IN THE MATTER OF AN ARBITRATION

BETWEEN:

THE MINISTER OF HUMAN RESOURCES
(GOVERNMENT OF THE NORTHWEST TERRITORIES)

Employer

-and-

THE UNION OF NORTHERN WORKERS

Union

POLICY GRIEVANCES RE: CASUAL EMPLOYEES
(Grievance Numbers 17-P-02165 and 17-P-02211)

AWARD

Before:	Tom Jolliffe, Q.C.
Representing the Employer:	Sarah Kay, Counsel Karin Taylor and Maren Zimmer, Co-counsel
Representing the Union:	Michael Penner, Counsel Rebecca Thompson, Co-counsel
Hearing Dates:	December 12, 13 and 14, 2018 May 6, 7, 8 and 9, 2019 August 21 and 22, 2019 December 11, 12 and 13, 2019 January 7, 2020
Hearing Location:	Yellowknife, Northwest Territories
Written Submissions Received:	February 18, 2020 March 27, 2020
Union's Reply Submissions Received:	April 3, 2020

Date Award Issued:
July 30, 2020

My File:
53,247

INTRODUCTION

The Union has filed two policy grievances to be heard jointly, with one award to follow, the first of which matter being **#17-P-02165** filed in August 2017. It reads as follows:

> The Union of Northern Workers alleges that the Employer has specifically violated Appendix A5.01 of the Collective Agreement by hiring casuals for periods over four months and not appointing them on a term basis with the result of the member not being provided all provisions of the Collective Agreement from the first day of his/her employment that they are entitled to. This includes members who are hired on another casual contract within the same authority without leave greater than 14 days.

In its grievance response, the Employer expressed concern over its not yet having sufficient particulars. Further it stated that casual employees are hired to carry out job duties, but not put into specific positions, nor being incumbents in any positions, and further that they were paid at the appropriate rate for the duties they were performing.

The Union's second grievance was filed in September 2017 as **#17-P-02211**. It reads as follows:

> The Union of Northern Workers alleges that the Employer has specifically violated Article 2, Appendix A4 and Appendix A5 of the Collective Agreement by disguising term and indeterminate employees as casuals. These positions should be posted and staffed appropriately as term or indeterminate employees but are being disguised as casual employees in order to avoid providing all the benefits and entitlements of a term. Although the Employer in some cases may be providing these "casual over four months" employees with their proper entitlements of sick, special leave, step increments etc. These employees are still not receiving all the entitlements of a term or indeterminate employee such as a proper statement of duties and a proper job evaluation using the Hay Plan method. By hiring these members as "casuals for over four months" the Employer is also avoiding staffing competitions, updating org charts, official Job Descriptions and creating position numbers for jobs that are clearly not "casual" in nature. This is being done as a way of avoiding proper pay for the position.

There was no change in the Employer's denial stance.

It can be observed from outset that these two policy grievances having been joined for purposes of this arbitration proceeding, are about whether on a systematized or even systemic basis as the Union phrases it, was the Employer breaching Appendix 5 of the Collective agreement,

specifically A5.01 and A5.02 during the currency of the collective agreement in force at the relevant time. The Union in these grievances, both filed under the terms of the expired 2016 Collective Agreement, asserts there had been a planned and consistent misreading of contractual language in these its use of casual contracts. It can be observed at outset that there is a well developed and certainly instructive line of arbitration case law between the Parties setting out some parameters under the agreed contract language concerning the use of casuals. There have been issues materializing in the past over employing persons, hired in this category, for longer than a continuous four month time period contemplated by Appendix A5.01 and what should happen when they are foreseeably needed beyond that time, whether observable at outset of the employment relationship or as it develops. It has been long accepted that artificial/contrived short-lived gaps separating periods of uninterrupted employment cannot be used by the Employer as a means of sustaining one's casual employment status, nor used to determine his or her entitlements on that basis. One needs to reference Appendix A5 as a whole, and the established line of arbitral case law to be cited later in this award, in order to determine where the balance lies in dealing with the issues described in the grievances.

Firstly, the contract language of the 2016 Collective Agreement contemplates the existence of both employee categories, casual and term employees. Appendix 5A addressing casual employment reads as follows:

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 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.

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.

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

a) Clause 2.01(**e**) "Continuous Employment" in respect of a casual employee shall include any period of employment with the Employer 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 and 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 and 21.05

(iii) Article 33 - Lay-off.

(iv) Article 39 – **Public Service Pension Plan**.

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

(vi) Article 43 – Relocation Expenses on Initial Appointment and Subsequent Moves As An Employee

(vii) 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 on a bi-weekly basis for services rendered at the appropriate pay range at a minimum of the Casual Step set out in Appendix B.

A5.06 A casual employee hired from outside the community in which he/she will be working will be eligible for the following relocation expenses in and out of the community:

a) Airfare for the employee, by the most economical and direct means;

b) Duty travel per diem rates as per 45.05(a);

c) One day"s pay each way

d) Excess baggage (not including pets or food stuffs) to a maximum of four (4) pieces not more than 25 kg each, for the employee

A casual employee hired from outside the community in which he/she will be working will be eligible for lodging up to 10 days in the community of work.

A5.07 Unless otherwise agreed upon by the Employer and the Union, the standard hours of work for casual employees on a daily and weekly basis is based on the standard work week of similar fulltime positions.

A different employment relationship attaches to term employees under Appendix A4. It reads as follows:

APPENDIX A4
TERM EMPLOYEES

A4.01 The Employer shall hire term employees for a period not to exceed forty-eight (48) months of continuous employment in any particular department, board or agency.

A4.02 Term Employees shall be entitled to all the provisions of this Collective Agreement. Terms of six months or less are not eligible to contribute to the **Public Service Pension Plan** (Superannuation), the Public Service Health Care Plan and to disability insurance.

A4.03 If an Employee in a term position is to be extended beyond 48 months of continuous employment in that position, the Employer shall consult with the Union.

A4.04 Where vacation leave or the use of lieu time has been denied due to operational requirements, Term Employees will be allowed to use any unused vacation leave and lieu time to extend their employment. Where employment is extended at the request of the Employee, if the new term exceeds 48 months consultation with the Union is not required.

A4.05 Term Employees shall be entitled to Maternity and Parental Leave allowances provided the Employee"s current term of employment provides sufficient time to completely fulfill the return of service commitment required after the return from maternity or parental leave.

It is also to be noted that the Collective Agreement at Article 2.01(m) provides definitions of employee which include:

(i) "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;

.....

(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.

In that the grievance includes reference to the Employer's failure to provide a proper job description, statement of duties, or proper job evaluation under the Hay Plan to the affected employees, one notes the wording of Article 34.01 dealing with the Employer providing a statement of duties "assigned to that position" when an employee is first engaged or is reassigned to another position in the bargaining unit. It reads as follows:

> 34.01 When an employee is first engaged or when an employee is reassigned to another position in the Bargaining Unit, the Employer shall, before the employee is assigned to that position, provide the employee with a current and accurate Statement of Duties of the position to which he/she is assigned.
>
> Upon written request, an employee shall be entitled to a complete and current Statement of Duties and Responsibilities of his/her position, including the position's job evaluation level and point rating allotted by factor, where applicable.

Also Article 36 dealing with job evaluations has significance, particularly Article 36.02 and 36.03. It reads as follows:

> 36.02 During the term of this Collective Agreement the Hay Job Evaluation Guide Charts, in conjunction with benchmark positions as set out in the Job Evaluation Manual, will be used for assessing the value of positions to which employees are assigned. Upon request, an employee shall be provided with access to a copy of the job evaluation manual including guide charts.
>
> 36.03 (1) Where an employee believes that his/her position has been improperly evaluated and prior to filing an appeal under Clause 36.04, the employee is encouraged to discuss the evaluation of his/her position with his/her supervisor or a representative of management who is knowledgeable in the job evaluation system.
>
> (2) Upon request the employee shall be provided a copy of the job description for his/her position together with the point rating and the rationale supporting the point rating assigned.

The Employer contends that the arbitrator should observe the language of A5.01 and A5.02 has now been renegotiated, a matter of recognizing there has been a changed contractual reality past

the currency of the 2016 collective agreement under which these grievances are filed, which was said to provide context going forward. As its counsel put it in the written submissions, this chance "helps frame the temporal scope of this grievance and gives insight into how the interpretation is changed given the new language". It bears observing that my role is to interpret the language of the expired collective agreement which is the subject matter of this grievance. Nevertheless, one observes that the new language of A5.01 applicable since April 21, 2019 reads as follows:

> The Employer shall hire casual employees for a period of not less than five (5) days and not to exceed six (6) months of continuous employment in any particular department, board or agency. Casual employee shall have scheduled hours.
>
> The five (5) the minimum shall not apply to casual employees who are Health Care Practitioners under Appendix A10.

As counsel indicated, A5.02 was changed in 2019 only to the extent that the final paragraph was removed, with the rest remaining the same.

PARTIES' POSITIONS

The Union has summarized its current position pertaining to the rights and obligations contained in the 2016 collective agreement in counsel's opening statement. The evidence to be brought forward in this matter, from the Union's perspective, was said to make clear the basis of its primary concern, being what it takes to be the "systemic" misuse of casual employees, or at least the systematized breach of its contractual obligations. Simply put, it has set up shop without due adherence to Appendix A4 and A5, or as Union counsel, Mr. Penner, articulated it in his opening remarks: the Union's case centres on the evidence it views as indicating that "the Employer had set up its infrastructure around 'casual/term' employment that breaches Appendix A5 in general and Appendix A5.01, A5.02 and A5.03 specifically". The Parties have agreed that the individual situations explored in evidence through seven affected employees working on successive contracts after being hired as casuals on the basis of job offers under the general heading of "Casual Employment Opportunity-Job Offer", are examples of the Employer's approach.

The Employer denies that there has been any breach of the Collective Agreement in its use of casuals, systematic or otherwise. It relies on the language of A5.01 as not creating any maximum

use period for persons hired as casuals, but includes an element of anticipating relatively prolonged periods of employment with the phrase: "... Where the Employer anticipates the period of temporary employment to be in excess of four (4) months..." This phrase was said to recognize the possibility of one taking on the trappings of "casual/term" hybrid employment in order to ensure that certain entitlements are provided when fitting into this category. In the described individual situations there were no formal appointments into Public Service positions under the *Public Service Act* relative to any consideration of length of service, whether term or indeterminate. The Employer contends that a casual contract over four months is not a *prima facie* breach of the 2016 Collective Agreement as opposed to triggering different entitlements needing to be provided as if the person were employed on a term basis, hence the hybrid label of the person being a casual/term employee. It has produced the benefits tables associated with the various employee witness who testified, by way of showing that their eligibility for certain entitlements was recognized after completing the qualifying period of continuous employment for a stipulated period of time. The Employer relies on the arbitral interpretations covering this language, while pointing out that the Parties changed the wording in the subsequent Collective Agreement.

In their written submission on behalf of the Employer, Ms. Taylor and Ms. Zimmer have stated that the several Union witnesses called to testify, and the documentary materials entered in evidence do not prove on balance that there has been any systemic or systematized violations of the Collective Agreement. The Employer views its capacity to access the casual employment option as circumstances dictated to be a reasonable exercise of management rights, and that whatever the Union might have assumed, the Employer followed its clear policy position, including not hiring casual employees in lieu of indeterminate employees. Further, it asserts that any potential consequences, which is to say any impact in some circumstances on pension and benefits eligibility associated with working periods of casual employment, were unintentional, and stating: "whenever any concerns came to life, management expended significant effort to address any perceived negative impacts of casual employment". In its seeking dismissal of the two policy grievances, the Employer has described its use of casuals under the language of this now expired collective agreement as not leading to any reasonable conclusion on a balance of probabilities' standard that management was systematically misusing them so as to violate any contractual language. It denies any plan to use

them to avoid having more appointed indeterminate or term employees. Normally, any possible transgressions from time to time should be assessed on an individual case basis.

The Employer also views its actions vis-à-vis casuals as having been consistent with long-standing practice between the Parties, its having acted in completely transparent fashion in following the Human Resource Manual concerning its managers dealing with casual positions, and applying established case law interpreting the language of Appendix A5. Whatever the factual foundation for asserting long-standing practice, concerning which the Union disagrees there was any acceptance on its part, it is doubtful that whatever was the practice, it would be a determinative issue at this point in that there was no argument based either on ambiguity in the contract language nor that the Union is somehow estopped from presenting these two policy grievances. There is no doubt that the Employer has for some time been relying on its interpretation of the Appendix A5 contractual obligations as actioned through its policy approach in dealing with its deemed casual/term employee category in the context of established case law. The Union has disputed some occurrences discussed with the Employer during the consultation process, and in others provided no challenge. Certainly there has been much internal litigation on the issue of interpreting Appendix A5 and the obligations thereunder, and it must now be observed that the Employer at least had its own interpretation as to what was required and ultimately the Union disagrees.

The Employer's materials reference a Corporate Human Resource Services' document entitled "Casual Position Profiles" containing numerous job descriptions such as "senior accounting clerk" as one example, or "clerical-entry-level", or "administrative assistant-fully qualified" as other examples, and then setting out the "representative activities and qualifications" for each job. These descriptions follow the Corporate prepared explanation for such profiles taken from the HR Manual, which reads as follows:

> Pay levels for casual employees are determined using salary grids established by the current Union of Northern Workers collective agreement. Since casual positions do not have job descriptions, profiles have been developed to assist departments in establishing the hourly rate of pay. The following profiles provide a general description of duties commonly performed by casual employees in the Government of the Northwest Territories. Each profile has been evaluated using the Hay system of evaluation. To assign pay to your casual employee, compare the duties to a profile and refer to the hourly rate in the right-hand column.

> It is recognized that departments may occasionally have casual staffing requirements involving a unique set of duties. If those duties are not represented by the following profiles, it is suggested that you referred to the GNWT Job Evaluation Manual for an alternative profile or contact your departmental job evaluation facilitator for assistance.

The Employer relies on its other HR policy documents, said to be an accurate representation of how its managers receive HR advice on the use of casual employees. Firstly one notes that the document from the Human Resource Manual entitled "0502 – Types of Employment", setting out the following information with respect to casual and term employment:

> 3. Casual Employment is employment obtained through the casual hiring process for a fixed period less than 12 months to do work of a temporary nature where the employee is not appointed to a position in the Territorial public service. Casual employment can be full-time, part-time or as and when required. Casual employees may be included in the Union of Northern Workers (UNW) bargaining unit. Casual employees hired for periods of four months or more are entitled to provisions UNW collective agreement as outlined in Appendix A5 of the collective agreement.
>
> 4. Term Employment is employment for a fixed period and which at the end of the fixed period the employee ceases to be employed. Term employment is obtained either by:
>
> a. Appointment to a Territorial public service position for specified period (i.e., three years) through a formal staffing competition process (referred to as term employee); or
>
> b. Employment of the casual nature where the employee is not appointed to a Territorial public service position but whose continuous service exceeds four months and is less than 12 months and who, by virtue of this, is entitled to all the relevant provisions outlined in the collective agreement or handbooks (referred to as a casual term employee)
>
> ....

The Employer also has cited portions of its policy from the Manual, referenced therein as "0502d – Casual Employment". It describes the process which it takes to have been utilized across its departmentally organized system, and sets out this self described category of "casual/term". The

following relevant descriptions under the topic "Definitions" are noted as follows:

> 3. Continuous service for a casual employee means service with the Government, including employment with different departments, not broken by more than 30 working days. This means that if an employee has a break of exactly 30 working days, they do not have a break in service.
>
> 4. A Casual is an employee hired for a period of four months or less to do work of a temporary nature.
>
> ....
>
> 7. On-call casuals are employees asked to work on an as and when required basis.
>
> ....
>
> 9. Casual/term employees are casuals whose continuous service exceeds four months and who, by virtue of this, is entitled to all of the relevant provisions of the collective agreement.
>
> 10. Continuous Service for a casual/term means:
>
> a. Uninterrupted employment with the Government of the Northwest Territories.
>
> b. Prior service in the Public service of the Government of Canada....
>
> c. Prior service with the municipalities and hamlets of the Northwest Territories and
>
> d. here an employee other than a casual ceases to be employed for a reason other than dismissal, abandonment or positional rejection on probation, and is re-employed within a period of three months, his/her periods of employment for purposes of Superannuation, sick leave, severance pay, vacation leave and vacation travel benefits shall be considered as continuous employment in the Public Service.
>
> ....
>
> And under the topic "Guidelines" states:
>
> 14. Casual employees are generally hired for a specific period of employment to do work of a temporary nature. For example, casuals work on special projects or act as emergency replacements for employees on leave.
>
> ....
>
> 15. The Employer is required to consult with the Union before a former casual employee is hired in a particular division if that former employee has 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 hire.

....

23. casual is paid at the casual pay range unless a continuous service results in their being considered a casual/term employee.

....

And under the topic "Approvals/Extensions" states:

24. An extension of casual employment over four months results in the employee being hired as a casual/term employee.

25. An extension beyond six (6) months with the same department requires the approval of the Deputy Head of the employing department.

26. Casual employment must not exceed a continuous period of one year. A one-day break must be given. This will not constitute a break in service. Consultation with the UNW is required before a former casual employee is rehired within 30 working days to perform the same duties in the same division.

....

And under the topic "Benefits" states:

27. A casual employee is entitled to the following benefits from beginning of their employment:

a. sick leave;
b. special leave;
c. holiday pay at a rate of six percent of salary paid on each check;
d. Northern Allowance

Specific rules for each benefit are found in the Allowance and Benefits section in this Manual.

....

30. A casual employee who becomes a casual/term by virtue of the fact that their continuous service exceeds four months is entitled to all provisions of the Collective Agreement.

....

31. A casual employee who moves directly with no break in service of more than three months or less from a casual position to determine or determine the position keeps their leave credits earned as a casual.

> 32. A casual employee moves from one casual position to another within the Government carries all annual, sick and special leave credits to the new position providing there is no break in service of more than 30 working days.
>
> ....
>
> 34. Under no circumstances should a casual or casual/term employee be laid off or not extended, where there is additional work to be done, solely to avoid paying that individual benefits to which he or she might otherwise become entitled to.

It was said by the Employer to be the documented approach it has utilized across its system set out in policy documents "0502-Types of Employment" and "0502d – Casual Employment" and satisfies the contract language and the arbitral interpretation of that language at a policy level. There was also entered in evidence the Employers Staff Retention Policy which includes an introductory Policy Statement:

> The government of the Northwest Territories (GNWT) values the members of the territorial public service and the work they do. It is committed to the retention, retraining and development of existing staff as required to provide job security, career development and to maintain a skilled, stable and competent territorial public service.

It goes on to state under the portion dealing with the scope of the policy:

> This policy and guidelines apply to all territorial public service employees, except casual employees, employees of the Northwest Territories Teachers Association and employees of the Northwest Territories Power Corporation.

WITNESS EVIDENCE

Union Witnesses:

The Union's lead witness in this matter, in terms of outlining its information concerning what the Union viewed during the currency of the Collective Agreement question to have been widely experienced by a recognizable group of bargaining unit members, namely those persons hired into periods of casual employment across various departments and disciplines, was Service Officer, Avery Parle. He filed the initial grievance based on his information received from several bargaining unit members with lengthy working histories as casuals, concerned over their not receiving a

Statement of Duties, their lack of access to formal job evaluations, pay range levels, professed employment status, length of employment as casuals and rehiring practices as applied to them. He contacted the Employer's Labour Relations Advisor, Haley Mathisen, resulting in a lengthy email chain passing between from late September through November 2017. Ms. Mathisen advised Mr. Parle that despite not receiving comprehensive particulars the Employer understood the Union's concerns as follows:

- Casuals were being hired for periods of over four months and not being appointed on any term basis resulting in the employee not receiving the benefit of all provisions of the Collective Agreement from the first day of his/her employment.

- Casuals were being hired on another contract within the same authority without leave greater than 14 calendar days.

- Multiple casual employees were being paid at a range under the appropriate rate for their positions.

In Mr. Parle's October 23, 2017 email, he responded that the Union was relying on the entirety of Appendix A5 as the contractual reference. He further clarified what the Union took to be the violations, using a particular employee example, namely:

- The Employer was violating A5.02 by failing 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.

- The Employer was not consulting with the Union before a former casual is rehired in a particular division if the former casual had worked there performing the same duties at any time within the 30 working days immediately preceding the date of rehire.

- The Employer was violating A5.03(a) by committing itself to a pattern of systematic release and rehire of casuals into the same positions primarily as a means of avoiding the creation of indeterminate employment, or paying the wages and benefits associated therewith.

- The Employer was violating A5.07 by utilizing "casual as and when" employees to assigned standard hours of work on a daily and weekly basis

> based on the standard work week of similar full-time employees, utilizing such employee in of itself being a violation of the collective agreement.

Mr. Parle presented that same assemblage of concerns during the course of his testimony, taken from his having interviewed affected casual employees and reviewing their contracts. Ms. Mathisen did not testify, but in her email chain with Mr. Parle, she advised the Employer's position that when offered a particular assignment, the pay range is determined by assessing the duties that they will be performing, and in other cases they were not responsible for performing the full scope of duties listed in the job description of an evaluated position which would leave it up to the hiring manager and HR to determine the pay range for the casual employee in assessing the duties. She referenced this arbitrator's award in *Misuse of Casuals* (Grievance #02-582), unreported November 19, 2004, whereby the language of A5.01 was recognized as entitling employees anticipated to be working in excess of four months, or extended past four months, to be "appointed on a term basis", which was distinct from a formal appointment within the Public Service contemplated by the *Public Service Act*. It meant that casual employees "don't occupy evaluated positions, when they are offered a particular assignment (and) their pay range is determined by assessing the duties that they will be responsible for performing", which as she pointed out might mean that they could be performing the full scope of duties of an evaluated position in their usual assignment, to be paid accordingly, or did not have that level of responsibility. Either way they did not fall within the formal evaluation process as would a formally appointed employee under the *Public Service Act*. She was aware that the ramifications as viewed by the Deputy Minister at the time, David Stewart, in his final level grievance response in referencing the Article 34.01 statement of duties and Article 36 job evaluation requirements were as follows:

> Both Articles 34 Statement of Duties and Article 36 Job evaluation specifically refer to positions. Because casual employees do not occupy positions, they are not entitled to any provision of the Collective Agreement which explicitly contemplates that it applies to positions. Having said that, it is the Employer's practice to provide casual employees with a statement of their duties and pay range information with their casual job offer upon hiring. Although Appendix 5 doesn't specifically exclude casual employees from Article 34 and 36, it does not follow that casual employees are necessarily entitled to them. Many Articles of the Collective Agreement outline conditions that must be met in order for employees to be considered eligible for their provisions and contain qualifiers that limit their application to certain groups of employees.

And further in interpreting the various arbitration awards covering the GNWT's use of casual employees, which one might observe for purposes of dealing with casuals working longer than four months can be viewed as tantamount to appointing them on a term basis, at least for purposes of the collective agreement obligations, Deputy Minister Stewart stated in its final level grievance response provided to Mr. Parle that the Employer's extension of a casual contract could not be a violation of A5.02 as "this is not contemplated in the language". His understanding was that support came from the line of arbitration awards between these parties. He further stated:

> These awards form part of the Collective Agreement and clearly distinguish between a casual appointed on a "term basis" and term or indeterminate employees appointed to a "position" as per the *Public Service Act*.
>
> The Union's interpretation of A5.01, which equates casual employment over 4 months with being appointed to a "position" in the Public Service, alleges missing entitlements for casuals which do not apply by the nature of the casual's employment with the Employer. As the Minister has the exclusive right and authority to appoint persons to "positions" in the Public Service, only those appointed to "positions" can access entitlements available to "positions" under the Collective Agreement. Given the clear distinction between casuals appointed on a term basis" and term/indeterminate employees appointed to "positions" in the Public Service, it remains unclear how the Employer can be accused of disguising one group of employees as a different one.

Mr. Parle viewed this response not to be supported either by the language of Appendix A5 or the body of arbitration case law between these Parties, the point of which was recognizing the entitlement of casuals hired into continuous employment for more than four months having the right to be appointed on a term basis and gaining entitlement on that basis to all provisions of the Collective agreement and not using successive periods of casual employment as a convenient staffing practice to deal with work requirements over relatively lengthy periods of time.

It is to be noted that following seven days of hearing testimony, firstly from Mr. Parle and then from 10 others including seven "example" employees, as the Union views their individual situations, all of them hired on successive casual contracts without being formally appointed to term positions under the *Public Service Act*, the Parties filed an Agreed Statement of Facts signed off by their respective counsel. It sets out an analysis of the Organization Chart vacancies for numbered

positions, i.e., either appointed indeterminate or term positions under the Public Service, at several moments in time, organized in a spreadsheet, and does not include any employees hired into casual assignments in the charted information however long that relationship may have lasted. Whether working in the duties which have become available due to a vacant numbered position, or not, they have no unique position number attaching to their employment. The position vacancy rates are set out in the agreed facts, as calculated on an arithmetical basis, showing both the total vacancies in the departmental sections in appointed positions and the average of all vacancies bearing position codes, including those identifiable when a position moves from one assigned letter code to another, i.e., reflecting the movement of indeterminate employees. The spreadsheets accompanying the agreed facts captured the situation existing in the Departments of Environmental & Natural Resources; Northwest Territories Health & Social Services Authority (NTHSSA) – Stanton; Department of Health & Social Services (HSS); and Department of Finance with respect to existing vacancies. The information informs that vacancies for positioned employment exist in all these Departments with the vacancy rates for coded positions able to be calculated at any given point time, generally presenting in the 15% to 30% range, and occasionally even somewhat higher. Some vacancy rates were significantly higher in specialized employment areas such as forest management personnel, wildfire officers and attack crew, some technicians, and medical personnel – none of which job categories involved any of the Union's witnesses and no doubt are known to be difficult-to-fill positions.

In moving on to outline the testimony of seven affected employees whom the Union called as witnesses, firstly, it is to be noted that witness Jacques Benoit Roberge, the Union's adjudication officer, worked on organizing the information involving the bargaining unit witnesses who testified about their own experiences as casuals. He explained the pertinent information on each employee's file concerning her employment situation, all of them being female witnesses, and the concerns raised by the numbers of successive contracts with little or no break time. He also related his view of the administrative approach being taken by management in describing his understanding of their employment histories and what they reveal. Certainly, from the Union's perspective, their evidence was meant to be taken as disclosing the various ways and reasons for sustaining

employment relationships over considerable periods of time on a casual basis. They were in order of appearance as follows:

Tracy Hutton was the first affected employee to testify: She was hired into casual employment with Aurora College as an instructor in the Office & Business Administration program offering a variety of certification level courses, earning a stated hourly wage, plus northern allowance. She was hired by the Program Head of Business Administration, Hillary Leroy-Gautier, who was called to testify as an Employer witness. The initial contract signed by Ms. Hutton encompassed January 4, 2010 to April 23, 2010. She signed several successive contracts thereafter, always said to be providing a period of casual employment, each having the heading: "Casual Employment Opportunity – Job Offer" and starting with the introductory message: "We are pleased to offer you the following casual employment opportunity…". The second contract covered April 24, 2010 to April 30, 2010; the next from August 23, 2010 to December 21, 2010; then from December 21, 2010 to April 29, 2011; from May 2, 2011 to June 3, 2011; from August 24, 2011 to December 21, 2011; from December 21, 2011 to May 26, 2012; from August 20, 2012 to December 21, 2012; from December 21, 2012 to May 31, 2013; from May 31, 2013 to June 10, 2013; from August 19, 2013 to December 20, 2013; from December 20, 2013 to May 30, 2014, said in a follow-up document signed on her last day of that contract to have been extended to June 27, 2014; next from August 20, 2014 to June 26, 2015, said in a follow-up document signed by her prior to her last day to have been extended to August 18, 2015; from August 20, 2015 to June 20, 2016; from August 24, 2015 to June 30, 2016; from September 6, 2016 to December 16, 2016 (in another Department); from August 25, 2017 to December 15, 2017 (returning to Aurora College); and finally from August 28, 2017 to June 3, 2018, as extended to June 29, 2018. Several of the contracts, it can be observed, were more than four months, some were less than four months. Some were extended and others were followed by an immediate rehiring. All the contractual periods followed on the heels of the previous period of casual employment and excluded summer break time. Some of the contracts excluded the Christmas break. These successive contractual periods of casual employment were said on the face of the signed documents to be "inclusive" of the stated dates, and referenced appendices covering the benefits' issue. It is observed that those signed contracts up to four months were covered by its Appendix "A" – no benefits, and those with signed contracts over four months were covered by its

Appendix "B" showing the benefits entitlements at that point for a term employee, with contributions to Superannuation commencing at six months by reference to the statutory language. The contracts pertaining to working in excess of four months stated that "casual employees assigned continuous work may be required to work year-round due to legal or operational requirements". Its language also confirmed that "extensions and/or amendments to the term of employment shall be upon mutual agreement between the supervisor and casual employee". Ms. Hutton was aware that if she was extended past four months, in a stated contract of less duration, the Appendix "B" contemplated benefits be applied but would end when the contract finished whether or not she was immediately rehired into another period of casual employment. She was allowed her to carry over her accumulated leave entitlements from one contract to the next.

It can be observed that Ms. Hutton's initial 17 contract hours per week were increased to 31, and then to 37.5 hours which was tantamount to being paid at full-time hours. In her testimony, she identified the standard Aurora College "casual staffing request form" with the checkbox on each renewal entitled – "re-hire request". The form required a stated "casual position title", namely an instructor position in her case, also setting out a short description of her duties, also her start date and end date, weekly hours, stated wage rate, assigned pay level, and pay step, together with her "previous" GNWT ID number which always remained the same from contract to contract. It showed an approval notation for accessing PeopleSoft which according to its Appendix "B" is available to casual employees employed for over four months. PeopleSoft is the human resources information management system which keeps track of time worked, leave entitlements, payroll information and produces. She was never denied access to it at the end of any contract. By Ms. Hutton's description, she had never responded to an advertisement for available casual work. At the end of each stated period of employment she simply carried on as before, not being issued with any Record of Employment (ROE). Contractual time periods under four months provided no benefits coverage. When a new contract carried a stated period of time over four months she would have to reapply for benefits on the basis that she was coming back to work after a break in eligibility, which is also to say she never had any benefits' coverage over the summer months when she was without a contract for two months, unless extended without any break when she was required for course organizing or development purposes. She said that she was periodically paid out on her earned vacation

entitlement.

At one point Ms. Hutton did apply for a GNWT position opening in the general pool of administrative work, but was not successful. She was never appointed to a term or indeterminate instructor's position under the *Public Service Act*, nor did she press her manager on that topic until June 2016. Up to that point she had generally discussed with her supervisor from time to time prior to the end of a contractual period whether there would be any need for her to continue teaching business administration classes into the next school term, meaning entering into another contract, such conversations usually being held during the spring session when assessments were being made about the next school year's course requirements. She remarked that she always knew at the point of her casual employment being about to expire that her supervisor wanted her back teaching her usual course load the next term, meaning another casual employment contract. It was either presented in the form of a contract covering less than four months or in some cases a contract term exceeding four months, meaning covering the entire upcoming statement school year. From January 2010 onwards she had simply gone along with the employment program presented to her. However shortly prior to her contract expiring at the end of June 2016 Ms. Hutton became aware that an indeterminate position in her teaching area was being posted, and she applied. She ultimately was unsuccessful, having been screened out of the competition for not having a Masters degree which was one of the stated prerequisites for instructing the various business courses to which he had been assigned over the previous six years. She acknowledged in her testimony that she only had a diploma/certification level post-secondary education. By her description, she would have liked to have increased her education qualifications by then, but without access to education leave as was available to formally positioned employees, she had never been in the financial position to pursue that possibility. She said that the Department Chair in a past conversation had discouraged her from leaving her job at Aurora College to pursue a university degree program as she was needed where she was working in her instructor's role.

In any event, not having been considered for indeterminate employment on the basis that she was not qualified to teach the courses she had been teaching, Ms. Hutton was nevertheless offered another casual teaching contract with duties to include providing advice and some training to the person hired into the permanent instructor's position. She declined and decided to take the offer of

casual employment she had received from another Department at the College, namely teaching in the Environmental & Natural Resources Technology Program. She continued working with the same employee ID number, still working in Fort Smith at the same Aurora College campus. In accepting the offer she signed another casual employment contract, the same standard form approach as previously taken, including a paragraph indicating that any extensions and/or amendments to the length of employment would be upon mutual agreement. Ms. Hutton completed two contracts, each time as a casual working up to four months, the first stating significantly reduced hours and the second being on an "as and when" basis. She then accepted the offer of a casual employment contract on August 8, 2017 to work again as an instructor in the business administration area of studies, hired into a 10-month contract of casual employment at 28.5 hours per week which was extended to the end of June 2018 when she decided against taking any further contracts to prolong the employment relationship any further. By her description, going from contract to contract as she had for the previous eight years and started wearing on her self-confidence. By her thinking, if her manager had always considered her not qualified enough for indeterminate employment at the College, it should never have hired her in the first place and kept her going from contract to contract teaching the same variety of courses.

Ms. Hutton testified that as the periods of casual employment accumulated one after the other over her eight years at Aurora College, she knew that were anyone to"crunch the numbers" she had been losing thousands of dollars per year as the difference between what she was making on hourly wages with summer and Christmas break time and what would have been her salary range and benefits in indeterminate employment, especially when compared with the contracts she signed for less than four months; albeit her hourly wages over the years had improved from $40.27 per hour (Pay Range 18, step 0) on her first contract as an instructor to $52.89 per hour (Pay Range 18, Step 04) on her last contract for 28.5 hours per week. As she put it: "I think they saved a lot of money over the years". She learned in 2018 that her successive contractual periods of employment were considered pensionable time with Aurora College which after receiving financial planning advice she left in the Superannuation system.

Shannon Clarke (nee Jensen) was hired as a casual administrative assistant in "non-continuous employment" at the Inuvik Probation Office with the Department of Justice on December

1, 2014 to last until May 29, 2015. She went on to complete six consecutive over-four-months' contracts through to October 3, 2018, all stating a 37.5 hours per week commitment, Monday to Friday scheduling. She was advised on commencing her first contractual period of employment by her manager Nancy Chinna, later called to testify as an Employer witness, that she should consult Appendix "B" in the contractual language respecting the benefits to which she was entitled for being employed over four months. Her second contract was from May 30, 2015 to November 30, 2015, then December 2 to June 1, 2016, which was extended to November 28, 2016. Her next contract was from November 30 to March 31, 2017, then from April 4 to October 3, 2017, and from April 5 to March 30, 2018 as extended to October 3, 2018. Briefly, by Ms. Clarke's description, she raised the issue of her working successive periods of casual employment with her manager, Nancy Chinna, who explained that hers was not a funded position and that she was being paid from monies made available from a vacant probation officer's position. She said that it was explained to her that "unfunded" meant no specific allocated monies in the budget to cover her duties, no salaried position set up in that category. She owned no position. She found it difficult to accept this explanation inasmuch as by her understanding there were administrative assistants working in indeterminate positions elsewhere for the GNWT. By her recollection, the explanation was repeated in various conversations she had with her manager over the next 3½ years, which she found "nerve-racking" on approaching the final days of each contract. She said it was stressful not having any job security and not knowing from year to year whether she was going to be offered another period of employment. She never saw a job posting for the work she was performing and her casual employment documentation was simply re-signed at the point of each expiration. She was not about to refuse the work. She said that it was not until November 2016, which is to say four years into her working relationship, that any HR representative sat down with her to explain the benefits available for her employment situation exceeding four months, not having known that she qualified for pension accumulation which her pay stubs nevertheless indicate she had been contributing since some point in 2015. By Ms. Clarke's recollection she was not issued any ROEs at the end of any contract. She recalled being told that she needed to take one day off before again starting work. Presumably she would have been re-qualifying for entitlements at commencement of the next contract over four months. Eventually lacking any permanent job seniority she moved on to other

employment and was replaced by someone else. She does not believe that the job has ever been posted as an indeterminate position although the range of duties associated therewith has always needed to be performed.

Sara Jayne Dempster was hired as a casual medical billing clerk by the Beaufort-Delta, stated in the contract to be "non-continuous employment", at 37.5 hours per week, Monday to Friday, from April 29, 2015 until April 28, 2016. She had brought a financial background to the job from working at a CIBC branch in Ontario and received some training in medical technology when she started her employment. She understood from outset that she fitted into the contractual category of casual employment over four months and accordingly was entitled to the benefits and pension accumulation set out in Appendix "B" of the hiring document. Her next contractual period of employment was for a full year from April 29, 2016 to April 27, 2017, her hours again described as 37.5 per week in the same clerical work dealing with inpatient record entries. The third contract lasted between May 1 to October 27, 2007, same work, same hours, and upon her request was extended by her manager to November 30, 2007, and then further extended to January 12, 2018. By then she had applied for a posted indeterminate position and had been the successful candidate, accepting the offer and starting the next day. By her description she had been asking her manager, the Director of Finance and Operations for the Authority, Roger Israel, about moving into indeterminate employment, being her stated preference, but nothing materialized until January 2018, which is to say three years after doing the job. At the point of moving into indeterminate employment, a position appointment into the Public Service, she had never been issued an ROE between contracts, by her recollection, being a matter of taking a day or two off and then starting on the next contract.

Shannon Coleman, following her being laid off from working in a Northwest Territories mine, was hired into casual employment at Aurora College in Fort Smith as a residence life supervisor with duties which included maintenance and security work on an "as and when" basis. Her first short-lived contract ran from February 14, 2017 to March 31, 2017. It was extended and then replaced by another contract for "continuous employment" as a casual housekeeping aide for the Northwest Territories Health and Social Services Authority in Fort Smith from April 29 to May 12, 2007, working a regular 7.5 hour shift. It was followed by another contract from May 17 to May 26, 2017. Her next contract was from June 16 to June 26, 2017, again working as a residence life supervisor at Aurora College

with her situation still described as being "as and when". Her next contract returned her to housekeeping aide casual employment with the Health Authority in Fort Smith from May 27 until June 29, again working a 7.5 hour shift schedule. She signed another contract performing the same work from July 1 to July 31, 2017, extended to August 31, 2017. In her next contract she returned to work as a resident life supervisor, at Aurora College, covering two days, September 9 and 10, 2017. The casual contract which immediately followed took her through to the end of September 2017, and then on to working as a casual laundry aide from October 23 through to January 5, 2018 on a 7.5 hour shift schedule, 37.5 hours per week, which was first extended to March 31, 2018 and then again extended without any break to April 30, 2018. The contract documentation referred her to its Appendix "B" recognizing benefits' eligibility for employment over four months. For Ms. Coleman, it was always a matter of "taking what was offered", but by the fall of 2017 she knew that the full-time employee doing laundry work was considering retirement. She accepted a one year contract on June 1, 2018, and by February 2019 was appointed to an indeterminate position in the Public Service doing laundry work following her coworker's retirement. In being asked by counsel to explain what she thought about having accepted the series of casual contracts, she answered that at least it gave her a "foot in the door", and made it possible for her to eventually move into an indeterminate position after two years as a casual.

Marilyn Bonnetroupe worked as a clerk/receptionist for Deh Cho Health and Social Services Authority in Fort Providence after signing an "as and when" casual contract which initially provided for "continuous employment" of 37.5 hours per week for four months, less one day, starting February 23, 2012, and thereafter signing a series of contracts to commence the day following expiration on the same "as and when" basis, but working regular office hours, or in some cases the contracts were extended. She worked for the described periods under manager Andrea Donovan who was an Employer witness in this matter, and by her description at no point did Ms. Donovan ever indicate to her that completing any current contract would finish her working relationship with the Authority. By her description, generally she would be approached a week or two prior to expiration to confirm that the casual "continuous employment" situation would continue with another contract. On more than one occasion she worked through the end of the contract and the paperwork which. Her initial spate of 14 contracts, back to back, lasted between October 15, 2012 and March 15, 2015, two of

which slightly exceeded four months. She experienced a one month break, before returning on April 15, 2015 to the same casual clerk-receptionist duties she had always worked, this time running for less than four months at 37.50 hours per week, her last day being July 31. At that point she started another period of employment until December 1, 2015, again at 37.5 hours per week. This contract was extended on December 1, 2015 to run until April 1, 2016, which was extended until April 8, 2016, when she signed another continuous employment contract from April 12, 2016 until September 9, 2016. It was extended until January 6, 2017, then until August 11, 2017, then until April 6, 2018, and then again until December 8, 2017. Whenever the description in the contract language was her working more than four months there was a reference to Appendix "B" dealing with extending benefits' coverage. She signed her last contract placed in evidence describing continuous employment from April 10, 2018 until October 5, 2018 which was extended to April 5, 2019. All during these years, by her description, in going from contract to contract she never received any ROE upon completing one period of casual employment and moving on to the next.

During Ms. Bonnetroupe's seven years working for the Authority between February 2012 and April 2019, in what she called "steady employment", covering some 21 periods, all the signed contracts indicating casual employment, she always had a "good feeling" that her situation would continue. By her description, she had become very knowledgeable concerning the administrative duties she was performing, mostly compiling medical travel documentation and working as a front desk receptionist. She recalled being advised by her supervisor at some point during the course of working her many casual contracts for less than four months that she was not entitled to any benefits or pension accumulation. She acknowledged that on some days when working in "as and when" employment she did not work a full 7.5 hour shift, being required for fewer hours. By her description, her supervisor never talked with her about her casual status.

Lanita Thrasher worked as a clerk in Paulatuk for the Beaufort Delta Health and Social Services Authority after signing a series of contracts for 37.5 hours per week employment of not more than four months duration starting April 19, 2010 to April 23, 2010, then May 17 to May 21, 2010, June 22 to June 25, 2010, July 6 to July 30, 2010, August 16 to August 27, 2010, followed by an "as and when" hours of work contract extending for two days commencing March 10, 2011. Thereafter she worked a 37.5 hours per week contract for "continuous employment" extending April 18 to April

22, 2011, then from May 16 to May 20, 2011, from June 10 to June 23, 2011, from August 19 to August 26, 2011, from September 6 to September 9, 2011, and then after a lengthy break in her casual employment, signing another contract extending from September 2 to September 18, 2015 at 37.5 hours per week. She next secured a casual employment contract as an education assistant working 28.10 hours per week with the Beaufort Delta Education Council between March 14, 2016 and June 10, 2016, extended to June 28, 2016, and next a contract for continuous casual clerk work with the Northwest Territories Health and Social Services Authority Beaufort Delta Region, to last from September 11, 2017 to September 15, 2017, still working in Paulatuk.

Following a short break, Ms. Thrasher next signed a casual employment contract with the Beaufort Delta Education Council to work as a school secretary in "as and when" hours, extending between September 27, 2017 and June 26, 2018, being her first contract for more than four months, which is to say the entirety of the school year, thereby qualifying her benefits "for casual employment over four (4) months". Her next contract ran from September 10 to December 20, 2018 covering the same work to the point of the Christmas break, having returned to working a less than four months' contractual period. It was extended to the end of the school year, being June 2019. All the while she was working toward her commercial pilot's license which she succeeded in achieving. She finished her employment with the Education Council in June 2019 and is currently employed as a pilot. During her time as a casual employee she never applied for any permanent position, although she thought one may have been available as an education assistant. During her time as a casual employee, by her recollection, she never received an ROE until her employment relationship finally ended in June 2019 after nine years of casual contracts.

Alana Hjelmeland signed a casual contract as a financial clerk with the Department of Industry, Tourism & Investment in Yellowknife, working 37.5 hours per week commencing August 1, 2015 to May 4, 2016, having been provided with the Appendix "B" notification with respect to benefits available to casuals hired for more than four months. The next casual contract as a finance officer in "non-continuous employment" was as a finance officer from May 6 to October 17, 2016 with Northwest Territories Housing Corporation assigned 37.5 hours per week doing collections work. The next contract was from October 18, 2016 to February 14, 2017, it having been pointed out that she was at that point holding casual employment which no longer exceeded four months, which

is to say losing the benefits. Ms. Hjelmeland's next contract, after a two-day gap in her employment, referenced the same collections officer's work for the Housing Corporation to be performed from February 16 to August 16, 2017, being a period of more than four months and thereby again qualifying her for the benefits referenced under the Appendix "B" portion of the contract. The contract was extended another six months to February 14, 2018. Her next contractual period, still working as a collections officer, following another two-day gap in employment was from February 16 to August 15, 2018. On her final day of that contract she started another contractual period of casual employment as a maintenance officer with the Housing Corporation working 37.5 hours per week until February 14, 2019. During her final period of employment she worked under manager Scott Reid's supervision who had hired her into the maintenance officer work. He was later called to testify as an Employer witness.

Ms. Hjelmeland testified that at some point she had successfully applied for a mining industry job but did not take it because she understood that she was more likely to gain permanent employment with the GNWT were she to persevere in casual employment. She had become aware that for any contractual periods over four months she was receiving benefits. In wanting to discuss her "long-term" prospects she recalled her manager, Mr. Reid, advising that they would "circle back" to discuss it later. Nothing materialized for her with the Housing Corporation. Eventually, in February 2019, she applied for an excluded position in Department of Infrastructure where she is currently working as a Public Service appointment to a one year term position.

Summary of Union's compiled casual employee research:

The Union's service administration assistant, Barb Kardash identified three binders of assembled communications between the parties together with a spreadsheet compiling descriptions of widely varying situations where casuals were rehired or extended beyond four months. Some placements had involved consultations with the Union at the time and explanations had been provided concerning some 168 situations described therein. The reasons provided to the Union were varied and sometimes complex, the most common being backfilling employee absences/leaves. Others were recorded as covering the period of time to evaluate whether there was a need for an indeterminate position; or the complexity of a particular project requiring specific and continuing short-term

expertise; or the qualified person being unable to commit to long-term employment due to another job; or needing to develop expertise to determine whether they were qualified for a possible indeterminate position; or management needing to determine whether an indeterminate role was even required going forward; or awaiting results of competitions; or being unable to fill available positions through competitions due to lack of interest; or some lacking credentials to compete for an indeterminate position; or no immediate community interest in potentially available long-term employment opportunities; or some successful candidates for indeterminate employment declining to accept; or some competitions taking longer than expected; or awaiting position transitioning into another department; or duties expected to be rewritten; or known continuing temporary job requirements extending past expected limited duration; or requiring continued specialist expertise; or needing to cover staffing shortfalls; or the search for qualified indeterminate employee had been unsuccessful there being a "struggle" in filling an available indeterminate position; and in some instances the prospect of an indeterminate position was simply unfunded with no funding in sight but all the work needed to be done.

It can be seen that in some instances the Union expressed approval on hearing the rehire/extension explanation in consultation, and in others it assessed the Employer's approach as being excessive, which is to say non-responsive to its concerns in a satisfactory fashion. This is to say that in some instances the Union assessed the varying information received as providing adequate explanations and others not, and maintained an oppositional approach when it was thought that a casual was being employed into the indefinite future as a matter of convenience without establishing a term employment under Appendix A4. In some cases it was thought there was inadequate consideration given to indeterminate employment, or simply failing to provide any real justification as the Union viewed it. The documentation discloses that the Union is recorded as having taken issue with approximately 50 rehires/extensions. An underlying difficulty always present was that its bargaining unit members wanted to be employed and presumably did not want to jeopardize their working situations.

Superannuation requirements explanation from both sides;

Both the Union's final witness James Infantino who is employed by PSAC as its national

pensions and disabilities insurance officer, and the Employer's witness Joanne Corey, a benefits specialist with the GNWT testified concerning the issues arising under the *Public Service Superannuation Act* and explanations provided in the Superannuation Administration Manual applicable to its eligible employees. Both these individuals deal regularly with the impact and implications of the *Act* on pension eligibility which covers GNWT employees. Most notably, Section 5 requires that "an employee who is engaged for a term of six months or less..." is excluded from contributing. The Manual contains numerous detailed example situations in applying the statutory language. For our purposes it is necessary to observe that if a person is appointed to a position in the Public Service on an indeterminate basis contribution is immediate; or if the person is hired for a period of more than six months whether full-time, or part-time, and working at least 12 hours per week, whether stated to be a contract of casual employment or term employment, contribution is immediate; or if the person is working in a term or casual situation of continuous employment which eventually extends past six months, although not hired on that basis, one becomes a contributing employee for pension purposes at six months, and continuing in that fashion unless there has been a lapse in employment of more than one working day (rest days excluded). According to Mr. Infantino, in referencing the statutory requirements one would expect to receive an ROE at conclusion of a term of employment, even in a situation of being quickly rehired. It can be observed that Service Canada has its own rules which do not require an ROE to be issued for only a few days cessation before restarting. He pointed out that the employee definition language in the Collective Agreement at Article 2.1(m) does not contradict any language in the *Public Service Superannuation Act*, nor are the statutory requirements even expressly addressed by the language of Appendix A4 or A5 whatever the collectively bargained requirements in one moving from one employment category to another. By his explanation were an employee to suffer contrived/artificial breaks in employment between contractual periods, it would be possible never to achieve pension plan eligibility, just as if the person were an "as and when" casual which employee designation is ineligible although a factual issue may arise as to whether a person is in reality employed on an "as and when" basis.

As with James Infantino, the Employer's benefits specialist Joanne Corey is closely familiar with the innumerable rules for administration of pension benefits, with the Employer's information provided through its PeopleSoft HR system utilized for management of employees, including pay and

benefits requirements. She views her job as a "conduit" of information being sent to the Pension Centre. For her purposes in compiling employment information, there are essentially two categories of employees, being those who contribute under the Superannuation rules and those who do not by reason of not being hired for more than six months, or ultimately not being employed for more than six months in "substantially continuous" employment measured in months, with no break in the employment relationship allowable for more than one day. It can be noted as with Mr. Infantino that "as and when" casual employees have no eligibility. Ms. Corey also pointed out that if a person is a contributor for less than two years before leaving the GNWT his or her their contributions are returned, there being no vesting until that period of employment is reached. In her testimony, Ms. Corey spoke to the pension situation covering the bargaining unit employees who gave testimony, for example Ms. Bonnetroupe who was non-contributory while working as an "as and when" casual, or while working contracts less than six months, but would became contributory when her casual contract for continuous employment was extended past six months without a break subject to losing that status after a break in employment of more than one day. Likewise the same breakdown could be done for Shannon Clarke who was initially hired for less than six months on a casual contract but was thereafter extended past that threshold without a one day break, but on having a break of more than one day was hired again on a contract not exceeding six months which meant that she had to start again on the basis of needing to work past the six months threshold. Those employee witnesses hired into periods of "as and when" casual employment, no matter how frequent their attendance on site did not qualify in that category, presumably on the basis that their working relationship did not indicate continuous employment. Obviously, it can make for a complicated situation respecting Superannuation contribution in one following the various employment patterns for those employees hired into contracts of casual employment of more or less than six months, or being extended, or rehired, or having a break in service of more than one day or not.

Employer's management witnesses:

The Employer's lead witness Candace Parsons held a management portfolio between March 2015 and July 2019 as Superintendent of Human Resources, Northern Region, Department of Finance, meaning working as the client service manager, involved overseeing HR services in the

Beaufort Delta Region which included Inuvik and Norman Wells. While acknowledging that she has played no role in the development of the Employer's HR policies, and generally would consult with Labour Relations on individual issues as they arose and take its advice, nevertheless Ms. Parsons has a working familiarity with the internal HR Manual dealing with casual employment within the GNWT departmental network. Excerpts from this Employer document have been earlier set out in this award. Ms. Parsons started by citing its definition language from the Manual: namely that it is employment for fixed period less than 12 months to do work of a temporary nature, can be full-time, part-time, or as and when required. Further, she is aware from the definition section in the policy document "0502d – Casual Employment" that its language contemplates the employee category of "casual/term" which she knows to be defined as "casuals whose continuous service exceeds four months and who, by virtue of this, is entitled to all of the relevant provisions of the collective agreement". The policy's definition language which she cited also contemplates that continuous service for this presumed casual/term hybrid employee status contemplates "uninterrupted employment". In reviewing its guidelines' section addressing certain understood parameters, she is aware as stated therein at para. 14 of the document that they are "generally hired for a specific period of employment to do work of a temporary nature" providing examples such as their working on special projects or acting as emergency replacements for employees on leave. It also states that "the hiring of a casual is planned in advance, based on anticipated workload, staff absences and/or resignations, and the planning of special projects". Its language goes on to distinguish them from seasonal term or indeterminate employees, while contemplating that this employment category may be used to provide temporary opportunities for individuals requiring work experience prior to obtaining indeterminate employment. It would be difficult to find much compatibility between her evidence and the testimony, and work histories of the seven employee witnesses in terms of describing their usage patterns.

By Ms. Parsons understanding, the policy document in its dealing with extensions contemplates that an extension of casual employment over four months results in the employee being hired as a casual/term employee but should not exceed a continuous period of one year, its further providing that a one day break in service will not constitute a break in service, no specific reference to the *Superannuation Act* requirements. She has been aware, as taken from the policy document, that casuals are entitled to some benefits, namely sick leave, special leave, holiday pay, and northern

allowance. She has observed that the policy language at para. 34 of the 0502d outline goes on to state that "under no circumstances should a casual or casual/term employee be laid off or not extended, where there is additional work to be done, solely to avoid paying that individual benefits to which he or she might otherwise become entitled to". It leaves her with some confidence over extending the employment relationship where there is still work to be done. She is aware that the policy language also specifically deals with on-call casuals which may be hired "when required but are generally not scheduled to work on other than a 'call in' or emergency basis". Their continuous service is said in the document to run from time from which they were first hired up to and including the final day of their employment regardless of the frequency or duration of work that occurs between those dates, presumably lasting all that time during which they still hold on-call status whatever their work schedule which could be full-time.

Ms. Parsons conveyed her assessment testimony that the essential limitation on the GNWT using casuals hired on the basis of temporary or short-term employment was set out in the *Public Service Regulations* which under Section 5 requires that they "shall not be employed beyond six months but, with the approval of the Minister, the period of employment may be extended to 12 months". She takes the one year rule to be the maximum, which does not prevent rehiring after that time into a period of new employment which we know to be occurring from the testimony of the various affected bargaining unit employees – a short break in service and then rehiring into new casual employment in the same duties. It can be observed that casual employee has been defined under Section 1(1) of the *Regulations* as "a person engaged to perform work of a casual nature or in an emergency." She sees no problem with this initial one year period of work, requiring extension of the casual/term status at four months, or the eventual rehiring on the same basis following a break in service of whatever duration.

Ms. Parsons was referred to the HR document entitled "Request for Approval to Hire a Casual (or a Student)" setting out the likely areas of inquiry in terms of hiring a casual by a departmental supervisor such as whether they were needed full-time, number of hours per week, start and end date and looking to be reviewed and signed off by delegated signing authority. By her understanding, certainly the length of the contract can widely vary depending on the work requirements. She went on to remark that in her experience departmental funding plays a role in whether to hire someone into

a contract for casual employment, or a series of contracts through addressing the prospect for their rehire or extension. even presents the possibility of changing one's workplace assignment without an initial break in service. She said that whether or not they are capable of performing the full scope of duties of an existing job description would be reflected in the rate of pay. She is aware that the contracts contain reference to an Appendix A for casuals hired up to four months, or to Appendix B for casuals hired in excess of four months setting out benefit entitlements in each category. She is aware that if there was an intervening break of one full day it would require resetting the pension entitlement back to the start-line of requiring a full six months.

Having been referred to some of the working situations involving the casual employees who testified, Ms. Parsons presented her understanding of how it was they would have been hired for the periods of time they worked, having no direct involvement, including not having considered their qualifications or lack thereof when compared with anyone seeking indeterminate employment. In remarking on how it may have been that there extension situations came about, and what their entitlements would be depending on length of continuous employment, she noted that extensions occur as a means of continuing their employment without a break, as opposed to being rehired. By her description, casuals remaining employed for whatever period of time should be approached on the basis of the work continuing in line with the usual reasons for utilizing casuals as set out in the Human Resource Manual, no doubt sometimes involving a rehire, or an extension, even situations of closing in on the one year maximum limit under the *Regulations,* such as covering for maternity leave. Simply put, more of the same work needed to be done. She did not dispute the reasons given during the union/management consultation process as remarked in the testimony of Ms. Kardash.

Ms. Parsons also testified that she has never herself used the description "casual/term" to describe an employee working under a contract of casual employment exceeding four months, being aware that the collective agreement does not contain any such express reference to this category although contemplating a benefits' difference at that point in the employment relationship. In dealing with the possibility of a casual employee wanting to challenge their pay level within the grid, she responded that any employee on a casual contract can seek a review at the supervisory level, although not having the same formal process as term or indeterminate employees. It is generally accepted by managers, she said, that casual employees should move up to a higher pay level in line with their

experience in doing the work. She acknowledged that while there might not be carryover from job-one to job-two work activities upon rehire, where the duties remained the same the pay range should reflect the experience in the job. At the same time, she is not informed concerning individual case circumstances and front-line approaches from her own experience, the local managers having the last word on pay level placements.

Nancy Chinna, is a regional manager in Probation Services, having been Shannon Clarke's direct supervisor at the Inuvik Probation Office. Her supervisory duties at the time of working alongside Ms. Clarke included managing 13 communities serviced by seven offices, all of which needed to be equipped and properly run. By her description, having an administrative assistant was "critical" to the operation. Prior to her hiring, She had become aware of Ms. Clarke's having general financial experience in the private sector and with local government. She accepted that there was no person locally available as capable of doing the range of administrative assistant duties as Ms. Clarke. However, in 2014, by her description there was no funding available for a permanent administrative assistant position, not initially and not during the time that Ms. Clarke worked for her in successive casual contracts. The organizational chart in addition to showing 10 probation officer positions, and a senior probation officer, showed one administrative assistant position, but by her description, there was no funding to fill it. Her thought had been to convert a vacant funded Probation Officer position, which would sidestep the lack of funding, although following her hiring Ms. Clarke she learned that moving funding around from position to position was not permitted, as it had not been properly "earmarked" for hiring an administrative assistant. By Ms. Chinna's description she pled her case with "headquarters" knowing that her finding a position for Ms. Clarke was justified due to the amount of work required to be performed on an ongoing basis and her competence in the job. She said at some point she learned from her superiors that funding would be found for an appointment into an indeterminate administrative assistant position, but it never was. She said she was eventually advised in her discussions with an HR representative that there was not even enough accessible funding to have Ms. Clarke formally appointed into a term position, with Appendix A4 allowing term employees to be hired for up to 48 months of continuous employment. It had become a situation of her continuing to use the monies already made available for one of the funded probation officer positions which she had not been able to fill, probably due to the remoteness of the location associated with the

position. Ms. Clarke continued working on that basis.

While still looking for position funding, according to Ms. Chinna, she prepared a comprehensive report for her superiors in February 2017 pointing out that Ms. Clarke to that point had worked six successive casual employment contracts, doing well and presenting no issue with respect to performance. She summarized her situation by addressing the Inuvik Region's ongoing needs for the administrative position and seeking the permanent funding which she understood had been postponed due to an ongoing reorganization project in Inuvik. She advised that there was a lot of competition in the region for staff and she anticipated that her preferred casual might well leave departmental employment when offered more security, i.e., a permanent position elsewhere, and noting the significant amount of time needing to be invested in training. Ultimately, no funding materialized. However, Ms. Chinna acknowledged that no one ever advised her that it was a matter of saving money, and by her understanding there was no financial saving in employing her as she did in successive casual contracts, the final contract extended to October 3, 2018 paying her $34.48 per hour, at pay range 8, step 5, together with northern living allowance, for her long-standing 37.5 hours per week. Ms. Chinna by then was prepared to keep Ms. Clarke working "indefinitely" on successive casual contracts if that was the necessary approach. She pointed out that it was not her job to secure funding for any particular positions. She can only make recommendations as what she thought was needed. At the same time she appreciated that were a person never to receive a position appointment, the GNWT hold on them was tenuous, subject to a better offer providing more security. Eventually, as confirmed by Ms. Clarke in her testimony, she stopped accepting casual periods of employment and moved on to work elsewhere in November 2018.

Hillary Leroy-Gautier was the Program Head for the Business and Leadership faculty at Aurora College, having been an instructor for many years. She described the structural changes implemented over the years due to the flexibility required for successful program delivery in accordance with educational demands. She used casual contracts as a means of employing enough instructors within her department, the approval coming from her College superiors, either the President or Vice President in consultation with HR, following her requests. But, it was not a matter of saving available dollars in utilizing them. It was difficult to know what the future would bring concerning program requirements. She explained that some programs were created and others were

deleted from year to year, with her not always knowing which programs were going to be offered in subsequent years, nor what the student demand would be, thereby presenting a difficulty in understanding the faculty's instructional manpower requirements going forward from year to year. Some programs were continued on a pilot basis and then either extended or deleted which presented staffing issues from year to year. She referred to the "instability" of the instructors' course-load assignments from one year to the next. She remarked that it could be that a casual is associated with a particular position, but sometimes not the case in their simply being employed for their expertise and experience to fill a current need without availability of any indeterminate position going forward. Nor could she compel any decisions made by the Deputy Minister concerning usage of casual employees, as opposed to creating or filling indeterminate positions, her role being one of making a recommendation.

More particularly, Ms. Leroy-Gautier testified concerning Tracy Hutton, being her immediate supervisor at one point, and being aware of her having worked numerous contracts of casual employment with Aurora College between January 2010 and June 2018. She always considered Ms. Hutton to be a competent instructor. In dealing with a 2015 contract, she recalled one employee in particular having long-standing health issues leading to Ms. Hutton covering her teaching duties and continuing thereafter when the absence was resolved and someone else transferred into the position. She was aware that Ms. Hutton had developed a range of usable expertise, being applied year after year. She was also aware that Ms. Hutton was interested in finding a permanent vacancy which by 2016 had become available but were she to apply, as she did, lacked the required educational qualifications to successfully compete. Nevertheless Ms. Leroy-Gautier considered her experienced enough to continue employing her on a casual basis to provide some curriculum review and delivery covering a variety of business related courses, including working with developing the video conferencing platform leading to hybrid course delivery but also causing a certain "instability" respecting teacher workload. When the permanent position materialized Ms. Leroy-Gautier had no control over any determination of possible equivalencies to deal with the application of someone not having the required education qualifications, such as Ms. Hutton, that which disqualified her from the competition. She knew that Ms. Hutton returned for the 2017- 2018 school year, but was aware that she left her employment at Aurora College in June 2018 despite always having found courses for

her to teach year after year, which at that point she was expecting would continue. There was no explanation from Ms. Leroy-Gautier why she would have not have at least sought her being appointed into a term position under the *Public Service Act* which could have provided some job security up to 48 months, and then allowing for further employment subject to consultation with the Union pursuant to Appendix A4. As it was, during much of her time at Aurora College she did not qualify for contributions into Superannuation.

Scott Reid is the Director of Infrastructure Services for the Northwest Territories Housing Corporation. He testified concerning his working with Alana Hjelmeland as a maintenance officer with the Housing Corporation during her last casual employment contract for six months ending in February 2019. Prior to his hiring her he knew that there was a vacancy by reason of a full-time maintenance officer vacating his position. He had received some advice from the VP of Finance, namely indicating that she was "doing a real good job" in her previous assignments as a collections officer, her most recent contract coming to an end. He had also discussed the situation with an HR specialist where he indicated that he expected he would need someone for at least six months which would require a period of training on a variety of anticipated duties. He offered Ms. Hjelmeland a six-month casual contract, which she accepted.

Mr. Reid indicated not being conversant with either the Appendix A4 or A5 language dealing with term and casual employment but he understood that the casual employment relationship, once established, was capable of being continued either by rehiring or extension if she proved satisfactory. He shortly recognized that Ms. Hjelmeland possessed a variety of valuable administrative skills, including those from her financial background, which was proving to be especially useful in dealing with invoices and contracts. Plainly put, he observed her to be working well in any of the assigned duties as a maintenance officer, including having "great" data entry skills. In all, in assessing her work, it led to his concluding that she would be a good long-term fit within Housing. Accordingly in December 2018, by his recollection, he approached the VP of Finance to inquire whether she could be offered a direct appointment into an indeterminate position, the initial difficulty encountered being that someone would have to work on developing her expected role, compile a suitable job description and have the job evaluated. As far as he knew the job description was thereafter being worked on and was "slowly getting there", as he put it, but not yet fully developed when Ms. Hjelmeland near the

end of her casual tenure advised that she was interested in the job offer she had received from Infrastructure where she previously had worked. He recalled mentioning to her in February 2019, as she was closing in on the end of her contract, that he had approval for her direct appointment, with the job description having been drafted but not yet issued, or presumably yet evaluated for salary range, and she should take some time to consider her situation. Ms. Hjelmeland shortly indicated that her decision was to take the other job offer which we know from her testimony was a one year term position.

Mr. Reid testified that no one within his reporting structure ever indicated to him that hiring casuals was a money-saving approach, and he has never held to the view that it would be, inasmuch as he knew they require training and resource expenditure to be able to satisfactorily perform whatever duties to which they are assigned, which he explained was the observed situation with respect to Ms. Hjelmeland. However his evidence did not address the situation with respect to casuals who might find themselves in a situation of being rehired, or extended, contract after contract ultimately covering several years of performing the same range of duties as a reliable worker on an ongoing basis. His working relationship with Ms. Hjelmeland was confined to the one contract and he provided no information concerning her previous periods of casual employment dating back some four years, other than knowing that she had been appreciated for her work as a collections officer.

The last Employer witness to testify about her managerial dealings with one of the casual employees who testified, Andrea Donovan, is the Regional Manager, Primary Care, for Deh Cho Health and Social Services Authority. Her healthcare responsibilities encompass Fort Simpson, Fort Providence and Fort Liard, having started in this management position in 2017. She recollected that during her manager orientation meetings there were no discussions concerning casual staffing, whether and when it was appropriate. However, from her past experience in performing managerial duties, she understood that casuals were to be employed when there was an operational need and no funded position availability. Ms. Donovan has never consulted the collective agreement in that respect, but has a passing understanding of the Human Resource Manual guidelines.

Ms. Donovan had become aware shortly following her arrival on site in October 2017 that Marilyn Bonnetroupe was working as a casual employee providing additional administrative support and that the nurse-in-charge was requesting she be rehired into another period of casual employment,

which she arranged. By that point she had already reviewed the organizational chart covering administrative support services which shows an incumbent holding the one indeterminate position. By her information, the incumbent had long since been experiencing significant recurring sick leave absences, also drawing back from performing the full scope of position duties, leading to the nurse-in-charge having earlier secured additional administrative support, namely Ms Bonnetroupe. She had learned that the incumbent's time away from work over the course of seven years could only be described as "significant", being at work "just over" 50% of her scheduled shifts, and had eventually indicated being interested in only performing part of her job, being the medical travel arrangements' portion. Ordinarily, by Ms. Donovan's assessment, there would not have been enough work available for two positions as administrative assistant, but in the circumstances there was sufficient work for Ms. Bonnetroupe to perform. At the same time, she knew that there was no funding available for an additional indeterminate position on the administrative side of the operation. There nevertheless was a need for a second person to ensure the work was being completed into the indefinite future.

Ms. Donovan was aware that thereafter the rehires continued as set out in the evidence of Ms. Bonnetroupe. She did not know why it was that she would have signed any contracts describing "as and when" employment inasmuch as she always worked a standard shift schedule for known periods of time from contract to contract. She would finish one contract and be offered the next. She saw Ms. Bonnetroupe's situation to be different than with most casuals at the Authority who were "mainly" working in relief coverage, often no more than five or six weeks at a time backfilling indeterminate positions, which remains the current situation for others, including performing nursing duties which are difficult to fill on any other basis keeping in mind the scarcity of trained personnel. She said that at no time was she ever directed to use casual contracts in order to save money. She was not familiar with the benefits differences between casual contracts for more or less than four months, nor was she knowledgeable in understanding the ramifications of a break in service in terms of relinquishing benefits' coverage and affecting Superannuation contributions. The nurse-in-charge made the recommendations for the contracts which she supported on the basis of the work needing to be done in the manner sought, and dutifully forwarded requests to a higher managerial level for approval. Admittedly, she was more concerned in trying to arrange sufficient nursing staff which as she put it was "a constant challenge", than giving much thought to Ms. Bonnetroupe's situation. It seemed to

be working out. She did not indicate any awareness that over the course of some seven years starting in February 2012, Ms. Bonnetroupe had signed a series of 21 contracts for casual employment.

Celito Rivers is employed as an HR business analyst in its statistics group, with a working history as an internal auditor. Her evidence touched on the vacancy reports covering of the 29 GNWT Departments and Boards across its system, for example referencing their September 2017 statistics summary breakdown indicating that some 206 funded positions were filled at 94.3% rate, which is to say having gone through the Legislative Assembly and/or the employing group's formal approval process. She explained the difference between the GNWT figures for position vacancies and the Union's higher percentage figure as a matter of recognizing the significance of funding, without which "typically" there can be no recruitment, whereas the Union's figures included underfunded position vacancies, unlikely to be filled at least in the short term. The GNWT considers it to be more accurate system than just looking at overall vacancies in numbered positions, some of which may never be filled, possibly awaiting deletion, or persons are on a long term leave situation and are going to return at some point, or recruitment has been unsuccessful. The recruitment figures include both indeterminate and some term positions, but not casuals. In particular, dealing with Aurora College her information indicates 61 posted positions, but 13 supposed vacancies have been cancelled due to a variety of reasons such as no suitable candidate, failed references, candidate withdrawal, course changes, or as a matter of departmental discretion. No doubt casuals are used on a fill-in basis in such a situation of the work needing to be done whether enlisted for more or less than four months. She acknowledged that her statistics do not capture a situation where there may have been a long term approach applied to staffing available work with casuals, inasmuch as their working situation is not a matter of active recruitment into a funded position. Her vacancy statistics do not reveal the work being done by them, not having any attachment to any funded position, nor can she say how common it might be. She went on to remark that she was unaware whether casuals are still being utilized even where specific funding has been arranged, or whether they may be working under basic departmental funding not attaching to any specific position.

Christine Hoiland is the Manager of Operations in the payroll section at Financial Services. Her evidence addressed the Employer's issuance of the ROE document at completion of one's employment. She said that her interpretation of the administrative requirements, it is to be issued

under the HR system following a termination, or where there is more than seven days interruption in pay, or for leaves of absence with or without pay. She acknowledged that where one's contract casual employment ends followed by a rehire the next day, there is no ROE for there being "no real break in service". Were the ongoing working relationship to be finalized with no further back-to-back casual employment contracts, that is when the ROE is issued, picking up the previous periods of casual employment in reporting to Service Canada and allowing them to apply for their employment insurance benefits on that basis. The information is available on the Service Canada website. She explained how this approach was applied to the various casuals who testified, for example in dealing with Ms. Bonnetroupe, her ROE was issued after a five-day break, even though two days short of the threshold seven days separation before issuance under the Service Canada rules, and another issued ROE referencing a subsequent 11 days' break. There is no issuance for any one day breaks before rehiring the next day or within a few days. In Ms. Hutton's situation, she advised, the ROEs were issued where there was more than a seven days break between the periods of casual employment.

ARGUMENT

Discussion of Union argument and its case law submission:

Mr. Penner on behalf of the Union stated at outset of his written final argument filed with the arbitrator that it was significant the Employer had called no witnesses from Labour Relations, nor any others who authored the Employer's response to the grievances, no one involved in authoring the policy document approach. None of their frontline witnesses were in a position to address more than the limited scope of their particular role within the system. As he put it "each deferred to the direction they received from Labour Relations/Human Resources and senior management" as if to say that none of them stepped outside their appointed role in order to consider the contract language concerning the use of casuals. It presumably means that they acted as they did in hiring casuals into repeated periods of employment because they simply understood it was a suitable and convenient pathway to follow for their own managerial needs. Counsel submitted that the arbitrator could draw an adverse inference over the lack of any explanation from the Deputy Minister of Finance at the time, David Stewart, especially. In support he cited arbitrator Shime from *Canada Post Corp. and CUPW* (Seymour) (1992), 25 L.A.C. (4th)137 where the arbitrator relied on the developed case law and provided some

historical perspective in referencing *Wigmore on Evidence*, 3rd ed., Vol, II, pp. 162 et seq. The learned authors had recognized that where one had failed to bring before the tribunal a witness capable of elucidating the facts, it raised the propriety of drawing an adverse inference that the witness would have exposed facts unfavourable to that party, a matter of placing appropriate evidentiary weight on that failure. However, one does observe that the Deputy Minister pretty much framed the Employer's use of casuals in the grievance reply process, with the Employer relying on its policy statements as being sound and in compliance with its obligations under the Collective Agreement, with the Union objecting to its stated approach. Consultations followed on an individual case basis, and it would be doubtful that there is any conclusion that either side was left in the dark over the other's position, or the manner in which the requirements of Appendix A5 were being approached as explored through the witnesses who did testify.

In dealing with this issue of alleged "systemic" or at least supposed systematized misuse of casual employees, Mr. Penner addressed what the Union views as the evolution of arbitral case law between these parties dealing with the Employer's use of casual employees. He commenced his outline with arbitrator Chertkow's award between these Parties in *Northwest Territories (Commissioner) and NTPSA* 1982 CarswellNWT 61, where the complaint was one of management using a series of casual employees in lieu of establishing full-time positions or filling vacancies with term employees at the Yellowknife Correctional Centre. The pertinent language was set out in the 1980 Collective Agreement at A7.01 and A7.02 (identical to A5.01 and A5.02 in the 2016 Collective Agreement). Arbitrator Chertkow's conclusion was that the Employer could not knowingly hire an employee for a period in excess of four months without offering a term appointment. However where management "cannot reasonably anticipate that the period of employment will exceed for months" the contract language did not bar the Employer from either hiring the person in the first place or continuing his employment after four months provided that all benefits under the collective agreement were accruing after that time. The Union points to the arbitrator's analysis of the evidence where he noted at p.9 of the award that the Employer had made "every reasonable effort" to fill the vacant position, but its recruitment efforts had failed, leading him to conclude that management had not formed the original intention of hiring casual employees for more than four months and could not have anticipated that their employment would continue after that time. Thusly, management was

found not to have breached the contract language. It was significant that it had make suitable efforts at recruiting into vacant positions, because in the arbitrator's view had it been a matter of failing to take all reasonable steps to identify and correct the problem of insufficient staff, or failing to press for and obtain an increase in established positions, "then it could very well have been found to be in breach of Article A7.02" (now A5.02).

There followed the *Tessier* interim award, (unreported, June 26, 2002, Jolliffe), where a corrections officer was rejected on probation six weeks into an appointed term position, with the preliminary issue being whether he held probationary status at the time of his termination. The employee had been continuously employed as a casual through periods of time exceeding four months and then accepted a term position. In dealing with the same language as contained in the 2016 collective agreement, this arbitrator reasoned at p. 13 that the collective agreement did not equate continuous casual employment, as opposed to being broken and intermittent, as tantamount to an appointment within the Public Service, such appointment carrying statutory requirements set out in the *Public Service Act*, but I did state at p. 13:

> "... on one passing through the gate post 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.

It might be observed that this arbitrator did not state that the Employer could altogether avoid its contractual obligations under Appendix A5 by extending benefits associated with term employment or by choosing to employ a series of casual employment situations in lieu of establishing a full-time position or filling a vacant position. In the second *Tessier* award (unreported, August 13, 2002) dealing with the remedy applicable to a term employee after it had been found that the Employer had breached a substantive contractual provision requiring proper notice and union representation, the Union argued that it was within the arbitrator's authority to create a new period of term employment, it having already expired, which the Employer disputed on the basis that the *Public Service Act* limited my options. I stated at page 10:

> I accept that a period of term employment, as contemplated within the collective agreement in those sections cited in my first award, can only be created by operation of statutory authority under the *Public Service Act* and not by arbitrators looking to fashion a fair and equitable remedy. I accept that would be within my authority certainly to reinstate a person into his/her indeterminate employment or into what remains of a statutorily appointed term, but not to create a new period of term employment.

Subsequently, in *Misuse of Casuals (Grievance 02-582)*, (unreported, November 19, 2004, Jolliffe), the issue involved casual employees at the River Ridge Young Offender facility, having worked longer than four months without being appointed on a term basis. There was an ancillary issue of whether a probationary period should apply were they to be considered term employees. The Union relied on the language of Appendix A5 as requiring appointment to term positions. Following my considering some arguable evidentiary shortcomings which had led to an unsuccessful non-suit application, I determined that the Union had at least presented a *prima facie* case that a breach of A5.01 had occurred. The factual situation reasonably called for some explanation covering the Employer's dealing with one's employment status at the four-month threshold, or even initially if it were known that they would be required for longer than four months, and whether management's actions complied with the collective agreement. The conclusion I reached on the facts presented was that the affected employees hired as casuals were entitled from outset of their employment to have been appointed on a term basis and likewise entitled to all the benefits of a term employee from the first day of their employment. The reasoning included my having considered arbitrator Chertkow's approach in accepting on the basis of the contractual language of Appendix A5 that the Employer cannot knowingly hire a person into continuous casual employment of more than four months without offering term employment from outset. In dealing with that conclusion, I recognized that in my earlier award I had accepted that working past four months was not the same as having received a formal appointment to the Public Service under the *Act* keeping in mind the exclusive right and authority resting with the Minister. In concluding that the aggrieved employees were entitled from the outset of their employment to have been appointed on the term basis "at least for purposes of the collective agreement" they were entitled to all the provisions from the first day of his or her employment, and that their employment "must be consistent with the definition of 'term employee' defined in Article

2.01", I stated:

> 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 appointment.

I also determined that whether there was a probationary period to apply was inextricably tied to one's appointment or promotion within the Public Service and not to any deemed term status under the Collective Agreement. But in reaching that determination I did not state any disagreement with arbitrator Chertkow's recognition in his *Commissioner* award that it would be a violation of A7.02 (now A5.02) were the Employer to go about knowingly hiring casuals into a series of successive contracts in lieu of establishing a full-time position, although in that case the grievance failed because there is no original intention of hiring casual employees for more than four months and could not have been anticipated.

Subsequently, in *Casual Employees-Statutory Holiday Pay*, (unreported November 23, 2007, Jolliffe), the issue centered on the Employer prorating payments for designated paid holidays applicable to "as and when"on the basis of total hours worked over a given period of time, and noting the emergence of its recently self-described hybrid employee category of "casual/term" which policy driven description did not play any role in the decision. It would have been a trite observation to point out that the Collective Agreement makes no express mention of any such category anywhere in its contractual language, not in the employee definitions nor any provisions dealing with substantive rights, obligations and entitlements. I ruled that where the designated paid holiday benefit was applicable to a casual employee by operation of Appendix 5.03(c) after 15 days of continuous employment, it should not be prorated in the fashion chosen by the Employer but rather should be measured against the employee's actual work day were he or she be to be working that day but for the designated holiday, or not being scheduled. In reaching that conclusion I found it was not analogous to dealing with part-time employees, casual employees being a defined category. I stated at p. 15, which the Union views as my addressing the sanctity of separate groups of employees within the Collective agreement:

> ... I must observe that article 2.01(m) defines the categories of employees for purposes of their treatment under the collective agreement, including providing separate definitions for casual employees and part-time employees.
>
> In any event, I do not see that casual employment for purposes of this collective agreement can be equated with part-time employment unless I am shown the negotiated provision which directly combines or correlates the two categories.

Thereafter, in the line of cited case law, arbitrator Holden in *Ferry Service at Fort Providence* (unreported July 9, 2013) dealt with a group grievance where employees working ferry service duties had been working in term employment, awaiting completion of a new bridge which would end the need for their continuing to work. Following completion of their set terms there was no clear delineation of their status at that point with the Employer holding to the view that they would be casuals and the Union asserting that they should have acquired indeterminate status. The arbitrator recognized that with management having anticipated that their employment would be lasting for longer than four months they should have been appointed on a term basis under A5.01, and followed the approach taken in the previous Jolliffe award, *Misuse of Casuals*, in concluding that they assumed term status by operation of A5.01 thereby qualifying for the benefit entitlements attaching to that status collective agreement as term employees, but concluding that the arbitrator had no authority to make any appointment under the *Public Service Act*. As she put it: "employees are entitled to whatever term employees are entitled to under Appendix A5 and any other provisions of the Collective Agreement which would pertain to them".

The Union next cited arbitrator Ponak in *Use of Casual Employees at Sutherland House, Grievance 12-G-01496)* (2015), 255 L.A.C.(4th) 309, a group grievance arising from the use of casual employees in a 10-bed women's shelter located in Fort Smith operated by GNWT employees, where the Union had alleged a breach of Appendix A5. The Employer had responded to the grievance that it had been seeking a non-government operator and were it not able to use casuals in the manner done, namely four-month contracts for each worker immediately followed by rehirings, the facility would have to be closed in the meantime. It was known after the first four months that each casual employee received the same collective agreement benefits as regular employees backdated to the first day of one's employment and after six months they became eligible for the pension plan. The evidence from

the Employer indicated there was no budget to move away from the use of casual employees, no funding for indeterminate appointments. We know that it was a situation not unknown to many managers in their continuing to use casuals, made clear enough on the evidence of the Employer's witnesses in this current policy matter. The shelter workers' periods of successive casual employment persisted over six years, the operation needing to continue while the Employer searched for a new facility operator. Certainly a comparison can be drawn with the facts of the *Ferry Service* case where the Employer needed the ferry service to continue while it awaited completion of the new bridge. Both cases involved delayed expectations and the need to carry on. In both cases there was a need to continue using casuals as the Employer saw it. In both these cases there were business driven reasons.

Arbitrator Ponak in *Sutherland House* took a different approach than arbitrator Holden in squarely addressing the significance of successive casual contracts in his reasoning. He hearkened back to the analysis employed by arbitrator Chertkow in the *Commissioner* award in considering whether there had been a violation of Appendix A7 (now A5). He observed there was no doubt that using casuals to maintain operations in the manner done had been a "pragmatic" approach by management, but going on to state: "At some point, however, it should have become apparent that there was not going to be any quick fix". He saw the issue to be larger than management providing the contractual benefits for employment beyond four months as per A.5.01, noting the mandatory language of A.5.02. He determined that given the wording of that provision and the facts of the case, being that management was using the casuals for as long as it did in choosing not to establish full-time positions even when it was clear, or should have been, that finding another operator was going to be a difficult and protracted exercise, its approach had been contrary to the A5.02 requirements. There being no actual end in sight, once the supposed temporary solution of using casuals crossed the line into an indefinite long-term solution, management's continuing to use them as it did was contrary to A5.02. In reaching that determination, which the Union contends should be considered as instructive in this policy matter, he stated as follows in his conclusion starting with a reference to arbitrator Holden's approach:

> 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.

What I take from this discussion by arbitrator Ponak in his considering the *Misuse of Casuals* and the *Ferry Service* awards, is his recognizing arbitrators' acceptance that casual employees can take on term status by operation of Appendix A5.01 without there needing to be formalized appointments to the Public Services under the *Act,* no doubt the precursor for the Employer creating the category of casual/term employee for HR purposes. But he also observed that neither case dealt directly with A5.02. He remarked that arbitrator Holden the *Ferry Service* award, as was the situation with this arbitrator in *Misuse of Casuals*, was never asked to address the question of whether using casuals for a lengthy period though successive contracts might run afoul of A5.02. He noted that arbitrator Holden appeared to have taken no issue with the use of casual employees for an extended period as a pragmatic response needed to keep the ferry service operating until the newly constructed bridge was ready, although it resulted in a status change under the collective agreement. He considered the plain wording of A5.02 as binding the parties, which in the circumstances presented in *Sutherland House* meant that the Employer's lack of success in winding up its operations "should have engendered a more urgent search for alternatives that complied with Article A5.02 far sooner than what actually occurred". And further stating: "But it is not open to the Employer under the collective agreement to indefinitely use casuals when it becomes obvious, or should become obvious, that there is no solution in sight." He made this pronouncement in the context of examining individual circumstances. In one considering the significance of the Ponak award, the most recent examination on the Employer's use of casuals, again, one might observe that the language of A5

nowhere expressly references the existence of any employee to be described as a casual/term, which the Union takes to be an internal concoction in order to avoid the requirements of A5. The Union takes it to be a term of convenience without any contractual substance and has been used as a cover for long-term use of casual employment by extending or rehiring employees into additional contracts without regard to the requirement that it not use casual employment in lieu of establishing a full-time position, which is to say term or indeterminate positions, or filling a vacant position.

In all, the Union contends the evidence indicates there was a systematic breach of A5 on a policy driven basis and I should issue a declaration recognizing the ongoing violation and remain seized respecting the fullness of remedy.

Discussion of Employer argument and its case law submission:

Ms. Taylor and Ms. Zimmer in their written argument on behalf of the Employer stated that the Union has not shown on the civil law balance of probabilities test that the Employer was systematically breaching Appendix A5 through its use of casual employee contracts. It contends that the evidence from its witnesses demonstrates that "the Employer was managing a large workforce in a dynamic work environment, which created a number of unique challenges". It was exercising reasonable management rights as the circumstances required in utilizing or prolonging the employment relationship with certain casuals. I should find that there was no direct evidence of any Employer policy or direction to use casual employees instead of hiring indeterminate employees, or to use casual employees as a money-saving strategy. But rather the evidence should lead one to conclude that the Employer was following a clear policy statement not to hire casual employees in lieu of indeterminate employees. The Employer asserts that "any of the potential consequences of casual contracts are unintentional, and that when employee concerns came to light, " significant efforts were made to address any perceived negative impacts of casual employment". Further the evidence should lead that the Union's evidence shows that casual contracts were used in situations where the need for staffing was for an unknown period of time due to:

- covering duties while the manager sought permanent funding;
- filling short-term needs; and
- covering duties when indeterminate hiring was unsuccessful

The evidence, in all, counsel submitted should lead one to conclude that the Employer was using

employees "well within the bounds of the Collective agreement" and further such usage was:

- Consistent with long-standing practices as between the Employer and Union
- completely transparent and clear in the Employer's Human Resource Manual; and
- following the established case law regarding the language of A5

Having noted that the Union is alleging routine and systematic breach of the collective agreement, counsel submitted that in my following the established legal principles, to be successful, it would have had to present sufficient evidence for one to conclude it was more likely than not that a contractual breach had occurred as a pattern of doing business, which involves weighing all the evidence in making that determination. In doing so, there should be no adverse inference drawn against the Employer keeping in mind that the burden of proof rests with the Union throughout to establish that such a breach has occurred as alleged, which by the Employer's assessment has not been satisfied. It should be noted, counsel submitted, that the possibility of drawing an adverse inference pertains to the party bearing the overall onus of proof and failing to call a witness on a particular point. The party not bearing the onus can simply continue disputing that the case has not been made out. It relies on the reasoning in such cases as *NSUPE, Local 13 and Halifax Regional Municipality (Clarke)*, [2019] CarswellNS 628 (Richardson), and *Vancouver (City) Fire and Rescue Service and Vancouver,* (unreported April *19,* 2017) where arbitrator Fleming having subscribed to the level of certainty required for the standard of proof to have been met as remarked upon in Brown and Beatty *Canadian Labour Arbitration* at topic 3:2400 and by the Supreme Court of Canada in such cases as *Smith v. Smith*, [1952] 2 S.C.R. 312. In his considering the issue of adverse inference relating to the issue of contradicting or corroborating evidence already adduced, the arbitrator viewed it as a matter of weighing the evidence, not providing a basis for making a finding on a point concerning which there has been no evidence. As arbitrator Fleming stated at p. 58: "put another way, a failure to call evidence where a *prima facie* case has been established may result in an adverse inference being drawn," but the employer in that case had provided an explanation and asserted that there was no further evidence required beyond what had been said by its witnesses, witnesses it believed had responded to the evidence adduced by the union. The arbitrator determined that not calling additional witnesses whom might have additional knowledge concerning the issue at hand did not provide an appropriate basis from which to draw an adverse inference. In this current matter, the Employer points to the witnesses it called as necessary to respond to the Union's evidence, and it did not have any

obligation to call any more witnesses. It is a solid response given the amount of information provided to me respecting the use of casual, including from its front-line managers. One observes, as part of its case the Union relies on the grievance reply written by Deputy Minister David Stewart whether or not he could also have testified in order to authenticate the document and repeat his view on the use of casuals which, frankly, was made pretty clear from his correspondence. His answer can be taken as having provided reliable contextual evidence respecting the policy driven issues the parties were trying to resolve. Similarly, one observes, Mr. Parle's approach on the Union's behalf and presumably also Ms. Mathisen's presenting the Employer's view in her dealings with Mr. Parle is evident from their email exchanges which Mr. Parle identified and confirmed in his testimony.

The Employer has set out to codify in policy format its contractual obligations under Appendix A5, given the explanatory backdrop of its dealing with case law in the manner chosen. No doubt it gave the Employer pause to consider its situation going forward, in determining that it could create by policy a category describing a hybrid employment status of casual/term employees in hiring them into successive periods of casual employment as described by the seven affected employees who testified, and the management-side witnesses. This would be without having to make any formalized term appointments under the *Public Service Act* as an exercise of ministerial discretion. We know how the policy, as it was applied, affected the employment of these employees who testified respecting their experiences. Hence, it would be difficult to find that there is any doubt about the Employer's approach centering on recognizing the authority of the Minister whether, or not, to appoint persons into positions under the *Public Service Act,* whatever the limitations under Appendix A5 in terms of the Employer administering its contractual obligations, while at the same time there is an arguable valid business reason for having casuals working beyond four months for any number of reasons, made evident on the testimony of the Employer witnesses. The casuals were at least able to eventually establish and maintain term employment status under the collective agreement for purposes of benefits and entitlements – unless affected by the break time between successive periods of casual employment, and the next contract being less than four months. The question still remains about the legitimacy of the Employer's overall policy approach as described by its witnesses which counsel submitted is not inconsistent with the case law development and Appendix A5.

Ms. Taylor and Ms. Zimmer in the Employer's written submissions reviewed the case law

between the Parties. In dealing with arbitrator Chertkow's 1982 *Commissioner* award where he observed at p. 7: "casual employees by definition under Article 2.01 are hired to fill a casual vacancy of a temporary nature...", with the contract language going on to include the contractual context: "pursuant to the provisions of Appendix A5", counsel cited the well-known passage where he had reasoned that the contract language of what is now A5.01 prevented the Employer from knowingly hiring an employee for a period in excess of four months of continuous employment without offering a term appointment. Notably, where not able to reasonably anticipate such usage will exceed four months, there was no bar against the Employer hiring casuals in the first place for employment eventually lasting more than four months providing it extended full benefits after that time. He made no reference to the *Public Service Act*. Presumably, one might observe, such an eligibility determination would normally require considering the facts of the matter on an individual case basis, but, as counsel pointed out, the Union has the onus to establish such a breach on a preponderance of probabilities, from its perspective meaning on a case-by-case basis. Arbitrator Chertktow specifically stated, as quoted by counsel and underlined for emphasis in the Employer's written brief "... The Association bears the onus when alleging a breach of Appendix A7.02 of establishing its case on a preponderance of the evidence in a given fact situation". However, it might also be observed, he did not say that a policy grievance approach was barred from consideration in terms of one examining the Employer's own internal references, considerations and preferences in applying the language of Appendix A7 (now A5) on a policy driven basis as it might be expected to play out on the departmentalized front lines in furtherance of what the Employer now contends has been made "completely transparent and clear" in its Human Resource Manual. By its description it only seeks to follow established case law while recognizing the Minister's unique authority under the *Public Service Act* concerning appointments to the Public Service.

In their historical review, counsel next cited *Commissioner of the Northwest Territories and NTPSA (Casual employees – Duty Travel Pay and Commuting Allowance),* (unreported February 24, 1986, Hope) where the arbitrator noted that those persons employed as casuals were subject to the terms and conditions of employment in line with the Collective Agreement where the Employer had set out to establish special terms and conditions of employment by policy directive. Interestingly the arbitrator stated in his conclusion in rather prescient fashion: "I leave it to future disputes, if they arise, for determination of the various and complex issues of interpretation which can arise with respect to casual

employees". The following year, in *NTPSA and Commissioner of the Northwest Territories (Tordoff/Buhler Grievance)*, (unreported, January 26, 1987) arbitrator Areseneau in considering an alleged violation of pay provisions of the collective agreement, clarified that casual employees are used to fill specific positions and classifications, and must be paid at the applicable range of the position and classification they were filling. In that case he noted that there was no distinguishing the duties being performed by the casuals when compared to the indeterminate corrections officers in that "the evidence is that regardless of their experience and prior training they basically perform the same job". Certainly this observation would fall in line with the evidence provided by the seven affected employees whom the Union put forward as examples of the approach being taken on a policy basis. For example, there is no evidence to suggest that Ms. Hutton's approach toward fulfilling her instructor duties would be any different than one of the indeterminate instructors, nor that in moving along from contract to contract she required any re-training on any aspects of her usual duties. Indeed she was asked to continue working on a casual basis in 2016 in order to help transition the newly hired indeterminate employee. Counsel next referenced arbitrator Chertkow's awards in *GNWT and UNW (Shell),* (unreported, February 6, 1991) and in *GNWT and UNW (Manernaluk)*, (unreported August 13, 1996) where he recognized that continuous employment as a "casual as and when" spoke to the length of the contract and not the number of actual working days associated therewith. It did not matter what department or departments where the employee was working which is to say recognizing that casuals can be moved around during the course of their continuous employment relationship with GNWT. No one doubts that to be a possible situation, but it might be observed that the seven affected employees were pretty much working in stationary situations, contract to contract.

The Employer's written brief moves on to a discussion of the "recent history" cases, relying on this arbitrator's approach in the two *Tessier* awards of June 26, 2002, August 13, 2002 and the *Misuse of Casuals* award of November 19, 2004, where in considering appropriate remedy for a breach of A5.01, I reasoned that the *Public Service Act* did not provide any jurisdiction to arbitrator's to appoint anyone to a position in the *Public Service,* which are creations under the *Act*, although one can observe that the contractual language defines term employees under Article 2.01(m) (vii) as "a person other than a casual or indeterminate employee who is employed for fixed period in excess of four (4) months ...." As the Employer now interprets it, being evident from its policy documents on which it relies: "the only remedy

that could be available is that the employee be treated as a term/casual". The Employer views its approach towards dealing with employee status where there has been no appointment under of the *Public Service Act* as legitimate. Essentially what has occurred with each example witness involving their rehiring or being extended as casuals can be summarized, as counsel did by applying my analysis in *Misuse of Casuals*. Upon my having observed that the term "appointed" or "appoint", as used either in the *Public Service act* or in Appendix A5.01 was not itself separately defined in Article 2.01, I stated at p.21 as cited earlier in this award, that A5.01 addresses the parameters for casuals being appointed on a term basis for purposes of the Collective Agreement.

Taken from the written submissions, upon reviewing the Jolliffe awards, the Employer considers there to be arbitral recognition that two classifications of employment exist for those hired through casual contracts of employment. Accordingly, it takes there to be a need to look for a separate employee description for employees working on successive periods of casual employment, thereby qualifying for the benefits and entitlements associated with term employment without any formal appointment under the *Public Service Act*. Counsel has stated in summarizing the approach:

- where the Employer anticipates more than four months at the time of hire, the employee becomes a term/casual with benefits accruing from the first day of contract;

- Where the Employer does not anticipate more than four months at the time of hire, and later the employee's extended past four months the employee becomes a term/casual with benefits accruing after four months. Before four months benefits are as per A5.

- Where the Employer does not anticipate more than four months and the employee is not extended, the employee is a casual for all purposes with limited benefits' as per A5.

It was said by counsel to be the matter of the Employer following through on the arbitral reasoning that casuals were capable of taking on term employee status for purposes of the collective agreement, meaning, as the Employer sees it: "being given the same rights as a term employee under the collective agreement resulting in the employee becoming a term/casual employee". This would be without any express language in the collective agreement using the employment description of casual/term or term/casual as a category, nor any arbitration decision where that term is expressly used.

In further support the Employer relies on arbitrator Holden's award in *GNWT and UNW (Job Security-Cessation of Ferry Service at Fort Providence),* (unreported, July 9, 2013) as following this arbitrator's approach taken in the *Tessier* awards and *Misuse of Casuals* award where in a situation involving contracts of casual employment for longer than four months awarded to seasonal employees, she determined they were allowable under the language of A5 as the term benefits were being applied to the contracts. The Employer has cited her assessment at p.27 where she stated:

> ... there is no provision that after a certain number of extensions or a certain number of successive terms that the employee's status would be changed to indeterminate. Without such express language, I cannot arbitrarily determine a number of successive years of employment, albeit seasonal, as constituting indeterminate status. I can therefore not find for the Union in this regard without express language to that effect.

In the process, arbitrator Holden was considering the factual circumstances as coming within the accepted premise that the Employer has the right to organize the workforce as it sees fit so long as it has acted in good faith and within the provisions of the Collective Agreement. The Employer views her award as a matter of recognizing that the process of placing persons into its self-assigned category of casual/term employment rather than ensuring that term employees are appointed under the *Public Service Act* when they are expected to be working longer than four months does not contravene the collective agreement and comes within the Employer's management rights.

In moving on to address the Ponak award in *Sutherland House*, the case involving employees hired as casuals at a women's shelter being extended to cover six years of the employment relationship where management professed uncertainty of funding while looking for a non-government operator which did not materialize, the Employer takes the arbitrator to have simply recognized in a specific fact driven situation that "there was a point in the timeline when the Employer either was or should have been aware that the situation was not going to be temporary in nature". That point in time was found on the facts of the matter to have been exceeded. Accordingly, the Employer contends that an arbitrator needs to ask, based solely on the facts of an individual case, not lending itself to any policy award, whether management knew or should have known that the requirement for the work to be done was not temporary. Nevertheless, one might again observe in passing that it would be difficult to avoid Arbitrator Ponak's remarking that: "it is not open to the Employer under the Collective Agreement to indefinitely use casual

employees when it becomes obvious, or should be obvious, that there is no solution in sight in dealing with individual circumstances", which nevertheless would seem to be a caution applicable to considering policy driven decisions. In considering the reasoning of arbitrator Holden in the *Ferry Service* award arbitrator Ponak observed that she did not take issue with management's use of casual employees for an extended period, it being seen as a pragmatic response to the need to keep the ferry service operating until a new bridge was ready, obviously having good business reasons, but in its so doing, recognizing that those employees had "assumed term status by operation of A5.01" as had been this arbitrator's approach in the *Tessier* and the *Misuse of Casuals* cases. As with the earlier Jolliffe awards, it can be observed that there was no consideration given to the possibility of A5.02 having application at some point, nor in the Employer arguably reaching the stage where it was using its new described category of casual/term employment to possibly avoid any obligation to formally appoint employees into term positions. At this point, one needs to consider that arbitrator Ponak's approach was to apply arbitrator Chertkow's analysis to such a problem of indefinite use of casuals which he found to be "instructive" with respect to that issue on an individual basis, which is what he was dealing with.

Nevertheless in my determining whether there has been a breach of Appendix A5, the following was said by counsel to be required, based on individual case assessments:

> 41. In determining whether A5 has been breached, an Arbitrator needs to ask: based on the facts of the case, did the Employer know or should they have known that requirement for a casual employee was not temporary? "[I]t is not open to the Employer under the Collective Agreement to indefinitely use casual employees when it becomes obvious, or should be obvious, that there is no solution in sight."
>
> 42. To prove their case, the Union must establish that there was:
>
> i. a breach of A5.01 by showing there was a need for the duties to be performed that the Employer knew or ought to have known would extend beyond 4 months, AND the Employer failed to offer term benefits; or
>
> ii. a breach of A5.02 by showing that there was a casual employee hired to do work in lieu of filling an indeterminate position AND the Employer knew or ought to have known that it was not temporary in nature. When determining if the Employer knew or ought to have known there is an element of bad faith that needs to be considered; and
>
> iii. that either such breaches as described above took place on a systemic

> basis, not just on isolated occasions, given the overall context of the grievances as "policy grievances".

From the Employer's perspective it is crucial to start with a situation-by-situation examination of individual circumstances, which presumably does not easily lend itself to any policy driven pronouncement, although what lies at the heart of its acknowledged approach is the concept of there being an employee category known as casual/term which allowed it to have proceeded in the manner chosen in each case, the possibility of a pattern developing not contemplated by Appendix A5. In counsel detailing the evidence proffered through the seven Union employees who described their casual employment experiences during their time as bargaining unit members, witness by witness, counsel submitted that the Union has failed to show any systemic, or systematized breach of the Collective Agreement based on their descriptions. It should be apparent, counsel submitted, that these employees received their proper entitlements and benefits in line with their casual/term employment status. Counsel submitted that their descriptions, as summarized in written argument, when considered in relation to the evidence called by the Employer and the developed law shows no breach of the Collective Agreement. From its perspective, Mr. Parle's testimony was helpful in its referencing the scope of the grievance and providing context for the evidence which followed, but much of what he related was hearsay and should be given little weight where he speaks about the supposed difficulties encountered by anyone who did not testify. Nevertheless, I am driven to observe that the Union witnesses were not individual grievors but were called as example experiences in these two policy grievances addressing the Employer's approach toward use of casuals of which the Union complains and relies on the Employer's policy documents, the vacancy statistics, the clear language of the collective agreement, and the Employer's having misapplied the case law, from its perspective.

The Employer takes issue with the evidence of Barb Kardash on several bases although it was said to be helpful in her providing a spreadsheet highlighting the Employer providing reasons to justify each casual rehire, called as a union witness, her evidence, counsel submitted, was not a complete record of all consultations which took place regarding casual rehires, and whether they were shorter or longer than four months' periods of employment. It should be noted, counsel submitted, that many of the rehires, following a process which included advising the Union, did not result in challenges at the time. It was said that one could even draw an adverse inference in that the Union did not take issue or challenge many

of the rehires, there only being five challenges recorded between January and September 20, 2018 although we know from some of the witnesses that they wanted the work and took what was offered. In any event, it was said that I should not conclude that the evidence leads to any finding on balance that there was a high volume of casuals working past four months across the system; nor that they were all inappropriate given that two of the Union's challenges at the time show fact patterns where the employer was using a casual to cover unexpected special leave or sick leave; nor that the Employer was not consulting within 30 days of the end of the contract when an employee was to be rehired as a casual. It was almost as if counsel was suggesting that it could have been worse as something to consider.

Counsel summarized the Corporation's dealing with the consultation process and use of casuals in successive periods of employment as follows at para. 85:

> The consultation process and the determinations made under it are in line with the previous arbitral interpretations on the length of casual employment. For example, Arbitrator Ponak found that "... there are some circumstances where casuals must be used for a short period of time while procedures under the Act for creating and funding full-time positions are put in motion". He then goes on to indicate that this "short period of time" does not mean indefinitely and that the facts of each case must be used to determine what an appropriate time is in each case.

In addressing its own evidence, counsel described Candace Parsons, as the one witness explaining the Human Resources approach towards casuals from a position of authority, with her description of its policy documents to be taken as an accurate representation of the Employer's policy on the use of casual employees. In her former role as a client service manager she advised front-line managers on how the rules should apply. Counsel submitted that the Human Resource policy documents were consistent with her testimony and would be the advice lack of effective provided to local managers. They should consider hiring indeterminately or on a term basis instead of using casuals "when possible" but, as she put it "in the end, the determination on 'need' was at the discretion of the hiring Department and not Human Resources". Counsel also cited her response on being questioned over A5.01 requiring that casuals are not to be hired for a period exceeding four months of continuous employment, namely that the clause "needed to be read in its entirety" inasmuch as the second paragraph of A5.01 referenced anticipating the period of temporary employment to be in excess of four months requiring that the employee be appointed on a term basis, hence the creation of the casual/term category to reflect the entitlements' requirement. Counsel submitted that her evidence was that the Employer's policies reflect "reflect this nuance" through

applying para. 24 from its policy document entered in evidence, namely "0502d – Casual Employment" which states that "an extension of casual employment over four months results in the employee being hired as a casual/term" which, by the Union's observation has been used to prolong some employees casual employment relationship with their hiring department into successive periods of time, even for years, without any formal offer of term appointment under the *Public Service Act*, let alone indeterminate employment. They might as well have been called, were one to accept the Employer's perspective: "continuous casual employees with term employee benefits".

Counsel submitted that it should be clear from Ms. Parsons' testimony that successive casual contracts are not the preference of the Employer, although one might observe it would be difficult to make that finding from the affected employees' descriptions which is the only individualized employee testimony on that issue of front-line usage and could be taken as showing a pattern in a variety of circumstances which might otherwise be dealt with as a matter of making formal appointments into positions, whether term or indeterminate. In many respects, the Employer's presentation focussed on the difficulty in moving away from casual employment, namely as counsel put it: the Employer's evidence disclosed that rehiring casuals into successive contracts of renewing contracts was "labour, time and cost intensive", therefore not as productive as might be, but adding: "however, there were times when successive casual contracts were necessary to fill a gap based on the nature of the work and to react to the realities at face a remote Northern workforce" as addressed in the testimony of Nancy Chinna and Andrea Donovan both of whom related their experiences in recruiting workers into small remote communities for longer than two years, being difficult to find qualified people who are willing to commit long term, resulting in a greater than normal staff turnover and requiring management to exercise flexibility in staffing. However, it would be difficult to ascribe that reasoning in dealing with the seven employees who testified given that they all worked for lengthy periods of casual employment and none of them indicated they would not have been willing to take a term appointment.

Nevertheless, I was urged to conclude there was "great care" taken to ensure that the process set out in A5 was followed namely managers being required to submit the form requesting a casual hire, consulting with an HR person and even the union "when required". It should also be noted, counsel submitted, that its witnesses' testimony indicated that were it to be determined that the need existed for a casual hire beyond four months the pay was changed to reflect the same pay range as for an

indeterminate or term employee, which is to say treating them like a non-casual even though they were hired on that basis. While the Union no doubt considers it to be more than a pay change issue, Counsel submitted that Ms. Parsons testimony indicated that the policy of the Employer was to comply with the Collective Agreement, and that on a balance of probabilities one should not conclude that there was any policy level breach of the collective agreement, neither systemic nor systematic. In other words, were the Union to have any difficulty with how casuals are being handled, inasmuch as the entire system of consulting was meant to act as a check on determination of reasonableness, it would give rise to individual grievances "where they did not agree that the Employer was using its discretion reasonably", to be dealt with on its specific facts as was the situation in the Ponak award dealing with the number of employees who filed the group.

Ultimately, the Employer holds to the view that its approach both with respect to utilizing casual employees, including extending them past four months where circumstances dictated that approach, is both consistent with the language of A5 and in the arbitral awards issued on this topic. The arbitration awards are being followed, it asserts, in that employees hired or working past four months are entitled to the same contractual provisions as term employees, and receive them. Likewise the obligations with respect to Superannuation contributions are being met as explained in evidence by Ms. Corey where employees are automatically contributing if hired for more than six months or when able to combine two successive contracts with only a one-day break or no break, although Superannuation has its rules concerning a break in employment.

Counsel submitted that it was also necessary for one to observe that the Union's organizational charts were in attempting to calculate vacancy rates on a GNWT-wide basis by recording the number of empty boxes on each page of organizational charting and reducing the count to a percentage, was rebutted by the evidence of senior HR business analyst Celito Rivers to not be an accurate reflection of the actual unionized vacancies in that they did not take into account the exclusion of non-unionized positions, nor double filled positions, interns, and nuances about funding types. Certainly, many of the vacant positions were no doubt specialized, and others presenting difficulties for any number of reasons finding qualified candidates. However, one might observe, whatever the count of vacant positions recorded in the system the overall problem faced by the affected employees who testified was that the Employer was not about to ensure their being formally appointed into positions covering their work, whether vacant, as yet

unfunded, or needing to be created from scratch, whether term appointments or indeterminate.

In dealing with the evidence from the seven individual employees, counsel summarized the Employer's breakdown of their testimony at some length in their written submissions and briefly set out its position covering their descriptions of individually experienced events, said not to disclose any systemic, or systematized breach of the Collective Agreement, nor that any of these employees were not being treated as casual/terms properly under the contractual requirements and its HR policy by which the Employer administered those requirements. Their summation reads as follows:

> 111. It was agreed that the Union would call evidence from several individual employees in an attempt to prove a systemic breach of the Collective Agreement. This is the lens under which we must examine the individual employee examples. The examples are not relied on to ground specific individual grievances, but in an attempt to establish a pattern supporting a finding of an Employer policy, applied systemically, that resulted in a breach.
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> 112. The Union called seven individuals who had all been given casual contracts in the relevant period of time. The Employer, in turn, called six witnesses to speak to the circumstances surrounding the hiring of these employees. Looking at each example, it is the Employer's position that they do not prove a pattern or systemic breach of the Collective Agreement. Each example had a unique fact scenario that led to casual re-hires or extensions. The Employer was able to provide reasonable explanations for each hire. Further, there was no common policy thread linking all the examples which, in the Employer's view, is required to establish a systemic breach.
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> 113. The Employer also led evidence from Joanne Corey in respect to each of these employees to show what, if any, impact casual contracts had on their benefits and pension. Through this evidence, it is clear that the rules were applied in a way to ensure that casuals over four months were treated as term employees and received the appropriate benefits.

In all I should determine there was no persuasive evidence that any of the Employer's policy driven decisions with respect to employing casuals, and either rehiring them or extending their contracts was somehow inconsistent with the requirements under the collective agreement, including with respect to rehires and extensions over significant periods of time. I should recognize that there was no difference in benefits payable to the persons hired as casuals and extended past four months and those benefits received by appointed term employees. Counsel summarized its response to the Union's submissions as unconvincing on the issue of a policy driven breach of the collective agreement occurring, and asserting

that "the ample arbitration interpretations of A5.01 and A5.02, the text of the article and actions of the Union and the Employer support Employer's interpretation", and further emphasizing that it rested with the Minister to make the appointments under the *Public Service Act*, that for one to "substitute the word 'Minister' for 'Employer' would be a mistake in law and stretches the bounds of interpretation too far".

Counsel concluded the Employer's written argument as follows:

> 163. Following the relevant arbitral decisions on this issue, the Employer created and maintained a policy regarding the use of casual employees that was clear and transparent. This policy was followed by managers who sought advice from Human Resources when required.
>
> 164. The Union is correct in asserting that the Employer's policy follows Jolliffe's 2004 decision (misuse of casuals). This decision clarified the nature of casual employment and introduced the concept of term/casual. The Employer, through its policies, has adopted this concept as a better way to explain the language in the Collective Agreement and ensure that the proper entitlements are afforded to employees who fit into this category.
>
> 165. These are longstanding policies. The Union participated in the consultation requirement under these policies. The Union has now brought an argument that any casual contract over four months is a *prima facie* breach of the Collective Agreement. The Employer maintains that although casual contracts over four months trigger different benefits this is not a *prima facie* breach of the Collective Agreement.
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> 166. The Employer does acknowledge that using casual employees over four months triggers a closer examination of the situation to make sure the proper benefits were being provided and to ensure that the Employer was exercising its management rights in good faith. The evidence submitted in this case shows that the Employer has met this obligation.
>
> 167. The Collective Agreement as negotiated by the parties contemplated the use of casuals. To find that the Employer had misused casuals based on the Union's evidence would effectively be concluding that any use of casuals over this time was a misuse. This cannot be the case given that the parties had explicitly agreed that casuals could be used provided the rules set out in the Collective Agreement were adhered to.
>
> 168. Furthermore, Arbitrator Holden indicated that A5 should be dealt with at the bargaining table and that has now occurred. The new language contained in A5 effectively removes any ambiguity relating to the interpretation of A5.

169. The Union has not proven on a balance of probabilities that the Employer has systemically breached A5 of the Collective Agreement. The evidence simply does not support such a finding.

CONCLUSION

In turning to my conclusion in this policy grievance matter after having reviewed the pertinent evidence heard during the 10 days' hearing, and considered the detailed written argument from both counsel, including discussing the case law tabled in support of their respective viewpoints, I will start by observing that the Employer for its own purposes might well choose to script an internally convenient mechanism to cover of its use of casuals hired or over-holding the four months' threshold described in Appendix A5.01 as a means of distinguishing them from employees formally appointed under the *Public Service Act* to positions in the Public Service. Presumably, for purposes of correctly applying the applicable contract provisions it can place whatever convenient internal title it sees to be descriptive of its proper use of casuals, and noting the testimony from seven affected employees and their immediate superiors whose personal experiences were examples of the Employer's front-line approach in applying the contract provisions of Appendix A5. It has chosen to refer to their employment as "casual/term" pursuant to policy. It is not a formal employee definition known to the Collective Agreement and the Employer's labelling them as such does not change its management obligations under A5. Its usage reflects a term of convenience and is said to find its genesis in the arbitration awards where it has been accepted that arbitrators lack jurisdiction to direct the Minister to make such appointments under the *Public Service Act*. Nevertheless, those employees qualifying for such appointments under A5.01 were recognized on a contractual basis to have taken on term status for purposes of qualifying for the rights and entitlements contained in the Collective Agreement not otherwise applicable to casuals. For those rights and entitlements to apply they would have to be considered term employees under the Collective Agreement language. At the same time it might well be seen, as would be the Union's position, that using such a hybrid term to describe those employees who have qualified for term employee status under A5.01 is not helpful. The contractual implications of persons remaining casual employees are dealt with under Appendix A5.03 including excluding them from entitlements which apply to term and indeterminate employees so long as they hold that status, or are returned to that status during the course of a long-term

employment relationship and hence shows the overall contractual significance of an employee securely moving into term employment, even if it is a matter of securing that status by reference to A5.01 and not any formal appointment made under the *Public Service Act*. The inapplicability of Articles 34 and 36 to casuals at point of hire is a significant example.

The Employer contends that there to be no breach of A5.01 in that the Union has not proven that the Employer knew or ought to have known that the casual employment duties would extend beyond four months AND that the Employer failed to offer term benefits, although plainly various management persons in dealing with several of the affected employees who testified were anticipating that the employment relationship which was running into successive periods of casual employment had no particular definitive end in sight. They no doubt were pleased to have someone reliable performing the duties in satisfactory fashion on an ongoing basis. Their overall understanding of the Collective Agreement requirement would seem somewhat marginal. The evidence does not support the Employer's position concerning likely reasons for extensions occurring and it would seem to be contrary to its own policy statement indicating that casual employment should not be ended where there is still work to be done. In many of the factual circumstances apparently the work subsisted literally for years. Certainly, the Employer was willing to extend the term benefits while they continued working and then with a short break in service, or not, continued their casual employment by reference to the contracts they signed, being offers of casual employment. The evidence showed it not to be an unusual step to have a relatively short break, meaning they lost both their term employment entitlements under the collective agreement and the benefits associated with Superannuation contribution before again passing through the time-based threshold to again gain term status at some point, extending benefits and entitlements is not the sole emphasis of Appendix A5, but it is difficult to overlook the excluded benefits under A5.03 until the hybrid status of casual/term was again established. The form of the employment offer in all these example cases was always presented to hirees as describing a period of casual employment.

In all the evidence presented in this matter, it would be difficult to accept there was no cohesive and planned approach by the Employer in prolonging the periods of casual employment through successive rehirings or extensions where the situation was, simply put, working out to the manager's satisfaction. To say that there was no urgency shown in clarifying the employment approach in most cases would be an understatement, although benefits and entitlements were extended until whatever break

time occurred. The preponderance of evidence plainly points in that direction. One of these employees (Hutton) completed 17 separate periods of casual employment contracts over an eight-year period where the expectation was that she would be returning to the usual scope of her assigned teaching duties following conclusion of each one, being released over Christmas and summer break time unless working on a particular project. Another employee (Bonnetroupe) worked 21 successive contracts as an administrative assistant over seven years in what she referred to as "steady employment", and always having a "good feeling" that her situation would continue. The Employer's answer is that it was following the case law interpretation as codified by it i its policy documents. I will hold off again recapitulating the testimony of all these affected example employees who testified, all of which evidence was presented in a straightforward and entirely believable manner, but I have reached the conclusion that they convincingly showed that their respective managers must have been satisfied dealing with them on the basis of successive casual contracts. The work needed to be done into the foreseeable future. Some experienced no break in service at the four-month threshold. Otherwise, they moved back and forth between term and casual status, for purposes of the Collective Agreement, and some, but certainly not all of them eventually qualified for Superannuation contribution. Obviously, they were not absolutely precluded from eventually being appointed into full-time employment as term or indeterminate employees which occurred in some instances. Certainly, those were individualized accounts but they do illustrate the Employer's approach towards casual employment.

The evidence is persuasive, one must conclude, that the creation of the casual/term status by policy was an internally developed Employer description to hopefully satisfy the requirements of A5.01 by keeping their casuals' successive periods of employment alive, extending benefits and entitlements as if they were deemed term employees by reference to the period of work time on one contract or another, but avoiding the prospect of having to have them formally appointed under the *Act* into term or indeterminate positions. As I once indicated in a previous award the Employer was treading a fine line in that respect.

However, one needs to consider the impact of these successive casual contracts. The Employer contends that Appendix A5 was not breached, in that the Union has not shown that there were casual employees hired to do work in lieu of filling an indeterminate position AND the Employer knew or ought to have known that it was not temporary in nature in its acting for valid business reasons. However, the

evidence shows that in many of these examples management had no compelling interest in establishing full-time positions, whether term or indeterminate, on any formalized basis, while there was nothing temporary about the usage by reference to the affected employees' testimony. I do not see that the Employer's evidence respecting its difficulties in filling positions, or even its funding problems, has much application where casuals are working their way through repeated periods of employment, some for many years, in that casual category at point of hiring.

At the same time the Employer would have me note that in the *Ferry Service* case arbitrator Holden recognized the Employer to have been acting in pragmatic fashion at least in dealing with its employees as it did which is to say no suggestion of bad faith. That may well be but it is not the test for contractual breach. Appendix A5 must be viewed as containing contractual parameters which are wider than just extending entitlements and benefits to long serving casual employees – the casual/term descriptor as the Employer sees it. The evidence does not disclose any confusion or misapprehension on the part of front line management that they are going to need casuals working in successive periods of employment for lengthy periods of time. Indeed the HR Manual provided encouragement in that it indicates casual employment should not be ended where there is still work to be done. Plainly, in many of these cases this work continued for years. The explanations from the front line managers who testified was essentially that they were without a means to require appointment under the *Act;* no funding, no numbered position available, no vacancies to fill, no actual guarantee of permanency, and no instructions to the contrary, but the work needed to be done. On some occasions, unsuccessful efforts were made by front-line managers to seek formal appointment but the difficulties in taking that approach were made obvious in testimony. Manager Reid is notable in that respect. Some others simply went along with the process knowing the difficulties presented. I would say that on the whole the Employer's front-line managers who testified supported the Union's theory that failing to obtain formalized positions for the casuals, at least those who testified, was more about position funding issues and other organizational difficulties, than their need to have them continue working well into the future.

Notably, the Employer's position that there was no breach of A5.02 on any systemic or systematized basis proven by the Union requires one to give close consideration to the most recent award by and arbitrator Ponak in *Sutherland House,* whose analysis of the casual employment issue and conclusion I have quoted at some length earlier in this award. Once again, it was a situation where the

employees had been working in successive contracts of casual employment at a women's shelter over a period of six years while the Employer was trying to arrange the sale of the facility. The factual circumstances behind their employment dragging on due to circumstances seen by the Employer to be out of its control finds a comparison in the circumstances discussed by Arbitrator Holden in the *Ferry Service* case where she viewed the Employer to be taking a pragmatic approach. The work needed to be done going forward for some indefinite period of time, hopefully relatively short-lived, but perhaps not, and in the meantime they received their benefits and entitlements ensured by A5.01 and the past interpretive case law. I accept that arbitrator Ponak's analysis takes proper guidance from arbitrator Chertkow's approach in the 1982 *Commissioner* award where the issue centered on an alleged violation of A5.02 and not whether term benefits and entitlements were being applied. No doubt it was a case decided on the individual circumstances but plainly the management process was one of securing four month contracts followed by immediate rehiring and receiving the same collective agreement benefits as if they had been regular employees, i.e., presumably if one were to apply the HR term, they were being handled as employees in the category of casual/term. While arbitrator Ponak's award dealt with individual assessed circumstances, nevertheless his analysis I find to be both compelling and instructive in this policy grievance matter.

It would be difficult to distinguish the Employer's process observed by arbitrator Ponak from that described by the seven affected employees and their immediate superiors, who while encountering different individual circumstances, location to location, the continuing result was their being always rehired or renewed on the basis of signed contracts of casual employment, more often than not less than four months at a time, no mention of any deemed appointment into term employment on the face of the hiring form. Some were not even aware of their contractual situation other than they were working successive periods of casual employment. They needed the work. The Employer presented no evidence indicating that anyone working successive periods was more likely than not to receive a formal term or indeterminate appointment offer at some point for a position in the Public Service, although plainly this result occasionally did occur. There is no persuasive evidence that anyone else, some other affected employees who did not testify, were being treated much differently in terms of management persons handing out successive contract of casual employment in what was thought to be good business practice for their purposes. The Employer's evidence essentially concentrated on justifying that approach.

I accept there was a pattern of providing term benefits and entitlements after qualifying for them by reason of how the periods of casual employment meshed together, but the policy documents themselves tend to tell the real story of what was occurring, namely the creation of the casual/term category by policy dictum and the stated requirement under HR Manual policy directive that casual employment should not be ended where the work remains to be done. Were benefits and other entitlements to apply at some point, so be it. Plainly, in all these cases presented as examples of the Employer's way of dealing with casuals, work remained to be done contract after contract, year after year in most cases, and the import of the directive to front-line managers was that the casual employment presented no problem from an HR perspective whatever the benefits' and entitlements' situation. For my purposes, the individual circumstances entered in evidence illustrated the policy dictum being pursued.

The evidence presented in this policy matter leads one to consider the obligations under A5.02 as explained both by arbitrator Chertkow in *Commissioner* and arbitrator Ponak in *Sutherland House*. As I consider the totality of the evidence, it would appear that essentially we have a *Sutherland House* situation writ large across the Employer's GNWT employment system, supported by the HR Manual, whether or not there are difficulties arising on individual case assessments related to finding, or securing suitable candidates for positions, or dealing with remote communities, or having some difficulty determining the length of required work. The employee category of full-time employee is not defined under Article 2.01(m) and I take it to include both term employees and indeterminate employees as defined therein. The essential character which emerges are of prolonging the casual employment relationship, where thought to be convenient for a variety of business related reasons. These individuals who testified as examples of the process being followed, once enlisted, sometimes stayed in their working situations for years at a time without anyone taking sufficiently meaningful steps to establish any full-time positions, or fill numbered vacant positions, as the case might be. The fact they were being paid wages at a comparative rate to properly positioned employees, and receiving benefits depending on the length of their current period of employment, is not determinative. The evidence from the Employer including Ms. Parsons and the front-line managers who testified does not persuade me otherwise. I do not see than any of them thought there was pressure being applied for them to regularize the employment status of their long-term casuals in terms of the Employer having to take appropriate and meaningful steps to fill

vacant positions, or create new positions, or find formalized appointments for them in some other fashion. It was realistically shown to be an ongoing way of doing business.

More particularly, in dealing with the Employer's assertions that the evidence shows that casual contracts were consistent with long-standing practices as between the Union and the Union, there was no argument concerning the need to sort out an ambiguity, nor any estoppel submission. The evidence was that the Parties have attempted to work out problems in consultation, concerning which they were partially successful, but eventually this policy agreements arose when it was thought there were liberties being taken with A5 which could not be worked out between them in any satisfactory fashion. The fact that they tried to work out their differences in individual case situations does not exclude the possibility of eventually seeking contractual clarification in the policy grievance format. There is no doubt the Employer was acting in transparent fashion and pursuant to its own policy dictates of the HR Manual which does not make its approach contractually compliant. The allegation that the evidence showed the casuals were used for filling short-term needs, or to cover duties was simply not borne out on the testimony. Frankly they were used for long-term needs, some of them year after year without any end in sight. It was only the successive casual contracts themselves which were of a short-term nature. The suggestion that the evidence, on balance, should persuade me that casual employees are being used to cover duties when indeterminate hiring was unsuccessful, may have been the case in some circumstances, but I find it was more likely the established practice was in many cases that casuals were being used over a lengthy employment relationship as a convenient way to proceed. Further I do not see that any suggestion there is an unwarranted cost attached to using casuals, as means of naturally dissuading managers from abusing their use, is not borne out on the evidence. The evidence more likely shows that the general situation existed of prolonging the use of individual casuals in numerous successive contracts. They all knew their jobs and were performing their normally assigned duties without needing further resources on training going from one casual employee to another casual employee does not appear to be the usual situation given the evidence indicating that successive contracts were being offered year after year to the same casuals where the work needed to be done in a continuing fashion. Any evidence that the Employer needed casuals to cover duties when indeterminate hiring was continuing to be unsuccessful may have occurred in some circumstances but does not explain the usage year after year in the fashion described in evidence occurring pursuant to a policy driven directive. I agree with arbitrator Ponak's

conclusion in *Sutherland House* that at some point the Employer can be viewed as crossing the line into contravening Article 5.02 which is what the HR Manual policy fails to recognize with its emphasis on completing the available work on the basis of extending benefits and entitlements where required by the length of one's current employment. Article 5.02 in the 2016 expired Collective Agreement contemplates a limitation on that approach.

In all, I am persuaded that the evidence presented in these two policy grievances heard together discloses on balance that the Employer has been proceeding in its policy driven employment of casuals in a fashion which contravenes Appendix A5, and more particularly A5.02 in that it has sought to normalize the employment of casuals through a series of successive hirings or extensions which fails to adequately ensure that their employment not be continued in such a fashion in lieu of establishing full-time positions, whether term or indeterminate, or filling vacant positions. The language contains no specific exclusion relative to experiencing organizational difficulties. The Union is accordingly successful in this policy grievance referral. But my reaching this conclusion does not mean that managers are left without legitimate discretion in making decisions in individual cases. They nevertheless should have always been attentive to not moving across the line which offended the language of A5.02 respecting reliance on successive contracts, which is to say having too little regard for the obligations thereunder. This matter references the language of the expired Collective Agreement but it is noted that the wording of A5.02 remains the same except for deletion of the last paragraph dealing with mandatory consultation. In the past the joint consultation process dealing with individual cases has shown itself to be helpful to work out front-line solutions.

As requested I will remain seized respecting any clarification, directions or remedial rulings with the award to issue as declaratory at this point for the violation of Appendix A5 in the expired 2016 Collective Agreement.

DATED at Calgary, Alberta, this 30th day of July, 2020.

Tom Jolliffe, Q.C.