approved, the Authority will then have the ability to staff the facility on an indeterminate basis. Until such time however, the Employer is not a position to offer full-time indeterminate employment.

In cross-examination, Ms. Mawdsley stated that the GNT Department of Human Resources handled the staffing and the casual contracts. She was unable to say why there were gaps of several days between the end of one casual contract and the start of the next contract for the same employee. When asked why Sutherland House casual employees were not put into full time, indeterminate positions, Ms. Mawdsley responded that no full time positions existed within the public service into which Sutherland House employees could be placed and there was no budget to create such positions.

Mr. Chapman was Manager, Human Resources, with the territorial government at the material time. He testified that under the *Public Service Act* the only way that a casual employee can become a full time, or indeterminate, employee is through a formal open job competition into a numbered position or a direct appointment through cabinet. All indeterminate appointments must be into funded numbered positions. In contrast, according to Mr. Chapman, casual employees can be hired through a much less formal process for up to four month at a time under the collective agreement. Casual employees can be used in situations of sudden and unexpected need, to cover absences or illness, and for specific projects.

Mr. Chapman had limited knowledge of the details of Sutherland House's use of casuals between 2008 and 2014 or the circumstances of particular employees. He agreed that article A5.02 precluded using a series of casual employees instead of a full time employee, but added

that the specific context of any given situation would determine how that provision was implemented. He was referred to the definition of casual and term employee under article 2.01(m) of the collective agreement. According to Mr. Chapman, a casual employee who works longer than four months still remains a casual employee but is treated as a term employee without a numbered position within the public service. Such an employee will receive the benefits specified under the collective agreement and is eligible for the pension plan if he or she works at least 22 hours per week. He indicated that the GNT followed an arbitration decision of Thomas Jolliffe in regard to the term status of casual employees: *Northwest Territories and Union of Northern Workers [Misuse of Casuals]* (2004) CLAD No. 542 (Jolliffe). As well, since a casual employee cannot be hired for more than one year, a break in service is built into the casual contract renewal process. In his view, these short service breaks did not have any pension implications.

Ms. Blesse was hired as a casual shelter worker in Sutherland House in May 2010 by the GNT (exhibit 2-1). She subsequently received 14 more casual contracts (exhibits 2-2 to 2-15) until October 2014. At that time the YWCA assumed operational control of the facility and she became an employee of the YWCA. While some of the casual contracts are contiguous, with the subsequent contract starting the day after the previous one ended, others have small breaks of several days between the end date of the expiring contract and the beginning of the next contract. The contracts all specify a start date, end date, and termination date, the termination date being the day after the end date. For example, Ms. Blesse's third casual contract began December 1, 2010 with an end date of March 31, 2011 and a termination date of April 1, 2011 (exhibit 2-3). Her next casual contract had a start date of April 1, 2011 (exhibit 2-4). After the first contract, Ms. Blesse was placed in pay range 1, gradually moving up the

step pay grid with each contract. Her hours increased from around 20 hours per week at the outset to 40 hours per week by the third casual contract. In August 2013, her hours were reduced to “as needed” apparently because of her sick leave record.

Ms. Blesse testified that no one ever explained the contracts’ pay grades, her benefit entitlement, or why some contracts required her to take a few days off before the start of the next contract. She stated that she accepted the casual contracts because of the very limited employment options in Fort Smith and because she liked the work at Sutherland House. The contracts also provided sick leave, paid vacations, special leave, and eventually pension coverage. Benefits simply were carried over from one contract to another and she never received a Record of Employment at the end of each contract.

Ms. Blesse recalled a staff meeting where managers were asked about why employees could not be hired on an indeterminate basis. She said the staff were told that the casual contracts would continue until an NGO took over the operations of Sutherland House. She stated that the casual contracts increased her stress level because of the uncertainty over renewal.

The final witness was Ms. Baisi who testified that the grievance was filed because casual contracts were used for a period of six years. The grievance was filed by the Union’s Fort Smith representative and used a standard template with language common to all grievances. In the “Request” section only Item # 4 was specific to the current grievance. She agreed that the wording in the “Details” section mirrors article A5.02 of the collective agreement. In her view, article A5.01 was raised through Requests 2 & 3 and the broad wording of the claim section. She acknowledged that wording specific to article A5.01 was not included in the grievance and that the “grievance was not perfectly worded”. Ms. Baisi stated that it was

the Union's intention that the grievance cover both A5.01 and A5.02. The addendum also used standard (or boilerplate) language to preclude the Employer from objecting to the introduction of evidence that was discovered after the submission to arbitration.

With respect to the merits of the grievance, Ms. Baisi testified that Ms. Blesse and other casuals like her should have been appointed to a numbered term position in the public service after working as a casual employee for more than four months. Under article A5.02, Ms. Baisi stated that casual employees cannot be used to avoid creating a full time position - in her opinion, that is precisely what occurred with Sutherland House.

In cross-examination, Ms. Baisi conceded that there was no language in the grievance that mirrored article A5.01 and no language suggesting that Sutherland House casual employees were not receiving the benefits to which they were entitled under the collective agreement. She agreed that the Employer had requested particulars but could not say what had been provided since she was not directly involved in the processing of the grievance; it had been handled by the local representative in Fort Smith.

**UNION ARGUMENT**

The Union argued that the grievance was clearly about the use of casual employees at Sutherland House and it was obvious from the evidence that both articles A5.01 & A5.02 were engaged. It acknowledged that the wording of the grievance was more specific to A5.02 but took the position that a liberal and flexible interpretation of the grievance document was appropriate. The Union also submitted that there was no evidence of prejudice to the Employer of having article A5.01 addressed in the arbitration.

In the Union's submission the proper compensation of casual employees under article A5.01 had been a longstanding issue between the parties and that the interests of labour relations would be well served by having the award address this issue. The Union pointed to a recent arbitration award between the two parties: *Government of the Northwest Territories and Union of Northern Workers [Ferry Service]* (2013) Unreported (Holden). Article A5.01 had not been expressly mentioned in the grievance document, but the arbitrator still found that the Union was entitled to seek relief for the GNT's failure to provide contractual benefits to casual employees. The Union argued that it was looking for the same remedy pursuant to A5.01 in the current case and suggested that a careful review of Ms. Blesse's term contracts and her evidence would show that she was not receiving the term benefits to which she was entitled. It asked that employment records be assessed and that employees receive any compensation to which they had been rightfully entitled: *Government of the Northwest Territories and Union of Northern Workers [Holiday Pay]* (2007) NWTLAA No. 1 (Jolliffe) and *Government of the Northwest Territories and Union of Northern Workers [Pay Step]* (2009) NWTLAA No. 2 (Moreau). The Union made it clear that it was not seeking actual appointments to the public service.

With respect to article A5.02, the Union argued that the language was very clear that a series of casual contracts could not be used as a way of avoiding the establishment of full time positions. The evidence was uncontroverted, the Union contended, that the Employer had in fact used multiple casual contracts rather than create full time positions. The reasonableness of its approach was not relevant; according to the Union the language of A5.02 was mandatory and unmodified by words such as "reasonable", contrary to use of the words "reasonable" or "reasonable effort" elsewhere in the collective agreement. In the case of Ms. Blesse, she was

given a series of casual contracts over a four year period. Even if the GNT's direct operation of Sutherland House was meant to be temporary, that is not what in fact occurred. There were repeated violations of article A5.02 as a result.

The Union disagreed that the Employer was faced with only two options – use casuals or close Sutherland House. Characterizing this approach as a "false dichotomy", it was submitted that the Employer never considered that the continued use of casuals violated A5.02. According to the Union, the evidence showed that the GNT had the option of creating indeterminate positions to staff Sutherland House but chose not to do so. It requested a declaration that the Employer had breached article A5.02. In support of this position, the Union cited: *Commissioner of the Northwest Territories and Northwest Territories Public Service Association [Casual Employees]* (1982) Unreported (Chertkow).

**EMPLOYER ARGUMENT**

The Employer objected to the inclusion of article A5.01 or any of the addendum items as part of the grievance. With respect to the addendum, it was noted that the Employer had requested but never received any particulars. The boilerplate language of the addendum items was vague and sweeping, and in the absence of particulars, the Employer submitted that the addendum could not be used to bootstrap article A5.01.

The Employer characterized article A5.01 as distinct from article A5.02. It was argued that article A5.01 was not referenced at all in the grievance documents either expressly or, as was the case for article A5.02, through language that made it plain that article A5.01 was being grieved. No particulars relevant to article A5.01 were provided, despite requests from the Employer. Thus, article A5.01 was being raised for the first time through the arbitration hearing,

an approach that rendered it inarbitrable: *Government of the Northwest Territories and Union of Northern Workers* (2011) NWTSC 32.

With respect to the merits of the article A5.02 grievance, the Employer argued that full time or indeterminate jobs can only be created through the procedures in the *Public Service Act*. An arbitrator lacks the authority, according to the Employer, to force the GNT to create positions: *Minister Responsible for the Public Service Act and the Union of Northern Workers [Tessier]* (2002) Unreported (Jolliffe); and *Government of the Northwest Territories and Union of Northern Workers [Misuse of Casuals]* (2004) CLAD No. 542 (Jolliffe). In the current case, the Employer submitted that the evidence showed that the GNT had acted in good faith. Faced with the impending closure of a women's shelter, the GNT had kept Sutherland House open by operating the facility itself for what it expected to be a temporary situation.

The Employer recognized that the temporary operation proved to be longer than anticipated, but reiterated that the approach was the most reasonable in the circumstances. The Employer drew attention to the language of article A5.01 which expressly permitted the GNT to hire term casuals for periods exceeding four months as long as the casual employees received the full benefits of the collective agreement. This principle had been articulated by Arbitrator Jolliffe in the *Misuse of Casuals* decision and recently followed by Arbitrator Holden in *Ferry Service*. In *Ferry Service,* casual employees had been used for more than six years and the arbitrator did not find a contract violation. Thus, the Employer submitted the contract expressly contemplated using casual employees for relatively long periods and the fact that it took six years to find a solution to the operations of Sutherland House did not equate to a contract violation.

In the event the arbitrator did not accept the Employer's preliminary objection with respect to article A5.01, the Employer argued that there had been no violation of that provision. In its submission, the evidence showed that casual employees at Sutherland House had begun receiving all the benefits of the contract after four months of employment and had become eligible for the pension plan after six months. The Employer argued that the Union had not provided any evidence that employees had not been receiving the correct compensation and benefits.

**UNION REPLY**

The Union pointed out that each of the previous arbitration decisions dealing with casual employees had been decided on their own specific fact pattern and care must be taken when extrapolating to the current set of facts. With respect to article A5.01, the Union reiterated that the parties were in agreement that casual employees were entitled to the full contractual benefits after four months and the Union was only seeking assurances that these employees had in fact received the compensation and benefits to which they were entitled. The arbitrator in *Ferry Service* had issued a declaration to that effect and the Union was seeking the same remedy in the current case.

**DECISION**

I begin with the Employer's preliminary objections to the inclusion of the grievance Addendum and article A5.01 in the arbitration. I can quickly dispose of the Addendum issue. By the arbitration hearing, the Union had withdrawn the last six (of seven) items listed in the Addendum that variously alleged health and safety violations, discrimination, disclosure failures, and violations of union representation rights. The only remaining Addendum item is the first

item that states that the Employer's actions "were contrary to the collective agreement and/or legislation". Without ruling on the validity or not of the Addendum itself, I simply note that virtually every grievance ever filed, including the current grievance, alleges a contract or statutory violation, making Addendum Item 1 completely redundant. Whether Item 1 of the Addendum is included or excluded as part of the arbitration of the current grievance is irrelevant. It need be given no further consideration.

Turning to article A5.01, I am satisfied that the Employer's objection that A5.01 is not covered by the current grievance is well founded and should be sustained. Appendix A5 of the collective agreement is devoted to casual employees and it contains provisions that deal with a variety of issues relevant to the employment of casual employees. For example, Article A5.07 addresses the standard hours of work for casual employees and A5.05 specifies bi-weekly pay. My point is that the various provisions in Appendix A, while all dealing with casual employees, have their own specific purposes. A purported violation of one provision of Appendix A does not automatically suggest a violation of another provision of Appendix A.

It is trite law that grievances, notwithstanding the general principle that they are to be interpreted liberally, must still specify the alleged contractual or statutory violation. A plain reading of the grievance document (exhibit 2-20, set out above) does not reveal any allegation with respect to article A5.01. The article is not expressly identified nor does the wording of the grievance mirror, either directly or by implication, the language of article A5.01.

By contrast, although article A5.02 also is not expressly identified in the grievance, the wording of the grievance makes it clear that A5.02 that is being grieved. The first sentence of article A5.02 states: "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". Item 4 in the

grievance “Request” section asks the Employer to “cease the practice of using casuals in order to avoid offering full-time positions” and under “Details” the Union alleges that the Employer “has violated the Collective Agreement by using a series of casuals in lieu of establishing full time positions at Sutherland House” (emphasis added). This wording is almost identical to the language of article A5.02 and there can be no misapprehension about what is being grieved. I note as well that the *Ferry Service* grievance also does not specify a specific provision, but the wording of the first paragraph of the grievance, in its reference to Appendix A5 and term appointments in excess of four months, makes it clear that article A5.01 is engaged.

There is nothing even vaguely similar in the wording of the current grievance that can draw in article A5.01. While article A5.02 is aimed at preventing the substitution of casual employees for full time employee, article A5.01 addresses the contract rights of casual employees. The first section of A5.01 specifies a maximum of four months of continuous hire for casual employees and the second section indicates that where the period of temporary employment exceeds four months the employee is to be appointed as a term employee and is entitled to all provisions of the collective agreement. There is nothing on the face of the grievance document that suggests that the Union is targeting this article in its grievance. There is no allegation in the grievance that casual contracts have exceeded four months or, if they have exceeded four months, that employees have not been receiving the benefits of the collective agreement. In the absence of any such wording in the grievance, I conclude that the grievance does not cover article A5.01 and I have no jurisdiction to examine the Union’s claim that casual employees at Sutherland House have not received the contractual benefits to which they were entitled. I am precluded from adding an entirely new issue that was not raised in the original grievance: *Government of Northwest Territories* (2011) NWTSC 32.

I now turn to the merits of the issue that is properly before me – did the Employer violate article A5.02. I was referred to a number of arbitration decisions between these parties (or their predecessors) that dealt with casual employees. Of these, three cases address article A5.02 either directly or indirectly: *Commissioner, Misuse of Casuals,* and *Ferry Service*. The other authorities, such as *Pay Step* and *Tessier*, address aspects of casual employment (such as holiday pay eligibility and probation) that are not directly relevant to the current grievance.

The arbitration award that most directly raises article A5.02 is *Commissioner.* While the case was decided in 1982, the language of the material clause (then numbered as A7.02) is identical. In *Commissioner*, the government hired a series of casual employees in the Yellowknife Correctional Centre for approximately nine months after it experienced a delay in funding of some newly created positions and had trouble filling existing full time vacancies. The union grieved a violation of article A7.02. The arbitrator noted that under A7.01 (now A5.01) casual employees can be hired for periods longer than four months, entitling them to the benefits of the contract, as long as it was not for the purpose of circumventing A7.02. Arbitrator Chertkow's analysis is instructive and continues to be relevant (pages 6 & 7):

> It would appear on reading the first sentence of Appendix A7.01, 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 which requires the Employer to insure 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 strictures 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 employment 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.

With respect to article A7.02, Arbitrator Chertkow went on to say (page 7):

> 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 is a matter of fact which would have to be established in each case. The Association bears the onus when alleging a breach o Appendix A7.02, of establishing its case on a preponderance of the evidence in any given fact situation.

On the facts, the arbitrator determined that A7.02 had not been violated as the employer had immediately attempted to fill the vacancies with full time employees through a Canada-wide recruitment program and to establish and acquire funding for new indeterminate positions. His reasoning is set out in the following paragraph (pages 8 & 9):

> The evidence is clear and uncontradicted that it did not employ a series of casual employees for the purpose of not establishing full time positions or for the purpose of deliberately avoiding the filling of vacant positions with indeterminate employees. To the contrary, it only continued to employ a series of casual employees for more than four months after its first two attempts at recruiting for the vacant positions failed. It also took, in my view, all reasonable steps to identify and to correct the problem of insufficient staff at the Correctional Centre. It acted upon the report of Mr. Byliliw with reasonable dispatch and in an appropriate manner. Had it not made its recruitment efforts to fill the vacant positions or had it not pressed for and obtained an increase in the establishment for Correctional Officers; then it could very well have been found to be in breach of Article A7.02.

Thus, the “reasonable dispatch” shown by the employer to create and fill full time positions was a decisive factor in finding that there had been no violation of the requirement to not employ casuals “in lieu of establishing a full-time position or filling a vacant position”.

Both the *Misuse of Casuals and Ferry Service* cases only indirectly engage article A5.02. Neither case is directly concerned with whether casuals have been used in lieu of creating full time positions; they focus on the status and rights of casual employees that have been hired. Both cases conclude that casual employees may be used for periods longer than four months as long as the casual employees receive the benefits of the collective agreement.

In *Misuse of Casuals,* the union grieved that employees had been employed as casuals longer than four months and requested that the employees be appointed to term positions. After a review of previous arbitrations between the parties, *Commissioner* in particular, the collective agreement, and the *Public Service Act*, Arbitrator Jolliffe concluded that casual employees can "take on term status by the operation of Appendix A5.01 ... but without dictating appointments to positions within the Public Service as contemplated by the [*Public Service*] *Act"* (paragraph 22). In reaching his decision, the arbitrator was not asked to consider the circumstances under which use of long term casuals might impact article A5.02.

The same is true of the *Ferry Service* award. The case arose after the government took over direct control of the Fort Providence ferry service from a private contractor in 2005. At the time that the government assumed operational responsibility, a bridge was being planned to replace the ferry service. The ferry employees were offered three year term contracts, the expected bridge construction time. This estimate proved unrealistic; the bridge was not completed until 2012. In the meantime, the status of the term employees became an issue. After their initial three year term expired, there was no formal clarification of their status for another two years at which point some of the employees were mistakenly offered indeterminate positions and some employees were offered casual employment. The union grieved on behalf of the casual employees, suggesting that under the circumstances they should have acquired indeterminate status. This case is largely about whether the employees involved could be granted indeterminate status, a question that the arbitrator answered in the negative.

The *Ferry Service* case does not deal directly with article A5.02 and contains a fact situation that created genuine confusion among employees and managers alike about the status of the grievors. In the course of her analysis Arbitrator Holden, however, made some

observations that are instructive for the current case. With respect to the employer's decision to use term and casual employees for an extended period, she commented (pages 19 & 20):

> The question in this regard becomes: Did the Employer have the right to organize the workforce as it saw fit? I would reply in the affirmative as long as the Employer does so in good faith and within the provisions of the Collective Agreement. Having said that I do not find that Mr. Whitlock [Regional Superintendent] nor the Employer was acting in bad faith. Mr. Whitlock was trying to keep the ferry running as the completion date for the bridge continued to be extended from 2008 until 2012. He only had authority to hire casual employees without the sanction of cabinet so that is what he did.

Thus, the arbitrator appears to take no issue with the use of casual employees for an extended period as a pragmatic response to the need to keep the ferry service operating until the bridge was ready. Following the reasoning in previous arbitration awards she concluded that the casual employees "assumed term status by operation of A5.01" (page 26). Like the earlier Jolliffe award, Arbitrator Holden was never asked to put her mind to the question of whether management's approach of using casual employees for an extended period might run afoul of article A5.02.

In the current case, there is no doubt that management's decision to use casuals to maintain operations at Sutherland House also was a pragmatic one. When the third party organization that had been operating Sutherland House withdrew in 2008, Ms. Mawdsley may have had very little choice but to operate Sutherland House with casuals at first rather than shutting down the shelter. I accept the Employer's evidence that the government took over Sutherland House with the intention of finding another organization to operate it. The multiple Request for Proposals, the discussions with the YWCA, and the attempts to foster a made-in-Fort Smith solution demonstrate these intentions.

At some point, however, it should have become apparent that there was not going to be any quick fix. Indeed, in its response to the grievance in October 2012 (exhibit 2-21), after four

years of using casuals, the Employer admitted that it had not received a single response to its Requests for Proposals to operate Sutherland House. While article A5.01 does not restrict the GNT from continuing to use casual employees well beyond four months as long as the casuals received contractual benefits, A5.01 is not a stand alone clause. There seemed to be no attention paid to the potential restrictions imposed by article A5.02. Compared to the vigorous efforts of the senior managers in *Commissioner* to move away from using casuals, there is no evidence of a similar urgency in the current case. It was not until the end of 2012, more than four years after the government had begun using casuals that serious consideration was given to creating full time, funded positions for the employees of Sutherland House (exhibit 2-21). It was another two years before an NGO was found to take over the operation of Sutherland House. In the meantime, casual employees continued to be used to keep the shelter open.

Given the mandatory language of article A5.02 and the facts of this case, that is simply too long. The evidence is incontrovertible that the Employer operated Sutherland House for six years by using casual employees and chose not to establish full time positions even when it became abundantly apparent, or should have become apparent, that finding another organization to operate the shelter was going to be difficult. The only conclusion that can be reached from the evidence is that casuals were used instead of establishing full time positions, in direct contravention of article A5.02 of the collective agreement. The fact that the contract permits the government to hire casuals for extended periods does not immunize the Employer from the consequences of article A5.02. Nor is it a defence to say that because there were no funded full time positions, casuals had to be used. If that defence was accepted, article A5.02 would be meaningless – casuals could be used indefinitely as long as the government decided not to establish funded positions.

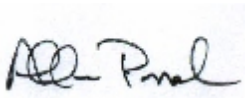
I recognize that there was no requirement for the government to keep Sutherland House open by creating full time funded positions. I also recognize that, as in *Commissioner*, there are some circumstances where casuals must be used for a short period of time while the procedures under the *Public Service Act* for creating and funding full time positions are put in motion. But it not open to the Employer under the collective agreement to indefinitely use casual employees when it becomes obvious, or should become obvious, that there is no solution in sight. The facts of each case will determine at what point it might be said that an acceptable temporary solution of using casuals crosses the line into an indefinite long term solution that is contrary to article A5.02. In the circumstances of the current case, the lack of success of repeated Requests For Proposals should have engendered a more urgent search for alternatives that complied with article A5.02 far sooner than what actually occurred.

For these reasons, the grievance is sustained. I conclude that the Employer violated article A5.02 by its use of casuals at Sutherland House in lieu of creating full time positions.

**AWARD**

The grievance is sustained. As a remedy, the Union asked for a declaration that the collective agreement had been violated. I so declare.

Dated April 18, 2015 in Calgary Alberta.



Allen Ponak