IN THE MATTER OF A GRIEVANCE ARBITRATION #19-P-GNWT-02452
(Continuous Service and Continuous Employment)

BETWEEN:

UNION OF NORTHERN WORKERS

(the "Union")

-and-

GOVERNMENT OF THE NORTHWEST TERRITORIES

(the "Employer")

AWARD

Arbitrator: J. Alexander-Smith (the "Board")

Appearances:

For the Union:
Michael Penner, Counsel
Shane Pike, Service Office UNW

For the Employer:
Jeannie Scott, Counsel
Mike Johnston, Manager, Advice & Adjudication Finance

INTRODUCTION

[1] This matter involves a policy grievance concerning the operation of Article 2.01(e)(i)(4) of the renewed Collective Agreement expiring March 31, 2021 (the "Collective Agreement") and, more specifically, the circumstances in which a bargaining unit member's prior service with the Hay River Health and Social Services Authority ("HRHSSA") will be recognized in determining a member's "Continuous Service" with the Employer.

[2] Article 2.01(e)(i)(4) of the Collective Agreement [also referred to as the "Hay River Clause"] represents new wording in the Collective Agreement effective April 21, 2019, which reads as follows:

> 2.01 For the purpose of this Agreement:
>
> (e)(i) "Continuous Employment" and "Continuous Service" means
>
> (4) prior service with the Hay River Health and Social Services Authority, providing an employee was recruited or transferred within three (3) months of terminating his/her previous employment. Continuous Service for the purposes of GNWT severance pay under Article 32 will not include any periods of employment with Hay River Health and Social Services Authority for which severance was paid.

PRELIMINARY MATTERS

[3] The parties agreed to proceed by way of a virtual arbitration hearing on June 10, 2020 (the "Hearing").

[4] At its outset, the parties accepted the composition and jurisdiction of the Board to hear and determine the merits of policy grievance #19-P-GNWT-02452 (the "Grievance").

[5] Prior to the Hearing, the Union and the Employer provided the Board with an Agreed Statement of Facts along with supporting documentation which together constituted the entirety of the evidence before the Board in determining the merits of the Grievance. The parties also provided the Board with their respective written submissions and authorities, later augmented by oral argument at the Hearing.

[6] The Agreed Statement of Facts submitted to the Board was later amended by the parties as a result of an inadvertent error in the identification of the effective date of the Collective Agreement. The Amended Agreed Statement of Facts was accepted by the Board and entered on the Record as Exhibit 1A.

THE EVIDENCE

Amended Agreed Statement of Facts

[7] The Amended Agreed Statement of Facts is set out below:

1. On January 14, 2016 a bargaining meeting was held between the Employer and the Union. The Union submitted a Bargaining Proposal to the Employer which contained a proposed amendment to Article 2.01(e) of the Collective Agreement in writing on that date.

2. Prior to the January 14, 2016 bargaining meeting, the Employer informed the Union that it was contemplating the incorporation of the Hay River Health and Social Services Authority (HRHSSA) into the Government of the Northwest Territories (GNWT) but that there would be no mandate to negotiate this issue in this round of bargaining. The HRHSSA has a workforce of approximately 190 bargaining unit employees who provide health care services to the Hay River region.

3. The January 14. 2016 bargaining Proposal included a special note in the preamble:

> SPECIAL NOTE
>
> Regarding the potential for Incorporation of the Hay River Health and Social Services Authority (HRHSSA) Into the Government of the Northwest Territories - all bargaining is without prejudice to and does not substitute for such future and other bargaining as may be required by law in the event that this possibility is realized.

4. At a subsequent bargaining meeting between the Employer and the Union held on January 27, 2016, the Employer submitted a revised proposal to amend Article 2.01(e) of the Collective Agreement in writing to the Union on that date.

5. During the bargaining meetings on January 14, 2016 and January 27, 2016 there was no discussion between the Employer and the Union about the implementation of the new language.

6. On January 29, 2016, the Union and Employer signed the amended Article 2.01(e) of the Collective Agreement.

7. On March 22, 2019 mediator, Vincent Reddy submitted his Report and Binding Recommendations to the Parties. The report states at page 31:

> All items previously agreed to between the parties in direct negotiations or during the mediation process, shall form part of these recommendations and be incorporated into the renewed Collective Agreement. For convenience these previously agreed to items are attached hereto as Appendix “A” (Items Agreed Prior to Mediation) and Appendix “B” (Agreed to Items at Mediation as at February 9, 2019).

> With the exception of wage increases, which will become effective April 1, 2018, the remaining provision of these recommendations concerning language changes in the renewed Collective Agreement will become effective thirty (30) days from the date of these recommendations.

8. The renewed Collective Agreement therefore became effective April 21, 2019.

9. On May 21, 2019, the Union filed a Final Level Grievance on behalf of its membership alleging a violation of Article 2.01(e) of the Collective Agreement.

10. On July 21, 2019, the Employer sent a letter to the Union denying the grievance at the final level.

11. On August 13, 2019, the Union replied to the Employer indicating that it was referring the matter to arbitration.

Agreed Exhibits

[8] The additional documents submitted to the Board in connection with the Grievance were entered into the Record as Agreed Exhibits as follows:

Exhibit 1A.1:	January 14, 2016 Bargaining Proposal (Union)
Exhibit 1A.2:	January 27, 2016 Revised Proposal (Employer)
Exhibit 1A.3:	January 29, 2016 signed Article 2 Amendment March 22, 2019
Exhibit 1A.4	March 22, 2019 Mediator Report and Recommendations with Appendices A and B
Exhibit 1A.5:	FINAL 2016-2021 UNW AGREEMENT without signing page
Exhibit 1A.6:	May 21, 2019 Grievance Letter UNW_19-P-GNWT-02452_2019_05_21(the "Grievance")
Exhibit 1A.7:	July 21, 2019 Employer Letter denying the Grievance
Exhibit 1A.8:	August 13, 2019 – Union Letter, Referral of Grievance to Arbitration

AUTHORITIES

[9] For the Union:

1. *Medis Health and Pharmaceutical Services Ltd v Teamsters, Chemical and Allied Workers, Local 424* (2000), 93 L.A.C. (4th) 118 (Ont. Arb.)
2. *DHL Express (Canada) Ltd and CAW-Canada, Locs 4215, 144 & 4278 (Re)* (2004), 124 L.A.C. (4th) 271 (Can. Arb.)
3. *Canada Post Corp v CUPW* (2005), 80 C.L.A.S. 465 (Can. Arb.)
4. *ATCO Structures & Logistics Ltd. and Alberta and Northwest Territories (District of Mackenzie), Re (2015), 255 L.A.C. (4th) 173* (Alta. Arb.)

[10] For the Employer:

1. *GNWT v Union of Northern Workers*, 2017 NWTSC 84
2. *Public Service Regulations*, R.R.N.W.T. 1990, c. P-28

[11] For the Board:

1. David M Beatty, Donald J Brown & Adam Beatty, *Canadian Labour Arbitration*, 5th ed (Toronto: Thomson Reuters Canada, 2006, loose-leaf):4:2000-4:2155
2. *GNWT v Union of Northern Workers* (2007), 91 CLAS 332
3. *Gov of Nunavut and NEU Re* (2017), 131 CLAS 256
4. *Hiltz v Northwest Territories (Commissioner)*, 2003 NWTSC 48

THE GRIEVANCE

[12] The Grievance submitted to the Board for determination is straightforward: to whom does the Hay River Clause apply: to HRHSSA bargaining unit employees on strength as of April 21, 2019 which I will refer to as its "Implementation Date" as well as to new hires thereafter during the currency of the Collective Agreement (the Union's position) or, does it apply only to new hires on and after the Implementation Date (the Employer's position).

[13] On May 21, 2019, the Union submitted a Grievance Letter to the Employer (Exhibit 1A.6), which provides in part:

> The Union alleges that the employer is in violation of **Article 2.01 (e)** of the Collective Agreement. The Union contends that the employer is not recognizing the continuous employment and continuous service of former employees of the Hay River Health and Social Services Authority (HRHSSA) who were on strength as of April 21st, 2019 (the date of the new Collective Agreement implementation).
> ….
> The Union takes the position that all members on strength at the date of Implementation shall benefit from the terms and conditions of the Collective Agreement. Therefore any employee on strength as of April 21st (the date of the implementation of the new collective agreement) is entitled to the new continuous service provision and any time employed by HRHSSA within 90 days of hire with the GNWT would be covered by the new definition contained under **Article 2.01(e)**.

[14] On July 21, 2019, the Employer denied the Grievance, for the reasons set out in Exhibit 1A.7, as follows:

> There was no discussion during collective bargaining that there would be any retroactivity applied to the amendments of the "continuous service" definition. As such I must defer to Mediator Reddy's report released March 22, 2019 states:
>
> *With the exception of wage increases, which will become effective April 1, 2018, the remaining provisions of these recommendations concerning language changes in the renewed Collective Agreement will become effective thirty (30) days from the date of these recommendations.*

> Included in the report is the provision for including previous service with the Hay River Health and Social Services Authority as continuous service which would now come into effect April 21, 2019 and applied going forward to all new hires with applicable service with the Hay River Health Authority.

SUBMISSIONS OF THE PARTIES

[15] The parties agreed that the implementation of the Hay River Clause was not discussed between them before it became effective on April 21, 2019.

The Union

[16] It is the Union's position that all members are entitled to the rights granted under the Collective Agreement absent express limitations, restrictions or exclusions to the contrary.

[17] By operation of Article 58.01, the Union submitted that the Hay River Clause became a vested contractual right to all members on strength on the Implementation Date and not a conditional right applicable to only future hires.

[18] It asserted that the plain and unambiguous language of the Hay River Clause did not support the restricted application of Article 2.01(e)(i)(4) adopted by the Employer, resulting in the Grievance.

[19] The Union urged the Board to find that the Employer misconstrued Mr. Reddy's Report [Exhibit 1.A.4, p.31) in which he stated:

> *With the exception of wage increases, which will become effective April 1, 2018, the remaining provisions of these recommendations concerning language changes in the renewed Collective Agreement will become effective thirty (30) days from the date of these recommendation***s.**

[20] The Union argued that the Employer's position requires the Board to impute additional restrictive language into the Hay River Clause, which I am precluded from doing by operation of Article 37.22 of the Collective Agreement, which provides:

> *The Arbitrator shall not have the authority to alter or amend any of the provisions of this Agreement, or to substitute any new provisions in lieu thereof, or to render any decision contrary to the terms and provisions of this Agreement, or to increase or decrease wages.*

[21] The Board was urged to adopt Arbitrator Hamilton's interpretative approach to an analysis of a particular clause in a collective agreement as articulated at paragraph 51 of his decision in *DHL Express*, supra; one which, as here, the Union argued was clear and unambiguous. In his words:

> Some preliminary remarks on the basic rules which govern my *interpretive* task are in order. The predominant reference point for an arbitrator must be the language in the Agreement because it is primarily from the written word that the common intention of the parties is to be ascertained. Language is to be construed in accordance with its ordinary and plain meaning, unless adopting

> this approach would lead to an absurdity or repugnancy, but in these latter situations, arbitrators will interpret the words used in a manner so as to avoid such results. However, it must be remembered that these particular principles of interpretation are to be used in the context of the written Agreement itself. It is also well recognized that a counter-balancing principle is that anomalies or ill-considered results are not sufficient to cause the alteration of the plain meaning of words. Neither is the fact that one interpretation of the Agreement may result in a (perceived) hardship to one party.

[22] The Union reiterated that the Hay River Clause is clear and unambiguous, without absurdity or repugnancy, and that its plain meaning must therefore be construed by the Board to include HRHSSA members on strength on April 21, 2019 and new hires thereafter during the currency of the Collective Agreement.

[23] In the alternative, the Union argued that should the Board conclude it necessary to do so, an application of rules of construction relevant to an interpretation of the Hay River Clause further undermined the Employer's position concerning its application of the Hay River Clause.

[24] In determining the implementation date of the Hay River Clause intended by the parties, the Union argued that the Board should first consider the whole of the Collective Agreement to resolve any discernible ambiguity or omission.

[25] The Union pointed out the many examples throughout the Collective Agreement where the parties adopted express restrictive temporal or exclusionary language in evidencing an intention that the particular clause was intended to apply on a "go forward" basis, such as Article 32.05, or through the use of exclusionary language as set out in Appendix A5.03, as follows:

> Article 32.05 reads:
>
> RESIGNATION, RETIREMENT AND DEATH
>
> Employees commencing employment before September 2, 1995 shall receive severance pay on resignation, retirement or death in accordance with the severance pay provisions identified in Articles 32.05, 32.06 and 32.07 of the Collective Agreement between the Employer and the Union, which expired March 31, 1994, for the length (duration) of their employment. [emphasis added by the Board]
>
> Appendix A5.03 reads:
>
> A casual employee shall be entitled to the provisions of this Collective Agreement except as follows:
>
> (a) Clause 2.01(e) "Continuous Employment" in respect of a casual employee shall include any period of employment with the Employer which has not been broken by more than thirty (30) working days. Provided always that there will be no systematic release and rehire of casuals into the same positions primarily as a means of avoiding the creation of indeterminate employment or paying wages and benefits associated therewith.

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

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

(ii) Article 21 Other Types of Leave - Clause 21.04 and 21.05

(iii) Article 33 - Lay-off.

(iv) Article 39 – Public Service Pension Plan.

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

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

(vii) Article 48 – Entire Article.

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

(i) Article 16 - Designated Paid Holidays shall apply to a casual employee after fifteen (15) calendar days of continuous employment.

[26] The Union asserted that there is no reasonable basis to impute a condition precedent to the recognition of prior HRHSSA service granted under Article 2.01(e)(i)(4), based upon the express limitations, restrictions and/or exclusions the parties have long adopted to reflect how a particular provision was intended to operate.

[27] The Union also pointed out the parties' adoption of express language in the past to identify restrictions in the application of negotiated "continuous service" provisions within the bargaining unit, as demonstrated by the following clauses:

- Article 2.01(e)(ii): restricts lay-off eligibility to those occurring after April 1, 1970;
- Article 2.01(e)(iii): contains an express exclusion of its application to casual employees;
- Article 22.18(b) (Job Sharing): contains an express provision that excludes the breaks between job shares in the calculation of "Continuous Employment" and "Continuous Services".

[28] In addition, the Union urged the Board to consider the parties' agreed use of the past verb tense of the Hay River Clause. It submitted that if recognition of prior service was intended to apply only to new hires after the Implementation Date, the only accurate verb tense would read "is" or "is to be" recruited or transferred; as opposed to the actual wording of "was recruited or transferred".

[29] The Union argued that these many provisions of the Collective Agreement persuasively demonstrate how the parties have used express language to communicate an intention to restrict or limit rights in some fashion; language notably absent from the provisions of the Hay River Clause. Since no

such intention is expressed in the Hay River Clause, the Union asserted that its absence supports a reasonable inference that the omission was intentional.

[30] The Union also argued that to conclude that the Hay River Clause creates two applications of the same definition (no recognition of prior service for members on strength on April 21, 2019 and recognition for prior HRHSSA service for those hired thereafter) leads to a contractual absurdity. It asserted that the Hay River Clause cannot be selectively applied to members without express language empowering the Employer to do so.

[31] The Union argued that should the Board conclude it is necessary to consider extrinsic evidence as an interpretive tool in determining the merits of the Grievance, it urged the Board to consider the circumstances in which the parties agreed on the wording of Article 2.01(e)(i)(4). The Union pointed out that the language of the Hay River Clause was first introduced to the Employer in its Bargaining Proposal dated January 14, 2016 [Exhibit A1-1]. In response, on January 27, 2016, the Employer accepted the Union's language without discussion, but added an express exclusion to the calculation of "continuous service" for the purpose of GNWT severance pay under Article 32 for any periods of prior service with the HRHSSA for which severance was paid.

[32] However, it further submitted that should the Board find a latent ambiguity in the wording of the Hay River Clause in a degree that required the Board to rely upon extrinsic evidence as an interpretative tool, it urged the Board to conclude that the evidence submitted is insufficient to prefer the Employer's interpretation of the Article 2.01(e)(i)(4).

[33] The Union asserted that the Board was obliged to enforce the plain and express language of the Hay River Clause, as modified by the Employer on January 29, 2016 [Exhibit 1A.3], without further discussion and incorporated into the renewed Collective Agreement more than three years later, effective April 21, 2019.

[34] In the result, the Union seeks a Declaration that the Employer has violated Article 2.01(i)(e)(4) of the Collective Agreement in its refusal to apply the Hay River Clause to eligible HRHSSA employees on strength on April 21, 2019 and, if successful, asks the Board to reserve jurisdiction in order to address any ancillary matters of the Grievance which the parties are unable to resolve themselves.

The Employer

[35] The Employer did not dispute the agreed wording of the Hay River Clause but argued that it only applies to new hires on or after the Implementation Date.

[36] On a practical level, the Employer pointed out that recognition of prior service under the Hay River Clause impacts upon bargaining member rights in two main areas: in the calculation of an employee's accumulation of vacation leave under Article 18.01 and in the calculation of an employee's severance pay entitlements under Article 32 of the Collective Agreement.

[37] In terms of vacation leave, the Employer noted that the greater the years of service, the greater an employee's hourly entitlement to vacation leave. Similarly, an employee's entitlement to severance pay under the Collective Agreement is also a calculation based upon years of service.

[38] The Employer argued that Article 58 of the Collective Agreement is plain and unambiguous; aside from wage adjustments, all other provisions of the Collective Agreement took effect on April 21, 2019 unless another date is expressly stated.

[39] The Employer also argued that since no other date is expressly stated with respect to the amendments to Article 2.01; the expanded definition of "continuous service" and its corresponding benefit apply to employees prospectively; meaning only to employees who transfer to or are hired by the Employer on or after April 21, 2019.

[40] It further argued that Article 58 prohibits a "retroactive application" of the renewed Collective Agreement except for pay adjustment schedules.

[41] The Employer asserted that a prospective application of the revised definition (as of April 21, 2019) cannot confer a retroactive benefit to employees hired before that date.

[42] The Employer argued that there is a latent ambiguity in the interpretation of the Hay River Clause, evidenced by the opposing interpretations of the implementation of the expanded definition of "continuous service" set out therein.

[43] For that reason it asserted that the Board is therefore entitled to rely upon extrinsic evidence as a tool of interpretation, such as section 1(3) of the *Public Service Regulations*, RRNWT 1990 c 9-28 [the "Regulation"] which relates to recognition of prior service with the public service of Canada and/or the public service of the Yukon, as authority for the Employer's position that this provision contains language mirroring the application of the Hay River Clause and which makes clear the benefit is contemplated at the time of appointment, and not prior.

[44] Section 1(3) of the Regulation provides:

> *Where a person, other than a casual employee, is appointed to a position in the public service within 3 months after terminating his/her employment in the public service of Canada or the public service of the Yukon for reasons other than dismissal, abandonment of position or rejection on probation, his or her periods of employment shall be considered as continuous employment in the public service and all leave credits and benefits earned but not granted shall be considered as earned in the public service.* [Employer's emphasis].

[45] The Employer also argued that entitlement to benefits under a collective agreement commences with employment start dates and length of service values, which are recorded in a data management system as a baseline from which vacation leave accrual and severance pay entitlements are measured and is adjusted over time. It noted that an employee's "continuous service date" runs from the date of hire.

[46] The Employer argues that to apply an expanded definition of "continuous service" retroactively to employees already on strength on April 21, 2019 necessarily yields an absurd result as well as a significant administrative burden on the basis that it would have to readjust "continuous service dates" for employees already on strength and thereby conferring a retroactive benefit.

[47] The Employer submitted that the Union's position requires a retroactive application of the Hay River Clause, which is contradicted and prohibited by Article 58 of the Collective Agreement.

[48] For these reasons, the Employer submits the Grievance must be dismissed.

Union Reply

[49] In response to the Employer's argument, the Union submitted that the parties intentionally negotiated the language resulting in an expansion to the definition of "continuous service" with the inclusion of the Hay River Clause in Article 2.01. That language was agreed as of January 29, 2016 and incorporated into the renewed Collective Agreement effective April 21, 2019.

[50] The Union argued that the statutory framework set out in section 1(3) of the Regulation is a "contractual floor" and the parties are free to agree to exceed a statutory minimum. The Union pointed out that the Regulation does not recognize municipal service; while the Collective Agreement does. It further submitted that the substance of the Grievance is not whether one or more provisions of the Collective Agreement are reconcilable with existing legislative provisions.

[51] The Union argued that the parties chose not to adopt a "point of hire" restriction which would have "mirrored" the language in the Regulation. The consequence of that decision and the agreed language of the Hay River Clause is that on April 21, 2019, entitlements under the Collective Agreement applied to all those eligible for an additional negotiated benefit as of the Implementation Date.

[52] The Union asserted that a mere reference to the Employer's data management system does not constitute evidence to buttress the Employer's position on any administrative burdens required to adjust "continuous service dates" for the purpose of severance or vacation accruals. That evidence is not before the Board.

[53] The Union argued that an "unintended consequence" arising from the agreed language of the Hay River Clause does not itself create an ambiguity. Once the Union's language was tabled on January 14, 2016, the Employer had an opportunity to consider the language and its impact upon available resources. The Employer accepted the proposed language but added a restriction to the recognition of prior service to exclude any periods with the HRHSSA for which severance was paid. On January 29, 2016, the language was agreed upon and later incorporated into the Collective Agreement as of April 21, 2019.

THE DECISION

[54] I have carefully considered the documentary evidence submitted to the Board in the Amended Agreed Statement of Facts along with its supporting documents entered as Exhibits in these proceedings, the submissions of counsel and the authorities identified at paragraphs 9-11 above.

[55] It is trite law to say that the source of this Board's jurisdiction is found in the Collective Agreement and in the issues identified in the Grievance before it. In assessing the merits of the Grievance, my task is to construe the applicable provisions of the Collective Agreement and in doing so, declare the meaning of the words that the parties have adopted and thus give effect to the intentions expressed by the parties who agreed to it.

[56] I have noted a number of rules of construction to be applied as aids in construing an agreement, aptly summarized in *Brown & Beatty*, supra, at 4.2000-4:2155, among them:

- parties are assumed to have intended what they said
- a collective agreement is to be read and construed as a whole
- words under construction should be read in the context of the sentence, section, and agreement as a whole
- clear words are to be given their normal or ordinary meanings
- plain meaning may be departed from where it would result in an absurdity or inconsistency with the rest of the agreement
- in the absence of ambiguity or lack of clarity in meaning, effect must be given to the words of the agreement
- extrinsic evidence is admissible as an aid to interpretation where an ambiguity is identified

[57] The essential facts of the grievance are not in dispute as set out in the Amended Agreed Statement of Facts, summarized below:

- Prior to a bargaining meeting between the parties on January 14, 2016, the Employer informed the Union that it was contemplating the incorporation of HRHSSA with a workforce of about 190 bargaining unit employees into the GNWT.

- At the January 14, 2016 bargaining meeting the Union submitted a Bargaining Proposal which contained a proposed amendment to Article 2.01(e) to provide for the recognition of prior service of the HRHSSA members who met the condition precedent.

- At a subsequent bargaining meeting held on January 27, 2016, the Employer submitted a revised proposal to amend Article 2.01(e).

- The Employer's amended proposal did not change the Union's initial proposal but, rather, added to it.

- The parties did not discuss the wording of the Hay River Clause or its implementation between either of these Bargaining Meetings.

- On January 29, 2016, the parties signed the amended Article 2.01(e), which was incorporated into renewed Collective Agreement effective April 21, 2019.

[58] For the sake of clarity, the agreed wording of the Hay River Clause is set out below. The Union's wording is in italics and the Employer's wording is underlined:

> *(4) prior service with the Hay River Health and Social Services Authority, providing an employee was recruited or transferred within three (3) months of terminating his/her previous employment. Continuous Service for the purposes of GNWT severance pay under Article 32 will not include any periods of employment with Hay River Health and Social Services* Authority for which severance was paid.

[59] In determining the merits of the Grievance, I am required to determine the intentions of the parties in choosing to adopt an additional category of recognized prior service under Article 2.01(e)(i)(4) of the Collective Agreement upon the incorporation of the HRHSSA into the GNWT. That language was agreed to by the parties in writing on January 29, 2016 although it only came into effect on April 21, 2019.

[60] I am mindful that in construing the Hay River Clause, I must first look to the agreed language used by the parties. In doing so, I am persuaded by Arbitrator Hope's approach to the interpretation of provision(s) of a collective agreement, cited as paragraph 9 of *Medis Health,* supra, in *Government of the Northwest Territories and Union of Northern Workers* (1997), 65 L.A.C. (4th) 211 (Hope), as follows:

> *It is the language selected by the parties that governs in the dispute and where the language is clear when given its ordinary meaning, it must be given effect unless admissible extrinsic evidence compels the conclusion that a different meaning was mutually intended by the parties or the facts support an application of the doctrine of estoppel so as to prevent a party from relying on a strict interpretation of language that differs from the manner in which it has been applied.*

[61] I am equally persuaded by Arbitrator Armstrong's conclusion in *Medis Health, supra,* at paragraph 10, in his interpretation of the weight of arbitral jurisprudence concluding that "…*the words used by the parties, applied in the grammatical and ordinary sense, govern and words not used by the parties should not be read into the agreement",* absent an absurdity, repugnancy or inconsistency. (emphasis of Arbitrator Armstrong)

[62] Applying these fundamental tenets of the interpretation of collective agreements and being mindful that the parties chose not to call witnesses or submit substantive evidence of bargaining history, such extrinsic evidence that is before me is limited to that which is set out in the Amended Agreed Statement of Facts.

[63] I have also considered the lack of evidence before the Board as to how the incorporation of the HRHSSA employees into GNWT employees was in fact completed. In its absence, the Board was provided with the express and agreed intention to recognize prior HRHSSA service as outlined in the Hay River Clause.

[64] I have noted the provisions of Article 4.01 of the Collective Agreement, which recognizes the application of the Collective Agreement to the Union, the Employer and to employees, defined therein as members of the bargaining unit and have further considered the conflict provisions set out in Article 5.03 of the Collective Agreement.

[65] Thus in construing the Hay River Clause, I have carefully considered the whole of the Collective Agreement and the parties' use of express language to express an intention to limit, restrict or exclude categories of members from the application of a specific provision in the Collective Agreement; be the casual workers (Articles 2.01(e)(iii), 18, 20, 21, 22, 39); breaks between job shares (Article 22.18(b), or restrictions to paid holidays (Article 16) of the Collective Agreement.

[66] I have also considered the exchange of proposals between the parties in the creation of the agreed wording of the Hay River Clause. Having had an opportunity to consider the Union's proposed wording for the recognition of prior service, I can only conclude that the Employer sought in its amendment, to limit the impact of the recognition of prior service for the purpose of a calculation of severance pay under Article 32 by eliminating any period of prior service with the HRHSSA for which the member had received severance pay.

[67] Having regard to the context in which the Hay River Clause was negotiated between the parties, and having regard to the whole of the Collective Agreement and the parties' practice to communicate its intentions through the use of express language in restricting, limiting or excluding particular provisions therein to certain members of the bargaining unit as evidenced throughout the Collective Agreement, including throughout Article 20.1, on the evidence submitted to the Board, I find neither an ambiguity nor a lack of clarity in the meaning of the Hay River Clause.

[68] Putting it another way, I am persuaded that the plain language of the Hay River Clause reflects what the parties meant by the words they used. Having had an opportunity to consider the impact of the Union's proposed wording in its Bargaining Proposal, the Employer sought only to limit its effect on severance payments under Article 32. This step, in my view, is insufficient to establish that the parties in any reasonable way intended the Hay River Clause to apply only to "new hires" after the Implementation Date.

[69] Even had I found a latent ambiguity in the parties' intentions concerning the implementation of the Hay River clause, I am not persuaded that section 1(3) of the Regulation is of assistance in this matter since I am unable to conclude that its wording "mirrors" the wording of the Hay River Clause. Indeed, I find otherwise. For convenience, section 1(3) of the Regulation is replicated below:

> *Where a person, other than a casual employee, is appointed to a position in the public service within 3 months after terminating his/her employment in the public service of Canada or the public service of the Yukon for reasons other than dismissal, abandonment of position or rejection on probation, his or her periods of employment shall be considered as continuous employment in the public service and all leave credits and benefits earned but not granted shall be considered as earned in the public service.* [Employer's emphasis].

[70] Being mindful of the Employer's familiarity with the wording of section 1(3) of the Regulation, I can only conclude that its failure to offer an amendment to the Union's proposed wording of the Hay River Clause to better reflect any such intention, was intentional.

[71] Having found the Hay River Clause clear and unambiguous on its face and having found that it does not *mirror* section 1(3) of the Regulation, I am unable to conclude that the Regulation is of any application or assistance in this matter. As Arbitrator Jolliffe put it in *Northwest Territories (Minister responsible for the Public Service Act) v. Union of Northern Workers,* supra at paragraph 30:

> *…Frankly the Regulation in any event would have only doubtful application in a situation such as here, where the parties have chosen to negotiate express language covering special leave with pay for bargaining unit employees, and where its application might be seen as conflicting with it, especially having regard to the way such a contract provision has been interpreted in the past by the federal sector adjudicators dealing with very similar language.*

[72] I am also not persuaded that the Employer's interpretation of Article 58 reasonably or necessarily requires that the Implementation Date of April 21, 2019, absent any other date expressly stated, means that it applies only to new hires. That is not what the Hay River Clause provides. I am unable to conclude that the wording of Article 58 excludes from its application the eligibility of existing HRHSSA employees within the bargaining to recognition of prior HRHSSA service under Article 2.01(e)(i)(4); particularly in light of the fact that the express wording of the Hay River Clause does not do so.

[73] I am unable to read an additional condition precedent into the Hay River Clause which, in my view, would effectively amend a provision of the Collective Agreement; a step prohibited under Article 37.22.

[74] There is no evidence before the Board should the Grievance be allowed establishing difficulties or issues in the implementation of this Award relating to the Employer's Self-Serve Data Management System. The parties chose to submit whatever evidence they chose in support of their respective positions on the merits of the Grievance. Having no evidence of the Data Management System, this aspect of the Employer's response to the merits of the Grievance is simply not made out.

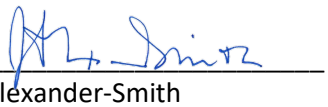
[75] On the evidence before the Board, I am not persuaded that housekeeping difficulties in implementing this Award are relevant in the circumstances.

[76] Having concluded that the context in which the Hay River Clause was adopted, particularly having regard to the parties' deliberate use of express exclusion, limitations and restrictions in the Collective Agreement, most particularly those employed in Article 2.01 and based upon the evidence submitted to the Board in this Grievance, the Grievance is allowed.

[77] As a result, I hereby declare that the Employer is in violation of Article 2.01(i)(e)(4) of the Collective Agreement in its refusal to apply the Hay River Clause to eligible HRHSSA employees on strength on April 21, 2019.

[78] The Board reserves jurisdiction in this matter to address any ancillary matters of the Grievance which the parties are unable to resolve themselves.

Dated this 29th day of September 2020.



J. Alexander-Smith
Arbitrator