

IN THE MATTER OF AN ARBITRATION

BETWEEN:

THE NORTHWEST TERRITORIES POWER CORPORATION

Employer

-and-

THE UNION OF NORTHERN WORKERS

Union

**GRIEVANCE RE: NEGOTIATED ECONOMIC SUPPLEMENT**  
(Grievance No. 14-G-01639)

**AWARD**

Before: Tom Jolliffe, Q.C.  
Representing the Employer: Michelle Theriault, Counsel  
Representing the Union: Michael Penner, Counsel  
Hearing Date(s): July 23, 2020 (via Zoom)

**Date Award Issued:**  
**September 15, 2020**

This matter concerns the Union filed grievance dating from April 2014 alleging that the Employer was violating the collective agreement by not paying employees their negotiated economic supplement pursuant to the entitlement provision, which language it takes to be compounding and cumulative, that which the Employer denies should be its proper application. The issue presented is whether the Employer has misinterpreted/misapplied Appendix J3(a) and the Article 28 Pay Administration language, in particular Article 28.07(c)(i) dealing with its administration of the negotiated economic supplement (NES). The NES was payable only to those employees who were frozen at their existing pay rate higher than the new points assessed rate to be applied under the Hay Plan job reevaluation process for the same work. This language dates from 2005.

The relevant provisions of the Article 28 Pay Administration language read as follows:

**28.01 An employee is entitled to be paid for services rendered in accordance with the hourly rates of pay specified in Appendix A for the evaluation of the position to which the appointment is made. The hourly rates of pay specified in Appendix A shall be the official rates of pay.**

.....

**28.07(c) Notwithstanding Clause 28.01:**

- (i) If an employee is reevaluated to a level with a lower maximum hourly rate of pay, the employee's hourly rate of pay shall not change. The employee shall receive his/her negotiated economic increase for the employee's level as negotiated economic supplement (NES). The NES shall be calculated by multiplying the negotiated economic increase for the employee's level by the employee's currently hourly rate of pay. The NES will be paid bi-weekly on all hours worked by the employee.**
  
- (ii) The employee shall continue to receive the NES until such time as the maximum hourly rate for the employees level equals or exceeds the employee's hourly rate of pay or until the employee accepts another position, whichever comes first.**

.....

The collective agreement at Appendix J addresses the Employer's conversion to the Hay Plan job evaluation system. It contains language at J3 dealing with the possibility of a re-evaluated employee placed in a lower points range and attaching pay grade, meaning a lower maximum hourly rate of pay. Their pay rate is frozen, but the Parties also contemplate easing the economic burden on the affected employees while awaiting the lower points range's assessed wages to eventually catch up with their existing frozen wage rate. It reads in as follows:

- 3(a) If an employee is reevaluated as of January 1, 2005 to a level with a lower maximum hourly rate of pay, the employee's hourly rate of pay shall not change. The Employee shall receive his/her negotiated economic increase for the employee's level as a negotiated economic supplement (NES). The NES shall be calculated by multiplying the negotiated increase for the employee's April 2005 level by the employee's current hourly rate of pay. The NES will be paid bi-weekly on all hours worked by the employee.**
- (b) The employer shall continue to receive the NES until such time as the maximum hourly rate for the employee's level equals or exceeds the employee's hourly rate of pay or until the employee accepts another position, whichever comes first.**

The negotiated percentage increase is dealt with in Appendix A covering hourly rates of pay set the increase across the wage grid at 1.50% effective January 1, 2012, 1.50% effective January 1, 2013 and 2.50% effective January 1, 2014. There is no doubt that the negotiated year-to-year hourly increase on the grid setting out basic wage rates was meant to be cumulative as it pertained to increasing the stated wage rates across the Hay Plan assessed points ranges, making no express reference therein to how the NES was to be handled covering the wage-frozen employees.

The sole witness to testify, Sharmayne Horton, is a human resources specialist with experience in labour relations and contract negotiations during her 18 years with the Employer. By her description, in dealing with the background of the NES language, the obvious problem which presented on their agreeing to the Hay Plan job evaluation system was that some jobs needed to be

reevaluated at a lower level by reference to the point ranges than currently was being paid for the work, resulting in the affected employees being frozen at their current wage level until wage rate catch up by reference to the negotiated yearly percentage increases across the grid for the reevaluated position. By her description, the Parties turned their attention to lessening the financial impact on employees receiving their pre-existing frozen rate until the new lower reevaluated points' driven rate caught up with their rate through the negotiated yearly percentage increases. It meant, from the Employer's perspective, that it was required to use the agreed percentage increase, year-by-year, to supplement the frozen wage rate but "not to be added to the rate itself" which could not change by reference to Article 28.07(c)(i). It was not a matter of their moving up the grid on a percentage basis, inasmuch as the hourly rates could not change but at least they had the benefit of the NES being applied on a percentage basis each year to provide some improvement to their frozen wage until the old wage and the newly assessed points-driven wage moving up year-by-year on cumulative percentage increase basis, intersected. She provided an example of how it was always applied, namely:

- Were a person to be earning \$40 per hour wage rate in their pre-existing range and the new Hay Plan points-driven reevaluation assessed the job at \$38 per hour, the hourly pay rate would stay unchanged at \$40 as per Article 28.07(c)(i), not being subject to the negotiated across-the-grid yearly cumulative wage rate percentage increases until the pay rate for the reassessed job reached \$40.
- However, as per the Employer's understanding of Article 28.07(c)(i) and Appendix J3, the NES was applied at 1.50% in the first year (2012) to the frozen wage rate, meaning \$0.60 added to the \$40 per hour wages.
- In the second year (2013), with the wage rate unchanged, the NES was again applied at 1.50% meaning that \$0.60 was continued to be added to the unchanged \$40 per hour wages.
- In the third year (2014) the NES was applied at 2.5%, meaning that \$1.00 was added to the unchanged \$40 per hour wage rate as a supplement.

- With the NES being applied in non-cumulative fashion the affected employee would have received \$40.60, \$40.60 and \$41 total remuneration covering those three years.
- By 2014 the reevaluated \$38 per hour rate attaching to the example position under the Hay Plan points assessment, no requirement for it to remain unchanged, due to the three yearly cumulative wage rate increases of 1.5%, 1.5% and 2.5%, would have reached \$40.13, meaning that the wage gap had been closed ( $\$40.13 > \$40$ ) and the NES no longer applied.
- The duration for catch up in the example wage rate situation was dictated solely by the base salary being frozen at \$40, not subject to change by reference to Article 28.07(c)(i), and not the additional NES monies paid as a supplement, whereas the yearly percentage wage rate increases are applied in the usual cumulative fashion to the non-frozen Hay Plan assessed position.

Ms. Horton was aware that 10 employees, upon the implementation of Appendix J3, received the designation of “present incumbent only status” as of December 31, 2004, meaning they were exempted by agreement and their wages were specifically protected under the language of the old collective agreement. In dealing with this matter, their experience is not pertinent as it constitutes an agreed exception.

A letter sent out to an employee whose points rating for his position had changed resulting in his being reduced from Grade 7 to Grade 6 on the wages grid, and frozen at his pre-existing \$44.08 per hour, contains the following explanation:

**Your rate of pay will remain at \$44.08 per hour. Effective January 1, 2011 you will receive a Negotiated Economic Supplement (NES) of 4.75% of your current rate on your paycheck. A NES will remain in place until such time as the maximum hourly rate for the Grade 6 salary scale equals or exceeds your current rate of pay.**

By Ms. Horton’s description it has always been handled that way since the inclusion of the Article 28.07(c)(i) language and Appendix J3, which is to say for some nine years prior to the grievance being filed.

Ms. Horton testified that there were about two dozen such letters sent out to employees whose wage rate remained unchanged while awaiting the new hourly rate becoming equal to or exceeding the currently paid rate. During that time they were paid the NES, and the supplement was never provided on any cumulative basis year-to-year. It was always based on the frozen wage rate figure. Eventually, with the negotiated year-to-year wage rate increases across the grid, the hourly rates of the reevaluated positions exceeded the current frozen rates at which point the NES ceased to be paid out. The duration of the catch up process was dictated solely by the frozen hourly rate placed alongside the reevaluated position's upwardly moving rate due to the negotiated yearly percentage increases. The NES supplement was always considered to be an obligation separate from the frozen base salary.

**Argument:**

Mr. Penner on behalf of the Union submitted that the most reasonable interpretation of the contract language were it to be considered unambiguous, which would be the Union's position, was that the NES supplement amounts to be added to the frozen basic wage by reference to Article 28.07(c)(i) and Appendix J3 should be cumulative, meaning, were one to use the frozen \$40 per hour example, the first 1.50% increase to this base rate figure would result in \$40.60, the next 1.50% increase would result in \$41.21 and the 2.50% increase in the third year would result in \$42.24 total combined hourly earnings. It would be an unfair and incongruous application, he said, not representative of the labour relations context concerning percentage increases in earnings year-by-year, to place the frozen wage earners in a situation where, by the Employer's calculation, they would receive no increase in overall earnings during the second year, i.e., combining for \$40.60 both years in the example provided by Ms. Horton, inasmuch as there was a repetition of the 1.50%

increase which it continued to apply only against the \$40 base rate. That result should not be viewed as a reasonable interpretation of the language on its face.

Were the Employer to rely on past practice in how it has dealt with this currently disputed language, as a matter of resolving any ambiguity in the language which might be seen to exist, it is significant whether the Union has been relying on a certain practice coming to its attention as constituting an employee perceived problem in the way management has been managing its payment obligations. As pointed out in such cases as *Lakes District Maintenance Ltd. v. B.C.C.E.U., Local 1012*, 2012 CarswellBC 1912 (Keras), *Hollinger Canadian Newspapers v. Vancouver Printing Pressmen, Assistants & Offset Workers Union, Local 25*, (unreported, April 16, 2004, McPhillips) citing the comments of arbitrator Harry Arthurs from the *Pilkington Brothers (Canada) Ltd.* case; namely that while a union will be moved to action by employees' complaints it is not reasonable to assume that it will conduct "spot audits" of the company's calculations to determine whether a monetary entitlement under the collective agreement is being properly paid. In the current situation there was no objection concerning the timing of the grievance filing, being raised with it by employees as an issue at some point, which the Union should be taken as having determined to deal with the problem when it was communicated by one or other members, no evidence to the contrary. The Union should not be taken as having been previously sufficiently aware of or tacitly agreed with the calculation. The Union also relies on *Westfair Foods Ltd and UFCW, Local 832*, 2012 CarswellMan 821 Peltz dealing with a capped insurance benefit to be paid where the union over several years had not become aware of any cap issue which would not give rise to any reliance on past practice. Accordingly it is a matter here of interpreting the entitlement on the basis of the express language under review. It gives rise to the more reasonable conclusion, counsel submitted, that it should have been applied no differently than the cumulative percentage increases available

under the wage schedule, otherwise it would mean that in the second year of receiving a 1.50% increase to one's wages, there was no increase being applied at all to the basic pay of \$40.60 reached with the first increase (to use the example employee figure). The reasonable interpretation, counsel submitted, was that the entitlement should be viewed cumulatively.

Ms. Theriault on behalf of the Employer submitted that the language was capable of being interpreted on its face as written, no ambiguity needing to be addressed by past practice or otherwise which would not be supportive of the Union's position in any event, noting the consistency in the letters sent out to affected employees. It required a purposive reading covering the plain meaning of the language. It showed the clear intention of the parties to provide an economic supplement each year in addition to the frozen hourly rate, i.e., a \$40 wage rate in the example situation provided by Ms. Horton. There is no indication on the language dealing with the supplement that the stated percentage of frozen base wage paid as a supplement each year was meant to be applied cumulatively. Were the NES figure to be paid in the second year at 1.50%, being the same as the first year, so be it. That was the agreed supplement. It is what was required under Article 28.07(c)(i), namely that the economic increase be paid but the "hourly rate of pay shall not change". Counsel submitted that it is crucial that the NES is based on providing a percentage of the hourly rate, which over the three years in the example situation was always \$40. Each separate increase in year one, two and three is added as a supplement to that frozen hourly rate, no indication of it being a cumulative calculation, which were it to be applied that fashion would require by the third year a total of 5.5% increase over the frozen wage rate having to be paid as the supplement. It would mean no catch up was capable of being reached within the newly assessed points range under the Hay Plan, which one might observe was the purpose of Article 28.07(c), namely that the NES would cease being paid when the hourly rate for the reassessed position equalled or exceeded the employee's hourly rate.



One is driven to observe that an example employee earning a \$38 non-frozen basic wage rate under the Hay Plan job assessment criteria following application of the 1.50%, 1.50% and 2.50 % increases over three years, no doubt cumulative in the usual way as an increase to wages, would have had their pay increased to \$38.57, to \$39.15, and to \$40.13 in the third year, meaning that no catch up would be occurring if the Union's cumulative calculation were applied to the NES supplement. With the NES at 1.50%, 1.50%, and 2.50%, were it to be applied cumulatively to the supposedly frozen \$40 figure, it would have resulted in total earnings of \$42.24. The earnings' gap between that employee and the coworker supposedly frozen at the \$40 per hour basic wage rate until catch-up was achieved would actually be slightly increasing which, one might observe, was not the stated purpose of the NES. It was meant to provide a financial supplement until parity was reached, so stated the contract language. Counsel submitted that affected employees receiving the supplement each year until parity should not be viewed as changing the essential aspects of the governing language namely that the wages were meant to be frozen and the supplement paid until there was catch up, the NES not being included in the wage grid. The language should not be read as exacerbating the problem of there being a wage difference and not supporting catch up.

In support of what was said to be the purposive approach, Ms. Theriault cited arbitrator Macdowell's award in *Waypoint Centre for Mental Health Care and OPSEU, Local 329*, 2013 CarswellOnt dealing with "red-circling", meaning in labour relations parlance that the wage rates are frozen until other employees catch up through the normal application of annual wage increases, the intention of the provision being to have the difference "corrected" by the passage of time. The arbitrator considered that the employer's reading of the specific provision was "more consistent with the meaning and purpose of 'red-circling' – while the Union's view is not" in noting that the Union's interpretation "magnified" the problem of anomalous rates, going on to state: "indeed, the Union's

view blunts the very purpose of red-circling and significantly distorts the anomaly...”. The Employer views it to be the same situation here were any cumulative calculation to be applied to the yearly percentage supplement

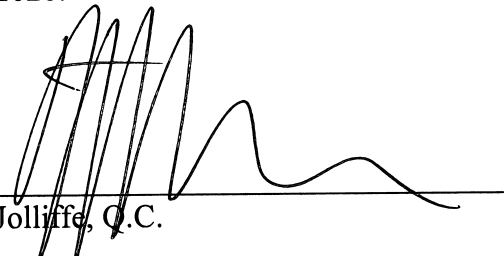
**Conclusion:**

Having set out the evidence and argument in this matter, I accept that Article 28.07(c)(i) and Appendix J3 can be interpreted on the clear meaning of the language which the Parties have chosen to express their mutual intention in dealing with the issue of having employees reevaluated under the Hay Plan job assessment system at a points’ range indicating they should be paid at a lower level than they were receiving, for example reevaluated at \$38 per hour instead of the current \$40 per hour they were currently receiving on the wage grid. The Parties chose to deal with the situation by “red-circling” employees earning a higher wage rate than the assessed points range would have allowed under Pay Plan reevaluation. As they agreed in Article 28.01(c)(i), “the employee’s hourly rate of pay shall not change” but they were to receive an “economic increase”, being the negotiated NES calculated by multiplying the agreed percentage economic increase by an employee’s current hourly rate of pay which was not to change, and to be paid year-by-year, until the maximum hourly rate for the employee’s level equalled or exceeded the employee’s hourly rate of pay. For the period of time in question it amounted to a yearly “economic increase” of 1.50%, 1.50%, and 2.50% over the frozen rate.

The language of this provision, and the language of Appendix J3, taken in context, separates out the NES from the standard negotiated percentage wage increases under the wage grid applicable to those whose wages governed by their Hay Plan reevaluations, albeit using the same stated percentages in applying the supplement to the frozen wage. There is no indication in the language

that it should be read on a cumulative basis, and to do so would fly in the face of the purpose of the provision which is to provide a supplement, an economic increase until such time as the maximum hourly rate equals or exceeds the hourly rate of pay, meaning the wage rate associated with the newly reevaluated points range applicable to the job. In my view this is not a situation where one can read in any requirement to apply any cumulative calculation to the financial supplement being provided. It was not a matter of any unchanged wages moving up the grid. To do so would effectively magnify the problem of there being a wage difference and not serve as an economic supplement until the employee's level under the Hay Plan assessed points range equalled or exceeded the frozen wages being received. I conclude that the Employer's interpretation of the language under review, Article 28.07(c)(i) and Appendix J3 is preferable and I cannot find any fault with its method of dealing with the NES. It did not need to apply the supplement in any cumulative fashion, rather it was appropriate to apply it separately each year to the base salary which did not change. Accordingly the grievance is respectfully dismissed on this basis.

DATED at Calgary, Alberta, this <sup>th</sup> 15<sup>th</sup> day of September, 2020.

  
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Tom Jolliffe, Q.C.