IN THE MATTER OF AN ARBITRATION

BETWEEN:

UNION OF NORTHERN WORKERS

- and -

GOVERNMENT OF THE NORTHWEST TERRITORIES

Regarding the Grievance of Tina Bragdon concerning Maternity/Parental Leave allowance

AWARD

BEFORE:

John Moreau, Q.C. - Arbitrator

APPEARING FOR THE UNION:

Michael Penner - Counsel

APPEARING FOR THE EMPLOYER:

Brad Patzer - Counsel

The Hearing in this matter was held via conference call on October 6, 2010.

AWARD

INTRODUCTION

The issue in this arbitration concerns the operation of the collective agreement as it relates to maternity leave and paternal leave for casual employees. The hearing was conducted by way of teleconference call. All the evidence and submissions, including case law, was provided in advance by counsel. The parties, as noted below, were able to arrive at an agreed joint statement which sets out the issue in dispute.

JOINT STATEMENT

1. The pertinent Collective Agreement for the matters at issue is the Collective Agreement between the Union of Northern Workers and the Minister Responsible for the Public Service, Expires March 31, 2005 (hereinafter, the "Collective Agreement").

2. The Employer and Union are seeking an interpretation concerning the operation of Article 21.03 "Maternity Leave" when applied to casual employees.

3. Attached as Document "A" is a copy of Article 21.03 "Maternity Leave"; attached as Document "B" is a copy of Article 21.05 "Parental Leave Without Pay".

4. The definition of a "casual employee" is contained within the definition of the term "Employee" in Article 2.01(n). The definition of "Employee" is attached as Document "C".

5. Article A5.03 of Appendix A5, attached as Document "D", establishes the entitlement of Casual Employees to Article 21.03 "Maternity Leave" and 21.05 "Parental Leave Without Pay" benefits.

6. The Employer produces a Human Resources Manual for the use of its employees and managers as a reference guide. There is a specific section of the Human Resource Manual for maternity leave and another for parental leave. Attached as Document "E" is a copy of the existing on-line version of Section 808

– Maternity Leave, and a copy of the existing on-line version of Section 809 – Parental Leave.

7. In conjunction with Document "E", the Employer has also produced a document entitled "Maternity Leave: Questions and Answers", and another entitled "General Information – 2 Commonly Asked Questions" for Parental Leave, copies of which are attached as Document "F". As well, the Human Resource Manual contains a draft Maternity and Parental Leave Agreement, a copy of which is attached as Document "G".

Factual Background

8. Tina Bragdon was a casual employee working as a Registered Nurse for the Stanton Territorial Hospital Authority.

9. On May 25, 2003, Ms. Bragdon began her maternity leave. Before going on leave Ms. Bragdon signed a Maternity Leave Agreement wherein she agreed to return to work on May 25, 2004 and remain in the employ of the GNWT for at least six months of full-time employment from that date; she also signed a Parental Leave Agreement with the same terms. A copy of these agreements is attached as Document "H".

10. Ms. Bragdon returned to work in May 2004 and resigned in June 2005. However, Ms. Bragdon did not work "full-time" hours during that period. While she satisfied the six months of employment as set out in the Maternity Leave Agreement, and the six months of employment as set out in the Parental Leave Agreement, she did not work the combined equivalent hours of twelve months' full-time employment (1950 hours).

11. In the almost 12 months leading up to her maternity leave (she didn't quite have 12 months of continuous service prior to her maternity leave) Ms. Bragdon had worked 1490.75 hours. After her maternity and parental leaves and within her 12 months of return to service, she worked 658.15 hours.

12. Upon her resignation, the Employer withheld lieu pay and pursued a garnishment of wages on the basis that Ms. Bragdon had not satisfied her obligation to provide a combined 12 months' of full-time employment.

13. The grievance correspondence from the UNW, the response from the Employer and the referral to arbitration are respectively attached as Documents "I", "J" and "K".

Issues: The Union and the Employer have agreed to submit the following issues for resolution:

A. What are the obligations of a Casual Employee respecting her return to service and repayment of the Maternity and Parental SUB Plan Benefits.

B. Can the Employer require Casual Employees to execute maternity and parental return of service agreements?

The foregoing is respectfully submitted for your consideration.

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Michael H. Penner Legal Counsel, Public Service Alliance of Canada	Brad Patzer Legal Counsel, Government of the Northwest Territories

THE COLLECTIVE AGREEMENT

2.01(n) "Employee" means a member of the Bargaining Unit and includes:

(i) a “casual employee” who is a person employed by the Employer for work of a temporary nature pursuant to the provisions of Appendix A5;

(ii) an “indeterminate employee” who is a person employed for an indeterminate period;

(iii) a "part-time employee" who is an employee who has been appointed to a position for which the hours of work on a continuing basis are less than the standard work day, week or month;

(iv) a "professional employee" who is an employee appointed to a position in an area of work where there is a requirement for a highly developed or specialized body of knowledge acquired through University education or a member of a group governed or regulated by a professional body; and

(v) a “seasonal employee” is an employee appointed to a position for which is not continuous throughout the year but recurs in successive years;

(vi) a “term employee” who is a person other than a casual or indeterminate employee who is employed for a fixed period in excess of four (4) months and includes employees hired as a leave replacement, employees hired in relation to programs of a fixed duration or without ongoing funding, or employees hired in relation to or in support of training.

MATERNITY LEAVE

21.03 (a) (i) An employee who becomes pregnant shall notify the Employer in writing at least fifteen (15) weeks prior to the expected date of the termination of her pregnancy and, subject to Section (ii) of this Clause, shall, eleven 11) weeks before the expected date of the termination of her pregnancy be granted leave without pay for a period ending not later than twenty-six (26) weeks after the date of the termination of her pregnancy. The employee may apply to Compensation Services and she shall be given, within one week of application, a clear understandable information package about maternity leave requirements and benefits, including the Supplementary Unemployment Benefit Plan.

(ii) The Employer may:

(a) Upon written request from the employee, defer the commencement of maternity leave without pay of an employee or terminate it earlier than twenty-six (26) weeks after the date of the termination of her pregnancy;

(b) grant maternity leave without pay to an employee to commence earlier than eleven (11) weeks before the expected termination of her pregnancy;

(c) where maternity leave without pay is requested, require an employee to submit a medical certificate certifying pregnancy.

(iii) Leave granted under this Article shall be counted for the calculation of "continuous employment" and "continuous service".

(b) (i) After completion of 6 months continuous employment, an employee who provides the Employer with proof that she has applied for and is in receipt of employment insurance benefits pursuant Section 18, Unemployment Insurance Act, shall be paid a maternity leave allowance in accordance with the Supplementary Unemployment Benefit Plan.

(ii) An applicant under Clause 21.03(b)(i) shall sign an agreement with the Employer providing:

(a) that she will return to work and remain in the Employer's employ for a period of at least six (6) continuous months after her return to work;

(b) that she will return to work on the date of the expiry of her maternity leave, unless this date is modified with the Employer's consent.

(iii) Should the employee fail to return to work, except by reason of death, disability or lay-off as per the provision of Clause 21.03(b)(ii), the employee recognizes that she is indebted to the Employer for the amount received as Maternity allowance. Should the employee not return for the full six months, the employee's indebtedness shall be reduced on a prorated basis according to the number of months for which she received pay.

(iv) No employee shall be laid off, transferred or relocated while on, or within six (6) months of his/her return, from maternity or parental leave without the consent of the employee, the employer and the union.

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

(i) For the first two (2) weeks, payments equivalent to 93% of her weekly rate of pay. For up to a maximum of an additional 15 weeks, payments equivalent to the difference between the unemployment insurance benefits she is eligible to receive and 93% of her weekly rate of pay;

(ii) (a) for a full-time employee the weekly rate of pay referred to in Clause 21.03(c)(i) shall be the weekly rate of pay to which she is entitled for the job evaluation prescribed in her certificate of appointment on the day immediately preceding the commencement of the maternity leave.

(b) for a part-time employee the weekly rate of pay referred to in Clause 21.03(c)(i) shall be the prorated weekly rate of pay to which she is entitled for the job evaluation prescribed in her certificate of appointment averaged over the six month period of continuous employment immediately preceding the commencement of the maternity leave.

(iii) Employees have no vested right to payments under the plan except to payments during a period of unemployment specified in the plan.

(iv))Payments in respect of guaranteed annual remuneration or in respect of deferred remuneration or severance pay benefits are not reduced or increased by payments under the plan.

(v) Where an employee becomes eligible for a pay increment or an economic adjustment with respect to any period in which the employee was in receipt of payments under Clause 21.03(c)(i), the payments shall be adjusted accordingly.

APPENDIX A5

CASUAL EMPLOYEES

A5.01 The Employer shall hire casual employees for a period not to exceed four (4) months of continuous employment in any particular department, board or agency.

Where 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.

A5.01 The Employer shall ensure that a series of casual employees will not be employed in lieu of establishing a full-time position of filling a vacant position.

The Employer shall consult with the Union before a former casual employee is rehired in a particular division if that former casual had worked in that division as a casual employee performing the same duties at any time within the 30 working days immediately preceding the date of rehire.

A5.03 A casual employee shall be entitled to the provisions of this Collective Agreement except as follows:

(a) Clause 2.01(f) “Continuous Employment” in respect of a casual employee shall include any period of employment with the Government of the Northwest Territories which has not been broken by more than thirty (30) working days. Provided always that there will be no systematic release and rehire of casuals into the same positions primarily as a means of avoiding the creation of indeterminate employment or paying wages and benefits associated therewith.

(b) The following Articles and Clauses contained in this Collective Agreement do not apply to casual employees:
   (i) Article 18- Entire Article except Clause 18.05
   Article 20- Sick Leave Clauses 20.09 and 20.10
   (ii) Article 21-Othet Types of Leave-Clause 21.04
   (iii) Article 33-Lay-off

(iv) Article 39-Superannuation
(v) Article 35-Employee Performance Review and Employee Files.
(vi) Article 48-Entire Article

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

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

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

A5.05 Casual employees are entitled to be paid on a bi-weekly basis for services rendered at the appropriate range of the Casual Step set out in Appendix B.

EXCERPT FROM THE HUMAN RESOURCES MANUAL-808

Maternity Leave

15. If the employee wants to receive the maternity leave allowance, the Deputy Head and the employee sign an agreement. The employee agrees to return to work on a specific date for a period of at least six continuous months. If an employee does not fulfill this commitment, the amount received as maternity leave allowance will be recovered on a pro-rated basis. Full-time employees must return to work for the equivalent of six months full time. Part-time employees must return to work for the equivalent of six months of their part-time hours prior to the maternity leave.

Example: The employee was working full-time hours prior to maternity leave. The employee returns to work at 50%. The employee will have to work a full 1950 hours in order to fulfil the commitment of the agreement.

Paternity Leave

34. If the employee wants to receive the parental leave allowance, the Deputy Head and the employee sign a Parental Leave Agreement. The employee agrees to return to work on a specific date for a period of at least six months. If the employee does not fulfil his/her commitment, his/her allowance will be recovered on a pro-rated basis proportionate to the period of time the employee returned to work.

SUBMISSIONS OF THE UNION

The Union pointed out that article 21.03(a)(i) sets out the general parameters of the maternity leave period and then article 21.03(b)(i) specifies the eligibility requirements for maternity leave. The main requirements are that an employee, like Ms. Bragdon, must demonstrate "continuous employment" for a period of 6 months and that she has applied for unemployment insurance benefits. The only other requirement is that the employee must sign a Maternity Leave Agreement, as noted in article 21.03(b)(ii), undertaking to "…return to work and remain at work for at least 6 months after her return to work". The Union observed that article 21.03(b) does not state that an employee has to be continuously working for a specified number of full-time hours. The employee need only satisfy the time period of six months of continuous service, starting from their agreed return to work date.

The Union further submits that the Employer is, in effect, trying to impose an hourly rate conversion term as a further eligibility requirement for the SUB plan. The Union points out that article 21.03(c), which deals with the payment percentage amounts under the SUB plan, only deals with the payments amounts for "full-time" employees [21.03(c)(i)(a)] and "part-time" employees [21.03(c)(i)(b)]. It does not set out a formula for the weekly rate of pay for casual employees like the grievor; or, specifically indicate that casual employees fall within the definition of "part-time" employees. The Union also noted that the

collective agreement specifically defines various categories of employees under article 2(n) including: indeterminate employees, part-time employees, professional employees, casual employee etc. The “casual employee” is defined in article 2(n)(i) as one employed for a temporary nature and, as noted in Appendix A5, are appointed on a term basis for a period that is not to exceed four months. Accordingly, casual employees are not part-time employees and should not be considered to be the same for any purpose, including article 21.03 or 21.05. (See: Jolliffe award on *statutory holiday pay* cited below beginning at p. 15).

Counsel referred to the Maternity Leave Agreement and the Parental Leave Agreement where the grievor undertook to return to work on May 25, 2004 “… and remain in the employ of the Government of the Northwest Territories for at least six months of full-time employment from that date.” He noted in that regard that the collective agreement does not define “full time” employment but only speaks to “indeterminate” employees. This group of “indeterminate” employees work a minimum of 37.5 hours per week (1950 hours per year) but may also work up to 40 or 42 hours per week. There is no basis to impute, as the Employer purports to do here, a further requirement that the grievor must work some 975 hours to satisfy the 6 month requirement set out in article 21.03(b). There is simply no language to support a conversion from a continuous service requirement over 6 months to a requirement to work 975 hours over that period of time.

The Union also submits that the consequences of insisting on a minimum number of full-time hours results in a contravention of Appendix A5. The grievor, under such circumstances, would effectively be working as a term employee because of the specified number of 975 hours of work she was required to do during the six month period. The Employer, by introducing this requirement, changes a fundamental component of the employment relationship from the previous casual status to a term employee status. The Union submits that is a violation of article 21.03(b)(iv), which prohibits such changes without the consent of the Employer and the employee. It could also affect the grievor's payment status as she would no longer be considered, for all intents and purposes, to be a casual employee.

Further, the Union submits that any agreement for reimbursement signed by an employee must be interpreted in a manner which is consistent with the collective agreement. The 975 hour requirement would amount to an agreement negotiated outside the scope of collective agreement, and without the consent of the Union as the exclusive bargaining agent for all employees in the bargaining unit. Counsel for the Union proposed that the grevor, based on her past level of work attendance as a casual nurse, would be required to work some two years in order to avoid having to repay the employer. That would be a heavy burden for any employee and not, in the Union's view, a result that the parties intended under the collective agreement. In support, the Union cited: *Brantford Police*

Services Board and Brantford Police Assn.(Near)(Re) 82 L.A.C. (4th) 436*; Air Canada v. CAW-Canada (Courtemanche Grievance)* 82 L.A.C.(4th) 436;*Federated Cooperatives Ltd. v. Teamsters Local Union 987* [2004] C.L.A.D. No. 234*; Government of the Northwest Territories v. Union of Northern Workers: Casual Employees – Statutory Holiday Pay (Jolliffe (2007)); Government of the Northwest Territories v. Union of Northern Workers: Relief Workers' Minimum Staffing and Standby PayClaim (2009).*

SUBMISSIONS OF THE EMPLOYER

The Employer noted the three requirements for SUB plan eligibility: six months continuous employment, proof of application for unemployment insurance maternity leave benefits; and, her signature on a Maternity Leave Agreement. Counsel submits that the "return to work" reference in paragraph 2 of the Maternity Leave Agreement indicates that the grievor must return for a specific period of time. That requirement can only mean, in the Employer's view, that the employee must be held to account for having to work a specified number of hours upon her return to work.

The grievor, as noted, is a casual employee. As such, she has flexibility in the sense that she is not considered, for example, to have abandoned her position if she fails to report to work for 3 days. She is on an on-call list and must report to work, but only when called to do so by the Employer. This does not

mean that she can satisfy the return-to-work requirement of the Maternity Leave Agreement by simply showing up the first day back, as the Union suggests, and leave her name on a casual list. Or simply sign a contract that says she will show up for work when requested. As Arbitrator McPhillips stated in the *Health Employers Assn.* (cited below) “being at work” means more than just signing a contract. The requirement for her to “return to work” carries with it the continuing obligation of attendance at the workplace for all categories of employees, including those who do not report to work on a daily basis, like casual employees.

Counsel further submits that the collective agreement supports the adoption of a pro-rated approach to repayment of the maternity leave allowance. A pro-rated formula, counsel noted, has been agreed to by the parties at article 21.03(b)(iii) for repayment of the maternity leave allowance debt where an employee does not return to work for the full six months. In the words of the provision: “Should the employee not return to work for the full six months, the employee’s indebtedness shall be reduced on a pro-rated basis according to the number of months for which she received pay”.

Further support for the pro-rated approach to resolving the issue between the parties in this case is found in Article 21.03(c)(i)(ii), which sets out the payment formula for the SUB plan for both “full-time” employees and “part-time” employees. Counsel noted that the collective agreement does not define either

term. The only reasonable way to distinguish the two categories of employees, in the context of article 21.03, is to review their actual hours of work for the six months period prior to their application for the maternity leave benefits.

Counsel submits, by way of example, that those indeterminate employee who are designated to work 37.5 or more hours per week i.e. regular 7.5 hours per day, are considered to be “full-time” employees while those working less than 37.5 hours per week fall into the remaining category of “part-time” employees. In that regard, counsel noted that paragraph 10 of the Agreed Facts supports this calculation i.e. an employee working 37.5 hours per week will work 1950 hours per year, or 975 hours over six months. Casual employees, like the grievor, may fall into one category or the other, depending on the number of hours they are called in to work over the six month period.

In this case, the grievor falls into the “part-time” category, given that she worked, on average, less than the 37.5 hours per week. As a part-time employee, her weekly rate of pay was based on the pro-rated pay formula set out in article 21.03(c)(i). This pro-rating approach averaged over six months is a fair, inclusive and predictable practice that works for all types of employees, including casual and seasonal employees. It is a fair repayment formula that is in keeping with the number of hours worked by an employee. To simply remain on a list of employees, as the Union would have it, is not enough to satisfy the requirements of the maternity/paternal leave provisions.

Counsel also added that the Union is seeking a significant monetary benefit and has not demonstrated through clear language that it is entitled to such a benefit in this case i.e. to the effect that staying in the Employer's employment is sufficient to fulfill the repayment requirements. Counsel finally added that the language of the Maternity Leave Agreement is consistent with the spirit and intent of the collective agreement as well as the expectations of the parties. The Employer tabled the following authorities: *Health Employers Assn. of British Columbia v. British Columbia Nurses' Union* [2000] B.C.C.A.A.A. No. 423; *Zimmermann v. Treasury Board (Department of Indian Affairs and Northern Development)* [2008] C.P.S.L.R.B. No. 87; *Guertin and Treasury Board (Veterans Affairs Canada)* [1989] C.P.S.S.R.B. No. 183; *Alberta (Department of Family & Social Services) and A.U.P.E. (Bartake)* 21 L.A.C. (4th) 300; *Burns Meats (Div. of Burns Foods* (1985) Ltd.) and U.F.C.W., Local 832 50 L.A.C. (4th) 415; *Peace County Health v. United Nurses of Alberta, Local 37* 162 L.A.C. (4th) 13.

DECISION

It is worth noting as a starting point that there is no dispute that the grievor falls within the category of a casual employee. The grievor, as noted in the definition of casual employee in article 2.01(n)(i) and Appendix A5 is, unlike the other categories of employees listed in article 2.01(n), guaranteed employment

for a period of no more than four months. Importantly, in my view, the parties specifically bargained at clause A5.03(b) in Appendix 5 which provisions are not to apply to casual employees. Given that the list does not include article 21.03 (Maternity Leave) or 21.05 (Parental Leave), it is fair to conclude that the parties addressed their minds to the fact that casual employees would be entitled to all the benefits set out in those provisions.

The Employer referred to the three conditions of eligibility for the maternity allowance under article 21.03(b)(ii)(a) and (b): that the employee return to work; that the employee remain in the employ of the Employer for at least 6 months after her return to work; and, that the employee return to work on the date of expiry of her maternity leave. Counsel cited the *Health Employers Association* decision of Arbirator McPhillips in support of the proposition that the employee must be physically present in order to satisfy the return to work requirement. In that case, the Union claimed entitlement to extra travel time and/or travel costs incurred by an employee travelling to a site which was outside their normal workplace. The Arbitrator noted that being “at work” means being present at the actual work site. By analogy, counsel for the Employer submits that an employee, like the grievor, cannot simply put her name on a casual call-in list and nothing more. She must physically report to the work site in order to satisfy the return to work requirement.

With respect, I do not agree that "return to work" in the context of article 21.03(b)(ii)(a) and (b) necessarily requires an employee in a casual position to physically report to the workplace in order to satisfy the "return to work" requirement of the position. A casual employee fulfills the return to work requirement of the provision by placing themselves back on the list of casual employees available for work as of a specified date. In this case, the grievor's return to work date was set out in her Maternity Leave Agreement as May 25, 2004 and the Agreed Facts indicate, at paragraph 10, that she did in fact return to work in May 2004. In my view, she satisfied the return to work condition by placing herself on a casual list of employees available for work as of May 25, 2004. She would not have been required to physically report to work in the same way as an employee who holds an appointed position.

Turning to the main issue, the Employer's solution to resolving the disparity between those working full-time hours of at least 37.5 hours of week and those working less than 37.5 hours per week, like the grievor, is to use a pro-rated formula. The Employer points out that the collective agreement, at article 21.03(b)(iii), speaks to a formula of reducing the indebtedness for the maternity leave allowance on a prorated basis, in cases where an employee does not fulfill the six month requirement, according to the number of months for which she received pay. In addition, the Employer notes that a prorated formula is used to calculate the maternity leave allowance for "part-time employees" in article 21.03(c).

The difficulty I have is that an ordinary reading of the collective agreement does not support the Employer's interpretation of the key provision in this case, article 21.03(b)(ii). The requirements of the provision, as the Union argues, is simply that the employee sign an Agreement that she will return to work and remain employed for a period of six months after her return to work. There is no reference to any specific number of hours that must be worked during that six month period. I am reinforced in my view given the similar reference in article 21.03(b)(i) to "six months of continuous employment" as a pre-requisite for seeking SUB plan benefits. The six months requirements set out in article 21.03 (b)(i) and 21.03 (b)(ii) essentially mirror each other in terms of the period of continuous employment service required both before and after maternity leave. There is no reference in either of these provisions to prorating; the reference to prorating appears in article 21.03(b)(iii).

The reference in article 21.03(b)(iii), however, similar to the language used in article 21.039(b)(i) and (ii), is to a reduction of the indebtedness for the maternity allowance if the employee does not return "for the full six months". Again, the reference is only to prorating the "six months", and not to any hours worked during that period of time. I note that Arbitrator Jolliffe applied similar reasoning in his award involving these same parties over statutory holiday pay. He states as follows at p 16:

> While the Employer asserts that it should reasonably be able to prorate he payment in line with the total hours/days worked during the previous month when compared with a standard schedule, the Union says that a day is a day and the casual employees receive a full working day where 16.02 has applicability. I agree there is no indication that prorating should apply on the collectively bargained language despite the Employer's view that it would be the fairest way to proceed based on a comparison over time with standard hours worked, either by analogy or direct reference to article 4.02 governing the approach taken with part-time employees.

Further, although the parties only specified two types of employees in article 21.03(c), full-time and part-time, the purpose of that provision relates to the manner of calculation of the payments under the SUB plan. Article 21.03(c) is not helpful, nor should it be relied on, in my view, to interpret the terms and conditions relating to the maternity leave allowance. Those terms and conditions are comprehensively set out in the previous paragraph, 21.03(b). The prorating exercise is only triggered under article 21.03(b)(iii) if the grievor failed to work for the full six months after returning to work from maternity leave.

What about the grievor's undertaking to return to "full time employment" set out in both the Maternity Leave Agreement and Paternal Leave Agreement that she signed on February 21, 2003?

The parties, at paragraph 10 of the Agreed Facts, noted that "full time employment" means the equivalent of 1950 hours per year (37.5 hours per week). But the grievor's undertaking to return to full-time employment does not mean that she committed herself to six months of full-time hours. From my

perspective, she fulfilled the requirements of the Agreement by working for six months of “full-time employment” as a casual employee.

Alternatively, if the meaning of “full-time employment” equates to 1950 hours per year as set out in the Agreed Facts, then I find that portion of paragraph 2 set out in Maternity Agreement referring to “full-time employment” is inconsistent with article 21.03(b)(ii) of the collective agreement. That provision of the collective agreement, as noted, only requires an employee seeking the maternity leave allowance sign an Agreement committing herself to a return to work on a fixed date and “remain in the Employer’s employ” for six months. It does not require that the employee work full-time hours during that six month period. To read those words “full-time” into article 21.03(b)(ii), as indicated in the Maternity Leave Agreement, would amount to an alteration of the collective agreement, which is prohibited by its own terms. Similarly, I note that the Employer’s guidelines, at paragraph15, incorporate the notion of hours of work in reference to the Maternity Leave Agreement. These guidelines fall within the guise of a rule introduced by the Employer without the prior agreement of the Union. Given the conflict between the guidelines and the clear wording of article 21.03(b)(ii), I find that a breach of the *KVP* rule. As Arbitrator Ponak noted in the *Federated Co-op* case at paragraph 52:

> In a situation in which a unilateral policy is inconsistent with the collective agreement, the collective agreement must govern (Re KVP).

CONCLUSION

The answers to the two issues put to the arbitration board are as follows:

Q: What are the obligations of a Casual Employee respecting her return to service and repayment of the Maternity and Parental SUB Plan Benefits?

A: The obligations of a Casual Employee on returning to service from combined Maternity and Parental Leave is to provide twelve months of continuous employment (six months for each leave period) from the specified return to work date or repay the Maternity/Parental leave allowance. The Casual Employee fulfills this repayment requirement by making themselves available for casual employment, in the same manner they did prior to taking their maternity leave (in accord with Appendix A5), for a period of twelve consecutive months from their agreed return-to-work date. Should a casual employee, by their own choice, not remain in their position for the full twelve months after their agreed return-to-work date, the casual employee will remain indebted to the Employer. The indebtedness will be reduced on a pro-rated basis according to the number of consecutive months the employee returned to work as a casual employee, and received pay, during the twelve month period after the agreed return-to-work date.

Q; Can the Employer require Casual Employees to execute maternity and parental return of service agreements?

The parties have agreed that employees seeking maternity or parental leave benefits shall sign an Agreement with the requirements noted above. Casual employees are not specifically exempt from this requirement. Casual employees are therefore required to sign an Agreement just as any other category of employee defined by article 2(n).

The grievance is allowed. The grievor has fulfilled the requirements of both article 21.03 and 21.05 by remaining in her position for twelve months from May 2004 to June 2005.

I remain seized in the event that any issues arise with respect to the implementation of this award.

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JOHN MOREAU QC

January 21, 2011