IN THE MATTER OF AN ARBITRATION

BETWEEN:

THE GOVERNMENT OF THE NORTHWEST TERRITORIES

Employer

-and-

THE UNION OF NORTHERN WORKERS, a Component of the Public Service Alliance of Canada

Union

POLICY GRIEVANCE
(Grievance Number: 19-P-GNWT-02508)

AWARD

Before:	Thomas Jolliffe, K.C.
Representing the Employer:	Thomas Wallwork, Legal Counsel Kirsty Hobbs, Legal Counsel
Representing the Union:	Michael Penner, Legal Counsel
Hearing Dates (via Zoom):	September 20, 2022

Date Award Issued:
October 5, 2022

My File: 53,675

Introduction:

1. In this policy grievance (19-P-GNWT-02508) filed by the Union on September 20, 2019, bargaining unit member Michael Runge who has his own individual grievance (19-E-02521), stands as a representative employee. The issue centres on Mr. Runge having received a layoff notice from the Employer in September 2019, together with some other affected employees, all of them having been hired into casual employment contracts more than four months prior to the current collective agreement ("new") being signed and continuing to work thereafter. The question presented is whether their contractual rights supposedly secured under the expired but extended ("old") collective agreement, had become vested, and were subsequently ignored and thereby violated under the new agreement. During the course of hearing, it was acknowledged on behalf of the Union that for purposes of this grievance involving Mr. Runge and the coworkers in his situation, there is no argument to be made covering other employees whose rights, arguably, were not yet vested at the time of changeover to the new collective agreement.

2. The layoff notice giving rise to the grievance, issued under the new contract language and served on Mr. Runge on September 10, 2019, and on the others within a similar time frame, was titled "Notice of Casual Employment Layoff". This notice directed one's attention to the new language of Appendix A5.01 requiring that casual employment could not exceed six months in duration. The language no longer contained an over-holding provision addressing appointment on a term basis after four months with entitlement to all provisions of the collective agreement from the first day of employment. In serving the layoff notice, the Employer was acting on the basis that Mr. Runge's employment had lasted longer than six months, which is to say referencing the new

language, which it undoubtably had as with several other affected employees. The Employer reasoned that under language change coming into effect in April 2019 it could not keep them employed as casuals which would be a violation of the new Appendix A5.01 without any continuing access to the previous over-holding language.

3. As was stated in the layoff notice Mr. Runge received, in September 2019 he had been working continuously as a casual at Stanton Territorial Hospital for a period of time greater than six months which was said not to be compliant with the new provision. Mr. Runge was provided 10 days notice. This would be one day's notice of layoff for each week of continuous employment to a maximum of 10 days, being what was required for a casual employee.

4. It is known by reference to the trail of arbitration cases between these parties that the previous Appendix A5.01 language had been interpreted to provide for over-holding casuals to move into term employment status as to entitlements and benefits, although arbitrators did not profess to have any appointment authority under the *Public Service Act.* The pertinent language for term employees is referenced at Appendix A4.02 which provides that they "shall be entitled to all the provisions of this Collective Agreement" except that terms of six months or less are not eligible for superannuation, or the Public Service Health Care Plan, or disability insurance. Article 33.03(a), in the old language, remaining unchanged as to layoff language, includes employees having term status.

Evidence:

5. In preparing this matter for hearing, the partiės reached an agreement as to certain facts in relation to the policy grievance which is set out as follows:

WHEREAS the parties have reached an agreement as to certain facts in relation to Grievance 19-P-GNWT-02508 (the "Policy Grievance"), which is scheduled for hearing beginning on September 20, 2022 before Arbitrator Tom Jolliffe;

The following are the terms and conditions the parties mutually agree to as facts:

1. In 1974, the parties introduced Appendix A7 into their collective agreement to govern the benefits to be allocated to casual employees employed by the GNWT. Appendix A7 contained Article A7.01, which reads as follows:

   A7.01 The Employer shall hire casual employees for a period not to exceed four (4) months of continuous employment in any particular division or department.

A true copy of the 1974-1976 collective agreement between the parties is attached hereto as **Exhibit "A"**.

2. In 1976, the parties modified Article A7.01 by adding the wording identified below in bold text:

   A7.01 The Employer shall hire casual employees for a period not to exceed four (4) months of continuous employment in any particular division or department.

   Where the employer anticipates the period of temporary employment be in excess of four (4) months, the Employee shall be appointed on a term basis and shall be entitled to all provisions of the Collective Agreement from the first day of his employment.

A true copy of the 1976-1978 collective agreement between the parties is attached as **Exhibit "B"**.

3. The wording present in Article A7.01 persisted through every subsequent iteration of the collective agreement between the parties until 2019, although the appendix was moved within the collective agreement and retitled Appendix A5 during that period.

4. Between 2016 and 2018, the parties engaged in collective bargaining to amend their collective agreement.

5. In mid – 2018, having reached an impasse with respect to several outstanding issues at the bargaining table, the parties appointed mediator Vince Ready to assist them

in resolving what differences remained between them. Mediation hearings took place in Yellowknife on October 25 and 26 of 2018, as well as February 8, 9 and 10, 2019.

6. The parties had still not reached a consensus on all outstanding items by February 10, 2019. To avert a pending strike by Union members that was to occur on February 11, 2019, the parties agreed that Mr. Ready would issue binding recommendations on all outstanding items to the parties pursuant to section 41.2(2)(a) of the *Public Service Act* of the Northwest Territories.

7. Mr. Ready issued his binding recommendations on March 22, 2019 and a report attached hereto is **Exhibit "C"**. Mr. Ready's report did not include any recommendations with respect to Appendix A5 - Casual Employees.

8. The parties subsequently sought Mr. Ready's recommendations with respect to Appendix A5, which he issued by way of e-mail on March 27, 2019, a true copy of which is attached as **Exhibit "D"**. In that e-mail, Mr. Ready recommended the following changes to Article A5.01, with insertions marked in bold text and deletions crossed out:

> A5.01 The Employer shall hire casual employees for a period not **less than five (5) days and not** to exceed ~~four (4)~~ six months of continuous employment in any particular department, board or agency. **Casual employees shall have scheduled hours.**
>
> **The five (5) day minimum shall not apply to casual employees who are Health Care Practitioners under Appendix A10.**
> ~~Where are the Employer anticipates the period of temporary employment to be in excess of four (4) months, the employee shall be appointed on a term basis and shall be entitled to all provisions of the Collective Agreement from the first day of his/her employment~~.

9. In April 2019, parties subsequently Entered into the 2016–20 21 collective agreement, the terms of which govern the present dispute between the parties. A true copy of this collective agreement is attached as Exhibit "E". This collective agreement implemented Mr. Ready's recommendations concerning Article A5.01. Article A5.01 now reads as follows:

> A5.01 The Employer shall hire casual employees for a period of **not less than five (5) days and not** to exceed six (6) months of continuous employment in any particular department, board or agency. **Casual employees shall have scheduled hours.**

> **The five (5) day minimum shall not apply to casual employees who are Health Care Practitioners under Appendix A10.**

10. In September 2019, the GNWT laid off multiple employees whose casual contracts had exceeded six months of continuous employment. All of the employees laid off for this reason during this period (the **"Individual Grievors"**) were provided with notice or pay in lieu of notice pursuant to Article A5.04 of the collective agreement.

11. The Individual Grievors brought grievances alleging that, given the length of their tenure with the GNWT, they were in fact term employees. The Individual Grievors argued that, as term employees, they should have received the full benefit of the collective agreement, including, but not limited to the provisions concerning layoffs and job security instead of the lesser benefit offered by Article A5.04.

12. Given the grievances brought by the Individual Grievors are substantially similar to each other, the parties agree, that one of the Individual Grievors, Michael Runge, will be used as an example that is representative of the issues brought forth by the Individual Grievors generally:

    a. In November 2018, Mr. Runge was hired as a Casual – Distribution officer, for the period November 13, 2018 to December 14, 2018. A true copy of the letter offering Mr. Runge this position is attached as **Exhibit "F"**;

    b. In December 2018, Mr. Runge's contract was extended to March 31, 2019. A copy of the letter extending Mr. Runge's contract is attached as **Exhibit "G"**.

    c. In January 2019, Mr. Runge's contract was extended to October 31, 2019. A true copy of the letter extending Mr. Runge's contract is attached as **Exhibit "H"**;

    d. On September 10, 2019, Mr. Runge received a letter entitled Notice of Casual Layoff, a copy of which is attached as **Exhibit "I"**.

    e. On September 27, 2019, the Union of Northern Workers submitted Grievance #19-E- 02521 on Mr. Runge's behalf, a copy of which is attached as **Exhibit "J"**;

    f. On October 25, 2019, the Government of the Northwest Territories provided a Response to Grievance #19-E-02521, attached as **Exhibit "K"**;

g. On November 14, 2019, the Union of Northern Workers referred Grievance #19-E- 02521 to Arbitration. A copy of the letter referring the matter to arbitration is attached as **Exhibit "L"**.

13. On September 20, 2019, the Union of Northern Workers brought the present Policy Grievance with respect to the GNWT's dismissal of the Individual Grievors. A copy of this Policy Grievance, namely Grievance No. 19-P-GNWT-02508, is attached as **Exhibit "M"**.

14. On October 18, 2019, the Government of the Northwest Territories provided a response to the Union of Northern Workers in relation to the Policy Grievance, attached as **Exhibit "N"**;

15. On November 7, 2019, the Union of Northern Workers referred the Policy Grievance to Arbitration. A copy of the letter referring the marriage arbitration is attached as **Exhibit "O"**.

16. The parties agree that Mr. Tom Jolliffe, QC is an appropriate arbitrator to hear this grievance and that he possesses the jurisdiction to resolve this grievance.

Agreed to on September 16, 2022 at the City of Yellowknife in the Northwest Territories

6. It was additionally agreed that the findings and conclusions reached in this matter from the factual circumstances entered in evidence, applied to the other affected laid-off employees in the same situation as Mr. Runge. Briefly put, the new provision negotiated in March 2019 is now contained in the 2016-2021 collective agreement. As for Mr. Runge, his contract of casual employment, and those of the other affected employees, had been extended under the previous contract language, no doubt for business reasons, meaning the employment relationship had lasted lasting more than four months without any break by the time the new language came into effect. They remained working under said contract(s) through the changeover to the current language until laid-off in September 2019.

7. More particularly, by way of tracking Mr. Runge's situation from the documentary materials entered in evidence, the job offer for his first casual employment contract was issued in mid November 2018, which he accepted. It stated simply that he was a new employee with a one month contract, and that in dealing with the benefits issue: "for casual employment four (4) months and under: See Appendix A", meaning he was to consult the contract language referencing casual employment with its reference under Appendix A5.03 to having no entitlement to various sick leave provisions, certain types of leave or the Public Service Pension Plan, which is to say working as a casual in the usual sense of that employment relationship. However his employment thereafter continued, initially extended through to mid December 2018 and then through to October 31, 2019. These two contracts stated the following opposite the heading "Benefits": "for casual employment over four (4) months: See Appendix B" which language referenced pay schedules, there being no further reference to Appendix A covering casuals.

8. One observes that there was no change to Appendix A5.04 which continues to read:

> A5.04 A casual employee shall upon commencement of employment be notified of the anticipated termination of his/her employment, and shall be provided a one day notice of lay-off for each week of continuous employment to a maximum of ten (10) days notice.

9. The unchanged portion of Article 33.03, which applies to term employees but not those working valid contracts of casual employment, unchanged in the new collective agreement, reads as follows:

> 33.03(a) Where the duties of a position held by an employee are no longer required to be performed, the Employer may lay-off the employee. The Employer and the Union recognize the necessity and the justice of the application of the merit principle, which means qualifications and competence, in

> determining who will be laid off. It is agreed that where two (2) employees of equal merit face being laid off, length of service will be the deciding factor.

Discussion of Parties' Arguments

10. I will say at outset, as was apparent from their respective arguments and case law submitted, both parties are well aware of the substantial arbitral jurisprudence between them decided over the years under the old contract language, dealing with over-holding casuals or those anticipated to be needed for longer than the four months as mentioned in the expired Appendix A5.01, and the consequential change in employment status under that language. Plainly put, it referenced "all provisions" of the collective agreement, meaning the benefits and entitlements made available to employees holding temporary employment status by operation of Appendix A5.01. Its language survived several collective agreements until renegotiated in March 2019 to comprise the new Appendix A5.01 as set out in agreed facts.

11. Mr. Penner on behalf of the Union submitted that unquestionably Mr. Runge and the other affected employees covered by the policy grievance were hired into casual employment prior to the changeover to the agreed terms and conditions set forth in the collective agreement negotiated in March 2019. It has a five-year term extending April 1, 2016 through March 31, 2021. By the time this new collective agreement was negotiated, no doubt they had all been working longer than four months, by reference to the expired language, and would have qualified under the old collective agreement for changeover to term employment status. Some of them, such as Mr. Runge, had more than the six months mentioned under the new Appendix A5.01. The Union takes their rights to have crystallized and became vested under the collective agreement in place at the time they worked past

the threshold for taking on term status, applying the old language of Appendix A5.01, a very narrow issue as Mr. Penner put it.

12. For purposes of this policy grievance it is not a matter of the Union asserting that their rights crystallized after the new collective agreement came into effect in April 2019. It holds to the view that at the time of vesting no one in authority should have thought any differently about their rights having been secured under Appendix A5.01 as it was then written, whether or not management later reasoned that the Employer could lay them off as casuals under the new languages and not treat them as established terms for all purposes. Mr. Runge and the other employees in his situation would have had to presume and rely on the Employer having already recognized their change in status after the four months' working threshold was exceeded and their having accrued all benefits and rights required under the old language available to term employees. By the Union's assessment, ultimately there was no consideration given by the Employer to Article 33.03(a), which language remain unchanged, in that management was presuming that Mr. Runge, and the others in his same situation, had become attached to a period of casual employment longer than six months and could be laid off on that basis. The Union contends that they no longer held casual status when the new collective agreement came into effect in April 2019. Mr. Penner submitted that the new collective agreement should not be taken as having any retroactive effect on this issue.

13. By the Union's assessment, the general labour relations rule is that if a person attains a certain job status under specific contract language, and has become vested with that status, unless the new language is retroactive in such a way to specifically cover the issue at hand, the achieved

status continues. The Union relies on Article 58 in the new collective agreement under which this grievance was filed dealing with contract duration and renewal, which states:

> 58.01 The term of this Agreement shall be five (5) years from April 1, 2016 to March 31, 2021.
>
> The pay schedules contained in Appendix B shall be effective April 1, 2016. All other provisions of this Agreement shall take effect (30) calendar days from the issuance of the March 22, 2019 Collective Bargaining Report and Binding Recommendations, unless another date is expressly stated.

14. There is no doubt that frequently new collective agreements are given effective dates that precede their execution for purposes related to applying certain new provisions, no doubt a matter of negotiation, but here under Article 58.01 the effective date is stated, going forward, except for the retroactivity of wages. The Union takes this not to be a newly founded principle. In support Mr. Penner cited *Re Canadian Canners Ltd. and I.A.M.*, [1973] O.L.A.A. No. 49, 4 L.A.C. (2d) 59 (Schiff) which dealt with a training program started by the aggrieved employee under the terms of the collective agreement in existence at that time, from which he withdrew, but not being declared a failure. Thereafter when he attempted to continue the training he was told that under the terms of the new collective agreement he was disqualified. The Arbitrator applied the language in existence at the time the employee had initially enrolled in the program. Following his review of numbers of cases, after noting the widely different factual circumstances which had been the subject of past arbitrations on the issue of retroactivity, he stated at para. 4:

> Despite the obvious differences in the facts, the reasoning in most if not all of the awards cited yields a standard of interpretation important to our consideration of the present grievance: when a new collective agreement supersedes a predecessor agreement, in the absence of compelling language in the new agreement arbitrators will not read the new provisions as applicable to events occurring before the date of the new agreement's execution if the effect of the retroactive reading would be absurd or would unfairly disappoint the reasonable expectations of those who had been subject to the provisions of the predecessor. Indeed, in the *Public Utilities Commission* award, [earlier cited in his award

> as *Public Utilities Commission of the City of London* (1965), 16 L.A.C. 182 (Arthurs)] to buttress the denial of retroactivity the board offered as a hypothetical example an employer's wrongful discharge for conduct during the period of alleged retroactive operation which was clearly not cause for discharge until so rendered by a provision in the new agreement. ....

15. The Union would draw a parallel to the circumstances at hand where the Employer wants to apply the new language retroactively so as to extinguish a vested status achieved under the old language. Counsel cited arbitrator *Re Northwest Territories and U.N.W.*, [1989] N.W.T.L.A.A., No. 2, (1989) 5 L.A.C. (4th) 353 (Chertkow) where the new collective agreement had reduced the probationary period for new employees from one year to six months and the employer argued that at the time of the termination that employee was no longer on probation as a result of the newly reduced time, thereby allowing it to terminate him when it did. The arbitrator determined that the reasonable expectation of the parties at the time of hire was for a one year period of assessment which should not be denied by a subsequent change to the language. In making that determination the arbitrator viewed the new contract language as being clear and unambiguous. Save for certain provisions, all other provisions were to take effect on the day of signing, leaving him unwilling to imply any retroactivity to the issue at hand.

16. I would observe that this Chertkow award came before me for my consideration in *GNWT and U.N.W. (Grievances 17-P-02165 and 17-P-02211),* (unreported July 30, 2020, Jolliffe), together with the line of policy driven case law between these parties dealing with the use and status of over-holding casuals decided under the Appendix A5.01 language contained in the old collective agreement. The analysis in the Jolliffe award also includes reference to the *Tessier* interim award (unreported, June 26, 2002, Jolliffe), also the *Misuse of Casuals* award, (unreported, November 9,

2004, Jolliffe), also *Ferry Service at Fort Providence*, (unreported July 9, 2013, Holden) and *Settlement House Grievance* 12-G-01496) (2015), 255 L.A.C. (4th) 309 (Ponak). These arbitration awards are well known to the parties, and are consistent.

17. Nevertheless, it can be observed that prior to the language change in 2019, the Employer had sought to create a hybrid employee with casual/term status by policy application, not exactly contemplated by the contract language, but not denying the benefits and entitlements available to non-casual employees, meaning terms. As I put it at p.66 of my July 30, 2020 award:

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

18. The Union in this instance takes the Employer's approach to be an extension of much earlier thinking in that it was seeking to lay off employees under the new language, whose employment was already extended past four months at the time the new contract came into being, as if they still held casual employment status at the point of layoff in line with the new language. Presumably they were already accessing, or should have been accessing, certain entitlements and benefits by reference to the case law interpretation between the parties, there being no retroactivity on employee status issues negotiated into the new collective agreement. The Union relies on the vesting of term employee status under the old language of Appendix A5.01 having long since been determined for over-holding casuals through earlier arbitrations between the same parties, not just my own awards. Mr. Runge, and those other employees in his situation, would have already had access to the Article

33.03(a) layoff provision were it necessary to protect their employment.

19. Given the discussion in some arbitration cases of reasonable expectations, Mr. Penner submitted that Mr. Runge's reasonable expectation, and so too the others in his situation, and also as understood by the Union, was one of having achieved term status before the language change. The new collective agreement was not retroactive with respect to that issue. In support, he referenced Mr. Runge's two final contracts where the Employer, presumably recognized the significance of having him accept continued employment anticipated to last longer than four-months, requiring changeover in status. It had rewritten the "benefits" heading in the second and third contracts from Appendix A dealing solely with casuals, to Appendix B.

20. The relief sought by the Association at this point is a declaratory recognition that those hired under the old contract language who had passed the four-month threshold prior to the language change, as contemplated by the previous Appendix A5.01, should have all the same rights and benefits attaching to term employment, including their having access to the layoff language of Article 33.03 which is particularly relevant for what occurred here. I should remain seized over any other remedies which might be applicable, including with respect to individual employee circumstances.

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21. Mr. Wallwork submitted on behalf of the Employer firstly that for the grievance to be successful, it should have been brought under the previous collective agreement, presumably when it became known that the vesting of affected employees with a different status under Appendix A5.01 would not be occurring under the new collective agreement which was not yet signed.

Certainly they were aware of Mediator Ready's recommendations which they followed. He submitted that arbitrators have always been wary of employees asserting rights under previous collective agreements which were no longer in existence, and the language changed. In support, counsel cited *Manitoba v. M.G.E.U.,* 2008 Carswell Man 685, (2008), 180 L.A.C. (4th) 150 (Peltz) where the union was claiming retroactive benefits under three prior collective agreements, meaning all of them were expired by the time the grievance was filed over an admitted failure on the employer's part under the terms of these earlier collective agreements. In Arbitrator Peltz's discussion on that issue, after pointing out that his starting point for his mandate was the collective agreement under which he was appointed to hear the matter, he stated:

> 52. ... For nearly 30 years of the *Goodyear* principle [*Goodyear Canada Inc. v. U.R.W., Local 232* (1980), 28 L.A.C.(2d) 196 (M.G. Picher)] as applied in Canadian labour law, holding that a board of arbitration can have no jurisdiction beyond the collective agreement under which it is constituted (*supra* at para.16). This was the Employer's basic objection. It has not consented to arbitrate under the 1997, 2000 and 2003 agreements.

22. However, I observe, Arbitrator Peltz pointed out in the award that there were ways around that jurisdictional problem as had been discussed in numerous cases including, as quoted from *Goodyear,* where there was a continuing breach under the current collective agreement "as distinguished from a single and spent breach of either the expired collective agreement or the current collective agreement", or presumably a breach under the current collective agreement in improperly applying retroactivity were that to have occurred. In any event, the Arbitrator pointed out the case law suggests that redress in such a case generally will exclude any remedy except for the period of time within the time limits of the current collective agreement. But significantly in my view, Arbitrator Peltz referenced the Supreme Court of Canada's judgement in *Dayco (Canada) Ltd v. C.A.W.*, [1993] 2 S.C.R. 230 dealing with arbitral principles concerning vested rights, which clarified

and confirmed several key legal principles, namely that an expired collective agreement did not have prospective effect, but did not become a nullity, and as Justice LaForest stated at para. 45:... "The rights that have accrued under it continued to subsist" and at para. 47: "... remain enforceable". He stated at para. 46, quoted by Arbitrator Peltz:

> ... I have found no case that suggests that accrued rights are expunged once a new collective agreement is negotiated. Moreover, I see nothing differentiating a promise to pay retirement health benefits from promises to pay regular wages or vacation pay. All of these can be enforced after the termination of the agreement. Any other conclusion would render meaningless a wide range of promises to employees that might extend beyond the expiration of the collective agreement. In addition to unpaid wages and retirement benefits, disability benefits owing to former employees in pension benefits to retired workers would also be placed in jeopardy.

23. It is observed that Arbitrator Peltz, in this award cited by the Employer, remarked that "since *Dayco* ... arbitrators have grappled with a variety of factual circumstances, assessing each case whether the entitlement was a vested right under the expired collective agreement" and if deemed vested "the rights have been enforced in proceedings under the later collective agreement". He went on to determine in *Manitoba v. M.G.E.U.* that he possessed a jurisdiction over determining the grievance alleging a breach of vested rights and ultimately upheld the grievance.

24. Nevertheless, Arbitrator Peltz also accepted that it was important to file a grievance under the old collective agreement, thereby presumably actioning the vested interest, at that juncture. At para. 12 he referenced *Huntsville District Nursing Home v. U.N.A.* (2002), 106 L.A.C.(4th) 312 (Lynk) for this being one of the necessary components. However, he observed at para. 16 that Arbitrator Lynk found it to have been recognized that there were general variances, including the parties consenting to jurisdiction regarding the breach of a previous collective agreement, or where the right was vested under a prior collective agreement. He went on to quote arbitrator Lynk that

since *Dayco* "arbitrators have routinely found that employment rights and entitlements accrued under a prior collective agreement have survived the end of the agreement". From this Arbitrator's perspective, I would add that it would have been difficult to grieve the issue at hand any earlier in that the right to status change and access to rights and entitlements under Appendix A5.01 as it was written through several collective agreements, and supported through several arbitration awards, was not declared to have been taken away from these affected employees until after the new collective agreement became effective. It was this language change which eventually, at point of layoff, raised the issue of whether it was a vested right not subject to retroactivity under the new collective agreement.

25. In addition to asserting that the agreement should have been filed under the previous collective agreement, presumably on the basis of the impending change to the language which was about to affect their rights and entitlements, Mr. Wallwork also submitted it was significant that the grievance itself did not mention any express reliance of the old collective agreement. The Employer contends that the rights which the Union alleges were vested and violated, specifically relying on Article 33.03 were not yet relevant at the time of the change over to the new collective agreement in that there had been no layoffs to that point, and whatever other "ramifications" the Union wanted to assert had not become automatically vested. The Employer contends that it is open to find that merely because there was the potential of needing to rely on one's changed status after the language change does not place a layoff concern in issue, thereby no crystallizing and nothing grievable under the new collective agreement. The Employer holds to the view that the Union should not be able to get around the essential fact of the matter being that Mr. Runge and the others in his situation were

not laid off until after the collective agreement expired, thereby not being able to raise any violation under the new collective agreement which has no retroactivity to it. Again, this presumably means that the Employer takes their status to have been effectively changed by the new language of Appendix A5.01 unencumbered by the old language, which is to say, prospective only and no vesting.

26. In further support, the Employer relies on *H.S.A.S. v. Prairie North Regional Health Authority*, 2003 CarswellSask 935, 120 L.A.C. (4th) 1 (Hood) where the issue was over whether the aggrieved employee's re-employment rights were "vested" and survived the termination of the expired collective agreement. The collective agreement changed so as to terminate the previous right of re-employment contained in the collective agreement. The arbitrator reviewed numerous cases dealing with vesting of the various rights under a collective agreement, or not, including referencing *Dayco*, before determining that in his view the re-employment rights in the old agreement did not survive the change over to the new agreement negotiated between the employer and a different bargaining agent. Having reviewed the arbitral jurisprudence, he stated his reasons at para 33, including that there was a new bargaining agent which had negotiated the grievor's rights collectively with the other members and it had the right to remove his re-employment rights which existed under the other collective agreement, and also stated in referencing the general concept of vested rights:

> Re-employment rights, like most other rights under the collective agreement, do not vest employees prospectively in the same sense as the retirement benefits in *Dayco*, supra. Re-employment rights, in this case, continue only for the duration of the operation of the collective agreement. The claim to such must be founded in the live collective agreement, not in the one that is expired when replaced with a new collective agreement. Retirement benefits for retirees are completely unique. Re-employment rights available to active

> employees differ from retirement benefits available to nonactive employees... It is the type of right that is bargained for collectively with other rights that can and do change from agreement to agreement... It was available only until removed in the new agreement. There was no "vesting" or "permanency" of this right independent from the collective agreement in which it was found.

27. Presumably the Arbitrator was relying on the fact that the aggrieved persons were still working at the time of the changeover to the new bargaining agent, and the new collective agreement simply removed that prospective right which had not become actionable prior to the change.

28. Mr. Wallwork also cited *Harry Dikranian v. Attorney General of Québec,* [2005] 3 S.C.R. 530, 260 D.L.R. (4th) 17 dealing with alleged vested rights respecting student loans under applicable legislation where the Court cited academic authority which had defined the concept of "vested rights"as having to be tangible and concrete rather than general and abstract, and they must have been sufficiently constituted at the time of the new statute's commencement. The supposed rights in that factual scenario did not pass muster for being vested and were therefore subject to a subsequent change in the language.

29. In reply argument, Mr. Penner pointed to the Article 33.03(a) layoff language which was carried over from the old collective agreement to the new, and would specifically rely on the person's employment status at the time of layoff being actioned. The cause of action was triggered under the new collective agreement when the layoff notices were issued in September 2019 without regard to Article 33.03(a) having application in that the established rights thereunder concerning layoff had become vested under the old Appendix A5.01. Essentially, their employment status had changed by reference to the language which applied at the time. They had nothing to grieve until

the layoff occurred and their reasonable understanding would have been that due to the over-holding nature of their employment, past four months under the old language, prior to the new language coming into effect, their right to whatever rights and entitlements they now had as term employees, would have become vested. The Union takes there to be nothing prospective about that reality, nor should this status change have been taken away without any retroactive language allowing that to occur. It contends that the cause of action surfaced when Article 33.03(a) was applied so as not to recognize their vested status.

Conclusion

30. On my review of the facts and circumstances of this matter, I must observe that management set out to extinguish certain alleged vested rights pertaining to Mr. Runge, and the others in his situation, in the form of the layoff notices sent out in September 2019 said by the Employer to have been properly issued under the new language of Appendix A5.01. The approach was to treat them as over-holding casual employees which, by the Employer's assessment, would require their departure as soon as their situation came to light. However, most notably this contract language was said by Article 58 to have become effective 30 calendar days from issuance of the March 22, 2019 Collective Bargaining Report and Binding Recommendations. Certainly, at the time of management issuing the layoff notices, and thereafter, there was no recognition by the Employer of any alteration in their employee status prior to the new language becoming effective, which is to say by reason of their having earned whatever attached rights and entitlements were applicable to employees on casual contracts once they exceeded four months, or were anticipated to exceed four months. The old Appendix A5.01 language has been interpreted at arbitration, repeatedly, to require term

employee status for purposes of the benefits and entitlements coming under the collective agreement as applicable to that category of employee. Plainly, in mid-September 2019 the Employer was not applying the language of Article 33.03(a) as if Mr. Runge, and the others in his situation, had already established a change in employee status, or if they had it was nevertheless something which could be taken away by the new language, counsel having cited the *Prairie North Health Authority* award.

31. At the same time, I would venture to say that none of them had anything to grieve until that moment in time when their change in status under the old language was not being recognized. The only cause for that occurrence, on the evidence, pertained to the layoff notices issued in mid-September 2019, with the grievances shortly following. Presumably, it would be in the nature of a continuing grievance from that point forward on whatever earned entitlements were being denied and success or failure depended on their employee status at the point of layoff.

32. In any event, on my review of the issue at hand and case law presented, I accept that the conclusion is unavoidable and focuses on Mr. Runge and the other employees in his situation having already had their changed employee status vested under the applicable Appendix A5.01 language of the old collective at the time the new collective agreement became effective in mid April 2019. Their status under the new collective agreement, without any retroactivity covering the revamped language of Appendix A5.01 would have had to recognize their rights and entitlements existing as term employees. Indeed, it is critical that there was no retroactivity to the new collective agreement on that issue, and there was nothing prospective about the rights associated with already having achieved term employee status by operation of the collective agreement language still applicable when that

status was achieved. In my view, without any retroactivity in the new collective agreement, their term employee status could not be extinguished. This issue, in my view, was grievable under the new collective agreement in that management did not recognize and acted against the status change in its ignoring the language of Article 33.03(a) at the time the layoffs were imposed.

33. In my dealing with the case law references on the basis of the factual circumstances of this matter, and the contract language, I consider that such cases as *Prairie North Health Authority*, which discuss the prospective nature of some rights negotiated under collectively bargained language, being subject to cancellation under the next collective agreement, are not helpful in reviewing the facts and language at hand. There are a great many cases, several of which were discussed in argument, where a vested status achieved under the language of an expired collective agreement has been successfully grieved during the currency of the next collective agreement when the established rights associated with the vested status were being denied.

34. In all I find that the case law placed before me ultimately does not assist the Employer's case. It is helpful in demonstrating the significance of having achieved a particular status under a previous collective agreement, not just prospective, which thereafter cannot be extinguished by new language which was not retroactive. Plainly, Mr. Runge and the other employees achieved term employee status before the new collective agreement became effective. Numerous cases submitted by the parties for my consideration, which include the fundamental guidance provided by the Supreme Court in *Dayco,* as quoted by Arbitrator Peltz in *Manitoba v M.G.E.U.*, support this grievance being successful. In my view the cause of action arose under the new collective agreement when the layoff

notices were issued and were properly grieved on the basis that the Employer was failing to recognize their established employee status and the ramifications attaching thereto, including by reference to Article 33.03(a). The Employer has improperly failed to apply this layoff language to these bargaining members continuing to hold term employee status during the currency of the new collective agreement. It constituted a violation under the new collective agreement by which contract their earned employee status must be recognized in that it was not retroactively changed.

35. The relevant pre-existing Appendix A5.01 language has been interpreted through arbitration to provide a change in employee status under the collective agreement after the threshold has been met, whether or not any appointment under the *Act* was forthcoming. There was no retroactivity allowing for change in vested employee status, and not just a prospective right. Theirs were secured, but rather securing existing and actionable rights associated with having achieved term status which could be relied upon from that point forward. This was the situation with respect to the purported layoffs. The actionable language of Article 33.03(a) requiring anyone with temporary employee status must come within its layoff language. Once vested, in my view, without clear language in the new collective agreement addressing this vested employee status, changing it on a retroactive basis, indeed extinguishing it by purporting to apply the new Appendix A5.01 coming into effect in April 2019, does not wash.

36. The policy grievance is successful on the basis of the evidence and the Union's argument showing that a secured vested term employee status was sought to be improperly extinguished without any retroactive application of the new Appendix A5.01 to allow that to have occurred. As

suggested, I will remain seized over the completeness of remedy, including whether it requires anything further to be considered and addressed on an individual employee basis. In the meantime this award stands as a declaration of vested status requiring that Article 33.03(a) be applied on the basis of Mr. Runge and those other employees in the same situation respecting layoff notices having the rights and entitlements under the collective agreement as term employees.

DATED at Calgary, Alberta, this 5th day of October, 2022.

Thomas Jolliffe, K.C.