IN THE MATTER OF AN ARBITRATION

BETWEEN:

GOVERNMENT OF THE NORTHWEST TERRITORIES

(the “Employer” or
the “GNWT”)

AND:

THE UNION OF NORTHERN WORKERS

(the “Union”)

(Grievance #’s 19-P-02455, 22-E-02899 and 22-E-02916)

ARBITRATOR:	Amanda Rogers
COUNSEL:	Maren Zimmer and Norm Boose for the Employer Michael Penner for the Union
HEARING VIA VIDEO CONFERENCE:	March 7, 2023 and June 5-9, 2023
ADDDITIONAL SUBMISSIONS ON REMEDY:	June 2, 5 and 23, 2023 and July 20, 2023
DECISION:	September 5, 2023

1. This matter pertains to three grievances. Two were filed by the Union on behalf of Salah Uddin and Olakunle Williams respectively, and the third on behalf of all aggrieved employees, which includes a third grievor, Denktash Emir-Ahmet (together the "Grievors").

2. All of the Grievors were hired as term employees for contracts of 36 months or more. The action challenged in all three grievances is the Employer's failure to convert the Grievors to full-time indeterminate status at the conclusion of their term employment, despite a change to the Collective Agreement which reduced the maximum allowable term for such employees from 48 months to 24 months.

3. Specifically, A4.06, which was added to the Collective Agreement in the 2019 negotiations by way of binding recommendations by Vince Ready, stipulates that term employees whose contracts exceed 24 months will be automatically converted to indeterminate status unless their employment meets the exceptions as set out below:

> A4.06
>
> (a) Except as provided for in subsections (b), (c), (d), and (e), after twenty-four (24) months of continuous employment in the same position for the same department, board or agency, the employment status of the term employees shall be converted to indeterminate status, effective the first day of the twenty-fifth (25^{th}) month of continuous employment in that same position.
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> (b) Term employees will not be converted to indeterminate status in accordance with subsection(a) where:
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> (i) They hold a position which is externally funded for a defined period of time; and
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> (ii) The Employer has no expectation that the external funding will be renewed after the defined period. This does not include external funding which is routinely renewed on a year to-year-basis.

For example:

A term employee may be appointed for thirty (30) months for a project where funding for thirty (30) months is certain and the Employer has no expectation that this funding will extend beyond thirty (30) months. This Employee will not be converted to indeterminate status.

A term employee who holds a position which is externally funded for one (1) year, and where the Employer expects the funding to be renewed each year will be converted to indeterminate status when the Employee's continuous service in that position exceeds twenty-four (24) months.

(c) Term employees whose term of employment has been extended beyond twenty-four (24) months under A4.04 will not be converted to indeterminate status in accordance with subsection (1).

(d) Notwithstanding Article 2.01(e), continuous employment for the purposes of this Article shall not include any periods of employment with any Employer other than the Government of the Northwest Territories, except where the Government of the Northwest Territories subsumes a public sector operation or entity.

(e) Breaks of service of thirty (30) days or less between periods of employment with the Employer shall not constitute a break in employment for the purposes of this Article.

(f) The Employer shall ensure that a series of term employees will not be employed in lieu of establishing a full-time position or filling a vacant position.

4. The evidence is that the Employer converted all term employees who were employed on terms exceeding 24 months following this Collective Agreement change except the three Grievors.

5. While the Employer initially took the position that the Grievors' positions were externally funded and that the funding for their positions was anticipated to be ending, thus meeting the exception criteria in A4.06, it conceded prior to the hearing of the Grievances that the Grievors all ought to have been converted to indeterminate status.

6. While the Parties agree that the Employer's failure to convert the Grievors to indeterminate status breached the Collective Agreement, they disagree on the appropriate remedy to flow from this breach of the Collective Agreement.

7. Thus, this decision addresses only remedy for the Employer's breach of the Collective Agreement.

I. BACKGROUND

(i) The Grievances

8. Grievance 19-P-02455 was filed by the Union on May 21, 2019 on behalf of its membership and alleges that the Employer had and was continuing to have employees with term contracts lasting longer than two years who had not been converted to indeterminate status.

9. Grievance 22-E-02899 was filed by the Union on behalf of Mr. Uddin on February 24, 2022, based on the Employer's failure to convert him to indeterminate employment status in accordance with Appendix A4.

10. Grievance 22-E-02916 was filed by the Union on behalf of Mr. Williams on April 7, 2022, based on the Employer's failure to convert his employment to indeterminate.

(ii) The Grievors

11. All of the Grievors are engineers hired by the Employer to work on various infrastructure projects for term contracts. Their respective employment history is set out below.

Denktash Emir-Ahmet

12. Denktash Emir-Ahmet is the only "affected employee" pursuant to grievance 19-P-02455. He worked for the Employer on a four-year term contract as a Senior Program Manager from January 4, 2016 until January 4, 2020. He is currently 69 years old, and had moved to the NWT from Edmonton, Alberta.

13. In the letter offering him term employment with the GNWT, it specifically indicates that he was being hired for a full-time four-year term position of Senior Program Manager-Major Projects, with the Highway & Marine Services Division in the Department of Transportation in Inuvik.

14. His evidence at the hearing was that he understood through the interview and selection process for the position that that his employment was likely to be extended past the initial four-year term. Mr. Emir-Ahmet testified that at the time he was hired, he understood that his primary project would be working on the Inuvik Tuktoyuktuk Highway project, but that afterwards, he would be moved to Yellowknife to work on two other corridors.

15. Mr. Emir-Ahmet's evidence was that the opening ceremony for the Inuvik highway took place in November 2017, after which he worked for approximately another year on the closure process for that project and on documentation and archiving.

16. In or around November 2018, Mr. Emir-Ahmet was advised that his position based out of Inuvik was ending, and he was offered the opportunity to transfer to Yellowknife where he continued as a Senior Program Manager working on environmental assessment and planning for another project, the McKenzie Corridor. Mr. Emir-Ahmet's evidence was that he helped put together the application process and business cases to secure funding for this project amongst other things.

17. Following the expiration of his term contract, Mr. Emir-Ahmet was hired to work for the Government of the Northwest Territories (GNWT) on a five-month casual contract, in a different position, and was extended in that position for an additional month, working until July 3, 2020.

18. At the time Mr. Emir-Ahmet's employment ended, he was being paid Grade 18, Step 8, Salary Admin Plan: U11 ($62.37/hr) which equals $121,621.50 plus $3450/year in Northern Living Allowance, for a total annual salary of $125,071.50.

Salah Uddin

19. Salah Uddin worked for the Employer on a three-year term contract as a Senior Project Officer from February 25, 2019 until February 25, 2022. He is currently 54 years old. He moved from Scarborough, Ontario to Yellowknife when he accepted employment with the GNWT.

20. The letter setting out the offer of term employment to Mr. Uddin did not reference that he was being hired for any specific project. Director of Transportation Binay Yadav's evidence at the hearing, however, was that Mr. Uddin was hired for the *Tłı̨chǫ* Highway project.

21. Mr. Uddin concurred that the *Tłı̨chǫ* Highway project was his primary responsibility while employed with the GNWT although he testified he worked on other projects during his employment.

22. Mr. Uddin testified he became aware of the Collective Agreement change requiring term employees to be converted after 24 months shortly after he became employed with GNWT, although he did not discuss this with anyone in management until approximately six months before the end of his term employment.

23. When Mr. Uddin's employment ended, he was being paid Grade 18, Step 7, Salary Admin Plan: U11 ($61.72/hr) which equals $120,354/year plus $3700/year in Northern Living Allowance for a total annual salary of $124,054.

Olakunle Williams

24. Olakunle Williams worked for the Employer on a three-year term contract as a Senior Project Officer from April 8, 2019 until April 8, 2022. He is currently 52 years old.

25. Mr. Williams moved to the NWT from Calgary to accept employment. Similar to Mr. Uddin, there was no specific project referenced in the Employer's offer letter to Mr. Williams setting out the terms of his contract employment. Mr. Williams' evidence was that he was hired to work on the development of the McKenzie Highway project but assisted with other projects during the course of his employment.

26. Mr. Williams testified that when he was initially hired, he was told he was being offered term employment but that he could potentially move into a regular permanent position in time. Further, he testified that he became aware of the change to the Collective Agreement limiting term employment and believed he would also be converted, since the project he was working on was ongoing.

27. At the time his employment was terminated on April 9, 2022, Mr. Williams was being paid Grade 18, Step 7, Salary Admin Plan: U11 ($62.65/hr) which equals $122,167.50 plus $3700/year in Northen Living Allowance for a total annual salary of $125,867.50.

(iii) The Employer Converts Other Term Employees to Indeterminate But Does Not Convert the Grievors

28. As noted, the Employer did not convert the Grievors into indeterminate employees at the conclusion of their term employment.

29. At the hearing, Mr. Yadav testified that he was unaware that the parties had recently agreed in collective bargaining negotiations to reduce the allowable term for term employees from 48 to 24 months at the time he hired Mr. Uddin and Mr. Williams in April 2019 – although he did become aware of this change to the Collective Agreement prior to the end of their contracts.

30. His evidence was that he learned that that the allowable term for contract employees had been reduced when there was an initiative to extend the terms of three other term employees in the Department of Infrastructure whose contracts were ending in or around June or July of 2020, rather than convert them to indeterminate status. The evidence is that those term employees, two Senior Project Officers and one Project Officer, were ultimately converted to indeterminate employees over Mr. Yadav's objections after the Union refused to agree to an extension of their term employment.

31. The facts around those employees' conversions are worth setting out. Manager, Surface Design & Construction Ziaur Rahman set out the Infrastructure Department's perspective on this issue in an email to Client Service Manager Christy Campbell and Human Resources dated April 19, 2020. In it, he explains the Department's wish to extend these employees' term employment rather than convert them to indeterminate as follows:

> The employment term for 1) Bidya Bhattarai 2) Raj Kadel 3) Sharafiddin Karabaev will end by early June/July, 2020. Department of Infrastructure (INF) had funding approval under new building Canada fund until Sep. 2020. INF hired those employees to deliver the projects under this funding agreement. Later on new building Canada funding agreement extended until March 31, 2024. This position will require continuing to deliver the projects until March 31, 2024 as funding agreement has been extended
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> We do not have any intention to turn into indeterminate position. We would like to extend the term until March 31, 2024. This was consulted with HR early March and HR suggested to consult with Union prior extension letter issued. DM has approved to proceed with this (DM approval attached).

> I have completed the union consultation form with rationale of extension. Please review and let me if need further info. Are you going to send to union as soon as possible. Also please let me know the next step.

32. Mr. Rahman subsequently reached out to the Union requesting its permission to extend these term employees. The Union responded by expressing concern over the length of time the employees had been on term contracts and noting each had already been extended previously. In an email dated April 24, 2020, Union Representative Avery Parle wrote to Mr. Rahman as follows:

> Good morning Ziaur,
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> I hope you are faring well in these strange times.
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> In reviewing the consultations I have a couple of concerns.
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> Firstly, two of these employees will end up being term employees for just under 7 years and the third for just under 11 years.
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> Because the funding has already been renewed once why do you not believe it will be renewed again.
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> Secondly, the GNWT employs many full time indeterminate project officers. Why would the GNWT not hire these employees indeterminately and then start their affected employee status in advance of the funding end date? This would give these long term and valuable employees priority hiring status for other full time indeterminate positions which their skills would suit.
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> Thanks,

33. In an internal Employer email dated April 30, 2020, Client Service Manager Christy Campbell wrote to Mr. Rahman the following:

Hi Ziaur,

My recommendation is to proceed with continuing as quickly and efficiently as possible to retain the three staff – this will be achieved by converting all three to indeterminate – pending that *I confirm all three were hired via a competition.*

I recommend that when you provide them with the indeterminate job offer, be transparent up front and let them know they will become an affected employee at the end of the funding in 2024.

I recommend calling Gary Brennan in Finance to discuss the funding piece for your O & M as he may have a solution to this concern.

Unfortunately, at this time, I do not have a timeline on when a regular competition will commence as we are not business as usual. If you choose to go back to competition, there is no guarantee all three will be successful and they will all be subject to a 31 business day break at the end of their employment before being re-hired as a casual.

34. In an email the same day, April 30, 2020, Mr. Brennan in Finance shared his view on the matter:

Ziaur,

I cannot comment on the Union Rules as that is HR territory. In terms of funding these positions, they can be funded with Capital even if indeterminate positions as long as they are working only on the capital projects. However, when/if the funding runs out, these employees could become affected.

Note that we have earmarked $100M from ICIP to continue Hwy reconstruction projects after Bundle 3 is done and this will take us to about 2028. Also note that I was hired as Federal Relation Manager under federal funding for 10 years knowing that I could be affected if no new funding was identified.

I think hiring indeterminate is best option to retain their skills rather than having to go to competition again. Also, we should start the application process for new funding soon under ICIP to secure the additional funding. You should be looking at how to spend $100M over 4-5 years. I will double check on end date of ICIP and get back to you.

> Finally, the own forces business case is still not submitted so if that is not signed off, no salaries can be covered anyway.

35. Ultimately, the three term employees were converted to indeterminate employees in May 2020.

36. During cross-examination, Mr. Yadav testified that although he had indicated in earlier emails that he had no intention to convert the three employees to indeterminate status, he understood he was required to do so under the terms of the Collective Agreement and that their conversion to indeterminate employees would result in priority hiring for these individuals into alternate positions if their positions were no longer required or funded.

37. Despite this admission, Mr. Yadav maintained in his evidence that there were two reasons why the Grievors' term employment was not similarly converted: the external funding for their positions was expected to end, and the Grievors knew they were being hired on term contracts which were permissible under the old Collective Agreement in place at the time they were hired.

38. On the latter point, Mr. Yadav acknowledged that when the Collective Agreement rate of pay was increased in the new Collective Agreement, all of the Grievors' pay was adjusted to the new rate even thought their employment offer letters listed a lower rate of pay. He also acknowledged that all other changes to the terms and conditions of work contained in the renewed Collective Agreement were also applied to the Grievors. As stated, he testified that he converted other term employees to indeterminate status despite expressing similar concerns about ongoing funding and despite these employees also being hired without an expectation that their employment status would automatically be converted at the end of their terms.

39. Mr. Yadav's testimony was that an oversight committee steered by the Deputy Minister decides how many employees are required for a project and the type of personnel needed. He confirmed that he is one of the members of this committee.

40. During cross-examination, after several attempts to ascertain the basis for the oversight committee's determinations, Mr. Yadav finally acknowledged that project proposals are written documents. This admission gave rise to an objection by Union counsel that these documents had not been disclosed as part of the pre-hearing production, despite the Union requesting all relevant documents related to the funding for the Grievors' positions.

41. With respect to the specifics of each of the Grievors' employment, Mr. Yadav gave the following evidence.

42. Mr. Emir-Ahmet began reporting to him in 2017, after Transportation was brought under the Department of Infrastructure. According to Mr. Yadav, once the Inuvik highway project was completed, Mr. Emir-Ahmet requested to move to Yellowknife and was placed onto the strategic team there.

43. Mr. Yadav's evidence was that Mr. Emir-Ahmet was not a good fit for that team. Despite this, though, he was offered and hired back on a six-month contract working for Infrastructure in their headquarters on different projects. At the end of the six-month contract, Mr. Yadav testified he indicated to Mr. Emir-Ahmet that there may be an additional six-month contract available but that there would be at least thirty days in between projects. Mr. Yadav's evidence was that Mr. Emir-Ahmet could not be extended in his contract because there was no funding for his position. He testified that, in his view, there were no performance issues with Mr. Emir-Ahmet's work, simply a lack of funding for his work.

44. With respect to Mr. Uddin, Mr. Yadav testified that he was hired for a three-year term because that was how long construction on his project was anticipated to take. Under cross-examination, Mr. Yadav acknowledged that a less senior Senior Project Officer working on the same project as Mr. Uddin was converted to indeterminate status and continued working after Mr. Uddin's employment had ended.

45. On this, Mr. Yadav testified that he considered Mr. Uddin a bad employee and that he had received a complaint about him from a contractor. Mr. Yadav asserted during his evidence that Mr. Uddin had been spoken to several times about his job performance although he acknowledged there was no discipline on his file.

46. Although Mr. Yadav remained firm in his evidence that there was no available alternate work for Mr. Uddin, emails in evidence show that Assistant Deputy Minister, Infrastructure, David Moore reached out to Mr. Yadav on February 23, 2022 to inquire into Mr. Uddin's employment status. In his email, Mr. Moore mentions he is unaware of three-year employment terms and asks "given all our challenges recruiting are we not considering him for other opportunities? Have we reached out to Regional ops to explore if they need a senior P.O?"

47. Mr. Yadav responded to Mr. Moore's email the same day as follows:

> Hi David
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> I had a conversation with him about 6 months ago and also yesterday. Ziaur is talking with him in continuous basis for last several months. I had suggested him to apply for other GNWT positions as he was hired for TASR in a term position. He has applied to Structures position.
>
> His performance was not satisfactory and we do not recommend for any future position.

48. When asked why the employee hired a month or so after Mr. Uddin to work on the same project was converted to indeterminate status while Mr. Uddin was not, Mr. Yadav confirmed that he preferred the other employee and that this fact played into his decision-making. Mr. Yadav went on to explain that it was not merely his preference for the other employee, but that there were several different projects ongoing and that because the Employer could not accommodate all people, it selected on the basis of experience and "other things" to determine what was best for the individual and the department.

49. Mr. Yadav testified the Employer did its best to accommodate everyone but that it could not offer indeterminate work to all of the term employees.

50. In respect of Mr. Williams, Mr. Yadav acknowledged he was working on several projects throughout his three-year term for GNWT and that Mr. Williams had approached him days before his contract was ending and inquired about whether there were positions available. Mr. Yadav testified that he was unaware of any performance issues, but maintained there was no available work that Mr. Williams was qualified to perform to allow for his continued employment.

(iv) The Grievors' Mitigation Efforts

51. As indicated, all three Grievors attempted initially to mitigate by seeking alternate employment within the GNWT.

52. Despite their efforts, none of them were successful in their attempts to obtain permanent work, although as noted, Mr. Emir-Ahmet continued on in a new casual position for approximately six months following the end of his term employment.

53. The details of each of the Grievor's experience seeking employment are as follows.

Denktash Emir-Ahmet

54. Mr. Emir-Ahmet's evidence was that he was enticed to the North by the prospect of working on the McKenzie Valley Highway project, the Slave Geological Province Corridor project and the *Tłı̨chǫ* Highway project – all of which he described as increasing access to the North and enhancing life for Indigenous communities.

55. Mr. Emir-Ahmet's evidence was that in or around June or July 2019, approximately six months before his term employment was set to end, he approached Mr. Yadav to determine what the prospect was that he would be able to continue his employment with the GNWT. According to Mr. Emir-Ahmet, Mr. Yadav advised him that there were no available positions and that there was a hiring freeze in the Department of Infrastructure. He testified he was certain that his term would be ending and that Mr. Yadav encouraged him to look for alternate employment.

56. However, the evidence is that a few days before Mr. Emir-Ahmet's term was to end, he was offered casual employment working on the Great Bear River Bridge project. Mr. Emir-Ahmet estimated the budget for this project as in the range of $50-$75 million.

57. Mr. Emir-Ahmet testified that at the time he was offered casual employment he raised that he believed he should rightfully be in an indeterminate position because he had worked for four years for the GNWT and knew he was entitled to have his employment status converted pursuant to the Collective Agreement. According to Mr. Emir-Ahmet's evidence, Mr. Yadav was consistent that he had been advised by human resources that there were no viable options for his continued employment.

58. However, Mr. Emir-Ahmet testified that the Great Bear River Bridge project is still ongoing and that he knew the funding was continuing for that project because of his role in securing it.

59. Mr. Emir-Ahmet testified that shortly after his extended employment came to an end in July 2020, the job he had been doing was posted as an indeterminate position and he was encouraged to apply for it through a job competition. At the end of that job competition, Mr. Emir-Ahmet testified he was told he was unsuccessful in obtaining the indeterminate position, but was once again offered casual employment since no one else was qualified to do the job.

60. However, at the same time, Mr. Emir Ahmet had been shortlisted for a job with SNC Lavalin and ultimately was offered this position. However, a few days before Mr. Emir-Ahmet was anticipated to start, he was advised that a strategic market focus shift meant his position was no longer required.

61. When it was put to Mr. Emir-Ahmet in cross-examination that he preferred the job at SNC Lavalin to continued employment with the GNWT, Mr. Emir-Ahmet explained that in his experience, contract employees whom the GNWT did not wish to hire back were rarely successful in applying for permanent positions. He testified that he assessed the probability of being successful in the hiring process and decided it was better to find employment elsewhere.

62. Mr. Emir-Ahmet testified he applied for hundreds of jobs and had been shortlisted for many. Ultimately, he found alternate employment on February 24, 2021 as a Senior Project Manager with HDR though his start date in that position was April 12, 2021. His annual salary in this position is $185,000 – higher than he earned when working with GNWT.

63. According to Mr. Emir-Ahmet's evidence, he plans to continue working until he is an octogenarian. He testified he had planned to embrace and live his life in the North if his employment had continued with the GNWT.

Salah Uddin

64. The evidence is that Mr. Uddin raised the issue of his continued employment with the Employer approximately six months before his term position was ending and expressed his interest in continuing to work for the GNWT. Mr. Yadav testified that he explained to Mr. Uddin at that time that there was no surface design work available and that his employment would not be continued after his contract expired.

65. Emails in evidence indicate that Mr. Uddin reached out to Human Resources on August 22, 2021, indicating that he wished to remain continuously employed. The response, sent on September 16, 2021, indicated that his project was expected to be completed in the Fall, that there were no plans to extend the project scope, and that Mr. Uddin would be informed of any upcoming opportunities in the Infrastructure Department should positions become available. Mr. Uddin responded to that email explaining that the project design and construction contract "is mostly funded by internal fund and only 25% (P3 Canada) external fund[ing]", and once again indicated his desire to continue his employment with the GNWT. The response to Mr. Uddin's email was that a few positions had opened in Transportation-Structure and that he should apply if he was interested.

66. In an email dated February 23, 2022, after speaking to Assistant Deputy Minister David Moore in person, Mr. Uddin responded to an email from him as follows:

> Hi David,
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> Thank you for the email. Actually, we two people are working in TASR project, myself and Yasir Jamal. I joined on February 25, 2019 and Yasir joined on March 11, 2019 with the same term position. We both were told and knew that the term was ending and same thing will be happening for both individuals, and would not be different.
>
> I am not aware of any issues like poor performance relevant to me that would put me in the side of not choosing/keeping me, on the other hand, Yasir got the employment renewed already and I am not. I went to you at my critical moment and also the current situation is not good. My understanding, GNWT at least will consider the staffing priority, seniority and the human rights, equal rights, diversity and overall fairness to everybody, and use of employees gained GNWT skills. I have seen these in HR manual and also in UNW agreement.
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> I have already applied for some positions within the GNWT and these are in my career job application page. In addition, I will also send you my CV as you advised as potential absorbing option for continuous employment. Have a great day.

67. The evidence is that Mr. Uddin applied on several positions with the GNWT but was not the successful candidate for any of them. Mr. Uddin's evidence was that in his view, this was because he did not have continuous employment and was thus not entitled to priority hiring. Mr. Uddin does not have access to his GNWT email account any longer, but remembers he attended a written test for a position with Municipal and Community Affairs. His evidence is that he would have taken a job with GNWT if it had been offered. He testified he stayed in Yellowknife until April 2022 trying to secure work but was unsuccessful.

68. Mr. Uddin found employment as a Project Engineer with Terraprobe Inc. in Sudbury, Ontario for two months (May to June 2022) with an annual salary of $88,000. In August 2022, he was laid off from his work in Sudbury and began work as a Senior Project Engineer with Peto MacCallum Ltd. in Barrie, Ontario. His initial annual salary was $72,000 and as of May 2023 increased to $77,000. He does not have any health benefits nor pension in his current position.

69. Mr. Uddin was clear during his evidence that he had planned to continue working in Yellowknife had his employment not been ended. While he was asked in cross-examination about the fact that his wife and two sons remained living in Ontario, Mr. Uddin explained that he visited them during his vacation leave and did not mind living this way long-term. He noted many people in the North have similar arrangements.

Olakunle Williams

70. As earlier indicated, Mr. Williams' evidence was that he became aware of the change to the Collective Agreement limiting term employment and believed he would also be converted, since the project he was working on was ongoing. Mr. Williams testified that when no paperwork to this effect was forthcoming, he sent an email to Mr. Rahman about two weeks before his contract was set to end requesting a meeting to discuss his ongoing employment. At that time, he testified, he made clear he wished to remain employed by GNWT. His evidence

was that he was informed his contract would not be renewed and that he should be looking for other work in the GNWT.

71. Following this meeting, Mr. Williams' evidence is that he escalated the matter to various directors who encouraged him to send in his resume for open positions.

72. The evidence is that approximately two days before end of Mr. Williams' term contract, he spoke with Mr. Yadav, who explained his contract was ending for budgetary reasons. According to Mr. Willaims' evidence, he thanked him for the opportunity to serve in his role and sent an email to his colleagues and directors to the same effect on his final day.

73. Mr. Williams' evidence was that he stayed in Yellowknife looking for work until the end of April that year. He applied on numerous jobs with the GNWT but was unsuccessful. In May 2022, he was asked to do written assignment in respect of one of the positions he applied on but ultimately the job competition was cancelled, purportedly due to no successful applicants.

74. He testified if he had been converted to indeterminate employment, or offered one of the positions he applied on, he would have stayed in NWT. In cross-examination, Mr. Williams testified that although his wife initially came with him when he moved North, they landed on an arrangement where she continued to reside in Calgary with their son, and that she planned to move to NWT when he finished school.

75. Under cross-examination, he was asked many questions about whether he would have stayed in Yellowknife had his status been changed. Mr. Williams was consistent in his responses, in that he had planned to stay, and have his wife join him in Yellowknife after their son finished school. He testified he enjoyed living there and that he saw it as a secure place to work. His evidence was that he understood his employment would eventually be converted to permanent and that he had made up his mind to continue with that.

76. After failing to secure alternate work with the GNWT, Mr. Williams worked briefly from August to November 2022 for the City of Calgary as a Transportation Development Engineer following the termination of his employment with the GNWT. His annual salary in that position was $103,000. He is presently unemployed and looking for work. Since his employment with the City of Calgary ended, he has continued to apply on work with GNWT but has been unsuccessful.

II. POSITIONS OF THE PARTIES

77. The Union emphasizes that this was not an administrative error that the Grievors' positions were not converted. Rather, the Union asserts the Employer acted in bad faith, noting that both Mr. Uddin and Mr. Williams were both offered three-year terms after the Parties had already negotiated new language limiting this type of employment to no longer than 24 months (although it concedes the new language was not quite yet in effect at the time of these job offers). According to the Union, the Employer knew it was obligated to convert these employees and yet it chose to ignore this obligation.

78. The Union notes that all three of the Grievors attempted to mitigate their losses by seeking alternate employment within the GNWT, and that they were screened in for these alternate positions and required to provide written assignments demonstrating their technical knowledge contrary to the reemployment language of the Collective Agreement. Ultimately, the Union observes, two of the three were rejected out of this process that ought never to have taken place.

79. The Union asserts that one must seriously consider the credibility of Mr. Yadav's evidence that all three Grievors were let go from their employment under legitimate circumstances related exclusively to funding. It points to the internal emails about three other Term employees who, over Mr. Yadav's objections, were eventually converted to indeterminate. In the Union's submission, the notion that there was no funding for the

Grievors' positions is "complete fallacy" advanced for the Employer's own convenience and agenda and proven false by the fact that other employees in similar situations to the Grievors had their employment converted. The Union challenges the suggestion that any of the Grievors were a "bad fit" or had performance issues, as Mr. Yadav alluded to in his evidence, noting the complete dearth of documentary evidence to support these assertions. According to the Union, the Employer was well-aware of its obligation to convert the Grievors' employment, as Human Resources had communicated about the necessity of complying with the Collective Agreement, and the value of retaining employees.

80. In respect of remedy, the Union notes that damages need to be definable and losses cannot be too remote. In this case, it observes, the Grievors' losses are easily calculated – each of them lost the opportunity for indeterminate employment and had varying levels of success obtaining alternate work. In the Union's submission, each of the Grievors diligently and immediately sought to mitigate. It argues there is no evidence that the Grievors did not fully meet their duty to mitigate in the circumstances.

81. The Union objects to the suggestion that damages in lieu of reinstatement ought to be discounted for contingencies such as that the Grievors may have left to seek employment elsewhere, asserting that such an approach is speculative and notional. The Union emphasizes that the Grievors each applied on multiple vacancies and there are multiple vacancies that still exist today within the GNWT. In its submission, the appropriate calculation of damages in this case, in light of the fact that the Grievors do not wish to return to working for the Employer, is to award their full economic losses with a top up of 20% plus interest to represent the loss of pension, health benefits, and other entitlements under the Collective Agreement. The Union additionally seeks special damages for what it characterizes as the Employer's intentional bad faith conduct in respect of the Grievors. It also requests a remedy for the Employer's failure to disclose all potentially relevant documents despite being ordered by the arbitrator to do so.

82. The Union relies on the following authorities: *Sunset Lodge v. British Columbia Nurses' Union (Tataryn Grievance)*, [2003] B.C.C.A.A.A. No. 299; *Sobeys Capital Inc. v. United Food and Commercial Workers, Local 401 (A.B. Grievance)*, 279 L.A.C. (4th) 1; *Northwest Territories (Minister of Personnel) v. Union of Northern Workers (Hansen Grievance)*, 10 L.A.C. (3d) 130; *Firestone Steel Products of Canada v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 27 (Compensation Grievance)*, 6 L.A.C. (2d) 18; *DeHavilland Inc. v. National Automobile, Aerospace, Transportation and General Workers Union of Canada, Local 112 (Mayer Grievance)*, 83 L.A.C. (4th) 157; *British Columbia Institute of Technology v. British Columbia Institute of Technology Faculty and Staff Assn.*, 87 L.A.C. (4th) 423; and *Hay River Health And Social Services Authority and Public Service Alliance Of Canada* (Concerning the grievances of Bill Dalton), [2010] C.L.A.D. No. 407 (Sims).

83. As noted at the outset, the Employer in this case concedes it breached the Collective Agreement by failing to convert the Grievors from term employees to indeterminate. In respect of remedy, the Employer submits that damages in lieu of reinstatement are appropriate.

84. The Employer denies there was any bad faith conduct in respect of its failure to convert the Grievors' employment status. It asserts that Mr. Yadav was unaware of the reduction in term length in the 2019 Collective Agreement and that, in any event, a contract is not binding on parties until it is signed. The Employer notes that there is an exception to the restriction on term length for employees when external funding is not expected to continue which, despite its concession in this case, it asserts the Employer believed was applicable to the Grievors at the time their employment was ended. The Employer points to Mr. Yadav's testimony that he made efforts to support the Grievors until the end of their terms and even after. It also distinguishes the Grievors from the three other term employees whose employment was ultimately converted to indeterminate on the basis that the funding for their positions had been extended.

85. According to the Employer, once the Grievors' terms had ended, it was appropriate and necessary to conduct job competitions to determine their suitability for alternate positions within the GNWT. This, it states, is consistent with its position at the time that the Grievors' terms had ended. The Employer objects to the Union's reliance on events following the end of the Grievors' contracts, asserting nothing can be made of this after-the-fact evidence. In any event, the Employer denies any bad faith conduct.

86. The Employer rejects the suggestion that this is a case where punitive damages are warranted. It points to cases where more egregious and harmful dismissals took place and yet arbitrators refused to award these types of damages. In its submission, pain and suffering is encompassed in all unjust dismissals and does not warrant any special damages except in the rarest of cases. Here, it argues, the Employer mistakenly thought an exception to the limitation on the use of term employees applied and eventually determined it could not sustain this position. In respect of the Union's claim for damages for the Employer's failure to discharge its disclosure obligations, the Employer asserts this is speculative and based on the Union's assumptions about what documents might exist or what they might show.

87. In respect of quantifying the amount payable to the Grievors, the Employer notes that Article 37.26 indicates that an employee who is discharged without just cause it entitled to reinstatement and compensated for lost wages or to be paid a sum that is fair and reasonable. The Employer asserts that what is fair and reasonable in this case must take contingencies and mitigation into consideration as well as the short-term nature of the Grievors' employment. The Employer urges a "modified fixed term approach" as it asserts was utilized by Arbitrator Sims in *Hay River, supra*.

88. The Employer notes that none of the Grievors are seeking reinstatement and that their positions no longer available. In the circumstances, the Employer asserts the Grievors should be entitled to the layoff provisions of the Collective Agreement plus about 20% for factoring in Collective Agreement entitlements – the formula it indicates was utilized by Arbitrator Sims in

Hay River, supra. The Employer asserts that approximately $40,000 is an appropriate award for Mr. Emir-Ahmet applying that *Hay River* formula, noting he withdrew from a job competition with GNWT to continue with a job opportunity closer to home, and eventually after nine months of unemployment found alternative higher paying work. Mr. Uddin, it notes, currently works in Ontario for a lower salary, and had a number of months of unemployment before finding his current employment. Taking all the factors into account, the Employer asserts Mr. Uddin is entitled to about $30,000. Mr. Williams, it submits, is entitled to around $40,000.

89. The Employer relies on the following authorities: *A.U.P.E. v. Lethbridge Community College*, 2004 SCC 28, 2004 CSC 28; *Saskatchewan Centre of the Arts v. I.A.T.S.E.**,** Local 295*, 2008 SKCA 136; *Hay River Health and Social Services Authority and Public Service Alliance of Canada*, *supra*; *O.P.S.E.U. v. Ontario (Liquor Control Board),* 2011 CarswellOnt 9516; *Regional Authority of Greater North Central Francophone Education Region No. 2 and Communications, Energy and Paperworkers Union of Canada Local No. 777*, 2012 CarswellAlta 1379; *Bahniuk v. Canada (Attorney General),* 2016 CAF 127, 2016 FCA 127, *First Canada ULC and IUOE, Local Union No. 955 (Diriye),* Re, 2017 CarswellAlta 2741; *When are damages in lieu of reinstatement appropriate,* CARS1MEMO-ONL 9938; and *Greater Toronto Airports Authority v. P.S.A.C., Local 0004*, 2011 CarswellOnt 449.

III. ANALYSIS

90. There is no dispute in the present case that the Grievors should have been converted to indeterminate employees at the end of their term contracts. This is conceded by the Employer. Accordingly, the only question to answer is in respect of the appropriate remedy for each of the Grievors flowing from the fact that their employment was improperly terminated.

91. Given the passage of time since their dismissals, none of the Grievors are seeking to be reinstated. They have all moved on and did not feel good about returning to work for the Employer given everything that has transpired. Instead, they are seeking damages in lieu of

reinstatement in the form of full back wages plus gross-up as well as special damages for the bad faith circumstances of their dismissal. The Employer, on the other hand, asserts that the damages ought to be assessed looking at the go-forward losses of the Grievors and argues that various contingencies ought to greatly discount any amount payable to the Grievors in this case.

92. In support of its position, the Employer urges that I follow the compensatory principles set out by Arbitrator Sims in *Hay River Health and Social Services Authority -and-PSAC, supra.* In that case, Arbitrator Sims considered the appropriate remedy for an employee entitled to reinstatement as the result of a successful grievance challenging his termination, but who, similar to the Grievors in this case, had indicated he did not want to return to employment. The union in the *Hay River* case advanced a claim for between 1.25 and 2.00 months' gross pay per year of service, plus a variety of benefits under the collective agreement including severance pay, vacation leave, Northern allowance, and pension. The union additionally sought damages to compensate the grievor for the loss of unionized employment and for pain and suffering.

93. In determining the appropriate remedy in that case, Arbitrator Sims noted that the current state of Canadian arbitration law has failed to provide clear and consistent guidance in what the determination of a suitable remedy is when damages are ordered in lieu of reinstatement. Arbitrator Sims observed that arbitrators had been using a variety of methodologies to assess damages in lieu of reinstatement, and that the conceptual legal framework used in these assessments was often not clearly articulated in decisions.

94. He went on in the decision to thoroughly set out the various influences on arbitral thinking on this issue: common law principles on reasonable notice and damages, labour relations board and human rights remedies, the timing of the arbitration award vis-à-vis the dismissal, severance clauses or "settlement packages" and taxation, and the employee's workplace experience and record.

95. Ultimately, Arbitrator Sims found it appropriate to award damages using a fixed term framework, taking into account contingencies such as plant closings, bankruptcy, technological changes, chance of layoff, chance of illness, quitting for other work and so on. He explained:

> 135 Where an employee's conduct is such that the employment relationship is beyond repair, it is a factor that can and should be taken into account in assessing the contingencies of how long the job (even with reinstatement) might last. Where the loss of the job is unrelated to the employee's conduct the employee probably had or might have had but for factors unrelated to them, a long term prospect of employment. An example might be the impossibility of restoring a person to employment with an irreplaceable manager or co-worker with whom they have developed, through no fault of their own, an antagonistic relationship. Where the impossibility is due to job elimination, the contingency can be predicted by reference to layoff or similar provisions or by comparison to the treatment of other similarly situated employees.
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> 136 In the ordinary course of events, I agree with the arbitrators in *Metropolitan Toronto, NAV Canada* and *Government of Alberta* that it is inappropriate to award the same restorative damages as would have occurred up to the date of the award and then to order a further period of reasonable notice thereafter. In principle it is more appropriate to make one award from the date of termination. As noted above, the only modification to this might be where the grievor was properly justified in making less than stellar mitigation efforts due to the justness or likelihood of reinstatement. In the normal "exception case" situations (if that is not a contradiction in terms) the breakdown in the viability of the relationship should be sufficiently apparent to cause a prudent individual to "set their course elsewhere" in case they lose either the just cause or the reinstatement argument.
>
> 137 It is a reasonable and efficient method to take the agreement's true fringe benefits like pension, holiday pay, insurance benefits and so on and make a gross estimate of their value rather than engage in individual calculations. However, once one does so and incorporates that into a formulaic award it is double counting to specifically add on those same items again.
>
> 138 Many of the cases have opted for a factor (1 month - 2 months) per year of service formula to calculate damages, "grossed up" for the value of collective agreement benefits. Such formulae have served to obscure the basis upon which damages are based, making them look very much like common law damages for lack of reasonable notice.

> 139 The choice of some arbitrators to use years of service in any formula is not because it parallels the common law method, but because, in contracts with strong seniority based benefits, once seniority is broken, it represents a method of recognizing that the loss gets higher each year; a 20 year employee loses much more than the 3 year employee and is unlikely to land a new job that provides a 20 year seniority credit at the outset. The difference, and the reasons arbitrators treat this differently in respect to mitigation, is that the employee's future loss is to marginal benefits over the long term, not to immediate benefits in the short term. Therefore that value is not mitigated by short term but insecure income over a reasonable notice period.
>
> 140 What is missing in such an approach is that it focuses on how much time the employee put in with the former employer but not how much time the employee might, but for the decision not to reinstate, continue to serve. The loss of a collective agreement's benefits for an employee with just one year to go to retirement is not likely to be the same as for an employee with 15 years to go. The period of service to date may alter one's view of the contingencies; a short service employee is probably far more likely to move on to other work than a long service employee. Their accrued benefits including the "golden handcuffs" benefits like pensions, and increased vacations and so on will be higher. Those with more years left in the workforce also have more years to regain some of those seniority based benefits elsewhere.
>
> 141 What the cases have rarely done is addressed the value of collective agreement benefits based on the strength of the specific collective agreement provision. For example, just cause protection can provide security, but less so if the employer has an unfettered layoff right unrelated to seniority. The value of these items may also be lower for an employee on the eve of retirement than for an employee otherwise likely to enjoy that seniority for a number of years.
>
> 142 My conclusion is that the loss of fixed term employment framework is more appropriate and adaptable to situations at hand than the common law damage approach. A position covered by a collective agreement is not a fixed term or lifetime position, but is subject to many of the same contingencies.

96. Arbitrator Sims went on to observe that "[a] unionized job is not a guaranteed job, even with seniority and just cause protections." In his view, "factors in many cases will reduce considerably the horizon of damages down from any notion of a life time job." He explained further at paragraph 143 of the decision:

> 143 …the appropriate discount depends on the individual circumstances. Similarly, the likelihood of further employment elsewhere needs to be factored in, and if the individual is skilled and employable this too will significantly reduce the level of damage…Applying this approach allows the flexibility to tailor the estimate of damage to the reasons for the refusal or inability to reinstate; the particular nature of the exception circumstances that follow that step despite the lack of just cause.

97. Applying this formula, Arbitrator Sims found the grievor had worked for the Employer for about 6 ½ years. At the time of his dismissal, barring other contingencies, Arbitrator Sims reasoned he might have been expected to continue to work there for a further 10 years, until a normal retirement age. However, he had by the point of termination been off work periodically over several years due to two disabilities and found it was reasonable to assume similar issues would have arisen again if his employment had continued and that he had to take into account the possibility that the grievor would have become disabled and unable to continue performing his job or that the Employer, which was small, would reach the point of undue hardship in its efforts to accommodate him. Arbitrator Sims noted there was the possibility of layoff, which might affect his position, perhaps by senior employees in other positions displacing him and that there was the possibility that he might, within that period, decide to return to employment "south of 60." On the basis of all that, Arbitrator Sims discounted the grievor's 10-year potential by 75%, noting this calculation was not a scientific formula. Determining the grievors would have earned $850,000 in those ten years, and discounting the sum on the basis of those assessments, Arbitrator Sims determined that $40,000 represented a reasonable estimate of the damage the grievor suffered from the loss of this position, taking into account the contingencies and prospects for mitigation. He added an additional 20% on top of that award for the loss of the health, welfare, and pension benefits under the collective agreement.

98. While there has been some arbitral uptake of Arbitrator Sims' approach in subsequent arbitration decisions, concern has also been raised about "the arbitrary (and very large) deductions made for contingencies" in the *Hay River* analysis including those expressed by Arbitrator Steinberg in *Humber River Hospital and ONA* (2017), 285 L.A.C. (4th) 248. While

indicating that the *Hay River* approach had "much to commend" as a basis for calculating damages in lieu of reinstatement, Arbitrator Steinberg lamented the lack of actual information underlying the assessment of contingencies. In light of that, he found it appropriate to order 1.25 months of pay for each year of service for a grievor (5.5 years in that case), 15% top up for fringe benefits, employment standards entitlements, and compound interest calculated quarterly on the basis of pre-judgment interest rates with no reduction for contingencies.

99. Arbitrator Surdykowski also expressed some concern with the *Hay River* approach in *Lakehead University* v. *Lakehead University Faculty Association*, 2018 CanLII 112409 (ON LA) (*Lakehead University*) – albeit for different reasons. While agreeing that the fixed-term approach is a more principled approach to the calculation of damages than the notice model used by some arbitrators, Arbitrator Surdykowski found that an unjustly dismissed employee who is not being reinstated is entitled to be made whole for the period of unemployment, less any discipline imposed to the date of the award, as well as compensation for their loss of collective agreement employment going forward. In other words, Arbitrator Surdykowski found that an employee in these circumstances is entitled to a compensatory award consisting of two assessments, stating as follows:

> 115. I disagree with the proposition stated in paragraph 136 of *Hay River* (and in the *Metropolitan Toronto*, *NAV Canada* and *Government of Alberta* decisions cited), and applied in cases such as *De Havilland*, *Canvil*, and *Humber River Hospital*, that all damages in lieu of reinstatement run from the date of the discharge determined to be contrary to the collective agreement. I do not agree that awarding damages based on an assessment of the grievor's lost wages and benefits between the date of discharge plus damages for the loss of collective agreement employment going forward from the date of the decision determining that the grievor's employment had been terminated in a manner contrary to the collective agreement is counterintuitive or inappropriate. I am satisfied that the opposite is true. In principle it is appropriate to make one assessment of collective agreement damages from the date of termination to the date of the decision (which with appropriate evidence is relatively easily done), and a second assessment of damages for the loss of collective agreement employment going forward from the date of decision (as the point at which reinstatement would have occurred in the usual case).

116. I disagree with the notion that awarding damages for the period between the date of discharge and the date of the determination of the grievance on the merits brings irrelevant factors into play or somehow punishes the employer who had no control over how long it took the grievance arbitration process to produce the determination. Why as a matter of principle should an employee who an arbitrator has determined should not be returned to the workplace notwithstanding that the employer did not have collective agreement cause for discharge be denied the same compensation as an employee who is reinstated? Why should the grievor who has been found not guilty of behaviour justifying discharge, and who would probably have been very happy to have had his grievance determined more expeditiously be penalized by the delay? Why on the other hand should an employer who has violated the collective agreement not pay the full price of doing so?

117. In the consensual grievance arbitration process a grievance must (subject to the applicable statutory expedited arbitration provisions) be processed through the collective agreement grievance settlement process before it can be referred to arbitration. Once the collective agreement grievance settlement process is exhausted and the grievance is referred to arbitration, control over the process rests in the hands and depends on the mutually agreeable availability of the union and the guilty (in the sense that it has been found to have discharged the grievor in a manner contrary to the collective agreement) employer. The parties must first agree to a suitable arbitrator, which they often do in consultation with counsel. After the parties agree to an arbitrator (with or without regard to the arbitrator's availability or any realistic assessment of how many days of hearing are likely to be required), a hearing date or dates mutually agreeable to the parties, counsel, and the arbitrator (i.e. dependent on their availability) are scheduled. Although the employer does not exercise sole control over the process, it is simply not true that the employer has no control. The employer has control over its availability, over the selection of counsel retained to present its case at arbitration (who may have a full schedule), and over selection of the arbitrator agreed to (who may not be available for many months). The employer does not lose all control even after the hearing begins. If more hearing dates than originally scheduled are required they are scheduled in consultation with the parties based on mutual availability. The grievance process being one that belongs to the parties (as opposed to proceedings before an administrative tribunal like the Ontario Labour Relations Board), it is the rare arbitrator who will schedule hearing dates without regard to the parties' (who are the union and the employer – not the grievor) professed availability. The delay inherent in the process is obvious. The grievor (i.e. the employee who has been fired and is "on the street") typically has no control over any of this. Why should the employer, who does and who has been found to have violated the grievor's collective agreement rights but has nevertheless

> succeeded in ridding itself of what it considers to be a troublesome employee, derive any benefit from a delay in the process?
>
> 118. The delays inherent in the grievance arbitration process inevitably operate to the detriment of the grievor employee who has been fired and is without income except to the extent that he can obtain alternate employment in the interim, and to the benefit of the employer who carries on with business as usual until the grievance is determined—however long that takes. Why should the employer who the arbitrator has determined violated the collective agreement escape the consequences of the delays inherent in the process engaged to the detriment of the grievor, "bad actor" or not, whose collective agreement rights were violated? Why should the grievor employee whose collective agreement rights were violated but who has been denied the usual remedy of reinstatement also be denied the usual remedy of compensatory damages for the period between the date of discharge and the date of the decision determining the merits of the grievance? In the usual case of a grievor whose discharge grievance is allowed and who is granted the usual remedy of reinstatement, that grievor also receives full compensatory damages for the period between the date of discharge and the date of the decision (subject to deduction for any discipline substituted by the arbitrator) without deduction or even consideration for how long it took for the grievance to be determined. Why should it be any different for a grievor whose discharge grievance is allowed but who is denied the significant remedy of reinstatement? Why should such a grievor also be denied the usual remedy of compensatory damages for the period between date of termination and date of decision allowing the grievance? I am not satisfied that there is a principled reason to deny such a grievor that compensation.

100. The Canada Industrial Relations Board endorsed and applied Arbitrator Surdykowski's two-step calculation in the recent decision *Szabo and Canadian Pacific Railway*, 2022 CIRB 1019, making the definitive statement (at least in respect to unjust dismissal cases determined under the *Canada Labour Code*) that "generally speaking, the way forward for determining damages in lieu of reinstatement under the *Code* is by applying the principles of the Fixed-Term or Economic Loss approach." Adjudicator Asbell, writing on behalf of the Board, wrote at paragraph 91:

> 91 The Board is also of the opinion that a wrongfully dismissed employee is entitled to not only damages from the date of their dismissal to the date of decision, but also damages for loss of employment rights from the date of decision forward. While non-union employees under the Code do not have

> rights under a collective agreement, they enjoy similar protections and security of employment. Upon dismissal, those employees should therefore expect similar protections as employees under a collective agreement. By adopting the principles underlying the Economic Loss approach, the Board will be in a better position to properly value the losses experienced by these employees due to the loss of their employment. Damages will normally be awarded based on an evidentiary assumption the employee will remain in their job until retirement, subject to appropriate contingencies. While non-exhaustive, some of these contingencies include the age of the employee, their tenure and position with the employer, their current state of health and projected length of time until retirement, the likelihood of the employee being dismissed for cause based on their prior or current conduct and behaviour, the likelihood of early retirement, or changes in their career given the type of job and educational level.

101. What is clear from above is that there continues to be different approaches with respect to how damages are assessed in these circumstances. Some arbitrators have assessed damages using the methodology for assessing damages in wrongful dismissal cases. Some arbitrators adopt a "multiplier approach" and assess damages using a formula by multiplying the number of years of employment by 1, 1.25, 1.5 or 2 months' compensation for each year of service. Others still have quantified the damages using a conceptual framework of loss of fixed term employment taking into account potential losses to normal retirement age but also taking into account a wide range of contingencies that may reduce the damages. The degree to which length of service or seniority determines the quantum of damages is not settled. Nor, definitively, is the role of mitigation, if any, in this assessment. Some arbitrators assess damages for loss of "fringe benefits" by applying a percentage value of salary/wages such as 10, 15 or 20% (see *First Canada ULC and IUOE, Local Union No. 955 (Diriye)), supra*, for another summary of the various approaches employed by arbitrators).

102. Similarly clear is that as an arbitrator appointed by the parties, I am vested with the jurisdiction to fashion an appropriate and conclusive remedy consistent with the applicable legal principles to the facts.

103. In exercising this responsibility, I accept the principles set out by Arbitrator Surdykowski in *Re NAV Canada and I.B.E.W., Loc. 2228 (Coulter), supra,* and the Canada Industrial Relations Board in *Szabo*, *supra*, that it is appropriate in successful unjust dismissal cases where reinstatement is not appropriate to embark on a two-step assessment of damages that involves determining collective agreement damages from the date of termination to the date of the decision, and separately, damages for the loss of collective agreement employment going forward from the date of decision – which must take into account a wide array of factors and contingencies.

104. The first calculation is straightforward. The Grievors are entitled to be paid what they would have earned but for the termination from the time of their dismissal up to the date of the Award, minus what they earned from alternate employment. This is the normal remedy that flows for unjustly dismissed employees reinstated to their positions via arbitral order. I agree with Arbitrator Surdykowski that it would be unfair for employees who have a right to reinstatement to be paid less simply because reinstatement is off the table. This is especially so when the employee has done nothing at all wrong, as is the case with the Grievors in the present matter.

105. Respectfully, I do not accept the Employer's suggestion in this case that the Grievors would have been laid off at the end of their term employment or may otherwise have left their employ with the GNWT. Rather, had the Grievors' employment status been converted, they would have had priority staffing rights for positions pursuant to Article 33.03 – without need for a job competition – provided they had the skills, abilities and qualifications for a position, or could successfully obtain the skills, abilities, and qualification for the job within one year of training. The Grievors in this case applied for and were advanced in various job competitions wherein they met the minimum requirements for available positions. Yet, they were screened out of the application process through interviews or written tests which ought never to have occurred given their right to such employment on meeting the qualifications for the position. On the evidence before me, I find it likely the Grievors would have continued their employment

with the GNWT for the foreseeable future – certainly at least until the date of this Award given their evidence that each of them intended to stay in the North and continue working if they had been converted into indeterminate employees.

106. In so finding, I observe the evidence is that the Employer stood in the way of allowing the Grievors to mitigate their loss of employment through alternate positions within the GNWT. While Mr. Yadav testified that the Employer attempted to accommodate all of the Grievors into alternate employment with the GNWT, I found his evidence on this point to be inconsistent and not credible. Certainly, his evidence that he tried to help all of the Grievors in their job search is undermined by his February 25, 2020 email to Mr. Moore wherein he explained that while he had encouraged Mr. Uddin to apply on various roles in the GNWT, he would not recommend that he be hired into any of these roles. His evidence about how he selected which employees would not be converted to indeterminate status despite working on the same projects and under the same funding arrangements as other term employees whose employment was properly converted, and his evidence about undocumented complaints, showed a complete lack of regard for the Collective Agreement rights of bargaining unit employees.

107. Given the number of large, ongoing and upcoming infrastructure projects in the NWT, it is likely, in my view, that with the Grievors' qualifications and clear employment records, they each would have continued their employment with the GNWT for the foreseeable future had they become indeterminate employees. That was their evidence, and it was uncontradicted by any other evidence. Thus, the Employer's decision not to convert the Grievors had a significant impact on each of their lives. It forced all of them to relocate and seek work elsewhere at a time where each of them had expressed a desire to continue their employment in the North. Each was required to move without the benefit of severance pay under the Collective Agreement or other financial assistance from the Employer, and in the face of believing their employment was going to be converted because of the change to the Collective Agreement and because they observed their peers similarly employed on term contracts have their employment status converted to indeterminate.

108. In all of the circumstances, in respect of the first part of the damages assessment, I order that the Grievors each be paid the equivalent of what they would have earned had they remained working for the GNWT from the time of their dismissal until the date of the Award, minus the income each earned during the same period from alternate employment.

Damages in Lieu of Reinstatement

109. The second step of the assessment is to determine the appropriate quantum of damages for the Grievors' loss of collective agreement employment on a go-forward basis.

110. I accept that in the ordinary course, damages need to factor in the economic loss of losing a position covered by a collective agreement including provisions relating to seniority and just cause provisions. There can be no doubt, in my view, that the unique nature and particular advantages to employees employed under a collective agreement, versus an individual contract of employment, are a legitimate consideration in assessing damages in lieu of reinstatement. These advantages were succinctly articulated by Professor Paul Weiler more than 40 years ago in *William Scott & Co. v. C.F.A.W., Local P-162*, [1977] 1 Can. L.R.B.R. 1 (B.C.L.R.B.) (para. 10) as follows:

> First of all, under the standard seniority clause an employer no longer retains the unilateral right to terminate a person's employment simply with notice or pay in lieu of notice. Employment under a collective agreement is severed only if the employee quits voluntarily, is discharged for cause, or under certain other defined conditions (e.g. absence without leave for five days; layoff without recall for one year, and so on). As a result, an employee who has served the probation period secures a form of tenure, a legal expectation of continued employment as long as he gives no specific reason for dismissal. On that foundation, the collective agreement erects a number of significant benefits: seniority claim to jobs in case of layoff or promotion; service-based entitlement to extended vacation or sick leave; accumulated credits in a pension plan funded by the employer. The point is that the right to continued employment is normally a much firmer and more valuable legal claim under a collective

> agreement than under the common law individual contract of employment. As a result, discharge of an employee under collective bargaining law, especially of one who has worked under it for some time under the agreement, is a qualitatively more serious and more detrimental event than it would be under the common law.

111. That being said, I note the Grievors in this case have all indicated they are not interested in being reinstated to employment with the GNWT. In other words, if I were to order reinstatement – which is, of course, the ordinary remedy in cases where an employee is found to have been unjustly dismissed – each would subsequently "resign" from their employment and accordingly would be entitled to severance pay under the terms of the Collective Agreement. Thus, I find this is the appropriate award to make in the present case for the Grievors' loss of unionized employment.

112. In coming to this conclusion, I observe that this is not a case where reinstatement is inappropriate, as was the case in the authorities cited above. Rather, it is the Grievors' own decision to not accept future employment with the GNWT. While I am cognizant of the Grievors' evidence that it was the Employer's actions in terminating their employment that, at least in part, is the reason for their reluctance to return, I find the fact that none are particularly interested in resuming employment in the North would lead to a very sizable discount on the calculation of future economic loss.

113. In my view, there is no need to crystal-ball the quantum of damages given the Grievors' expressed desire not to return to work for the GNWT. Rather, in these unique circumstances, as stated, I order the Employer to pay the Grievors severance in accordance with the Collective Agreement calculated as though their employment was continuous until the date of this Award.

Damages for Bad Faith

114. Finally, the Union argues that special damages are warranted in this case due to the Employer's bad faith conduct. I agree.

115. While Mr. Yadav attempted to draw a line around the three Grievors during his testimony to explain why only these three employees could not have their employment status converted due to the end of funding, I found his explanations were not supported by the evidence nor were they consistent with the Employer's admission in this case that the Grievors ought to have been converted. Put bluntly, the evidence about the Employer's attempt to avoid other employee conversion, and the clear direction he received that this was not permissible under the Collective Agreement, demonstrates that Mr. Yadav knew, or certainly ought to have known, that the Grievors similarly had a right to indeterminate employment and the priority hiring rights and other Collective Agreement protections that flow from that employment status. He chose not to convert their employment anyway. I find this kind of blatant disregard for the terms and provisions agreed to in the Collective Agreement and for the well-being of individuals employed by the Employer is precisely the type of conduct that requires an award of damages.

116. The Employer's breaches on the Collective Agreement had (and continues to have) significant impact on the Grievors' lives. All of them were required to move elsewhere to find employment. Their evidence, which I accept, was that they would have remained working in the North had they been converted to indeterminate employees. I find their testimony consistent with their respective efforts to continue their employment within the GNWT in alternate positions – efforts that appear to have been kiboshed by the Employer in job competitions that ought never to have taken place. In all of the circumstances, I find it is appropriate that the Employer pay an additional $10,000 in moral damages to each of the Grievors for the bad faith manner of their dismissal.

Failure to Disclose

117. Finally, the Union made a compelling argument with respect to the Employer's failure to meet its obligation to fully disclose relevant documents in its possession. The Employer did not

disclose, for example, performance evaluations nor internal emails that Mr. Yadav referenced in his testimony about Mr. Uddin being a bad employee. His evidence was that this played a role in his determination of which employees would have their employment converted – yet there were no documents to support such an assertion. There was also no disclosure of the financial documents detailing the staffing requirements for projects to which the Grievors were assigned, and upon which Mr. Yadav testified he relied on to determine that the funding for the Grievors' positions was ending.

118. Full disclosure is a fundamental fair hearing principle. Failure to fully disclose relevant information prior to the commencement of a hearing may result in unnecessary and avoidable delays and adjournments, or, as in the case under consideration, a lack of information that may have been helpful to determine the outcome of this case. I note the Union did not press for the missing documents in this instance; but, certainly, given Mr. Yadav's continued insistence that the Grievors' positions were legitimately ended because of funding deficits despite the Employer's concession to the contrary, the Union was entitled to receive these documents as part of its bad faith argument. The Employer's failure to disclose these documents could have delayed the hearing until the documents were produced had the Union insisted upon their production.

119. It is the responsibility of counsel to explain the legal requirement to produce *all* documents related to the issues raised in a grievance to their advisors and witnesses, and to explore the veracity of a search for information when expected or specifically requested documentation is missing to satisfy themselves that the documents truly do not exist. I trust that this approach will be adopted and that disclosure will not be an issue between the Parties moving forward. Also, I expect that any issues regarding the production of documents and/or particulars will be brought to the appointed arbitrator well in advance of a hearing so that any issues may be dealt with preliminarily. These practices will ensure that hearing dates are fully utilized.

IV. CONCLUSION

120. The grievance is allowed. I order the Employer to compensate the Grievors as follows:

(a) All wages the Grievors' would have earned up to the date of this Award had they worked in that period, minus the money each earned in alternate employment during this period;

(b) Severance pay in accordance with Article 32 of the Collective Agreement calculated on the basis that the Grievors' employment continued until the date of this Award; and

(c) $10,000 to each Grievor to compensate for the Employer's bad faith conduct in relation to the termination of their employment.

121. Finally, payment of the compensatory award of damages, based on the losses assessed above, will, on written direction from each of the Grievors, be paid in any lawful manner with a view to minimizing any tax consequences, for example, by payment directly into an RRSP assuming any necessary elective forms are provided.

122. I remain seized with the requisite jurisdiction to resolve any issues arising out of the implementation of this Award.

It is so ordered.

Dated at the City of Vancouver in the Province of British Columbia this 5th day of September, 2023.

Amanda Rogers, Arbitrator