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)

SUPPLEMENTAL AWARD

Before:	Thomas Jolliffe, Q.C.
Representing the Employer:	Trisha Paradis, Counsel Maren Zimmer, Co-counsel
Representing the Union:	Michael Penner, Counsel
Hearing Dates:	April 9, 2021 (Case Management via Zoom) May 20, 2021 (via Zoom)

Date Supplemental Award Issued:
October 14, 2021

My File:
53,247

Supplemental Award

Re: Reasoning on Remedial issue:

The Union filed two policy grievances in 2017 agreed to be heard jointly, with one award to follow, the first being #17-P-02165 and the second being #17-P-02211. Both these grievances raised the issue of the Employer's hiring and use of casuals across various departments and disciplines throughout its operations in the Northwest Territories, alleged to be contrary to the collectively bargained requirements set out in Appendix A5 as described in the Introduction section of my Award issued on July 30, 2020. The allegations were far-reaching in terms of claiming that the Employer was hiring casuals for periods over four months and not appointing them on a term basis; disguising term and indeterminate employees as casuals in order to avoid benefits and entitlements; not posting positions and avoiding staff competitions; also avoiding proper pay for the positions they were actually working without any appointments. The Union named some allegedly affected employees said to be examples of the Employer's approach.

It might well be said that the remedies sought by the Union in these two grievances were likewise far-reaching. In Grievance #17-P-02211 the Union claimed the following relief, which is to say 21 separate descriptions of what it said was required to remedy the alleged contractual violations:

1. A declaration that the Employer has misinterpreted, misapplied, and/or violated the collective agreement.

2. That the Employer cease violating Appendix A5.01 of the collective agreement.

3. That the Employer cease violating Appendix A4 of the collective agreement.

4. That all positions inappropriately classified as and filled by casuals be posted and staffed appropriately as terms and indeterminate positions, the positions placed on the org charts, a proper statement of duties be developed at a proper job evaluation completed.

5. That the employer conduct an audit of all Casual job in all departments across the GNWT to identify all disguised terms or indeterminate positions and provide the results to the union.

6. That the Employer, in their monthly reports, identify to the Union a comprehensive list of all members who have been hired as Casuals for a period of longer than four months.

7. That all affected members be made whole in all respects without restriction, including being awarded interest on monies owing or made part of redress, and further to be awarded aggravated damages.

8. That the Employer seek no further retaliation or other action against our members for the Union having exercised its right to grieve this matter on their behalf.

9. That all documentation leading up to and including this grievance be removed from any and all of the members' employee files.

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

11. That all affected employees leave banks be audited to ensure that they have received all right, benefits and entitlements afforded under the Collective Agreement.

12. That all affected employees step increments be audited to ensure that they have received all rights, benefits and entitlements afforded under the Collective Agreement.

13. That all affected employees pensions and health benefits be reviewed to ensure that they have received all appropriate entitlements.

14. That all positions classified as Casuals for a period in excess of four months be posted and staffed appropriately as term or indeterminate and be paid at the appropriate pay range for their position immediately and that all members whom were filling those positions as casuals have their pay range corrected and be compensated retroactively for all hours worked and paid at the wrong range since the date of hire.

15. That the employer conduct an audit of all Casual positions in all departments across the GNWT to identify positions and inappropriately classified as Casual and disguising terms or indeterminate positions.

16. That the employer make all affected members whole in terms of compensation, including but not limited to any loss of wages (inclusive of overtime, where applicable), benefits, pay increments premiums or any other items deemed just and appropriate under the circumstances, and that compensation be made with the addition of interest, compounded daily and calculated at prime plus 2%.

17. That positions be posted and staffed appropriately as terms or indeterminate.

18. That the employer cease disguising terms and indeterminate positions as casuals.

19. That the employer cease using "administration" as a reason not to staff appropriately.

20. That the employer cease hiring extending casuals into some positions with less than a 30 day break in service.

21. That the employer provide the union with a list of all casuals they have extended and provide a rationale as to why they didn't consult the union.

In Grievance #17-P-02165 the Union sought the following relief, which is to say 16 separate descriptions of what it claimed was required to remedy the alleged contractual violations, namely:

1. A declaration that the Employer has misinterpreted, misapplied, and/or violated the collective agreement.

2. That the Employer cease violating Appendix A5.01 of the Collective Agreement.

3. That members who have been hired as Casuals and either extended past four months or hired as Casuals within the same authority without leave greater than 14 days be appointed on a term basis and entitled to all provisions of the Collective Agreement from the first day of his/her employment.

4. That the Employer conduct an audit of Casual positions in all departments across the GNWT to identify members who have been hired as Casuals and either extended past four months or hired as Casuals within the same authority without leave greater than 14 days be appointed on a term basis and entitled to all provisions of the Collective Agreement from the first day of his/her employment.

5. That the Employer, on a regular basis, provide the Union with a comprehensive list of all members, who have been hired as Casuals and either extended past four months or hired as Casuals within the same authority without leave greater than 14 days be appointed on a term basis and entitled to all provisions of the Collective Agreement from the first day of his/her employment.

6. That all affected members be made whole in all respects without restriction, including being awarded interest on monies owing or made part of redress, and further to be awarded monetary damages in the amount of $10,000.00.

7. That the Employer seek no further retaliation or other action against our members for the Union having exercised its right to grieve this matter on their behalf.

8. That all documentation leading up to and including this grievance be removed from any and all of the members' employee files.

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

10. That all affected employees leave banks be audited to ensure that they have received all rights, benefits and entitlements afforded under the Collective Agreement.

11. That all affected employees step increments be audited to ensure that they have received all rights, benefits and entitlements afforded under the Collective Agreement.

12. That all affected employees' pensions and health benefits be reviewed to ensure that they have received all appropriate entitlements.

13. That members who have been hired as Casuals and have not been paid at the appropriate pay range for their position immediately have their pay range corrected and be compensated retroactively for all hours worked and paid at the wrong range.

14. That the Employer conduct an audit of Casual positions in all departments across the GNWT to identify members who have hired as Casuals and have not been paid at the appropriate pay range for their position.

15. That the Employer, on a regular basis, provide the Union with a comprehensive list of all members who have been hired as Casuals and have not been paid at the appropriate pay range for their position.

16. That the Employer make all affected members whole in terms of compensation, including but not limited to any loss of wages (inclusive of overtime, where applicable), benefits, pay increments, premiums or any other items deemed just and appropriate under the circumstances, and that compensation be made with the addition of interest, compounded daily and calculated at prime plus 2%.

During some 13 days of hearing, I heard evidence from seven witnesses hired into successive periods of casual employment, or having had their casual employment extended for varying periods of time, and from their representatives involved from the Union's perspective in trying to understand what was occurring. I also heard from Employer called witnesses looking to explain their usage. I

issued my 71-page award on July 30, 2020. In its conclusion, starting with my discussion at p. 64, I determined for the reasons set out therein that the Employer's policy driven employment of casuals contravened Appendix A5 and 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 a 5.02 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 remained seized for purposes of any clarification, directions or remedial rulings, with the award to issue as declaratory at that point for the violation of Appendix A5 in the expired 2016 Collective Agreement.

Thereafter, on April 9, 2021 I responded to the Parties' raising the issue of unresolved remedy with me, one needing to observe the scope of what was requested in the grievance documents in addition to declaratory relief. My understanding was that some clarification was needed on what was being sought at this juncture or expected, given that I had reserved my remedial jurisdiction, namely as stated in my reply email:

> The remedial issue to be considered is how far does my jurisdiction and authority extend concerning these two successful policy grievances, which is to say what can I do as an arbitrator at this point extending past declaratory relief if anything, and more particularly what is the argument to be heard concerning the possibility of requiring some level of individual employee relief, possibly financial in nature, which would be the Union's position.

Notably, the two grievances specifically pleaded that individual remedies should be considered for the affected employees in the event the Union was successful in proving a contractual violation. There has never been any doubt that the affected employees were the ones working the successive or extended casual contracts.

It can be observed that my July 30, 2020 Award recognized that the Parties had agreed that the use of casuals explored in evidence, from the Union's perspective in dealing with these two policy grievances, was based on information covering the seven affected employees who testified. They had worked, some continuing to do so, on successive or extended contracts after being hired as casuals. It was the basis of the job offers they accepted. They were only examples of the Employer's widespread approach. This is to say that in reality there were other affected employees, or at least arguably affected employees whose situations needed to be fully investigated, working in an enduring employment relationship on the basis of casual contracts. Some employees worked contract to contract over many years performing essentially the same duties without respite. However, as one might expect, not all their situations were identical, not all approaches toward maintaining and extending their working relationships were the same. The Employer had responded with its own evidence at the hearing into the merits concerning casual employee usage. It was not seen by me to outweigh the Union's evidence but did provide insight into the managerial approach, certainly not always consistent.

At this point it is important to note that the section of the Award summarizing the Union's compiled casual employee research, which is to say the information presented from the Union in addition to the individualized situations involving the seven affected employees who testified, is set out at pp. 27- 28 and reads as follows:

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.
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> 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.

In preparation for my reconvening the hearing on the issue of my reserved jurisdiction, the Parties' respective counsel provided written briefs in advance outlining their competing positions, also their submitting oral argument upon my reconvening the hearing on May 20, 2021. I have reviewed all the extensive materials submitted on the issue of remedial jurisdiction, together with

my Award issued on July 30, 2020. As yet, other than the limited research materials entered in evidence, there has been no further information presented covering the totality of other identifiable individual employees' employment situations, in addition to the seven employees who testified at the initial arbitration hearing. The immediate stumbling block at this point, as the Union sees it, is that it does not have enough knowledge of individual situations in order to assess the extent of the financial prejudice the numerous other affected employees have experienced by having been improperly categorized during their various periods of contract employment, that which it is seeking to have me remedy in exercising retained jurisdiction. Notably, the evidence at the hearing into the merits of the two policy grievances disclosed that the Union at that point was not objecting to the use of overholding or successively employed casuals in every instance, and I noted in the Award that there could be some level of managerial discretion applied, obvious fact dependent, having also noted that numerous situations had been resolved prior to the hearing on the merits of what was being alleged. Many others remain unresolved.

The Employer now objects to my awarding any further remedy past the declaratory award I have issued. It does not accept that my directing any additional investigation at this point to uncover and ultimately financially compensate adversely affected employees on the basis of the conclusions reached in the Award, concerning whom the Union is claiming relief, is an appropriate exercise of my retained jurisdiction in this policy grievance matter. It contends that the Award should stand as declaratory only.

Discussion of Parties'' Positions on Remedy:

Union:

The Union seeks a ruling by way of accessing my retained jurisdiction that all affected employees should be made financially whole in all respects without restriction, which is to say pertaining to those situations which were not settled in some acceptable fashion. Many individual experiences have not yet become fully known to the Union as necessarily inviting any individual remedy from its own limited investigation phase dealing with the information it had developed. Factual circumstances still need to be understood. This is to say, it seeks compensation for loss of wages, benefits, pension, pay increments and premiums for its members able to be identified as coming within the violation of Appendix A5. The Union is pursuing a financial remedy centering on the status they should have had when they did not have it. It seeks interest on any monies owing or made part of their redress.

In support, the Union has referenced the general case law driven compensation approach in labour relations matters, such as described by the Ontario Court of Appeal's judgement in the seminal *Blouin Drywall Contractors Ltd. and United Brotherhood of Carpenters and Joiners of America, Local 2486*, (1975), 8 O.R. (2d) 103, often cited for the principle that grievances should be liberally construed in order that the complaint be dealt with and an appropriate remedy fashioned where successful, including making monetary awards so as to restore the persons affected by a contractual breach to the position they would have been in had the agreement been properly performed.

In *Blouin Drywall* it had been a situation where the employer had violated preferential hiring and hiring hall clauses in the collective agreement by taking on non-union employees to do the work. The Court of Appeal confirmed the Arbitration Board's conclusion that the affected

employees should be compensated for their lost wages, having noted that "the loss cannot be measured with certainty and the tribunal, like a Court, must simply do its best at arriving at a fair assessment", having determined that the disposition of the monies directed to be awarded at arbitration was consistent with that approach. In that case the Board of Arbitration whose decision the Court of Appeal upheld, had calculated the totality of losses and awarded a financial sum to the union reflecting that amount, to be distributed to its affected members. For the Union, at this point it sees the best alternative as requiring the calculation of individual employee losses which should generate payments made directly to the affected members, or a lump sum paid to the Union needing to be passed on to the affected members once the calculations have been made, possibly something which could be agreed upon. The Union is at least open to exploring that possibility.

At the same time, the Union acknowledges that the issue of providing any in-kind remedy as an alternative, contained in its pleading as a possibility, would present a difficulty in terms of changing anyone's formal employment status. It is apparent, Mr. Penner has submitted, that the interplay of the Collective Agreement and the *Public Service Act* which contemplates only Government formalized appointments may well preclude an arbitrator from awarding the in-kind remedy of converting casual employees to term employees, even in cases of clear misuse of the Employer's authority. It further acknowledges that given the change in the collectively bargained language in 2019 with the currency of the next collective agreement coming into effect, any in-kind remedy being proscriptive, could now well be a moot issue. In any event, Mr. Penner has advised that the Union more realistically is seeking a monetary remedy as appropriate despite the possibility of an in-kind remedy having been raised as a remedial issue in the filed grievance.

Either way, the Union has always relied on the terms of Appendix A5.01 requiring that the casual employee whose period of continuous employment exceeds four (4) months is entitled to all

provisions of the Collective Agreement afforded to a term employee going back to his/her hire, however the Employer might like to reference their status for internal HR purposes. Nevertheless, it now appreciates that while a casual employee in that situation is at least entitled to an appointment, being a negotiated right, which was denied in numerous individual situations described in evidence, I am not clothed with authority to "convert" the affected employees into appointed term positions. With that kind of in-kind remedy likely not being available, the Union contends, an award in damages more likely becomes the appropriate vehicle to make the affected employees whole so far as it can be accomplished. Towards that end, it has sought specific information by way of the Employer conducting an audit to identify the affected members in their individual situations. It holds to the view that once identified, any shortfalls in their pay and benefits could then be calculated and compensated.

The Union relies on labour law jurisprudence demonstrating that when an in-kind remedy such as conversion is simply not available, a comprehensive assessment of damages becomes the appropriate vehicle to make the affected employee(s) whole where there are losses arising from contract violations, as can be reasonably achieved. Further, inasmuch as the Parties have agreed to different language in the latest Collective Agreement, the Union points out, there is an end date to the time period covered by the grievances, namely April 21, 2019, after which time newly bargained terms became applicable. At this point, the Union contends, it should be a matter of the Parties working together to identify the affected members and ensuring that any shortfalls in their pay and benefits, by reason of their improper classification, are properly compensated.

In support of the Union's position that individualized damages' assessments covering affected employees in the policy grievance format is appropriate, not seeking an in-kind remedy at this point, Mr. Penner has cited *Community Social Services Bargaining Assn. of Unions v.*

Community Social Services Employers Assn., [2006] B.C.C.A.A. No. 50 (Gordon). The successful union filed policy grievance had resulted in an initial declaratory award concerning a statutory holiday issue involving past practice, with retention of jurisdiction. Following the initial award, the union in furtherance of its seeking compensatory damages requested production of scheduling records from each agency that operated on statutory holidays during the relevant period of time, which the employer denied on the basis that the dispute was presented and determined as a policy grievance, thereby providing no entitlement to individual remedies. In her Supplementary Award the Arbitrator addressed the issue of when damages should be awarded as a matter of going beyond providing only declaratory relief. The employer in that case had acknowledged that the *Labour Relations Code* in British Columbia provided Arbitrator Gordon with discretion to award monetary damages thought to be appropriate. It nevertheless urged her not to take that approach in considering that the dispute was presented as a policy grievance. It had pointed out that correspondence between the parties did not disclose any agreement to pursue individual remedies in the event the union succeeded on the contract interpretation issue. Further the employer had submitted that the award did not constitute a foundation for paying damages to affected employees in the absence of individualized evidence having already been presented concerning each employee who claimed monetary remedial relief. The union's position was that refusing to grant a financial remedy to affected employees would leave it having identified a contractual right without a remedy for its breach.

Arbitrator Gordon in *Community Social Services*, having accepted that it was a situation where there reasonably could not be an in-kind remedy, rejecting the employer's argument on that approach being a possibility, went on to state at para. 28: "I find the refusal to provide remedial relief to employees affected by the breach would surely generate further litigation. In my view, a

final conclusive settlement of this dispute requires individual remedies for the contravention of (pertinent article)". She carefully dealt with the employer's alternative argument that a monetary sum should be awarded to the Union to be calculated on the basis of an appropriate global amount, proposed as suitable due to the complexity associated with granting individual remedies to affected employees. The union, as the Arbitrator put it: "disputes the propriety and efficacy, of that approach", in its asserting that the proof of individual damages was not as complex as indicated by the employer and further that awarding a monetary remedy would provide a final and conclusive resolution to the dispute. The union had acknowledged that it was unlikely they would be able to agree on the amount which would mean having to reconvene the proceedings and make submissions on what would probably be significantly differing amounts from each side.

Arbitrator Gordon in considering her jurisdictional footing cited the summary contained in Brown and Beatty, *Canadian Labour Arbitration* at topic 2:3124 dealing with policy grievances. Presenting the same kind of Brown and Beatty analysis, the current loose-leaf version states as follows:

> At one time, some arbitrators were of the view that certain types of grievances were inherently personal to individuals and could be grieved only by them and not by the union through policy grievances. For example, where the relief sought was pecuniarily individual, such a claim for monetary redress, reinstatement, or relief from improper recall or layoff, arbitrators either held such grievances to be inarbitrable as policy grievances, or alternatively limited relief to a declaration only. This approach, however, is no longer generally followed. Rather, only where the collective agreement specifically prescribes the range of union policy grievances is it likely that such a limitation will be found to exist....

In one reviewing this jurisdictional question of remedy covering a successful policy grievance as discussed and summarized in Brown and Beatty, it can be observed that the Historical References section of the topic 2:3124 footnotes include some cases from the 1970s into the 1990s where individual remedies were denied in the policy grievance format. See for example Arbitrator

Simmons' award cited as *Toronto (City)* (1974) 7 L.A.C. (2d) 53 and Arbitrator O'Shea's award cited as *Electrohome Ltd.* (1976) 13 L.A.C. (2d) 37. Nevertheless, during that same period there were other awards likewise cited by the learned authors as historical references where arbitrators considered that individual remedial relief for a breach uncovered by the policy grievance was appropriate and should only be barred if the collective agreement so provided. See for example Arbitrator Tenace's award in *Renfrew County Roman Catholic Separate School Board* (1997), 67 L.A.C. (4th) 109; preceded by Arbitrator Michel Picher's award in *Belleville General Hospital* (1981), 30 L.A.C. (2d) 323; and Arbitrator Shime's award in *Etobicoke (Borough)* 1980, 28 L.A.C. (2d) 1; and Arbitrator McFetridge's award in *R. Angus, Division of Finning Ltd.* (1992), 30 L.A.C.(4th) 169 where he noted, as had other arbitrators, that there were no express limitations on range of remedies pertaining to the policy grievance format.

One observes that having cited the Brown and Beatty summary at topic 2:3124, Arbitrator Gordon in her *Community Social Services* award went on to address the approach taken in an Ontario case to which she was referred involving the Ministry of Community and Social Services – no citation. In that case, by her description, it was found at arbitration that the affected employees through contractual breach had lost the opportunity to make an election under the collective agreement which impacted their seniority, and where the Arbitrator's awarding damages at some compensatory level was the only feasible remedy in the circumstances. She observed that in this other case it had not resulted in any individualized assessments but rather the arbitrator had awarded a global remedy of damages payable to the union for the loss of the affected employees' opportunity under the collective agreement with the quantum fixed by multiplying each employee's seniority by two weeks' salary, plus interest. Arbitrator Gordon understood that this approach had been upheld

on judicial review, meaning that fashioning a blanket award was considered to be a reasonable exercise of remedial jurisdiction because the employer had breached the collective agreement in a manner affecting employees' "collectivity", meaning there was a real loss to the affected group of employees but presumably very difficult to quantify on an individual case basis. She had observed that the Court on its judicial review of the *Community and Social Services* case had recognized the Arbitrator's award to be both innovative and reasonable, and that any insistence on individual remedies would have led to "interminable individual hearings", possibly harmful to management - employee relations. However, Arbitrator Gordon also recognized that it had been a factual situation in this other case where it was not possible to predict whether and which employees would ultimately suffer due to the loss of seniority.

Ultimately, in *Community Social Services*, Arbitrator Gordon did not apply the global award approach. Any concerns over issues related to proof of loss could be addressed in a case management context prior to any hearing. She determined that having found damages to be the appropriate remedy, she had the jurisdiction to grant individual remedies on that basis, turning the matter back to the parties at that point and remarking: "but proof of loss is a factual matter, and the quantum to be awarded to affected employees must await the appropriate factual determinations". From her perspective, it would be a matter of applying the law of damages generally as set out in such cases as *Hay River Health and Social Services Authority v. P.S.A.C.* (Dalton Grievance) (2010), 201 L.A.C. (4th) 205 (Sims) where a gross up strategy was adopted in dealing with a terminated employee's financial losses where reinstatement was not found to be a viable option. The approach taken by Arbitrator Sims was to account for future contingencies, calculate the years the affected employee would been expected to work in the job going forward, apply a discount figure for future

income to be earned elsewhere, and award damages on that basis, no entitlement relating to pain and suffering.

In further support, Mr. Penner cited Arbitrator Picher's award in *Belleville General Hospital, supra*, referenced in the Brown and Beatty topic 2:3124 footnotes where the issue of the employer's failure to pay holiday pay to part-time employees was raised in the policy grievance format, their needing an interpretation within a context involving two collective agreements. In dealing with the issue of whether there was an implied limitation on the arbitration board's remedial authority, the Arbitrator had relied on the interpretive principle espoused by the Ontario Court of Appeal in *Blouin Drywall, supra*, that a grievance should be liberally construed so that the real complaint can be dealt with and the appropriate remedy provided to give effect to the agreement and its provisions. He concluded at para. 25 that the Board had jurisdiction to award monetary damages and that an award in compensation should issue. In making that determination Arbitrator Picher stated on behalf of the Board majority:

> 25. In the absence of any contractual or statutory requirement it would in our view it serves little purpose, and indeed would risk bringing the arbitration process into disrepute, to require employees to file multiple individual grievances in respect of what is in fact a single issue of contract interpretation which affects them in common. For these reasons, and in light of the decision of the Court in *Blouin Drywall, supra*, we conclude that we have jurisdiction to award monetary damages and that an award of compensation should issue [Arbitrator Shime's award in *Borough of Etobicoke*, supra, being amongst those cited by Arbitrator Picher in support of this approach].

The principal Union concern at this point is its having insufficient information as yet to advance its remedial case with respect to all individually affected employees by reason of the systematized violation of Appendix A5, it having earlier been in consultation/discussions with the Employer over many of the situations (pages 27-28 of the Award). Mr. Penner submitted that in the absence of an express limiting provision my retained jurisdiction allows me at this point to direct

the Employer to produce such records as necessary for the Union to more completely identify affected employees for assessment of damages purposes, and gain better insight into their losses. It was said to be within the remedial authority inherently resting with the arbitrator seized of the matter and a critical component at this point, the next step as it were, in dealing with the issue of calculating appropriate compensation for affected employees. They were the common recipients of the adverse consequences arising from the Employer's systematized breach of Appendix A5. At this point it requires mutual cooperation concerning file reviews to move.

The Compensation on Issue Forward:

In further support Mr. Penner cited a more recent case, *Providence Healthcare v. C.U.P.E., Local 1590* (Policy Grievance no. 09-32), [2013] O.L.A.A No. 41 (Goodfellow) where there had been an award arising out of the policy grievance, with the arbitrator having found that the employer had breached the collective agreement by failing to post any vacancies as permanent over the relevant period under review. The parties were left with attempting to resolve the remedial consequences flowing from the decision, which they had been unable to do prior to the hearing being reconvened. The position taken by the employer at that point was that the arbitrator was limited to the declaration already made in that any further relief, if allowed, would be individual compensation, also proposing a time limitation in connection therewith as an alternative position. Arbitrator Goodfellow ruled that the relevant period in the award was the full period during which the employer was acting in accordance with its announced failure to post permanent positions, and he directed the parties to attempt to reconstruct what would have happened had the employer complied with its collective agreement obligations which the union had doubted could even be properly accomplished at that point. Nevertheless, the arbitrator also directed the parties to try to

work out the problem towards reaching an understanding of the compensatory parameters prior to reconvening. In applying that intermediate step in the remedial process, having discussed case law, the arbitrator stated at para. 8:

> 8. The fundamental point is that the now long-standing acceptance of the broad scope of arbitral remedial authority in the context of policy grievances, any limitations on that authority must be expressly spelled out. Arbitrator Burkett [*Saint Joseph's Hospital, London and Ontario Nurses Association*, (1988), 8 L.A.C. (4th) 144 at pp. 152-155], and the great many cases to which we were referred by the Union, makes this clear. In our view, there is nothing in the present agreement that expressly precludes that authority...

Mr. Penner cited *British Columbia Telephone and T.W.U.*, [1990] B.C.C.A.A. No. 406 (Munroe) where the union's request for production of records as necessary for it to identify affected employees resulting from the contractual breach came in the form of a subpoena *duces tecum* rather than a request made to the arbitrator for a formal audit. The case involved a policy grievance over sickness and disability benefits not being paid during the last 10 weeks of pregnancy to cover a pregnancy-related illness. The employer had taken the position that the impaneled Board was without jurisdiction to grant any retroactive remedy, which would exclude any payments being made to ex-employees. Chair Munroe disagreed, before ruling that the identification of the potential beneficiaries of his declaration, and the effective retroactive date for the new policy approach he was directing, would be referred back to the parties at that point. He stated as follows commencing at para. 31

> 31. There is one other matter requiring our attention. The union submitted that once the appropriate remedial date has been determined, we should direct the company to produce to the union such records as it may have that might assist the union in identifying those of its members who might have a claim. More particularly in that regard, the union asked us to issue a subpoena *duces tecum* which, frankly, was breathtaking in its potential scope.
>
> 32. It is not common for an employer to be required, in effect, to assist the union in the identification of possible grievors. At the same time, this case may well call for a more bilateral approach to its investigation and resolution than is the norm.

> 33. But we think it would be premature to now make determinations in that regard. The task at hand is to identify employees who, in the 10 month period June 1, 1987 to March 31, 1988, [time period from commencement of collective agreement to change in policy so as not to be discriminatory] suffered a pregnancy related illness for which they were denied sickness benefits. That task is referred back to the parties for discussion and, we hope, agreement as to how it can be accomplished.....

Having observed at para. 35, that he had provided such guidance to the parties concerning the identification of potential beneficiaries, Chair Munroe stated:

> .... the identification of the potential beneficiaries of that determination [effective date for the new policy respecting pregnancy related illness] is referred back to the parties. We will remain seized of the matter to resolve any disputes in that connection, and generally to bring this matter to a conclusion. It should be noted that persons claiming under the terms of this award to be entitled to a benefit arising from a pregnancy related illness will be put to the usual requirements of proof.

As an exercise of an arbitrator's reserved jurisdiction where the parties had not been able to come together on the remedial issue of individualized quantification, Mr. Penner cited Arbitrator Power's supplementary ruling in *Team-Cooperheat-MQS Canada Inc. v. Quality Control Council of Canada,* [2008] A.G.A.A. No.8, where he had issued a declaratory award in a policy grievance matter dealing with where employees should have been slotted into a paid grid based on hours, having been fashioned contrary to the governing contractual language. He reserved on the issue of whether any specific employee or employees were entitled to relief as a consequence of his declaration, and if so, the nature of the relief. The union thereafter sought an audit to determine the number of employees who had been improperly slotted due to the misapplication of the language. Upon reconvening the hearing on the basis of his reserved jurisdiction to deal with the union's application for an audit, Arbitrator Power observed that as yet no agreeable arrangements had been made for an inspection of the employer's records to ascertain who were the affected employees. In reconvening the hearing, there is no indication the employer was taking the position that despite the extended jurisdiction on remedy concerning affected employees, they were all obligated to file their

own individual grievances. In dealing with the reserved jurisdiction on remedy, the employer's position was that the records might not be helpful, might not even still exist, further asserting that it was up to the union to prove its case, and that any employees who considered themselves to have been affected, presumably, would have their own records from which the relevant calculations could be made by the union. The Arbitrator remarked that it might well be that the union could access employee records to some extent but it was still entitled to an audit as the next step, noting the supportive language in the collective agreement on ascertaining amounts alleged not to have been properly made under contract language. At the same time, he stated at para. 9 that "I continue to retain jurisdiction to determine whether any specific employee or employees are entitled to relief as a consequence of the declaration I made in my prior Award, and if so, the nature of that relief".

The real problem faced in proceeding to an assessment of damages phase at this point, as the Union has identified it, is not my extended jurisdiction in overseeing the compensation process arising from the breach, but is having to uncover which employees are affected by the improper policy and to what degree, which is to say the cumbersome nature of moving forward on remedy. The successful grievances raised the issue of the Employer's systematically violating Appendix A5 across its departmental structure during the currency of the collective agreement under which it was filed. I would venture to say at this point that in the case at hand the situations involving numerous affected casuals across the GNWT departments could presumably vary widely on a case-by-case basis, be difficult to individualize as to the full extent of one's loss, no doubt, and would be time-limited given the timing of the filed policy grievances and the change to the contract language. Nevertheless, the Union contends that in order to address specific financial relief in individual cases, the affected employees need to be identified and their individual situations adequately revealed so as to quantify the contractual breach. So far, we only know the circumstances pertaining to seven

of them, being sufficient to ground the successful policy grievance as a matter of showing the Employer's systematized approach. Hence the need for some form of audit to be carried out covering all the contractual periods of work of others not allowed to move out of their casual employee classification, a matter of reasonably individualizing the claims and compensating the losses that incurred. At the same time, the Union urges me to recognize that the preferable approach is to ultimately individualize payment of compensatory damages, one substantiated claim after the other, needing to be managed by me through exercising my retained jurisdiction.

The Union also relies on a history of subpoenas *duces tecum* having been issued as a matter of providing preliminary directions in numerous arbitration cases, where declaratory awards have been issued with reserved jurisdiction covering remedial directions. Mr. Penner cited Arbitrator Richard Brown's discussion in *Ottawa (City) v. Civic Institute of Professional Personnel (Contracting In Grievance),* [2010] O.L.A.A. No. 41 where the Union sought documents related to six workers alleged to be employees governed by the collective agreement and thereby, it claimed, not to be treated as contractors. The Arbitrator discussed several awards where production of documents/records had been directed, with guidance on what was needed as potentially or arguably relevant in order that the information dependent cases not proceed in a factual vacuum. The Arbitrator quoted the remarks of Arbitrator Knopf from *West Park Hospital and O.N.A.* (1993), L.A.C. (4th) 160 at p. 169 dealing with general disclosure parameters:

> [W]here the disclosure is contested, the following factors should be taken into consideration. First, the information requested must be arguably relevant. Second, the requested information must be particularized so there is no dispute as to what is desired. Third, the Board of Arbitration should be satisfied that the information has not been requested as a "fishing expedition". Fourth, there must be a clear nexus between information being requested and the positions in dispute at the hearing. Further, the Board should be satisfied that disclosure will not cause undue prejudice. In this regard, the criteria set out in the *Desmarais and Morrissette* case are applicable in terms of weighing whether or not privileged information should be protected.

At this point, given my retained jurisdiction, the Union sees there to be ample reason to provide directions covering the work needing to be done in order to identify and assess potential affected employees, so that the issue of suitable compensatory damages can be sorted out, and individual assessments can proceed on the basis of the information to be made available. It has repeatedly pointed out that the seven affected bargaining unit members who testified were said to be examples of the kind of systematized usage of casuals which has been ongoing for some time, in violation of Appendix A5. The issue was identified in the two policy grievances, and generated the declaratory award and my retained jurisdiction. The two grievances claimed individual losses to be assessed were the Union successful in showing the kind of contractual breach as was being alleged. They Union contends that if the breach of Appendix A5 is limited to declaratory relief, with no financial remedy for affected employees despite my broad reservation of jurisdiction, then the Employer has escaped any meaningful result. In support of that assertion, the Union has cited the Federal Court of Canada judgement in *L.C.U.C. v. Canada (Canada Post Corp.)* [1986] F.C.J. No.87 where it recognized that if a judgement was to be purely declaratory it was not capable of sustaining, without more, any execution process or any contempt of court remedy. The Court cited the legal author H.W.R. Wade in his textbook *Administrative Law* (Oxford Clarendon Press 1977 at p. 500) where it is said:

> A declaratory judgement by itself merely states some existing legal situation. It requires no one to do anything and to disregard it will not be contempt of court. But by enabling a party to discover what his legal position is it opens the way to use other remedies for giving effect to it.

Thus, lies the significance, the Union says, of arbitrators commonly reserving their remedial jurisdiction in order to give fullness and effect to the declarations they have given in policy grievance matters in order for them to consider appropriate remedial directions. It includes the

possibility of including individual redress. The Union views the arbitral community as having long accepted this approach, and sees the Employer at the stage wanting to avoid any meaningful result arising from the Award.

Employer:

In considering the extent of my retained jurisdiction, the Employer urges me to find that awarding any monetary or in-kind relief to individual employees at this point would exceed that jurisdiction, and that the appropriate remedy arising from these two policy grievances where the Union was successful in showing a systematized violation of Appendix A5 should be confined to the declaration already contained in the Award. The Parties should accept that the Award will provide guidance going forward and could provide a footing for individual grievances were that to be the path forward at some point, or possibly already commenced, although not commenting on the timeliness or remedial issues associated with possible future grievances.

In their written brief, Ms. Zimmer and Ms. Paradis have submitted on behalf of the Employer that inasmuch as my jurisdiction is grounded in the Collective Agreement which addresses remedial powers with respect to discipline and dismissal cases, but is silent on policy grievances, one could look to statute to determine any limits on what remedies are applicable. However, in the Northwest Territories neither the *Arbitration Act,* nor the *Public Service Act* were said to provide any guidance. In the absence of any specific contract or statute language, the Employer acknowledges, the summary set out in Brown and Beatty at topic 2:3124 illustrates the "modern approach" of arbitrators exercising remedial authority in policy grievance matters. It has earlier been cited in my dealing with the Union's argument and case law related thereto, and I have already referenced some of the cases contained therein.

Nevertheless, the insurmountable difficulty which the Employer takes the Union to currently face, as detailed in its written brief, is that this exercise of remedial authority must still be grounded in the grievance that was filed, and cannot exceed the scope of the question the arbitrator has been asked to decide, and presumably also the parameters of the collective agreement. In support counsel have cited *Dominion Castings Ltd. and U.S.WA.,* 1999 Carswell Ont 2573 (Levinson), a policy grievance matter, where the union was seeking a remedy for six months preceding the date of the grievance and where Arbitrator Levinson observed that the scope of his remedial authority was restricted to the term of the current collective agreement, equated with an arbitrator's remedial authority not being broader than the scope of the grievance itself, filed under a particular collective agreement. In the circumstances presented in that case it meant that the Arbitrator could not extend any remedy prior to the contract coming into force under which it was filed. Needless to say, one might well observe, there are numerous cases dealing with the temporal limitations of grievance awards.

In turning to the case at hand, counsel submitted, on the Employer's review of the grievance documents, the Union has claimed a policy breach and seeks individual relief for unnamed individual employees arising from the contractual breach. The Employer asserts that one must observe both the policy nature of the Award itself and the facts found pertaining thereto, in its contending that my jurisdiction does not extend to directing individual remedies. This would be the case, counsel submitted, even though one presumably would have to consider that the described grieved complaints set out on p. 1 of the initial Award include an alleged breach of Appendix A5, also describing how the obligations towards its employees have allegedly been mishandled and claiming individual remedies. More specifically the Employer has acknowledged that Grievance 17-P-02165 alleges a contractual violation firstly by hiring casual employees for periods of over four

months and not appointing them on a term basis; and secondly, by the impugned practice resulting in affected employees not being provided with all provisions of the collective agreement from the first day of his/her employment. It does not doubt the Award having determined that the unilateral policy-based approach violated Appendix A5 respecting the continued use of casual employees where there was still work to be done, and not fashioning appointments, which this Arbitrator determined resulted in a systematized breach of the Collective Agreement. But it contends that significantly the Award itself did not make any findings as to whether all casual employees are captured by the grievance; or what, if any, provisions of the Collective Agreement were denied to which employees, presumably meaning outside my declaring that Appendix A5 had been violated in the Employer's dealing with casuals as a generalized nonspecific determination based on the systematized nature of its actions in dealing with casual contracts. At the same time, the Employer does not express any doubt that my findings relied on the evidence provided by seven affected employees who testified. The Union presented these witnesses to support the determinations and declaration it was seeking in the policy grievance format, concerning which format there was no objection.

The Employer considers that the redress sought in Grievance 17-P-02165 falls into two "separate categories"; namely, the Union's first five bulleted descriptions as recapitulated above in the Union's argument are captured within the category of policy grievance, and the final 11 bulleted descriptions would supposedly be captured within the category of an individual or group grievance, although the references therein were to possible remedies being sought where the grievances to be successful. The Employer has considered in dealing with Grievance 17-P-02211 that it includes the allegation of there having been a violation of Article A5 by disguising term and indeterminate employees as casuals and claiming that the positions should have been posted and staffed as term

or indeterminate. The Employer has noted that the Union also claimed therein that the Employer has intended on avoiding the benefits and entitlements of a term position, and that its hiring casuals for terms of employment over four months meant avoiding staff competitions, updating work charts, creating official job descriptions of position numbers that are not "casual" in nature. However, it should not be missed, the Employer submits, that while the Award determined that the Employer's policy violated Appendix A5 by encouraging continued use of casuals, namely continuing their work by those who were presumably present and willing to do the work, there was no finding that the Employer did so with the intention to avoid paying benefits, entitlements or proper compensation to those affected employees. Rather it was a matter of the Employer having applied an incorrect interpretation of the language of Appendix A5 which, as determined, resulted in a misuse of its casual employees in varying situations. Presumably, the Employer considers there was a level of innocent intention disclosed in its breaching the contract language, or at least arguably its having a lack of wrongful motive, which corporate mindset is taken by it to be significant in terms of one assessing the appropriate remedy to ultimately be applied to the breach, presumably meaning not on an individualized basis, were any remedy needing to be applied within the Arbitrator's jurisdiction, which it disputes.

Further, it could be observed, counsel submitted, that the redress sought in Grievance 17-P-02211 fell into two categories with 12 of the bulleted items herein recapitulated said to be captured by the category of policy grievance and nine bulleted items being captured by the category of individual or group grievance as outlined in their argument. This is to say there are allegations contained therein, referencing the requested remedies, were have been left unproven on any individualized widespread basis in the Union centering its approach on the policy/language interpretation nature of the matter, and not individualized circumstances, presumably excepting the

seven employees who testified concerning their personal experiences as examples of what was occurring. The grieved complaints set out on p. 1 of the award, I would also say, were plain enough in alleging a violation of Appendix A5. Nevertheless, the Employer holds to the view, rather crucially from its counsels' perspective, that the Award itself should be read as solely addressing the policy grievance, with my having authority only over the issues on which I retained jurisdiction on that singular basis, which should not be viewed as including individual remedies. The Employer points to my having remained seized "specifically to address any clarification, directions, or remedial rulings arising from the Award", but it views my jurisdiction as not extending beyond the scope of the grievance and the evidence that was called leading to the Award; although presumably, from this Arbitrator's perspective at least, I would again say, with some certainty, one might also reference the grieved patterned actions on the basis of the examples provided and my conclusions reached.

Counsel have submitted that the Award clearly states the premise of the hearing was to address the policy grievances filed by the Union, which "premise is consistent" throughout the Award. In particular, in that the witnesses called by the Union were providing example experiences "as opposed to individual grievors" such an approach was said to be squarely reflected in the Award. They submit that the "undisputed characterization" of the grievances was as policy matters, with the evidence called at the arbitration hearing meant to establish or debunk the allegation of systemic or systematized contractual breach in addition to addressing the proper interpretation of the Collective Agreement. Accordingly, as they put it: "the remedial relief available is restricted to relief normally considered available in policy grievances and addressed by the evidence that was called to during the hearing", which is to say having to be declaratory only, not to be expanded into individual relief

by exercise of retained jurisdiction. They also stated in terms of dealing with appropriate redress:

> The over-broad scope of the two grievances and the combined 'policy' and 'individual' relief claimed in both grievances, are issues property addressed at the conclusion of the hearing. It is only once the facts and findings of the Arbitrator are known that redress can be spoken to.

But in our circumstances, I am not able to go beyond issuing declaratory relief, as I take the submission, meaning I am precluded from awarding any compensatory relief on the basis of what was not heard in evidence and not specifically addressed at conclusion of the hearing in the issued Award, and what the Employer contends was the premise of the hearing. Certainly, I can observe there was no individualization of circumstances as amongst the numerous other casual employees past the seven affected employees who testified concerning their own situations, and the tangential reference to the existence of other possibly affected employees in the Union's research materials entered in evidence (see pp. 27-28).

In support of this proposition that the hearing should not be "expanded" into a discussion of individual remedial consequences, counsel have cited *St. Paul's Hospital v. H.E.U.,* 1996, CarswellBC 3196, 55 L.A.C. (4th) 284 (Korbin) and *Mon Sheong Foundation and SEIU, Loc. 1,* 2017 CarswellOnt 18544 (Luborsky), both of which cases dealt with *preliminary* objections brought on the basis of there being no consensus on the availability of whichever remedies might apply to the policy grievances under consideration, were they successful. In reviewing these awards, I am able to observe that in the earlier case the preliminary objection dealing with potential remedy was seen to be premature in that an arbitrator did not view himself able to make an informed ruling as to remedy without hearing evidence on the merits of the policy grievance, which would provide a factual basis for the alleged violation of the collective agreement, or not. Arbitrator Luborsky in the latter case likewise determined that it was premature to raise the issue of remedy as a preliminary

objection, stating under the Disposition heading of his Ruling that the policy grievance would proceed through hearing and that "the question of remedial relief remains a live issue that must await the submissions of the parties in the event the Union succeeds on this grievance, in whole or in part". The point to be taken from these cases, as this Arbitrator reads them, is that an objection addressing the appropriateness of particular remedies attaching to a policy grievance, as a preliminary matter, is premature, there yet being the absence of a factual context establishing any violation of the collective agreement as alleged and possibly pointing in the direction of an appropriate remedy to be ultimately addressed as a matter of retained jurisdiction. I take these experienced arbitrators to have recognized that they were not yet in a position to deal with appropriate remedial relief on any reserved jurisdiction basis which could only be a topic for consideration subsequent to issuing a declaratory award addressing the appropriate interpretation of the contract language with which they were presented, and retaining jurisdiction on remedy. Neither of these two cases dealt with the limits of a broad-based retention of jurisdiction by the arbitrator after hearing the evidence and argument, and declaring a contractual violation possibly impacting numerous employees in various ways, even if as yet not quantified on an individual employee basis.

From my perspective it also bears observing that in *Mon Sheong Foundation*, Arbitrator Luborsky in his analysis of jurisprudence does not appear to mince words. He recognized there being a long-standing acceptance of the broad scope of arbitral remedial authority in the context of a policy grievance, and that any limitations in that authority needed to be expressly spelled out, as other arbitrators in numerous cases had ruled. He accepted the union's position that as filed it was not a grievance directly affecting "an employee" but rather was a grievance concerning the interpretation, application or alleged violation of the agreement that affects, or potentially affected, all employees. But having accepted as much, he went on to state at para. 63 that in the event the

operative clause was found to have been violated, there were remedial consequences. As he put it:

> 63. Thus following the foregoing principles I have concluded that the Union policy grievance is properly before me, and the remedy available to the Union (if the operative clause has been violated) may include an order that the Employer comply with its contractual obligations "retroactively and prospectively". It is also open for the Union to make submissions in the event of success on its policy grievance for more than declaratory relief, the details of which (including the availability of potential damages for individual employees as part of the general recovery for the bargaining unit) I leave for the parties to consider in their subsequent representations if a violation of [pertinent article] of the collective agreement is established.

Nevertheless, the Employer contends it should not be missed that the supporting facts for individual remedies have not been proven, from its perspective not on the table as it were, thereby providing no factual basis for moving forward. In support, counsel have cited *Windsor (City) and WPFFA (Policy/Association)*, 2013 Carswell Ont 4704 (Chauvin) for the discussion contained therein, said to provide a "valuable framework" as to when individual damages should be allowed as an appropriate remedy where a policy grievance was not successfully defended by the employer, and the arbitrator exercised retained jurisdiction. It was a situation where following issuing his award indicating that there had been a breach of the promissory estoppel principle by the employer he reconvened on the issue of resultant damages. In the factual circumstances of that case Arbitrator Chauvin determined that an in-kind remedy was not appropriate, choosing to award damages to individual affected employees where there had been an improper reorganization of manpower following a City fire truck being removed from service. He was dealing with a situation where the daily complement of firefighters had been reduced from 57 to 53 and the number of lost shifts having already been quantified at 323. In the Arbitrator's exercising post-award retained jurisdiction concerning remedy, for the various reasons discussed therein, he determined: "the proposed in-kind remedy is not possible or appropriate, and would make no labour relations sense". While the Union here is not now advocating for an in-kind remedy, Ms. Zimmer and Ms. Paradis submitted that "a

key take away" from the award for our purposes was the arbitrator's direction regarding payment of the money to whom. The affected individuals were said to be easily identifiable, unlike the current situation where numbers of possible claimants are as yet unknown or at least at this point are not squarely identified. One should keep in mind that my conclusion on the systematized violation of Appendix A5 did not mean that managers were left without legitimate discretion in making decisions in individual cases, but having to be diligent in not moving across the line which offended the contract language, in dealing with casuals. The Employer takes *Windsor (City)* to be relevant because it is seen to support its view that there are certain key factors necessary for individual remedies to be applied as appropriate and quantifiable, were an arbitrator able to retain jurisdiction in that respect, namely; knowing who the affected employees are, i.e. the union in the firefighters case had long since identified the individuals who lost the 323 shifts as a result of the reorganization; knowing the monetary loss; the union having been able to quantify the monetary loss from the missed shifts; and the fact that the actual loss was already known "down to the cent". Indeed, upon reconvening the hearing on the remedy issue the arbitrator was able to detail which lump-sum amounts were going to be distributed by the union to which category of employee. It was the kind of detailed information already developed and quantified for him. As Employer counsel described it in their written brief: "no additional evidence was required to determine what the monetary amount would be and the remedy was grounded in the facts established at arbitration". But they have also acknowledged that, as stated in their brief, the Arbitrator was dealing with a "specific fact scenario", obviously not a complex scenario presented to the Arbitrator in that case.

From this Arbitrator's perspective it might also be observed that Arbitrator Chauvin exercised his retained jurisdiction in *Windsor (City)*, after dispensing with the Employer's objection

that there could not be any claim for monetary damages because the union had chosen the policy grievance format. He moved on to consider whether it should be a matter of awarding damages to the union, or to individual firefighters, or fashioning an in-kind remedy. There is no doubt that on considering the remedial approach, there had been evidence presented quantifying the individual financial loss aspects of the violation, and certainly it can be observed that Arbitrator Chauvin had the kind of developed facts at hand which the Employer here views as suitable, even essential, for one exercising retained jurisdiction, i.e., his dealing with a specific fully known detailed situation, all the affected employees having been identified and resultant monetary losses calculated and known by the time the remedy issue reached his desk. This is at the point of his deciding to award damages. He certainly he was not facing a factually complex case involving numerous potentially affected employees across several Government departments, over a lengthy period of time. One might expect in such a situation that individualization of loss would be difficult until some declaratory guidance was received as to the extent of the Employer's violation of the contract language on its systematized i.e., broad-based approach, if able to be proven, and if there was any individual loss, and in what way. One would think that identifying the contractual parameters of the matter might be seen as a legitimate first step, given the overall complexity of the situation presented, prior to reaching the stage of exercising retained jurisdiction.

Nevertheless, on review, I would have to observe that presumably the Employer holds to the view that in order for one to exercise retained jurisdiction in a policy grievance matter, which is to say moving past the declaratory award which here involved an analysis of the Employer's contractual obligations and responsibilities under Appendix A5, all the evidence should have already been presented during the course of the hearing respecting identifying all the allegedly/potentially affected employees, knowing the loss(es) each one of them has suffered, and being able to establish

the exact monetary amounts in each case. Otherwise, they should have filed individual grievances, or possibly could still do that. In other words, the argument presented would seem to contend that where the policy grievance is successful, or partially successful say in dealing with the contractual rights involved, the Arbitrator's awarding any individual compensation on retained jurisdiction basis cannot be appropriate where the circumstances are complex and complicated, drawn out over time and in different ways, and where it all needs to be sorted out in order to decide whether and how affected employees are to be compensated. At the same time, I greatly doubt that anyone was anticipating a parade of some 50 or more potentially affected employees giving testimony on an individualized basis as a matter of quantifying their claims at the first hearing dealing with the parameters of the contract language and whether there had been a systematized breach of the Employer's obligations thereunder in its approach toward dealing with casual employees generally. The evidence and argument presented led to my declaration, and my retaining jurisdiction respecting any clarification, directions or remedial rulings.

At the same time, it would be difficult to conclude that arbitrator Chauvin in his *Windsor (City)* award was attempting to opine on the path needing to be taken by an arbitrator in considering the extent of remedial relief in any policy grievance award as a general rule respecting retained jurisdiction resulting from the contractual breach under discussion in that case, whether or not all affected employees have yet to be identified through a file-by-file examination. It is apparent that in some policy grievance situations it cannot yet be known at the time of issuing the declaratory award to what extent some employees have been affected, if at all, and rather crucially I would suspect, how the analysis and conclusions contained in the Award would impact one's review of their particular circumstances.

As set out in its written brief, the Employer holds to the view that "the facts of this grievance and the nature of the award make it clear that individual remedies are not appropriate in this case". It was said that realistically, the Parties might never be able to determine with any certainty who all the affected parties are, having noted that it is indicated in the Award that some legitimate discretion was still available to supervisory staff on their making decisions in individual cases. It was not as if in every case of problematic usage of an employee working casual contracts that Appendix A5 had been violated, or if it had been then to what extent and for how long. Presumably, it would require examining individual circumstances in dozens of cases. Indeed, from this arbitrator's perspective, again, one can consult the July 30, 2020 Award at pp. 27-28 where a summary of the Union's compiled research available by the time of hearing was entered in evidence as set out in the three binders of assembled communications between the Parties, together with a spreadsheet compiling the descriptions of the "widely varying situations where casuals were hired or extended beyond four months". From the Union's perspective it was at least a start on the road toward understanding the extent of the problem. This information shows that there had been consultations with the Union and that explanations have been provided concerning some 168 employment situations, with reasons provided to the Union said to be varied and sometimes complex. Some 50 situation or possibly more remain in dispute. No doubt, this section of the Award speaks to the complexity of trying to unravel the issue of possible individual compensation as a remedial course of action. Query whether that difficulty equates with having to altogether abandon that effort to qualify and quantify as an improper extension of one's remedial authority.

Nevertheless, the Employer finds support in what might be described as the complexity roadblock, Ms. Zimmer and Ms. Paradis have cited *British Columbia (Public Service Employee*

Relations Commission) v. Union of Psychiatric Nurses, 1994 CarswellBC 3192 (Hope), where the employer had assigned auxiliary nurses to positions which in the view of the union should have been filled by regular nurses, a classification issue said in its policy grievance submission to be a continuing breach. In addition to declaratory relief the union sought retroactive seniority for the affected employees as regular nurses and compensation for lost wages and benefits arising from the employer's failure to have granted them regular status. From outset it had been the employer's position that the union's interpretation of the contract language in dispute was incorrect, and further that the policy grievance format did not provide an appropriate vehicle for the resolution of the issues, which, for any case-by-case analysis, could have been handled through individual grievances. Arbitrator Hope discussed the prospect of a policy grievance in such a situation which involved interpretation and application of a number of provisions relative to particular factual circumstances involving numerous employees who were seeking a change in status, which the employer viewed as a "mingling" of individual grievances with a policy grievance. The Arbitrator in the Decision portion of his 1994 ruling opined at para. 102 that "pursuit of individual remedies in a policy grievance (as opposed to a group grievance), is the exception rather than the rule ..." and going on to state in the following paragraph as follows:

> 103. In the ordinary course, a policy grievance addresses an issue of interpretation of the collective agreement in which the remedy sought is a declaration with respect to the meaning to be ascribed to the disputed language. It is not a form that adapts readily to pleading issues relating to the application of an interpretation to particular facts, the reason being that individual grievances generally involve individual facts which must be proven in order to provide a framework for the application of the interpretation of the language in dispute. There are exceptions, but they follow a theme. In each case the exception involves alleged breaches in which no facts independent of those giving rise to the disputed interpretation need be proven in order to determine its application to particular employees. Where the language, once interpreted, applies to all employees falling within its terms, a union is entitled to incorporate a claim for all such employees in a policy grievance.

Arbitrator Hope went on to accept that the union interpretation did not meet that criteria, stating at para. 105: "a policy grievance can be suitable vehicle for the pleading of individual claims. But, on the authorities, a policy grievance is not suitable where individual facts must be proven in order to determine entitlement to a remedy". Having opined in this way, Arbitrator Hope went on to conclude that the union was not successful in its policy grievance in that the contract language under review did not support the union's interpretation, nor did it support its perception of there having been egregious conduct on the part of the employer which union allegation was seen to lack a factual basis. In denying the policy grievance he stated that any individual disputes must be pursued as separate grievances, which presumably can be viewed as giving the union another out. This 1994 case is not cited in Brown and Beatty at topic 2:3214, nor in its historical references.

It leaves one to ponder the Ontario Court of Appeal approach in *Canada Post and L.C.U.C., supra,* concerning the usefulness of purely declaratory awards. Nevertheless, the Employer views the approach taken by Arbitrator Hope to constitute a "basic premise" when dealing with the prospect of considering remedial possibilities in a policy grievance format, with counsel contending that at least my Award provides an interpretive guideline for the language in question, presumably meaning it will be helpful to the Parties in the future on that basis, being subject to individual grievances being filed. I will just say that one is reminded of Arbitrator Ponak's analysis *Use of Casual Employees at Sutherland House Grievance 12-G-01* (2015), 255 L.A.C. (4th) 309 discussed at pages 46-50 of my Award, predating it be some five years, where the Arbitrator noted that the use of casuals in his factual situation had "no actual end in sight, once the supposed temporary solution of using casuals crossed the line into an indefinite long-term solution, and thereby breaching appendix A5.02." Arbitrator Ponak's Award does not appear to have generated any compelling

guidelines for managers going forward from its issuance, as interpreted by the Employer. Indeed, lest there be some doubt about my appreciation of his analysis, in determining this policy grievance as I did, I indicated that I was in agreement with his conclusion that in dealing with its collectively bargained obligations: "... at some point the Employer can be viewed as crossing the line" into contravening the contract language, which is what I ultimately found to be the widespread situation in this policy grievance. One might expect that there could be some discretion exercised before crossing the line, as it were, given the circumstances facing a responsible manager, but at some point, the contractual breach will occur unless appropriate regard is given to the Employer's responsibilities under Appendix A5, my having gone on to note in my Award the apparent systematized nature of the violations.

In it's further submissions that having to deal with unique facts does not allow for any individualized remedies in a policy grievance format, counsel cited *Hayes Forest Services Ltd. and USW, Local 1-85 (Bereavement Leave),* 2005 CarswellBC (McPhillips). It was a situation where the union had brought a grievance over the employer not paying bereavement leave properly after the parties had settled an earlier individual grievance under identical factual circumstances and the employer was refusing to apply the same calculation to others. The employer had decided that even if the current complaint was in the nature of a follow-up policy grievance, the appropriate remedy should not include financial payment to any unnamed individual employees. Arbitrator McPhillips disagreed and remarked at para. 26 in dealing with individual remedies arising from a policy grievance:

> 26. In the case at hand dealing with the application of the bereavement leave clause, there is no need for the Union to prove any additional facts to determine the entitlement to individual remedies: *BC Hydro, supra; Canada Post Corp., supra**. There are no unique facts related to any of the individual grievors in the circumstances of this case. The Employer was aware of all the bereavement leave applications and paid them; it has just done so

> incorrectly. The right to the bereavement leave has been accepted by the Company and the only matter in dispute was what is the proper method of calculation which is not, in any way, a function of individual circumstances. This is not a case where the outcome is indirect, unusual and unpredictable but rather is one where there is a direct, obvious and predictable impact: *Raven Lumber Ltd, supra** at p. 363. Another way of looking at the situation is that once the policy grievance was filed by Mr. MacLeod [the responsible union steward], an employee who was approved for bereavement leave would be reasonable in assuming his proper remuneration would be determined by the outcome of the policy grievance. It would make little practical sense to have required other employees to file individual grievances.
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> **BC Hydro & Our Authority v, O.P.E.I.U., Local 378,* unreported May 9, 2003, Doc X- 026/03
> *Canada Post Corp. v. C.U.P.W* (1993), 35 L.A.C. (4th) 300
> *Raven Lumber Ltd v. I.W.A. Local 1-3* (1982), 9 L.A.C.(3d)354

As the Employer sees it, in *Hayes Forest Services* the critical aspect was there being no unique individual facts related to any of the affected employees, resulting in the availability of a straightforward process to make them whole. No doubt, Arbitrator McPhillips, was dealing with the facts he had before him, and he remarked that the union did not have to call any additional facts to prove individual losses arising from the breach. Nevertheless, he stated at para.18 in characterizing the nature of the policy grievance presented: "the subject matter of the grievance is of general interest, i.e., the method of calculating pay during a bereavement leave, the result of which could affect any or all employees in the bargaining unit at any point in time". The Arbitrator also stated at para. 20 that where a policy grievance was successfully pursued "presumptive remedy will be a declaration that there is been a breach of the collective agreement rather than award of individual remedies". He cited in support arbitrator Hope's 1994 award in *British Columbia (Public Service Employee Relations Commission), supra* while noting that the remedy did not turn on individual facts. It was just as with the firefighters in the *Windsor (City)* case where all the affected firefighters were entitled to the lost shifts which had been scheduled and could easily be identified, not dependent on any individual circumstances needing to be considered and assessed. However, Arbitrator McPhillips also cited another *British Columbia (Public Service Employee Relations*

*Commission) and Union of Psychiatric Nurses (*Ladner) -no citation, having noted that when it came to remedy the employer in that other case had argued that it was admittedly bound by the declaration and that any aggrieved employee could bring an individual grievance if they were not compensated in line therewith, Arbitrator Ladner had seen that possibility to be "a rather cumbersome procedure", and had remarked, as quoted from para. 27 of his award:

> ... We see no reason in principle what it should be necessary to have such a multiplicity of processes; there seems to us to be no reason why the Union on behalf of all affected employees could not seek the appropriate rate of pay and an order for payment, the union is after all their exclusive bargaining agent and in the sense only the Union can speak for them.

The Employer views the most significant remarks from Arbitrator McPhillips in *Hayes Forest Services,* where the only issue in dispute in the bereavement leave situation was the proper method of calculation, said not to be a function of individual circumstances, was: "This is not a case where the outcome is indirect, unusual and unpredictable but rather is one where there is a direct, obvious and predictable impact". The Arbitrator also stated that it would make little practical sense to have required the other employees to file individual grievances.

Moving beyond such cases as *Windsor (City)* where damages were awarded to individual affected employees who had lost overtime shifts resulting from removal of a fire truck from service, being discernible for everyone and easily calculated, and also the line of reasoning typified by Arbitrators Hope and McPhillips in their British Columbia awards, the Employer has also included *Toronto Police and TPA (G20 Summit Vacation Schedule)*, 2013 CarswellOnt 25024 in its case law brief. Arbitrator Kaplan had dealt with the issue of whether there should be individual damages awarded to affected employees where any actual monetary loss was uncertain, possibly not able to be established. It concerned an issue involving properly compensating some 500 police officers for their cancelled day of vacation during the 2010 G20 Summit in Toronto. The employer had argued

that the relief should be declaratory given the considerable time that had passed by then and the fact that they all had received pay for working the lost vacation day on a premium basis, but at the same time their planned vacation time had been disrupted in that the day had been lost from their scheduling. One can easily see the difficulty in proving monetary loss. The Employer takes Arbitrator Kaplan's approach as seeking to strike a balance where a declaration alone was not found to be a sufficient remedy, and where the affected employees were known and a breach was established as occurring some two years earlier; but the remedy was unclear. The Arbitrator had determined there was a breach of the contract language which contemplated members receiving a specific number of paid vacation days, having had one of them eliminated. As the arbitrator put it after finding the breach: "the case turns on the determination of an appropriate remedy".

It bears observing on my review of *Toronto Police* that the Arbitrator in dealing with the factual circumstances presented did not discuss the evidence and arguments on the basis that he was considering the matter to be in the nature of a policy grievance. He was satisfied that the affected employees, all of them obviously easily identifiable, had lost something they were entitled to under the collective agreement, namely a vacation day which no doubt had value to them as planned even though they were paid for working the day at premium rate. In his view, the breach required an appropriate remedy, noting at para. 24 that "the purpose of a remedy in labour relations, where a breach of the collective agreement has been established, as it is in contract law more generally, is to put a person in the position they would have been in but for the breach". He stated at para. 29 that "it is worth noting that this case presents the exact opposite of the situation where the employer is acting with impunity and in clear breach of the provisions of the collective agreement" although a contractual breach had occurred. He opined later in the same paragraph that "any award must, of

necessity, given the factual circumstances outlined above, be considered in context, be tied to the breach, would be compensatory of it, and be extremely modest", meaning where there was no actual financial loss. He directed the employer to pay each affected individual $100 as damages for each day of their cancelled location. Needless to say, on a purely factual basis, by my reckoning, it would be very difficult to compare the situation faced by the police officers having to work, and be paid at a premium rate, for a lost vacation day, i.e., no assessable monetary loss, with the circumstances described in the Award of numerous employees being offered only casual employment status, some extended or working successive contracts for several years, contrary to Appendix A5 of the collective agreement, however difficult it would be to identify them all and separate out their individual circumstances, one from the next, and whether their losses, if any, could ever be suitably established on an individual case basis at this point.

By comparison with the *Toronto Police* case, in dealing with the situation here of there being potentially financially impacted employees on an individualized basis, the Employer responds that there has been no consistency of loss proven, if any, or even detrimental impact resulting from the breach except as able to be proved going forward by whichever employees claim to be affected on an individualized basis. And, as counsel stated it: "the type of benefits the identified employees potentially missed out on, were not clearly placed in evidence and specific monetary amounts were also not clearly placed in evidence". There is no doubt that the individualized evidence from affected employees did not go beyond the seven who testified concerning their own situations, being those called as examples as how the Employer was dealing with its casual contract employees which is to say the evidence on which the policy grievance itself was pursued. Their evidence no doubt assisted my reaching the conclusions I did, although the evidence from the Employer witnesses indicated widespread use of successive and over-holding casual contracts for the reasons they

outlined in testimony. See pages 30-41 of the Award under the section heading "Employer's management witnesses."

The Employer contends that the Award and the evidence outlined therein leading to the conclusions I reached in finding a systematized breach of Appendix A5, does not allow on any reserved jurisdiction basis for a secondary follow-up process to determine who may have been affected, and in what way or to what extent, at least not as included in the policy grievance format. Ms. Zimmer and Paradis have further summarized the Employer's position in paras. 35 through 39 of their written brief:

> 35. Comparatively, in the case at issue there are seven casual employees who, at the conclusion of the hearing, were identified by the Union is having been affected; however, the extent and manner in which they were affected varied significantly. The type of benefit(s) the identified employees potentially missed out on, were not clearly placed in evidence and specific monetary amounts were also not clearly placed in evidence. Accordingly, the Arbitrator did not make findings of fact about specific benefits or monetary amounts these individuals should have or may have received.
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> 36. Other potentially impacted employees are unknown; we do not know who they are, how many there are, or how they may have been impacted. The evidence led by the Union on this issue was comprised of a spreadsheet introduced through Barb Kardash. The Arbitrator references this evidence in the Award and made a factual finding that "the documentation discloses that the Union is recorded as having taken issue with approximately 50 rehire/extensions [see pp 27-28 of Award]". The Award then goes on to outline the Employer's position taken at the hearing that the same evidence did not show a systemic breach. Based on all the evidence the Arbitrator concluded there was a systemic breach, but not make a determination beyond this.
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> 37. It is significant to note the Arbitrator was not asked to make findings of fact in regard to specific losses. Accordingly, there was no determination that employees who were presented by the Union and who gave evidence at hearing were impacted by the breach.
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> 38. The evidence put forward by the Union was used to establish the position that this was a systemic policy breach. However, if the same evidence is applied to the issue of individual remedy, the evidence becomes imprecise and incomplete.
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> 39. The details determining which casual employee(s) would be affected by the policy breach was not addressed in the Award and individual employees' circumstances were not specifically identified by the Union. The evidence showed that each casual employee who was called as an example was affected in a different way, therefore it can be assumed that any further affected employee(s) would have had different benefit entitlements with varying

> life circumstances that would impact what pay, benefits or pension they would have received or accessed. Further, there is no finding in the Award indicating all casual employees experienced a detrimental impact resulting from the breach. To engage in a secondary process or hearing for the purpose of determining who is affected under the umbrella of a policy grievance would fall outside the remedial jurisdiction of the Arbitrator.

Ms. Zimmer and Ms. Paradis stressed the reality of our case having varying factual circumstances across the gamut of employing numerous casual employees in a manner which contravenes Appendix A5 who may or may not consider themselves to have been impacted by the contractual misapplication, which would need an individualized approach to remedy. In support of its position that where it is necessary to subsequently prove relevant individual circumstances, it is "neither suitable nor appropriate" in the policy grievance format, they have cited the Alberta Court of Queen's Bench judgement in *Alberta Teachers Association v. Buffalo Trail Public Schools Regional Division No. 28,* 2020 CarswellAlta 1788. There, the union in the filed grievance document had broadly sought a remedy to "make any teachers whole" and "other remedies", which the Employer here views as similar to what the Union has claimed as part of its policy grievance. In briefly addressing the facts of the *Alberta Teachers Association* case, it involved the union having filed a policy grievance claiming that the employer had breached a pertinent *Ministerial Order* which set a targeted maximum amount of time a school board could require an individual teacher to instruct students and also provided for an "exceptions committee" to resolve instructional time issues for schools. However, there was no specific allegation of a breach of the collective agreement, nor did the grievance refer to any individual members or group within the broad spectrum of teachers having been affected. The employer at arbitration had successfully objected to the Arbitration Board's jurisdiction on the basis that it did not relate to a subject matter encompassed by the collective agreement. Ultimately, the Court declined to consider the union's review application on the basis of mootness, the legislative framework in force at the time having long since

expired. Counsel cited para. 27 concerning the inadequacy of generic claims for damages and other remedies made where there was no factual underpinning. This is how the Employer views the situation at hand where any individual remedies would need to turn on specific facts, presumably needing evidence from each affected employee making a claim for loss in order to determine if they fit into the class of employees who were adversely affected by the policy, although admittedly a class covering only those employees holding casual contracts at the material time, how they were affected, and what would be their monetary loss. This would be information which is as yet unknown to the Employer, unproven, for numerous possible claimants. However, I would have to observe that the factual and evidential circumstances in *Alberta Teachers Association* might well be seen as distinguishable, made evident by a fuller reading of the section in the Court's judgement containing the Employer's referenced paras. 25-28:

> 25. The grievance initiated by the ATA in this case is a policy grievance. It did not identify any individual member or group of members who sustained or may have sustained damages arising out of any actions by the Division or any breach by the Division of the *Ministerial Order*, the Framework Agreement or the Collective Agreement. The grievance does seek as two of six remedies "damages in an amount to be determined at arbitration" and "such further and other remedies as an arbitrator may deem fit, including all remedies required to make any affected teachers whole". Notably, the claim for damages does not specify teachers as having sustained damages, though the claim for "other remedies" includes those "required to make any teachers whole". This suggests that it was never intended that a claim for damages would be made on behalf of teachers and that some other unspecified remedy may be sought to make them "whole". There are no facts alleged in support of the right of the ATA to any damages nor is there a reference to any other form of remedy it may be entitled to or an arbitrator might award. There are also no facts alleged to support the right of any individual teacher or group of teachers to any damages even if they were included in that claim nor are there any facts alleged that might support some other remedy being awarded to make them "whole".
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> 26. The grievance is a policy grievance with the remedy sought crafted to include a generic claim for damages and "other remedies." The final paragraph of the grievance, immediately before the section listing the remedies being sought, states: "An arbitrator has the jurisdiction to apply and enforce the *Ministerial Order* and Framework Agreement". This statement reflects the essence of the grievance, and remedy sought, by the ATA. It grieves alleged breaches of the *Ministerial Order* and Framework Agreement and asks an arbitrator to apply and enforce them. The first four remedies are the mechanism sought by the ATA for application and enforcement. It alleges nothing more and, in actuality, seeks nothing else.

> 27. A generic claim for damages or "other remedies", with no stated factual foundation or underpinning, is inadequate and insufficient to create, or maintain the appearance of, a live controversy requiring adjudication. Vague allegations of damages cannot breathe life into an extinct controversy: *Tlicho Assembly v. Tlicho Government*, 2010 NWTCA 4 (N.W.T.C.A) at para 9. To hold otherwise would allow any party to simply claim damages come without any factual or legal foundation, so as to keep alive an otherwise dead action.
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> 28. The sub-stratum of this litigation has disappeared. The tangible and concrete dispute between the parties has disappeared and the issues that were live and contentious at the time the grievance was initiated have become academic. They have been rendered moot.

Query the connection between the facts, claims and eventual Court rationale in this *ATA* case with the claims and proven facts of this current matter sufficient to show a systematized breach of Appendix A5 in managers dealing with the casual class of employees, no doubt involving a sizable group of employees working casual contracts, referenced in the grievance document, but as yet individually separated as to their personal circumstances. The Employer states at para. 47 of its written brief by way of summarizing its principal position that the Union has no factual foundation for any exercise of remedial jurisdiction beyond a declaration:

> 47. In the current policy grievance any claim for individual remedies that the Union may make at this stage would need to turn on individual facts. Evidence from each affected employee would be necessary to determine if they fit into the class of employees who are affected by the policy, how they were affected, and what the corresponding monetary loss was. Without this information the Union is making a broad claim for individual remedies without any factual foundation.

In again citing *Mon Sheong Foundation, supra,* the Employer contends that the scope of remedy available to an arbitrator should be limited by the evidence submitted at the arbitration. I have earlier quoted arbitrator Luborsky's remarks at para. 63 of his preliminary award where in dismissing the employer's primary objection as to arbitrability he indicated that the policy grievance was properly before him and it would be open for the union to make submissions for more than declaratory relief, which was to say potential damages for individual employees, as part of the general recovery for the bargaining unit in the event of the policy grievance being successful. He

left it up to the parties to consider it in their subsequent representations, were the violation of the collective agreement to be established. He did not suggest that all the individualized circumstances had to come before him within the context of deciding whether there had been a contractual breach by reference to the policy grievance allegations. Nevertheless, the Employer asserts here: "... Submissions on remedy should be premised on facts already in evidence and any damages flowing from there must be grounded in the Award". This is to say from its perspective, it is not be carried out through a possible multitude of additional hearings to receive evidence on who the truly affected employees are, how individual remedies might apply, and what they would be. It was said by counsel to be outside the scope of the Arbitrator's jurisdiction to order the Employer to conduct an audit in lieu of having already heard *viva voce* evidence for the purpose of awarding individual remedies.

Simply put, the Employer contends that I should not go beyond the evidence at hearing, and the findings made. Having stated in its written brief that "awarding individual remedies to casual employees is neither appropriate nor realistic in this case", I am urged to accept that to find otherwise, the Union would already have had to identify whatever individual employees were involved, how they were specifically affected and in what way were they affected at the outset, or through evidence at the hearing. It was said that there have never been enough specifics, including who the affected members might be, needing to be determined on a case-by-case basis, but even then, as this Arbitrator pointed out at p. 71 of the Award, managers still maintain legitimate discretion. The exact quote from the Award is as follows:

> The union is accordingly successful in this policy grievance referral. But my reaching this conclusion does not mean that managers are left with a legitimate discretion in making decisions in individual cases.

This would mean, they contend, that this Arbitrator did not find that all cases of casuals being employed over four months resulted in a breach of the Collective Agreement, although I would point to Appendix A5.01 and A5.02 in that respect, the presumption being that any legitimately exercised discretion would not violate that language which does not appear to have been the norm from the evidence heard during the lengthy hearing. It was my conclusion that there had been systematized breaches of the Collective Agreement by those managers not attentive to the language of Appendix A5, whoever they be, whenever that occurred, and in whatever circumstances. No doubt some situations, I would expect, were easily discernible as to what was occurring, and an adequate understanding of the compensation issue could be easily known, which is to say not requiring an in-depth examination of every single affected employee at this point. But other situations certainly would be difficult to ascertain, including those where appointments were made after some delay and whether that delay could be considered reasonable as an exercise of management discretion in attempting to understand the full picture of what was required going forward. It is the "crossing the line" problem discussed by Arbitrator Ponak in his Award. No doubt, I would have to observe, it is unquestionably a complex situation in which the Parties now find themselves due to the Employer's systematized breach of Appendix A5. I am urged to consider that the most appropriate and compelling remedy in this case should be limited to declaratory relief so as to provide appropriate instruction going forward.

Union Reply (oral):

The Union disagrees with the Employer's interpretation and application of case law, and relies on the so-called "modern approach" by arbitrators towards applying an unlimited broad-based retention of jurisdiction in successful policy grievances. Mr. Penner submitted that whether the

contractual breaches were pursued, or are being pursued by some, as individual grievances as opposed to its now relying on my retained jurisdiction in this successful policy grievance where a general long-standing misapplication of Appendix A5 has been established, either way, it would be necessary for the Union to understand the individual situations on a fundamental level through accessing the employer's file information. Whatever the eventual remedial approach, there are as many as 50 or more affected employees involved, which requires examination of all available information held by the Employer. More information can and should be made available than the Union was able to assemble in presenting the policy grievance. It was never expected that the Union was going to call 50 witnesses describing their individual circumstances in the context of the policy grievance, not knowing if it would be successful in its argument concerning the systematized violation of Appendix A5. There was no objection taken to the Union's proving the contractual breach alleged in the two policy grievances through example witnesses.

Further, in my declaration, having retained remedial jurisdiction, Mr. Penner submitted, it should not be forgotten that the Employer's contract breach applies to people who do not work in a vacuum but come within the bounds of the collective agreement, and it requires that this systematized breach be properly remedied within an allowable context, which is to say its successful policy grievance giving rise to my remedial jurisdiction. This should be the case, the Union contends, whether it is a complex situation which needs to be sorted out, or something less involved. It also allows the Parties in their remedial discussions to bundle together employment circumstances for remedial purposes not suitable to advancing individual grievances. Either way, it was said to require a co-operative approach.

It should not be missed, Mr. Penner submitted, that the long-standing nature of the dispute over Appendix A5 can be seen from the numerous earlier cases decided by arbitrators under this

Collective Agreement dealing with casual employment issues, detailed to some extent in the Award. These other awards apparently never had the effect of settling the issue given the Employer's continued intransigent usage patterns which eventually gave rise to the need for a policy grievance. Were anyone to have raised the prospect at the beginning of this process that the Union had no remedy past a declaration, what realistically would be the purpose from either perspective, whether the Employer's or its own. The Employer would not have to change its course, as should be apparent from the previous cases concerning casual employee usage discussed in the Award, and the Ontario Court of Appeal judgement in *Canada Post and L.C.U.C.*, pointing out the doubtful use of a pure declaratory award with no retained jurisdiction on remedy. What the Employer is seeking at this point, Mr. Penner submitted, is for me to walk away from my retained jurisdiction, even though I specifically indicated I remained seized over any clarification, directions, or remedial rulings.

Directions on Retained Jurisdiction:

Having set out at some length the Parties'competing positions on the issue of my retained jurisdiction and having commented as I have in reviewing their extensive written briefs and supporting oral representations, including my having carefully set out the case law filed in support, I see no need to detail any further description of the case law or the positions taken by counsel. However, I will start my concluding remarks by saying that whether or not the Employer would like me to change course in having retained remedial jurisdiction, it is what I did in the Award, and it appears to me that it now seeks to limit my discretion covering that retention. There has never been any agreement to limit my jurisdiction outside the obvious parameters, namely the Collective Agreement and the filed grievances. The Employer's argument that somehow what I did should not be seen as any suitable reservation of jurisdiction to consider the range of possible remedies, in

addition to declaratory relief, or can be changed at this point to something less, i.e., limited to a declaratory award, is ultimately not compelling. Given my retained jurisdiction and the "modern approach" now generally accepted by arbitrators I do not conclude that there is any requirement or purpose in now resiling from considering what is required to bring some appropriate remedial finality to this long-standing issue presented at the hearing.

Were I to accept the Employer's position, essentially it would have to be on the basis of it being too cumbersome or complex overall to deal with the various individual factual circumstances affecting the approximately 50 employees whose employment situations have not yet been able to be resolved on a mutually satisfactory basis. Certainly, arbitrators in some instances have been reluctant to exercise remedial jurisdiction in dealing with complicated factual scenarios where not all individuals are found to be sufficiently alike in their individual circumstances. See the British Columbia cases in particular for the arbitrators' concerns discussed therein. Here, the complexity factor was evident from outset, and given the witnesses' testimony was something I considered in retaining jurisdiction on the issue of remedy. At this point it remains to be seen what is the reasonable path to be taken in exercising that responsibility.

Certainly, an arbitrator is bound by the parameters of the grievance and collective agreement, but I see no difficulty with that requirement being met in my having retained jurisdiction at the point of issuing the Award. In this respect I cannot accept the Employer's argument that somehow the policy grievance document was not drafted in such a fashion to contemplate possible individual employee remedies were it to be successful, or that anyone on reading these documents can conclude that the Union was looking only for a declaratory result. In my view the Employer was reasonably put on notice that there could well be individual employee ramifications with which to deal on a remedial basis if the policy grievance allegations of a systemic or systematized breach of Appendix

A5, affecting numbers of casual employees as the identifiable group, were found to be the case. In my view the policy grievance document as filed plainly raised the allegation of there being widespread violations of the contract language with the possibility of individual consequences needing to be addressed on a remedial basis were the Union to be successful.

Nor do I find that any references concerning motive or intent at this point are particularly helpful, my having to rely on the conclusion stated in the Award about what was occurring in terms of recognizing the longtime reality of casual employee use in the manner described by the seven example witnesses, and employer witnesses. It led to my conclusion that there had been a systematized breaching of contractual obligations.

Nor is there any significance at this point on any jurisdictional basis in my having indicated that there was some discretion remaining to managers in given situations, which I have commented on earlier in this award and was a recognition of the approach taken by Arbitrator Ponak in *Sutherland House, supra,* his having understood that not all situations of over-holding casual employees are created equal, at least up to a point after which a line has been crossed on a reasonable review of the facts. Plainly, as I indicated during my discussion of the Parties' respective arguments, and I repeat, some factual situations are more convoluted and complex than others, but the Award can be taken as having recognized that problem when I retained jurisdiction over remedy, and it does not equate on the evidence I heard with having to confine myself to a declaration. In my view, it is now a matter of searching out the most appropriate remedial approach, all things considered, towards recognizing and rectifying the financial harm to the affected employees.

I will venture to say that in the policy grievance format, unlike many individual grievances or even group grievances, some files lend themselves to early and easy identification and quantification of the losses accruing to the affected employees, whatever that might be, but others

not so. Obviously, some cases require an untangling of the breached contractual obligations as they affect individual employees distributed broadly across an employer's departmental system. Either way I do not accept that it restricts my authority to oversee the remedial process and, were there no agreement, having to eventually fashion a suitable remedy or remedies in line with my retained jurisdiction.

Ultimately the remedy should be based on the Parties' information able to be developed and presented in line with the conclusions reached in the Award, were that approach to be available through the usual information disclosure process. In this respect, I do not accept there is any requirement for an arbitrator to be possessed of all the information, pertaining to the eventual remedial choice of action, by the time one or other of the parties to the contractual dispute seeks the arbitrator's assistance subsequent to receiving the initial award, on a retained jurisdiction basis. As the case law indicates, some factual situations are convenient in that respect in that all the pertinent information has been easily assembled and conveyed to the arbitrator, but others not so. In some cases, the parties will not fully understand what information is pertinent for remedial purposes until the declaratory award describing the nature of the transgression has been issued, and jurisdiction retained. Note Arbitrator Luborsky's remarks in *Mon Sheong Foundation, supra,* concerning how he expected the matter would unfold were the policy grievance to be successful, and eventually giving rise to his retained remedial jurisdiction needing to be exercised at that future point. As one might expect, he did not indicate requiring all the individual circumstances of each possibly affected employee to be before him prior to deciding whether the policy grievance was successful. It can be seen that some cases require arbitrator directions to be made as a first step in exercising this retained jurisdiction at the point of the policy grievance being declared successful. See Arbitrator Powers' approach in *Team Cooperheat, supra*, and what was said by Arbitrator Goodfellow in Providence

Healthcare, *supra.*

I will say that despite the concerns raised by the British Columbia cases referenced by the Employer (Arbitrators Hope and McPhillips) which I have considered and appreciate the difficulties discussed therein, any presumption in a policy grievance matter that a declaration will suffice, or that a complicated and diverse factual scenario precludes the Arbitrator from going any further, I cannot accept. In my view, the preferred arbitral approach is one of handling a policy grievance matter in such a way to provide a full answer, if possible, giving finality to the issue at hand, where possible, and avoiding a multiplicity of actions, which harkens back to the famous *Blouin Drywall, supra* principles. Not all the cases tabled in this matter where arbitrators dealt with the consequences of the successful policy grievance on the basis of remedial jurisdiction disclosed simple and straightforward fact situations where individual employees were affected. I would say that *Team Cooperheat* and *Providence Healthcare* would be examples of matters needing further investigation concerning affected employees both of which dealt with contractual violations affecting numerous individuals. It is not as if the Employer has been blind sided by the Union's position given the remedies sought in the filed grievances.

My review of the case law presented, and the Brown and Beatty summary with their numerous historical references, informs that currently the parties to a policy grievance dispute can fully anticipate that if requested there will be retained jurisdiction on the issue of appropriate remedy. It could require a monetary assessment, or an in-kind solution, or fashioned in some other way such as a global approach, reflecting the fact of the policy grievance in a particular matter having been successful, or partially successful, as affecting an identifiable group of employees. It remains to be seen as to what is ultimately appropriate in dealing with our case scenario. Complexity of proof and how that arguably affects the remedy to be ultimately applied is another issue and is

not determinative of exercising my retained jurisdiction at this point. As it stands, I did not indicate any specific restriction in retaining jurisdiction on remedy, and am not persuaded that I should limit the award to declaratory only.

Whether or not some or other employees are affected so as to attract monetary compensation resulting from the policy grievance format, often depends on the arbitrator's initial ruling respecting what provisions have been violated, if any, and to what degree, and how. In my view, as the case law has developed to the current time, complicated and complex calculations should not be a touchstone for denying a compensatory remedial approach, all things considered. A policy grievance matter respecting an identified group of employees coming within the interpretive reach of the issued award, here dealing with a systematized breach of a specific contractual provision, invites an appropriate remedial result through retained jurisdiction. The corporate mindset at the time, it might be said, is only one factor to consider. In my view there is a remedial question needing to be addressed on a retained jurisdiction basis, and that responsibility is not undone by the possibility of some employees filing individual grievances which would only serve to have a multiplicity of actions going forward respecting the same group of employees working under the same contractual protections, nor by the numbers involved looking for resolution. Here, the identified group is obvious, their being the overholding or successively employed casuals on a contract basis, done in such a fashion that whatever the degree of residual discretion on the part of individual managers there has been a widespread i.e., systematized, contravention of Appendix A5.

At this point, having issued the policy grievance Award, the Union is seeking individual payments for adversely affected employees, or alternatively taking a lump-sum approach to be awarded to the Union presumably for distribution purposes, there being no argument currently on the table respecting any in-kind remedy. In my review of the Parties' respective arguments and

supporting case law, I am not persuaded that I should abandon exercising my residual jurisdiction respecting remedy in a fulsome manner. At the same time there could well be temporal restrictions to consider given the described boundaries of the dispute. I am not prepared to limit the Award to declaratory only on the basis that we have a difficult remedial situation to unravel going forward to finality. It has often been said that the remedial goal should be to put the parties as close as possible to where they would have been but for the breach of collective agreement.

Nevertheless, whatever the approach, whether there should be appropriate individualization, or issuing some manner of global award, or considering another tact at this point, in my view it is necessary to now send the Parties into a huddle of sorts on the basis that my remedial authority remains intact. It is a matter of the Parties having to reconstruct what would have occurred had managers complied with their obligations under Appendix A5. They should do their utmost moving forward with the remedial issue to share information concerning the allegedly affected employees, whether grouped together as presenting similar enough circumstances or otherwise considered individually, as a matter of showing extended or successive contracts contrary to Appendix A5.

At the same time, given the obvious complexity of the matter in providing a compensatory remedy, I consider it appropriate to take a case management approach and will be available on very short notice to orally provide specific directions as required concerning information sought and not disclosed were it to be considered pertinent for purposes of establishing what choice is most appropriate going forward to remedial conclusion of this matter. There should be ample disclosure for assessment purposes, the particulars of which I need not address at this point. Whether or not that tends to be a difficult process, I am sure that the Parties will do their best to reach an understanding of the parameters of the remedy to be eventually applied, and the information needing to be shared with the possibility of appropriate individualization continuing at this point.

My retained jurisdiction over this matter continues for the reasons set out above, giving rise to my current directions to the Parties, and anticipating my further involvement as needs be in working toward determining the appropriate remedy sufficient to give contractual justice to the affected employees.

DATED at Calgary, Alberta, this 14th day of October, 2021.

Thomas Joliffe, Q.C.