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IN THE MATTER of an arbitration pursuant to s. 37.20 of the Collective Agreement between the Union of Northern Workers and the Minister of Personnel for the Government of the Northwest Territories made September 6, 1989 for period April 1st, 1989 to March 31, 1992;

AND IN THE MATTER of a grievance filed regarding Adoption Leave - Reopener filed on or before June 28, 1991; 91-657

AND:

IN THE MATTER of an arbitration pursuant to s. 37.20 of the Collective Agreement between the Union of Northern Workers and the Minister of Personnel for the Government of the Northwest Territories made September 6, 1989 for period April 1st, 1989 to March 31, 1992;

AND IN THE MATTER of a grievance filed regarding Adoption Leave Reduction filed on or before September 26, 1991; 91-656

BETWEEN:

GOVERNMENT OF THE NORTHWEST TERRITORIES
(Employer)

- and -

THE UNION OF NORTHERN WORKERS
(Union)

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AWARD

The Union of Northern Workers and the Government of the Northwest Territories entered into a Collective Agreement on September 6, 1989. Article 21.05 of that agreement dealt with the issue of adoption leave as follows:

"21.05 (a) An employee who intends to request adoption leave shall make every effort to provide reasonable notice to the Employer, but in any event shall notify the Employer as soon as the application for adoption has been approved by the adoption agency or legal guardianship and custody papers have been drawn. Upon application the employee shall be granted adoption leave without pay of up to twenty six (26) weeks commencing on the date of the acceptance of custody of the adopted child who is below the age of majority.

(b) Leave granted under this Clause shall be counted for the calculation of "continuous employment" for the purpose of calculating severance pay.

(c) (i) After completion of six (6) months continuous employment, an employee who provides the Employer with proof that he/she has applied for and is eligible to receive unemployment insurance benefits pursuant to Section 32, Unemployment Insurance Act, 1971, shall be paid an adoption leave allowance in accordance with the Supplementary Unemployment Benefit Plan.

(ii) An applicant under Clause 21.05(c)(i) shall sign an agreement with the Employer providing:

(a) that he/she will return to work and remain in the Employer's employ for a period of at least six (6) months after his/her return to work;
(b) that he/she will return to work on the date of the expiry of his/her adoption leave unless this date is modified with the Employer's consent.

(iii) Should the employee fail to return to work, as per the provisions of Clause 21.05(c)(ii), except by reason of death, disability, or lay-off, the employee recognizes that he/she is indebted to the Employer for the amount received as an adoption leave allowance. Should the employee not return for the full six month period, the employee's indebtedness shall be reduced on a prorated basis according to the number of months he/she received pay.

(d) In respect of the period of adoption leave, payments made according to the Supplementary Unemployment Benefits Plan will consist of the following:

(i) up to a maximum of seventeen (17) weeks payments equivalent to ninety-three per cent (93%) of his/her weekly rate of pay;

(ii) (a) for a full-time employee the weekly rate of pay referred to in Clause 21.05(d)(i) shall be the weekly rate of pay to which he/she is entitled for the classification prescribed in his/her certificate of appointment on the day immediately preceding the commencement of the adoption leave;

(b) for a part-time employee the weekly rate of pay referred to in Clause 21.05(d)(i) shall be the prorated weekly rate of pay to which he/she is entitled for the classification prescribed in his/her certificate of appointment averaged over the six month period of continuous employment immediately preceding the commencement of the adoption leave.

(e) Adoption leave utilized by an employee-couple in conjunction with the adoption of a child shall not exceed a total of twenty-six (26) weeks for both employees combined.

(f) Where an employee satisfies the employer that such leave is required, such leave will not be unreasonably withheld."

Article 21.05(c)(i) provides for an adoption leave subsidy to certain tenured employees who have applied for and are eligible to receive unemployment insurance benefits. That adoption leave subsidy, described in the Collective Agreement as payments under the Supplementary Employment Benefits Plan, provides to eligible employees for up to a maximum of seventeen (17) weeks, payments to ensure that while they are on adoption leave and unemployment insurance, they will receive combined federal unemployment insurance and employment subsidies equivalent to 93% of their average weekly pay.

When the Collective Agreement was entered into, the pertinent sections of the *Unemployment Insurance Act* provided:

"11.(1) When a benefit period has been established for a claimant, initial benefit may, subjection to subsection (2), be paid to him for each week of unemployment that falls in the benefit period.

(2) The maximum number of weeks for which initial benefit may be paid in a benefit period is thenumber of weeks of insurable employment of the claimant in his qualifying period of twenty-five, whichever is the lesser.

(3) Notwithstanding subsection (2), the maximum number of weeks for which initial benefit may be paid to a claimant

(a) in any benefit period for reasons of pregnancy, placement of a child or children for the purpose of adoption, prescribed illness, injury or quarantine or any combination thereof, or
(b) in respect of a single pregnancy or a single placement of a child or children for the purpose of adoption, is fifteen.

12. A claimant is not entitled to be paid benefit in a benefit period until following the commencement of that benefit period he has served a two week waiting period that begins with a week of unemployment for which benefit would otherwise be payable.

13.(1) The rate of weekly benefit payable to a claimant for a week of unemployment that falls in his benefit period is an amount equal to sixty per cent of his average weekly insurable earnings in his qualifying weeks."

A combined reading of these sections of the *Unemployment Insurance Act* together with Article 21.05 of the Collective Agreement indicates that for the employees eligible for unemployment insurance, the maximum supplementary benefit provided by the Employer would be:

1. 93% of the employee's average weekly pay for an initial period of two weeks; and
2. 93% minus 60% or 33% of the employee's average weekly pay for a maximum period of 15 weeks.

These payments to be made by the Employer, like the unemployment insurance payments they supplement, are preconditioned on eligibility for the underlying unemployment

2) Is there a change in the Employer's obligation to supplement adoption leave benefits to employees eligible for unemployment insurance for adoption leave purposes as a result of the amendment to s. 11 of the Unemployment Insurance Act?

The Arbitrator found that the Employer could not reduce the adoption leave subsidy. The amendments to the Unemployment Insurance Act did not require a reduction by law and the Collective Agreement provided otherwise.

GRIEVANCE ALLOWED
MAY 12, 1994.

BAYLY, JOHN U.

insurance extended to those persons who can satisfy the Unemployment Insurance Commission that they are eligible for one or more of the purposes described in sections 11(3)(a) or 11(3)(b) of the *Unemployment Insurance Act*.

In 1990, while the Collective Agreement of September 6, 1989 was still in effect, amendments were made to the *Unemployment Insurance Act*. These amendments repealed the former section 11 of the *Unemployment Insurance Act* and replaced it with the following:

> "11.(1) Where a benefit period has been established for a claimant, benefit may be paid to the claimant for each week of unemployment that falls in the benefit period, subject to the maximum established by this section.
>
> (2) The maximum number of weeks for which benefit may be paid in a benefit period for any reasons other than those referred to in subsection (3) shall be determined in accordance with Table 2 of the schedule by reference to the regional rate of unemployment that applies to the claimant and the number of weeks of insurable employment of the claimant in the claimant's qualifying period.
>
> (3) Subject to subsection (7), the maximum number of weeks for which benefit may be paid in a benefit period
>
> (a) for the reason of pregnancy is fifteen:
> (b) for the reason of caring for one or more new-born children of the claimant or one or more children placed with the claimant for the purpose of adoption is ten; and
> (c) for the reason of prescribed illness, injury or quarantine is fifteen.
>
> (4) Subjection to subsection (7), the maximum number of weeks for which benefit may be paid
>
> (a) in respect of a single pregnancy is fifteen; and
> (b) in respect of caring for one or more newborn or adopted children as a result of a single pregnancy or placement is ten.
>
> (5) In a claimant's benefit period, the claimant may combine weeks of benefit to which the claimant is entitled for any of the reasons referred to in subsection (3), but the maximum number of combined weeks is thirty.

UNION GRIEVANCE GNWT 91-656

LEAVE OF ABSENCE - ADOPTION LEAVE, UNEMPLOYMENT INSURANCE ACT (IMPACT OF AMENDMENTS)

The parties had entered into a Collective Agreement on September 6, 1989. The agreement contained an article on adoption leave which reads in part:

> "21.05 (a) An employee who intends to request adoption leave shall make every effort to provide reasonable notice to the Employer, but in any event shall notify the Employer as soon as the application for adoption has been approved by the adoption agency or legal guardianship and custody papers have been drawn. Upon application the employee shall be granted adoption leave without pay of up to twenty six (26) weeks commencing on the date of the acceptance of custody of the adopted child who is below the age of majority.
>
> (b) Leave granted under this Clause shall be counted for the calculation of "continuous employment" for the purpose of calculating severance pay.
>
> (c) (i) After completion of six (6) months continuous employment, an employee who provides the Employer with proof that he/she has applied for and is eligible to receive unemployment insurance benefits pursuant to Section 32, Unemployment Insurance Act, shall be paid an adoption leave allowance in accordance with the Supplementary Unemployment Benefit Plan.

Article 21.05 (c)(i) provided for an allowance of fifteen (15) weeks in accordance with the Supplementary Unemployment Benefit plan for eligible employees.

In 1990, while the Collective Agreement of September 6, 1989, was still in effect amendments were made to the Unemployment Insurance Act which reduced the Unemployment Insurance benefit weeks for parental (formally adoption) leave from fifteen (15) weeks to ten (10). The Employer stated that in spite of the wording in the Collective Agreement because of the changes to the Unemployment Insurance Act eligible employees could only receive benefits for a maximum of twelve (12) weeks, including the two (2) week waiting period.

The Union disagreed with the Employer's interpretation and requested that the Collective Agreement be reopened and that the Employer's decision to reduce the adoption leave allowance be reversed. When the Employer refused to do either the Union grieved.

The Arbitrator had two (2) issues to decide:

1) Does the amendment to s. 11 of the Unemployment Insurance Act render null and void or alter any provision of the Collective Agreement?

... / 2

(6) In a claimant's benefit period, the claimant may combine weeks of benefit to which the claimant is entitled for any of the reasons referred to in subsections (2) and (3), but if the claimant is entitled under subsection (2)

(a) to more than thirty weeks of benefit, the total number of weeks of benefit payable for the reasons referred to in subsections (2) and (3) shall not exceed the claimant's entitlement under subsection (2); and

(b) to thirty or fewer weeks of benefit, the claimant may, subject to the applicable maximums, receive a greater number of weeks of benefit where the claimant is also entitled to benefit for any of the reasons referred to in subsection (3), but the total number of weeks of benefit shall not exceed thirty.

(7) The maximum number of ten weeks specified in paragraphs (3)(b) and (4)(b) is extended to fifteen weeks where

(a) to a child referred to in paragraph 3(b) or (4)(b) is six months of age or older at the time of the child's arrival at the claimant's home or actual placement with the claimant for the purpose of adoption; and

(b) a medical practitioner or the agency that placed the child certifies that the child suffers from a physical, psychological or emotional condition that requires an additional period of parental care."

As can be seen when comparing the *Unemployment Insurance Act* amendment with the pertinent provisions of the former legislation, in certain circumstances, the maximum unemployment insurance benefit available to an eligible Government of the Northwest Territories employee adopting a child remains the same. However, a combined reading of ss. 11(1)(b) and 11(7) makes it apparent that only where a child being adopted is at least 6 months of age and a doctor or adoption agency has satisfied the Unemployment Insurance Commission that the child has special needs, will the coverage, reduced by amendment to a 10 week maximum, be extended to 15 week maximum.

After the 1990 *Unemployment Insurance Act* amendments had been passed, Mr. Herb Hunt, the Government of the Northwest Territories Director of Labour Relations, wrote to the Employer's Superintendents, Directors and Managers of Personnel and to the Manager of the Payroll section of the Department of Finance. In his September 20, 1991 letter, which was filed as Exhibit E05, Mr. Hunt said:

> "Article 21.05 of the Collective Agreement with the Union of Northern Workers provides for the payment of an adoption leave allowance to employees who are eligible to receive benefits under the Unemployment Insurance Act.
>
> On November 18, 1990, amendments to the Unemployment Insurance Act came into effect. Those amendments changed the number of Unemployment Insurance (UI) benefit weeks for parental leave (formerly adoption leave) from 15 weeks to 10.
>
> As our SUB Plan depends upon the employee receiving unemployment insurance benefits, employees who proceed on adoption leave and who apply for the SUB Plan under Article 21.05(d) may receive benefits for a maximum of twelve (12) weeks. This period includes the initial two (2) week waiting period for UI benefits."

As a result of the Employer's interpretation of the effect of the changes to the *Unemployment Insurance Act* on the Collective Agreement, the Union demanded that the Collective Agreement be reopened and that the decision made to reduce the adoption leave subsidy be reversed. When the Employer refused to do either, the Union grieved the adoption leave reduction and the refusal of the Employer to reopen the Collective Agreement as a result of the *Unemployment Insurance Act* amendments. The Union asserted that, by failing to agree to reopen the Collective Agreement, the Employer was in breach of Articles 5.02 and 51 of the Collective Agreement. Article 5.02 provides:

> "5.02 In the event that any law passed by Parliament or the Northwest Territories Legislative Assembly renders null and void or alters any provisions of this

Agreement, the remaining provisions of the Agreement shall remain in effect for the term of the Agreement. When this occurs the Collective Agreement shall be re-opened upon the request of either party and negotiations shall commence with a view to finding an appropriate substitute for the annulled or altered provision."

Article 51 of the Collective Agreement provides:

"51.01 This Agreement may be amended by mutual consent.

51.02 The Employer and the Union acknowledge the mutual benefits to be derived from dialogue between the parties and are prepared to discuss matters of common interest."

It is apparent on review of the pertinent sections of the Collective Agreement and the former and amended sections of the *Unemployment Insurance Act,* that in this dispute there are two (2) issues before me. These I have framed as the following questions:

1. Does the amendment to s. 11 of the *Unemployment Insurance Act* render null and void or alter any provision of the Collective Agreement?

2. Is there a change in the Employer's obligation to supplement adoption leave benefits to employees eligible for unemployment insurance for adoption leave purposes as a result of the amendment to s. 11 of the *Unemployment Insurance Act*?

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1. DOES THE AMENDMENT TO S. 11 OF THE *UNEMPLOYMENT INSURANCE ACT* RENDER NULL AND VOID OR ALTER ANY PROVISION OF THE COLLECTIVE AGREEMENT?

The first issue I must decide requires a reading together of the provisions of Articles 5.02 and 21.05 of the Collective Agreement. From such a reading, it is obvious that only some

employees of the Government of the Northwest Territories are eligible for adoption leave subsidies. Those with less than 6 months employment with the Government of the Northwest Territories are not eligible for the supplement at all, notwithstanding their possible eligibility for unemployment insurance benefits based on unavailability for work by reason of adoption. Of those employees who are, by virtue of tenure, eligible for the subsidy, some may choose not to absent themselves from work because of adoption at all. Of course, if an employee were to make an election not to take advantage of the adoption leave provisions of the *Unemployment Insurance Act*, then he or she would not be eligible for a supplement. Others may choose to take shorter periods of adoption leave than their unemployment insurance entitlement allows. If an employee were to elect a briefer adoption leave, the subsidy would cease to be paid on the employee's return to work.

For those who prior to 1990, were eligible for the supplement and chose to stay home with an adopted child, the Employer provided:

(a) 93% of the first two weeks average pay; and

(b) 33% of the remaining weeks average pay for not more than 15 weeks.

The 93% payable during the first two weeks of leave does not, strictly speaking, subsidize any federal unemployment insurance payments since under the legislation, both pre and post 1990, there was a two week waiting period during which time no unemployment insurance was payable. After the amendments to the *Unemployment Insurance Act* were proclaimed in force, the Government of the Northwest Territories interpreted its obligations under Article 21.05 of the Collective Agreement as being to provide for those of its employees who were eligible for the supplement and chose to stay at home with an adopted child:

(a) 93% of the first two weeks average pay; and

(b) 33% of the remaining weeks average pay for not more than 10 weeks; and

(c) where the child being adopted was 6 months of age or older and had certain special needs, 33% of the remaining weeks' average pay for not more than an additional 5 weeks.

If this is the correct interpretation of the amendments to the *Unemployment Insurance Act*, there is obviously a potential alteration in the effect of Article 21.05 of the Collective Agreement on the adoption leave subsidy payable to some employees, or an effect on the Employer's liability to some employees or potentially on both. For a reduced potential number of employees who might have been adopting parents of certain older children with special needs, the amendment had no effect, either on them or on the Employer. Such employees continued to be eligible for the 15 weeks unemployment insurance benefits which underlay the supplement at the time of its being agreed to and its becoming part of the Collective Agreement. For other adopting parents, there was clearly a reduced eligible for unemployment insurance amounting to 5 weeks' benefits. For those employees to remain in the same position as they were in when the Collective Agreement was agreed to, the supplement paid by the Employer would have to be increased to:

(a) 93% of the first 2 weeks average pay; and

(b) 33% of the remaining weeks average pay for not more than 10 weeks; and

(c) 93% of the remaining weeks average pay for not more than an additional 5 weeks.

The 1990 *Unemployment Insurance Act* amendments did not abolish unemployment insurance eligibility for adopting parents. Nor did they render unlawful the payment of supplementary benefits to persons receiving unemployment insurance benefits while on adoption leave. Nor did they by act of Parliament legislate in any way which interfered with the Collective Agreement, although there is no doubt that by legislating as Parliament did in 1990, there was created an alteration in the potential effect of Article 21.05 of the Collective Agreement on one or both parties. However, the difficulty I have with the first question is that I can find nothing in the amendments to the *Unemployment Insurance Act* which either renders null and void or actually alters any provision of the Collective Agreement. In so stating, I have not overlooked the fact that as a result of the amendment, there has to be a change in either the amount of the subsidy payable to some adopting parents who would otherwise be eligible (a cost to the Employer) or a reduction in the number of weeks of the subsidy and consequently the employees' entitlement (a cost to the employees).

However that may be, the consequences of the legislative amendments neither nullify the provisions of Article 21.05 of the Collective Agreement nor alter its provisions. I must assume that the terms "renders null and void" and "or alters any provision", as they appear in Article 5.02 of the Collective Agreement were carefully chosen by the parties or agreed to between them in full knowledge and after due consideration of their meaning.

If, in contrast, the Article had read "in the event that any law renders null and void or alters the effect of any provision...", I would have no difficulty finding that as a result of the *Unemployment Insurance Act* amendments, the Employer is obliged to reopen negotiations to find an appropriate substitute for the provision. But, Article 5.02 does not say that, and the amendments to the section of the *Unemployment Insurance Act* do not alter the provisions of

Article 21.05 of the Collective Agreement. That section, notwithstanding the legislative amendments, still allows for the subsidy to have been paid to eligible employees for a maximum of 17 weeks.

As a result, I FIND that there is no obligation on the Employer under Article 5.02 or under that article when read in conjunction with Article 51 of the Collective Agreement to reopen negotiations with respect to Article 21.05 of the Collective Agreement as a result of the amendments to s. 11 of the *Unemployment Insurance Act*.

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2. IS THERE A CHANGE IN THE EMPLOYER'S OBLIGATION TO SUPPLEMENT ADOPTION LEAVE BENEFITS TO EMPLOYEES ELIGIBLE FOR UNEMPLOYMENT INSURANCE FOR ADOPTION LEAVE PURPOSES AS A RESULT OF THE AMENDMENT TO S. 11 OF THE *UNEMPLOYMENT INSURANCE ACT*?

The second issue before me is one which requires, in its answering, an analysis and determination of the Employer's obligation under Article 21.05 of the Collective Agreement. As earlier stated, the Employer has agreed that, in the cases of employees with at least six months service with the Government of the Northwest Territories who are eligible and apply for unemployment insurance benefits, it will provide a supplement to the unemployment insurance benefits for adoption leave purposes. By agreement, the maximum subsidy period was 17 weeks. During the first two weeks of that period (the waiting period), the subsidy was 93%. Canada provided none of that as unemployment insurance benefits. The Employer paid the entire cost. For the next period, unemployment insurance payments amounted to 60% of the average weekly wages of the employee. So, for that period, the subsidy was 33%. The 1990 *Unemployment Insurance Act* amendment changed the maximum period of unemployment

insurance eligibility for certain adopting parents, reducing the unemployment insurance benefit by 5 weeks.

What was the consequent obligation on the Employer? Can it be said, as Mr. Herb Hunt reasoned, that the maximum subsidy period was reduced from 15 weeks to 10, except for those employee parents adopting older children with special needs? I think not. The Employer had agreed to a 17 week maximum. The legislated reduction in the unemployment insurance contribution does not affect the bargain made between the Employer and the Union. It simply, albeit expensively, increased the required contribution of the Employer from 33% to 93% for up to 5 weeks in particular cases.

Consider for example if the *Unemployment Insurance Act* had been otherwise amended so that the waiting period was reduced from 2 weeks to 1 week. Surely the effect of such an amendment would have been to reduce the subsidy payable by the Government of the Northwest Territories. The Employer would have logically and rightly argued that such an amendment would not require it to continue to pay 93% for the "second week" of adoption leave because it had formerly been part of the legislated waiting period, thus giving the employee 93% plus 60% or 153% of his or her average wages for that week.

Consider by way of another example, what if Canada had decided to increase the maximum period of eligibility from 15 to 20 weeks? In such a case, surely it could not be said that the Employer's subsidy was payable beyond the 17 weeks which had been agreed to on September 6, 1989. Such a legislative change would simply provide an additional 5 unsubsidized weeks to the eligible entitlement of certain employees for benefits from the unemployment insurance fund.

Obviously the 1990 amendments to Section 11 of the *Unemployment Insurance Act* represent as a consequence, a financial burden on the Government of the Northwest Territories as an employer. But, as I earlier stated, the amendment does not alter any provision of the Collective Agreement nor does it render any provision null and void. Parties to the Collective Agreement negotiated and agreed on the wording of Article 5.02. Had they meant to agree on an alternate wording, then they ought to have done so. Should they wish to do so in future agreements, they should place the matter on the negotiating table in future contract talks. But I have not been asked to deal with any alternative wordings to the Collective Agreement. I have only been asked to interpret the meaning of Article 5.02 of the September 1989 agreement to determine whether it may be invoked in the situation before me. Having done so, and having found that nothing in the amendment to the *Unemployment Insurance Act* in 1990 renders null and void or alters any provision of the Collective Agreement, I must interpret Section 21.05 of the Collective Agreement on its own and determine whether or not the Employer could reduce the adoption leave subsidy.

I FIND that the Employer cannot reduce the adoption leave subsidy. The amendments to the *Unemployment Insurance Act* do not require a reduction by law and the Collective Agreement provides otherwise. Furthermore, I find that any adoption subsidy reduction (or leave reduction) which may have been imposed on any eligible Government of the Northwest Territories employee after and as a result of the Employer's interpretation of the effect of the 1990 amendments to Section 11 of the *Unemployment Insurance Act* when read with the subsidy provisions of Article 21.05 of the Collective Agreement to have been imposed outside the provisions of the Collective Agreement. I find that for the balance of the effective period during which the parties were bound by the September 6, 1989 Collective Agreement, Government of the Northwest Territories employees eligible for adoption leave and

unemployment insurance subsidies remained eligible for up to 17 weeks notwithstanding the amendments to Section 11 of the *Unemployment Insurance Act*. I further find that in the cases of eligible and affected employees, appropriate adjustments to remuneration and leave credits (if any) should be made.

In the event that I may be called upon to arbitrate any disputes which may arise between the parties arising from the effect of the interpretations I have made as a to the meaning of certain provisions of the Collective Agreement in this award, I agree to remain seized of this matter for that sole purpose.

DATED at the City of Yellowknife in the Northwest Territories this 12th day of May, 1994.

JOHN U. BAYLY, Q.C.
ARBITRATOR