

IN THE MATTER OF AN ARBITRATION

BETWEEN:

GOVERNMENT OF THE NORTHWEST TERRITORIES

(the "Employer")

AND:

UNION OF NORTHERN WORKERS
(PUBLIC SERVICE ALLIANCE OF CANADA)

(the "Union")

(Policy Grievance #21-P-GNWT-02827 – Northern Allowance)

(together the "Parties")

ARBITRATOR:

Amanda Rogers

COUNSEL:

Jeremy Walsh
for the Employer

Janice Maslanko
for the Union

HEARING:

April 5, 2022
Virtual hearing

DATE OF AWARD:

May 6, 2022

This matter concerns a grievance filed by the Union challenging the Employer's interpretation of Article 41 – the Northern Living Allowance provision. Specifically, the Union takes issue with the fact that the Employer does not pay this allowance to full-time indeterminate employees who are on unpaid leaves of absence (other than those taken under the deferred salary leave plan pursuant to Article 49, which is discussed later in this decision.)

For reference, Article 41 sets out as follows:

Article 41 – Northern Allowance

- 41.01 A Northern Allowance will be paid to every employee, based upon the community in which they are employed, in accordance with this Article.
- (i) The allowance will be paid bi-weekly as set out in Article 24.02.
 - (ii) The allowance for casual, relief, part-time and seasonal employees will be pro-rated to an hourly rate by dividing the annual rate for the community by the standard yearly hours (1950 or 2080).
 - (iii) No Allowance will be paid for overtime.
- 41.02 (a) The Union and the Employer agree that the methodology used to calculate the Northern Allowance shall form part of the Collective Agreement.
- (b) \$250 was added to the base effective April 1, 2028.

The Annual rates for Northern Allowance effective April 1, 2016 are as follows:

Community	Effective April 1, 2016 Rates
Aklavik	20684
Behchoko	5158
Colville Lake	27958
Dawson City	6636
Deline	22745
Dettah	3643
Enterprise	5822
Fort Good Hope	25680
Fort Liard	10155

Fort McPherson	19558
Fort Providence	7696
Fort Resolution	9311
Fort Simpson	10250
Fort Smith	6435
Gameti	15249
Hay River	5792
Hay River Reserve	5730
Inuvik	14131
Iqaluit	18318
Jean Marie River	12066
Kakisa	7611
Lutselk'e	19905
Nahanni Butte	17592
Norman Wells	19720
Paulatuk	28106
Rankin	21220
Sachs Harbour	28818
Trout Lake	22563
Tsiigehtchic	20809
Tuktoyaktuk	21449
Tulita	25043
Ulukhaktok	32077
Wekweeti	15088
Whati	15037
Wrigley	16031
Yellowknife	3450

The facts in this case are not in dispute. Article 41 has been in the Collective Agreement since around 1996. Manager of Operations Christine Holland testified the Employer has been paying this Allowance essentially the same way since the benefit was first negotiated by the Parties; that is, as a bi-weekly payment to eligible employees based on the number of hours they work and in accordance with the community they work in.

According to Ms. Holland's evidence, the way the Employer calculates the amount to be paid to employees, however, has changed over time. Under an earlier policy, instructions on the administration of the Northern Living Allowance were set out as follows:

INTRODUCTION

1. The Government pays a northern allowance to offset community differences in cost of living and travel.

APPLICATION

2. These guidelines and procedures apply to all employees except those employed by the NWT Power Corporation.

GUIDELINES

3. Employees do not have to apply for this allowance.
4. The allowance is paid bi-weekly. For UNW bargaining unit, excluded and management employees the biweekly amount is calculated by dividing the annual allowance by 26.088. For NWTTA bargaining unit employees, the bi-weekly amount is calculated by dividing the annual allowance by 26.
5. The allowance for casual, part-time, and seasonal employees is pro-rated to an hourly rate by dividing the annual rate by the standard yearly hours (1950 or 2080).
6. The allowance is not paid for periods of overtime or periods of leave without pay.
7. The allowance is based on the community in which an employee is employed as set out in the following table.
8. In addition to the communities included in the UNW Collective Agreement and the NWTTA bargaining unit employee's Terms and Conditions of Employment, employees residing in Churchill, Manitoba will be paid an annual allowance of \$1,865.
9. Compensation Services initiates the allowance for an employee.

The Employer's current policy regarding the payment of the Northern Allowance, provides:

Introduction

1. The Government pays a northern allowance to offset community differences in cost of living and travel.

Application

2. These guidelines and procedures apply to all employees except those employed by the Northwest Territories (NWT) Power Corporation.

Guidelines

3. A northern allowance is paid to every employee, based upon the community in which they are employed. Employees do not have to apply for this allowance.
4. The northern allowance is paid biweekly.
5. The allowance is not paid for periods of overtime or periods of leave without pay.
6. Northern allowances rates are established on a yearly basis following a methodology agreed to by the Unions and Employer. The methodology is updated with information available on specific dates of each year and may result in changes in the rates from one year to the next as follows:
 1. the Union of Northern Workers (UNW) methodology is updated with information available on February 1 for northern allowances effective April 1; and
 2. the Northwest Territories Teacher's Association (NWTTA) methodology is updated with information available on June 1 for northern allowances effective September 1.
7. Information that updates the methodology for the northern allowance include:
 1. negotiated increases to the base amount during collective bargaining;
 2. return airfare rate to Edmonton from the applicable community;
 3. GNWT kilometre rates for duty travel
 4. road mileage/accessibility;
 5. survey of household spending (basket of goods). The basket of goods includes food purchased from stores, household operation, household furnishing/equipment, the operation of automobiles/trucks, clothing/footwear, personal care and recreation; and
 6. living cost differentials.

UNW, Excluded and Senior Management Employees

8. UNW, excluded and senior management northern allowance rates ([//my.hr.gov.nt.ca/employees/pay/northern-allowance-rates](http://my.hr.gov.nt.ca/employees/pay/northern-allowance-rates)) are effective from April 1 to March 31.
9. The allowance for casual, relief, part-time and seasonal employees will be prorated to an hourly rate by dividing the annual rate by the standard yearly hours (1950 or 2080).

NWTTA

10. NWTTA northern allowance rates ([//my.hr.gov.nt.ca/sites/default/files/Website%20NWTTA%20NA%202018-2019.pdf](http://my.hr.gov.nt.ca/sites/default/files/Website%20NWTTA%20NA%202018-2019.pdf)) are effective from September 1 to August 31.
11. Northern allowance is calculated on the basis of a teacher working 195 days over a ten-month period.
12. Northern allowance for part-time teachers, substitute teachers and teachers who do not work a complete academic year will be pro-rated on the number of sessional days the employees work out of a full year of 195 days.

Procedures

13. When an employee is hired, the Department of Human Resources enters the applicable northern allowance into the Human Resources Information System.

Ms. Holland testified that the calculation was changed years earlier on the basis that this calculation was resulting in the Employer paying more than the specified annual amount every 13 years when there were 27 pay periods instead of the normal 26. She testified that under the Employer's existing practice, an hourly rate is generated for each community using the regular hours for that community in a bi-weekly period, and employees are paid the Allowance bi-weekly based on the number of hours they work. Full-time indeterminate shift workers, she explained, who may work 50 hours in one pay period and 80 in the next, would receive their full Northern Allowance because their hours will total 1950 a year, although the amount paid from pay period to pay period may differ. A full-time employee on a graduated return to work, she testified, who is working reduced hours while on a graduated return to work, would be considered on leave without pay for the hours not worked and thus would only receive the Northern Allowance on the hours actually worked.

Ms. Holland confirmed employees who take vacation leave, paid sick leave, casual leave, or special leave with pay continue to receive the Northern Allowance. Employees on deferred salary leave, or other personal leaves without pay including maternity leaves and education leaves do not receive the Northern Allowance while they are off work. Her evidence was that this has remained consistent since the Allowance was first introduced in or around 1996. She also testified that employees have been denied the Northern Allowance in their offer letters on the basis of where they live even if their job is attached to a qualifying community. This raised questions from the Union's representative about whether the Employer was denying individuals the Northern Allowance on the basis of where they were living when working remotely. Evidence was not available on this point, and the Parties agreed that this issue went beyond the scope of the present grievance.

There are two prior arbitration awards interpreting Article 41 of the Collective Agreement. In a July 2, 1997 award Arbitrator Chertkow considered whether employees who chose to receive Separation Assistance payments on a bi-weekly basis following layoff, and who continued to reside in a community for which Northern Allowance was payable, were entitled to the Northern Allowance for that period while in receipt of the payments.

In that case, Arbitrator Chertkow found the total amount of severance pay was stipulated in the Collective Agreement as "65 weeks of pay" without any explicit reference to entitlement to the Allowance. This lack of explicit language stipulating an employee's entitlement to the benefit in these circumstances, meant in Chertkow's view, that it would amount to "rewriting that provision of the collective agreement" to find employees who elected Separation Assistance payments were eligible for the Allowance.

In an April 22, 1999 award, Arbitrator Chertkow determined a grievor was not entitled to receive the Northern Allowance while on leave without pay and living in Vancouver, BC during the relevant time. Giving Article 41.01 a purposeful meaning, Chertkow found the grievor in that case was not entitled to the Allowance for two reasons – because she was not

living in the Northwest Territories (and thus the purpose of providing compensation to employees for the increased costs of living there was not met) and because she was not performing the duties of her position in the Northwest Territories during the relevant time.

POSITIONS OF THE PARTIES

The Union asserts, as noted, that the Employer's failure to pay the Northern Allowance to full-time indeterminate employees while they are on unpaid leaves of absence violates the Collective Agreement. In its submission, Article 41 stipulates that the Allowance will be paid to "every employee, based on the community in which they are employed", and that the benefit will only be prorated for casual, relief, part-time and seasonal employees – not for full-time indeterminate employees. The Union articulates that where there is a conflict between the terms of the Collective Agreement and an employer policy, the Collective Agreement takes precedence and is legally binding.

According to the Union, as long as the employment contract is in place, a full-time indeterminate employee is entitled to receive the Northern Allowance based on where they live, not the number of hours for which they are being remunerated. The Union asserts there is no basis upon which the Employer can prorate the Northern Allowance for full-time indeterminate people and that pro-ration under the language only pertains to the Allowance for casual relief, part-time and seasonal employees as explicitly stated in Article 41.01(ii). Put simply, the Union takes the position that the Employer's practice of paying full-time indeterminate employees the Northern Allowance based on the number of hours they work is wrong, and submits that nothing in the Collective Agreement supports this connection.

To the contrary, the Union points to Article 49.13 which explicitly states that for the purposes of the deferred salary leave, "No additional payments to the participants can be made such as loans, subsidies, allowances or salary". Thus, it states, it is not seeking that Northern Allowance be paid to employees while on this type of leave. However, in the absence of such a similarly explicit statement in respect of other leaves, the Union asserts, a requirement to pay

the Allowance is established. While the Union acknowledges that there are arbitration decisions pertaining to the Northern Allowance that have been resolved in the Employer's favour, it says those decisions are wrong, and that an alternate conclusion is warranted in this case based on the arguments put forward. The Union thus seeks a declaration that the Employer's impugned actions violate the Collective Agreement.

The Employer's position is that its administration of the Northern Allowance is consistent with the Collective Agreement. In its submission, if the Parties intended the Northern Allowance to be paid to employees during unpaid leaves, they would have explicitly said so. The Employer suggests the Union in this case is asking for Article 41 to be interpreted in a very literal way, while it asks for the provision to be interpreted in the context of the entire Collective Agreement, and in a manner that makes labour relations sense and is consistent with the jurisprudence.

In support of its argument, the Employer points to the definition of "Allowance" in Article 2.01(b) which is defined as "compensation payable to an employee *in addition* to his/her base salary", as well as Article 24.03 which also characterize allowances as being "in addition" to an employee's regular pay. The Employer stresses it has been administering the Allowance consistent with its interpretation since the benefit was first negotiated. For all of these reasons, it states the grievance ought to be dismissed.

DECISION

The Parties in this case disagree on whether full-time indeterminate employees are entitled under the Collective Agreement to be paid the Northern Allowance while they are on unpaid leaves.

The principles of collective agreement interpretation are well-established and may be summarized as follows:

1. The object of interpretation is to discover the mutual intention of the parties.
2. The primary resource for an interpretation is the collective agreement.
3. Extrinsic evidence (evidence outside the official record of agreement, being the written collective agreement itself) is only helpful when it reveals the mutual intention.
4. Extrinsic evidence may clarify but not contradict a collective agreement.
5. A very important promise is likely to be clearly and unequivocally expressed.
6. In construing two provisions a harmonious interpretation is preferred rather than one which places them in conflict.
7. All clauses and words in a collective agreement should be given meaning, if possible.
8. Where an agreement uses different words one presumes that the parties intended different meanings.
9. Ordinarily words in a collective agreement should be given their plain meaning.
10. Parties are presumed to know about relevant jurisprudence.

Pacific Press v. Graphic Communications International Union, Local 25-C,
[1995] B.C.C.A.A.A. No. 637

Most applicable to the present case, in my view, is number 5: that an important promise is likely to be clearly and unequivocally expressed.

In this case, the Union relies on the *absence* of an explicit reference in the Collective Agreement excluding employees from entitlement to the Northern Allowance. In other words, because the Collective Agreement doesn't say an employee is not entitled to the benefit means, by default, they must be entitled to it by virtue of their employment status alone. But this argument runs counter to the interpretive principles outlined above.

Rather, I find the correct interpretation is that had the Parties intended for Northern Allowance to be payable to employees while on unpaid leaves, they would have included this important stipulation in clear and explicit language in respect of each of the leaves. The fact that this important monetary promise is not provided for in the Collective Agreement means, in my view, that the Parties never intended it to be paid in these circumstances. In sum, leave without pay means precisely that – it is leave without compensation, unless the parties stipulate something different.

In so finding, I agree with comments of Arbitrator Jones in *Fort Providence Housing Assn. and UNW (Garden)* (2000), 60 C.L.A.S. 310. In that case, the issue was whether the grievor was entitled to be paid the utility allowance, housing allowance, and settlement allowance under the collective agreement while on maternity leave. Much like the Union in this case, the Union in *Fort Providence Housing Assn., supra*, argued that the allowances were payable to “all employees”, “employees” and “each employee” under the language of the collective agreement, and that employees who remained employed while on unpaid leave were thus entitled.

Arbitrator Jones rejected this argument, holding:

...it is axiomatic that an employee who does not work is not entitled to be paid – at least, not unless there is some specific provision in the collective agreement which requires a particular payment to be made. Accordingly, employees who are on leaves of absence without pay are not generally entitled to salary, benefits, allowances, or other forms of remuneration.

In rejecting the literal interpretation advanced by the union in that case, Jones found “this literal interpretation does not make labour relations sense”. She went on to conclude that there was “no labour relations reason for paying these allowances to employees who are on leaves of absence without pay” and that it could not have been the parties’ intention in drafting these provisions to make these allowances available to employees who were not providing any services to the employer.

Similarly, in the Collective Agreement under consideration, there is no reference to entitlement to Northern Leave under, for example, the Maternity Leave provisions in Article 21.04 of the Parties' Collective Agreement. To the contrary, this provision explicitly refers to this leave as being "without pay". While it is true that the Parties expressly stated employees on deferred leaves under Article 49 are not entitled to allowances specifically, this is insufficient to establish employees on other forms of leave are thus entitled to various allowances.

I find the Parties' understanding that employees on unpaid leave would not receive the Northern Allowance is further evidenced by the fact that the Employer has been paying this benefit in the same circumstances since the language was first included in the Collective Agreement. While it is true the Union objected to this interpretation in the 1997 and 1999 cases before Arbitrator Chertkow involving employees not at work being found to be ineligible for the Northern Allowance, it did not challenge these rulings, nor is there evidence it objected to the Employer's continued practice of not paying the Northern Allowance to employees while on unpaid leaves of absences. I find the Union's acquiescence to this practice for the last twenty years highly indicative of the Parties' mutual understanding and intention that the Northern Allowance would not be paid to employees during periods of unpaid leaves.

That being said, I do find one area of the Employer's administration of this benefit to violate the Collective Agreement. That is, the way it purportedly pays the Allowance to injured or ill full-time indeterminate employees working reduced hours while on a graduated return to work or as part of an accommodation. The evidence in this case is that an employee who is only working, for example, 10 hours a week instead of their normal full-time hours would receive the Northern Allowance calculated only on the 10 hours actually worked and would be considered on leave without pay for the other hours.

This practice is incorrect under the Collective Agreement language in that it prorates a benefit for disabled employees that other full-time indeterminate employees are entitled to receive based on their status as active employees alone. In other words, there is nothing in the Collective Agreement that allows the Employer to reduce the Allowance for full-time

indeterminate employees who are actively at work and who maintain their status as full-time indeterminate employees based on the number of hours they work. While there is no issue with the Employer calculating the Allowance on the basis of full-time hours for the purposes of determining the amount of the Allowance to be paid in each pay period, this practice does not authorize the Employer to prorate the benefit for full-time indeterminate employees who work less than their normal hours. If the Parties intended for the benefit to be prorated for full-time indeterminate employees, they would have explicitly said so, as they did with casual, relief, part-time and seasonal employees. Thus, I declare the Employer's stated practice of reducing the amount of Northern Allowance payable to full-time indeterminate employees working reduced hours violates the Collective Agreement, and order it to cease and desist this practice.

The grievance is allowed in part. It is so awarded.

Dated at the City of Vancouver in the Province of British Columbia this 6th day of May, 2022.



Amanda Rogers, Arbitrator