IN THE MATTER OF AN ARBITRATION

BETWEEN:

THE UNION OF NORTHERN WORKERS

- and -

GOVERNMENT OF THE NORTHWEST TERRITORIES
as represented by the Minister responsible
for the *Public Service Act*

Re: Pay Step Grievance

AWARD

BEFORE:

John Moreau, Q.C. **- Arbitrator**

APPEARING FOR THE EMPLOYER:

Brian Asmundson **- Counsel**
Kim Wickens **- Grievance Officer**
Roger Wah-Shee **- Student-at-law**

APPEARING FOR THE UNION:

Michael Penner **- Counsel, PSAC on behalf of UNW**
Roxanna Baisi **- Director Membership Services**
Kim Harding **- Service Officer**
Roshan Begg **- Grievance Officer, GNWT**

The Hearing in this matter was held in Yellowknife, NWT on October 20 & 21 and December 1, 2008.

AWARD

INTRODUCTION

This case turns on the interpretation of clause 24.01(2) of the collective agreement, which has a term from April 1, 2005 to March 31, 2009. It involves a dispute over the placement of new employees on the pay grid. The Employer's position, in a nutshell, is that new employees with six or more years of directly related experience can be placed no higher than the 3rdth step of the pay grid. The Union maintains that a new employee with six years of directly related experience should be placed at the 4th step of the pay grid. There are three grievances before me in all, two policy grievances (#08-G-00628; #08-G-00630) and the individual grievance of Ken Stair (#06-104).

The bold portion, article 24.01(2), which is the sub-clause in dispute, indicates a change in the language from the previous collective agreement:

> ARTICLE 24
>
> PAY
>
> 24.01 (1) Employees are entitled to be paid for services rendered or the job evaluation and position to which they are appointed at the pay rates specified in the appendices attached.
>
> **(2) Newly appointed employees will be credited with one step of the applicable pay range for the position for each two (2) years of directly related experience to the responsibilities of the new job, to a maximum of three (3) steps.**

The Employer put the Union on notice prior to the beginning of the proceedings that it would be raising an estoppel argument and adducing evidence of past practice as well as negotiating history regarding the application of the provision. The Union objected to the introduction of the extrinsic evidence on the basis of the clear and unambiguous language of article 24.01(2). After hearing submissions in a teleconference held on October 16, 2008, the Union's objection was dismissed. Following the long-standing practice of receiving evidence and then reserving on its admissibility in the case of an alleged ambiguity, the Employer was permitted to introduce the past practice evidence and negotiating history. See Brown and Beatty, *Canadian Labour Arbitration*, (4th) at 3:4410.

The Employer called several witnesses: Sylvia Haener, Jenetta Davis (by telephone); Theresa O'Toole and Linda Heimbach. The Union replied with Roxanna Baisi, David Mathisen and Todd Parsons.

EVIDENCE

The following is a summary of the relevant evidence for purposes of these proceedings.

Sylvia Haener is currently the Assistant Deputy Minister in the Executive Department. Ms. Haener was the former CEO of Stanton Hospital in Yellowknife

from May 2006 to May 2008. She was the Director of Labour Relations and Compensation Services for the Employer from 1998 to 2005. Ms. Haener led the Employer's bargaining team at the time of the last round of negotiations leading up to the current collective agreement.

Ms. Haener referred to the Employer's incoming bargaining proposal. She noted that the language in the Employer's proposal is identical to the current language found in article 24.01(2). Ms. Haener's also noted that her copy of the Employer's proposal has a handwritten note with the word "agreed" in the margin next to the 24.01(2).

Ms. Haener's own handwritten notes also contain the following reference to article 24.01(2): "comes fr Health Care App. (sic)" which is a reference to the Health Care Appendix A10E (the "Appendix") found in the previous collective agreement (expired March 31, 2005) and reads as follows:

COMPENSATION FOR PRIOR EXPERIENCE

A. 10. E. All health care professionals (excluding administrative support staff and cleaning staff) will be credited with a one pay level increment for each two (2) years' prior experience they have in their field to a maximum of three steps.

Ms. Haener further testified that the Employer's proposal, consistent with one of its overall bargaining goals, was to have the above provision apply across the public service and not just to the health care professionals. She noted that

the Appendix credited a health care professional with one pay level for each two years of service, to a maximum of three steps. The provision was typically interpreted in the past as follows: 0 to 2 years experience pay Step 1; 2-4 years pay Step 2; 4 years and over pay Step 3. Anything higher than Step 3 required the approval of the Deputy Head.

Ms. Haener added that she could not recall any extensive discussions about the new article 24.01(2) provision when it was raised at the bargaining table on January 17, 2005. She recalled that the Union spokesperson stated at the table that the proposal had been reviewed and that it was "OK" and ready for signing-off. Article 24.01(2) was then packaged into the bargaining materials and signed off on January 21, 2005.

Ms. Haener then referred to the Employers' Human Resources Manual ("HRM") which deals with new job offers. The HRM, which was placed on-line in the mid 1990's, is updated as required. She noted that article 15, which shows a last revision date of July 2006, states as follows:

15. Salary shall be determined as follows:

a) On initial appointment, employees will generally be credited with 1 Step of the approval level for each two years of directly related experience up to a maximum of Step 3 as follows:

i. At least two years of directly related experience-Step 1
ii. At least four years of directly related experience-Step 2
iii. At least six years of directly related experience-Step 3

b) Deputy Heads of the hiring department may authorize a job offer at a higher step up to and including Step 6.

The above pay procedure was adopted by the Employer during the time Ms. Haener was the CEO of Stanton Hospital. In that regard, Ms. Haener testified that a newly-appointed employee, without any prior experience, would start at Step 1, as would an employee with two years or less of prior experience. She noted, however, that very few employees were appointed to heath care positions who did not have any prior experience at all.

Ms. Haener, under cross-examination, was referred by Union counsel to the pay grid (Appendix B1) which is illustrated in part below:

Min Pts	Max Pts	Pay Range	Casuals	Step 1	Step 2	Step 3	Step 4	Step 5	Step 6

Ms. Haener testified that, in her view, article 24.01(2) applies to any appointed employee, including “Casuals”. Ms. Haener also commonly used the term Step “0” when referring to “Casuals” under the Appendix of the previous collective agreement.

Under further questioning by Union counsel as to the prior application of the Appendix language compared to the current language, Ms. Haener noted that the Appendix contained the words “for each two (2) years prior experience” in

contrast to the current language “for each two (2) years of directly related experience”. She testified that the Appendix was applied differently from the current Handbook references because of the difference in wording between the Appendix language and article 24.01(2). Ms. Haener concluded her testimony by acknowledging that there was not a lot of discussion at the bargaining table with respect to the application of article 24.01(2).

Jenetta Davis testified by telephone from Inuvik. She has been the Director of Human Resources for the Beaufort-Delta Health and Social Services Authority since December 2007. She worked as a human resources service officer for the Beaufort-Delta Health Authority for the previous two years leading up to her current appointment. She testified that the Beaufort-Delta Health Authority has one major hospital in its district, the Inuvik Regional Hospital. Ms. Davis has worked over the years with the health care professionals in the hospital including nurses, physiotherapists and occupational therapists. Ms. Davis testified that the Appendix was applied as follows: Step 1 pay level for 0 to 4 years experience; Step 2 pay level for 4 years to 6 years of experience; and, Step 3 pay level for 6 years or more of experience (except if the Deputy Head approved a higher pay level). The same pay practice continued under the new collective agreement as it did under the previous Appendix.

Linda Heimbach is the Manager of Critical Care for the Stanton Territorial Health Authority, which manages the Stanton Territorial Hospital in Yellowknife. It

is the major referral centre for the NWT. She has held that position since 2006 and was the Acting Manager in 2005. As the Manager of Critical Care, she is responsible for some 80 employees working in the Emergency and ICU Departments at the Stanton Hospital. She testified regarding the current and past practice dealing with the placement of newly-hired health care employees under the Appendix and under article 24.01(2).

Ms. Heimbach indicated that, under the Appendix, all applicants were initially screened to determine whether they had two years of directly related experience. If so, the applicants were then interviewed for the position and the successful candidate was selected. Once selected, the following formula applied under the Appendix: Step 1 pay level was applied to new employees with the threshold 2 years of experience; Step 2 was paid to new employees with between 2 and 4 years of experience; Step 3 was paid to new employees with 6 years of experience (or at a higher step if approved by the Deputy Head). Ms. Heimbach testified that the minimum requirement of two years of prior experience may be waived if the applicant had equivalent qualifications i.e. a critical care certificate and only 18 months of emergency experience. Ms. Heimbach then noted that section 15 of the HRM reflects the current practice for new hires: a newly appointed employee now requires at least 4 years of experience before being paid at Step 2 and a minimum of 6 years experience to reach Step 3, the maximum.

Roxanna Baisi has been an employee of the Union since 1984. She has held the position of the Director of Membership Services since 2002. Ms. Baisi was part of the Union bargaining team at the 2005 negotiations. She confirmed that the Employer's goal at the bargaining table was to negotiate broad provisions which applied to all employees and not just one sector of the membership. Similar to the Employer's witnesses, Ms. Baisi testified there was little discussion about the wording of article 24.01(2); the proposal by the Employer was to use the wording found in the Appendix in the new article 24.01 (2). Ms. Baisi testified that there was no indication from the Employer at the bargaining table regarding the method to be used to calculate the pay level steps applicable to new employees. Her understanding at the bargaining table was that a new hire with 2 years of experience would be placed at Step 2. Each additional two years of experience placed a new employee up an additional step i.e. 4 years experience to Step 3; 6 years of experience to Step 4, the maximum step.

Todd Parsons has been the President of the Union of Northern Workers since 2002. He was at the bargaining table at the time the current collective agreement was negotiated in 2005. Mr. Parsons testified that, in his view, article 24.01(2) is only applicable to employees that are "appointed" and that casual employees are not appointed. He noted that there is no reference to a "casual employee" being an appointed employee under article 2.01(m) which is in contrast to the other types of employees, such as part-time employees or relief employees. Mr. Parsons further testified that it was never explained to him during

the last negotiations that new employees could only be paid, at a maximum, to the Step 3 pay level. His understanding at the bargaining table was that article 24.01(2), as presented, provided for maximum of 3 individual steps: Step 1-2 being one step; Step 2-3 being a second step; and, Step 3-4 being the third (maximum) step.

In terms of the HRM, the position of the Union is that they will raise policy issues with the Employer once they become aware of policies which affect the Union membership. The Union's position in that regard is outlined in a letter to the Employer December 11, 1996 and was also mentioned at a Joint Consultation Meeting held on March 6, 2007. The Minutes of that meeting reflect the Union's position that it did not have the capacity to review all amendments to Government policies and that it reserved the right to file a grievance within 30 days of becoming aware of an issue which may affect the Union membership. Under cross-examination, Mr. Parsons testified that he was not familiar with the application of the Appendix nor was a grievance ever filed to his knowledge under that provision. Nor do his notes indicate there were any discussions about the Appendix wording during the bargaining sessions or in caucus. Mr. Parsons did acknowledge, however, that he understood that the language of article 24.01(2) was taken from Appendix. His understanding of the Appendix was that a new employee would be paid one step for each two years of experience, beginning at Step 1. An employee with 6 years of experience would be placed at Step 4.

SUBMISSIONS OF THE EMPLOYER

The Employer submits, at the outset, that the words “maximum of three (3) steps” is ambiguous when applied to the pay step references under article 24.01(2). Further, the provision is unclear in regards to the starting step i.e. Step 1 or Step “0” (casuals). The appropriate way to resolve the ambiguity is to refer to evidence of past practice.

The evidence is that a practice did exist in the application of the Appendix. In that regard, the language of the Appendix was the basis for the Employer’s understanding on how article 24.01(2) would continue to operate in the current collective agreement. This understanding was further confirmed in the HRM at section 115, which sets out how the provision is to be applied. The Union never raised its interpretation of either the Appendix or the new 24.01(2) provision at the bargaining table. Accordingly, the Employer properly understood that the Union was in favour of the practice. The onus was on the Union to indicate it was not in favour of the previous application of Appendix and it did not do so at the time of the last bargaining round.

The Employer also relies on the principle that past practice can be used as an aid to interpret the collective agreement. Counsel points to article 24.01 (2) which states that newly appointed employees “will be credited with one step of the applicable pay range for the position…” The Appendix sets out the

applicable pay ranges starting with the Casuals or Step “0”. Although the evidence is that most new health care professional appointments began at Step 1-due in part to the two years of prior screening criteria-there is no requirement on the Employer to do so. The “Casuals” step also exists as part of the pay range and can be used as a starting step if the Employer chooses to do so. This is part of management’s responsibilities as set out in article 7.01 of the collective agreement.

Further, the Employer submits that the Union cannot imply Step 1 as a starting point for new hires because of the clear need to reference the pay grid which, in turn, refers to the “Casuals” category as the starting pay level. Indeed the testimony of the Employer’s witnesses all support the reliance placed on the pay grid and the “Casuals” pay step. It was incumbent on the Union to raise its objections in the face of the long-standing practice followed by the Employer under the Appendix and it failed to do so.

Finally, the Employer submits that past practice can be used to support an estoppel. Again, it was up to the Union to raise its objections to the manner in which the Appendix was being interpreted in the past with respect to the placement of new health care professionals. The Employer would then have had the opportunity at that time to provide its interpretation of the provision based on the past practice under the Appendix. That occasion was not provided for in this

case. As a result, any interpretation of the collective agreement favourable to the Union should now only stand to the end of the current term.

SUBMISSIONS OF THE UNION

The Union's first position is that there is no ambiguity in the collective agreement. The ambiguity was created by the Employer in the manner in which it applied article 24.01(2).

The Union noted, by way of illustration, that the Employer has misinterpreted the collective agreement by including casual employees within its definition of an appointed employee. The collective agreement at article 2 sets out the definition of an "Employee" under the collective agreement. A "casual employee" under article 2 (m)(i) is not an employee who has been appointed to a position. See: *UNW v. GNWT (Casual employees-statutory pay)* (November 23, 2007). Given the absence of an "appointment" to a position, the Union submits that the Casuals, or the pay level "0" category, should be excluded from the pay step calculations under Article 24.01(2). The stating point for all new employees must therefore be at Step 1 and not at the illusory Step "0".

The Union also emphasized that article 24.01(2), which was tabled by the Employer at the negotiations, clearly and unambiguously refers to the "three (3) steps"; that is to three specific steps and not "Step 3" as the Employer would

have it. The “plain meaning rule” of contract interpretation applies in this case. To uphold the Employer’s interpretation of the collective agreement would amount to an amendment of the collective agreement because casual employees would be wrongly included in the application of article 24.01(2).

The Union further submits, in the alternative, that the Employer has not demonstrated a consistent application of article 24.01(2). In some instances, 3 years of experience has resulted in a Step 2 placement while, in other cases, 4 years is required for a Step 2 placement. The evidence also discloses that the past practice with respect to health care workers is to pre-screen prospective hires for two years of experience before being placed at Step 1. This again is a practice that might fit into the health care service but should not be one that is applicable to the entire public service. There was also evidence introduced of developmental-type appointments at Step 1 in cases where a new health care worker may not have the required experience but has other clinical course experience. This is another example of the Employer unilaterally determining how to interpret the collective agreement to meet its own interests.

Finally, the Union urges that the doctrine of estoppel not be applied given the requirement that it should only be used to provide equitable relief in the most serious circumstances. Compelling evidence is required to show that the Union knew or ought to have known how the Employer applied the collective agreement. That onus has clearly not been met by the Employer in this case. In

that regard, there was no clear representation by the Employer on how the Appendix would apply to the new article 24.01(2).

DECISION

There are legions of authorities which endorse the first principle of contract interpretation that the language of the document must be interpreted according to its plain and ordinary meaning. Reference was made by counsel for the Employer to *Re: DHL Express (Canada) Ltd. v. C.A.W.-Canada, Locs. 4215, 144 & 4278* (2004) 124 L.A.C. 271, at paragraph 8. which summarizes the accepted approach to collective agreement interpretation:

> The predominant reference point for an arbitrator must be the language of the collective agreement (here the Minimum Payment clause) because it is primarily from the written word that the common intention of the parties is to be ascertained. Language is to be construed in accordance with its ordinary and plain meaning, unless adopting this approach would lead to absurdity or repugnancy, but in these latter situations, arbitrators will interpret the words used in a manner so as to avoid such results. However, it must be remembered that these particular principles of interpretation are to be used in the context for the *written* Agreement itself. It is also well recognized that a counterbalancing principle is that anomalies or ill-considered results are not sufficient to cause the alteration of the plain meaning of words. Neither is the fact that one interpretation of the Agreement may result in a (perceived) hardship to one party. I refer here (as I often do) to the seminal case of *Re: Massey-Harris Co. and U.A.W.., Loc. 458* (1953) 4 L.A.C. 1579 (Gale)…

The Employer submits that the “Casual” reference in the pay grid allows the Employer to consider it as the starting step for purposes of calculating the first step of the three step maximum set out in article 24.01(2). The reference to “Casuals” in the pay grid, in my view, is no more than a convenient method of establishing an agreed pay rate for those employees who do not hold appointed positions in the Public Service. As Arbitrator Jolliffe noted in *UNW v. GNWT (Casual employees-statutory pay)* (November 23, 2007) cited by the Union:

> Realistically, by reference to the definition language, whether working standard hours, supposedly by comparison to a full-time indeterminate, or not, a casual employee is not one who has been appointed to a position. That issue has been previously discussed in the Bryan Tessier interim award between these parties, June 26, 2002, Jolliffe, where the Employer’s position was accepted by this arbitrator that casual employment in the context of this collective agreement does not constitute an appointment to the Public Service, it being pointed out that the “appointment” of a person to a position carries with it certain requirements under the *Public Service Act*.

I also note that Article 24.01(2) states that “newly appointed employees will be credited with one step of the applicable pay range for the position”. Casuals employees, as set out in the definition section of “employee” under article 2(m), are not appointed to a position. Given that article 24.01(2) by necessary implication excludes a casual employee, the pay level steps reference in article 24.01(2) must be read to include only Steps 1 through 6 of the pay grid and not the so-called “Casuals” step or “Step 0”. I agree with the Union that any

reference to “Casuals” as part of a pay level step in the context of article 24.01 amounts to a breach of the collective agreement and the *Public Service Act*.

Having determined that the applicable pay range incorporates only Steps 1 through 6 in the pay grid, it is then left to determine how the term “maximum of three (3) steps” is to be applied within the context of article 24.01(2). I again agree with the Union’s position that a plain reading of the entire provision leads to the unambiguous conclusion that an employee is entitled to a credit of one step for each two year’s of directly related experience, beginning at Step 1. By way of illustration:

1) Step 1 to Step 2 counts as the first of three steps for those employees with two years of directly related experience. An employee with two years of directly related experience would be placed at the top of the step, Step 2.
2) Step 2 to Step 3 counts as the second step for those employees with between two and four years experience. An employee with four years of directly related experience would be placed at the top of the second step, Step 3.
3) Step 3 to Step 4 counts as the third and final step (“maximum of three (3) steps”) for those employees with between four and six years of experience. An employee with six years of directly related experience would be placed at the top of the third step, Step 4.

There remains the issue of whether there are grounds to apply the doctrine of estoppel. As noted in Brown and Beatty, extrinsic evidence is admissible for purposes of establishing an estoppel. As the authors put it at 3:4420:

> Both the history of a specific agreement through its sequence of prior agreements, and documentary evidence, including memoranda of agreement or minutes of settlement forming part of the negotiations of a particular collective agreement, may be introduced. Such documentary evidence may include a related agreement which was used as point of reference, an interest arbitration award, as well as proposals made, discussions held, notes made, and agreements reached during negotiations, although reservations have been expressed to admitting evidence as to give-and-take of negotiation. Of course, evidence of such negotiation history must not only be relevant, but more importantly, to be relied upon ought to be unequivocal. (emphasis added by underlining).

There is a wide variety of evidence that can be put before an arbitration board to establish an estoppel. A clear point of reference in this case is evidently the Appendix taken from the previous collective agreement between these parties. The same elements of crediting health care employees with one pay level increment for each two years of experience to a maximum of three steps is found in both the Appendix and the new article 24.01(2). The evidence is that it was the Employer who proposed the new language in order to broaden the application of the collective agreement to all bargaining unit employees. The proposal met with little discussion at the bargaining table and was implemented without objection.

The evidence is undisputed that the Employer was at all times operating on the basis that a new hire under article 24.01(2) would do no better or worse than the health care professionals under the previous collective agreement. Although there is evidence that the experience factor was not assessed uniformly in establishing the applicable pay range for new employees, it is clear that no one was placed beyond the step 3, except in cases where the Deputy Head approved of the placement to a higher step in the pay grid.

The Union never challenged the Employer's consistent application of Appendix, and in particular the fact that new employees were not credited with their prior experience beyond the third step. In the absence of such a challenge, the Employer, before and during bargaining, proceeded on the understanding that, in keeping with past practice, any new hires, no matter what their work experience, would not be placed any higher than the 3rd pay step (unless the Deputy Head decided otherwise). That in my view was a reasonable assumption on the part of the Employer given that the wording of article 24.01(2) so closely parallels the wording of the Appendix.

In my view, the Employer in this case was entitled, relying on the consistent manner in which the Appendix was applied in the past, to believe that article 24.01(2) would be applied in a similar fashion in the current collective agreement. The Union, by virtue of its acquiescence to the application of the old Appendix language into the newly-bargained article 24.01(2) provision, is now

estopped from claiming the application of article 24.01(2) according to its plain and ordinary meaning. The estoppel shall continue to operate until such time as the parties return to the bargaining table to renew their collective agreement, at which point the estoppel will end.

The grievances are dismissed.

_____
John Moreau, QC

January 6, 2009