IN THE MATTER OF AN ARBITRATION

BETWEEN:

THE GOVERNMENT OF THE NORTHWEST TERRITORIES

(The "Employer")

AND:

PUBLIC SERVICE ALLIANCE OF CANADA
on behalf of
UNION OF NORTHERN WORKERS

(The "Union)

Grievance 23-P-03021 – Casual JD/Evaluation Appeals

ARBITRATION AWARD

ARBITRATOR:	RICHARD COLEMAN
FOR THE EMPLOYER:	THOMAS WALLWORK LYNDON STAZELL
FOR THE UNION:	MICHAEL H. PENNER
DATES OF HEARING:	November 7, 2023
DATE OF AWARD:	December 12, 2023

These proceedings concern a dispute between the parties as to whether an employee hired as a casual is entitled to a full statement of duties and responsibilities, with a concomitant right to appeal the rating of their job pursuant to the Hay job evaluation System used in the GNWT to determine pay grades. The grievance is listed as a policy grievance but arose from an inquiry from an individual employee.

The Union asserts that a casual is an "employee" and pursuant to the collective agreement they are entitled to an articulation of the duties they are meant to perform (art. 34), which in turn, must be evaluated by the Hay Evaluation process to determine the correct rate of pay (art. 36). And if they disagree with the rating they are given, they are contractually entitled to the appeal process available to other employees.

The Employer disputes the Union's interpretation and application of the collective agreement, on the basis that casuals are technically and legally not "appointed to positions" *per se* pursuant to the *Public Service Act,* and therefore have no right of appeal against the job evaluation rating and pay grade they are assigned. This position is articulated in the Deputy Minister's March 10, 2023 response to the grievance,

> The Employer does not arbitrarily determine the pay for casual employees. Casual employees are provided with a list of tasks for their employment which may or may not match those of established positions. Where the tasks match an evaluated position, the employee receives the equivalent pay for that position. Where it does not, the casual profiles associated with the casual work are relied upon for guidance; casual profiles have been rated according to the Hay methodology. If there is no casual profile for the job, an individual evaluation is undertaken, applying the Hay Method of evaluation to the specific list of duties.
>
> Additionally, the existence of the list of tasks and casual profiles informing these assessments are available to be shared with the Union upon request…**Casual employees are entitled to both articles 34 and 36 of the Collective Agreement, however, both articles hinge on the word position to exercise those rights.** It is a longstanding practice which is outlined in appendix A5.02, where casual employees do not occupy positions, and are therefore unable to exercise these rights.
>
> (emphasis added)

Evidence:

The main contract clauses in dispute are these:

2.01
(d) “Base Salary” means the hourly salary as determined by range and step placement in Appendix B1.

34.01
When an employee is first engaged or when an employee is reassigned to another position in the Bargaining Unit, the Employer shall, before the employee is assigned to that position, provide the employee with a current and accurate Statement of Duties of the position to which the employee is assigned.

Upon written request, an employee shall be entitled to a complete and current Statement of Duties and Responsibilities of the employee’s position, including the position's job evaluation level and point rating allotted by factor, where applicable.

ARTICLE 36
JOB EVALUATION

36.01
During the term of this Agreement, if a new or revised Job Evaluation System is implemented by the Employer, the Employer shall before applying the new or revised Job Evaluation System, negotiate with the Union the rates of pay and the rules affecting the pay of employees for the evaluations affected. If the parties fail to reach agreement within sixty (60) days from the date on which the Employer submits the new or revised standard to the Union, the Employer may apply the new rates of pay and the Union may refer the matter to arbitration. The arbitrator's decision will be retroactive to the date of application of the new rates.

36.02
During the term of this Collective Agreement the Hay Job Evaluation Guide Charts, in conjunction with benchmark positions as set out in the Job Evaluation Manual, will be used for assessing the value of positions to which employees are assigned. Upon request, an employee shall be provided with access to a copy of the job evaluation manual including guide charts.

36.03
(1) Where an employee believes that the employee’s position has been improperly evaluated and prior to filing an appeal under Clause 36.04, the employee is encouraged to discuss the evaluation of their position

with their supervisor or a representative of management who is knowledgeable in the job evaluation

(2) Upon request the employee shall be provided a copy of the job description for the employee's position together with the point rating and the rationale supporting the point rating assigned.

36.04 (1) (a)
Employees shall file job evaluation appeals directly with their Deputy Head…

> (1) (d) The Job Evaluation Appeal Board may by a unanimous decision, either determine that the employee's evaluation is proper or determine that the employee has been improperly evaluated in their position and determine the proper evaluation for the position.
>
> …
>
> (2) (d) The Job Evaluation Review Board may, by a majority decision, either determine that the employee's evaluation is proper or the Board may, determine that the employee has been improperly evaluated in the employee's position and determine the proper evaluation for the position.

APPENDIX A5
CASUAL EMPLOYEES:

A5.02
The Employer shall ensure that a series of casual employees will not be employed in lieu of establishing a full-time position or filling a vacant position.

An employee will not be hired as a casual employee to perform the same job as the employee performs in the employee's position. Any hours in excess of or outside of the employee's regularly scheduled hours of work in the same job shall be paid as overtime.

An employee who is on leave for greater than 14 calendar days may accept casual employment within the same Authority provided the employee is not performing the tasks within the same facility as their substantive position.

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

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

b) The following Articles and Clauses contained in this Collective Agreement do not apply to casual employees:

(i) Article 18 - Entire Article except Clause 18.05
Article 20 - Sick Leave Clauses 20.09 and 20.10.

(ii) Article 21 Other Types of Leave - Clause 21.04 and 21.05

(iii) Article 33 - Lay-off.
.
(iv) Article 39 – Public Service Pension Plan.

(v) Article 35 - Employee Performance Review and Employee Files.

vi) Article 43 – Relocation Expenses on Initial Appointment and Subsequent Moves As An Employee

(vii) Article 48 - Entire Article.

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

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

Memorandum of Understanding

The parties agree that the Hay Job Evaluation guide charts when used in conjunction with benchmark positions either set out in the Job Evaluation Manual or to be included therein, must be such as to provide for gender neutral job evaluations. The parties also agree that the job evaluation appeal process under Article 36 of the Collective Agreement

has been devised to provide a joint and independent process for ensuring that each individual job evaluation result is gender-neutral.

Therefore, the parties agree to the following process:

(1) The Deputy Head shall, at the end of each month, refer all appeals that have been received in the applicable month to a Job Evaluation Appeal Board under Article 36.04(1).

(2) The Job Evaluation Appeal Board shall group positions under appeal that may be the same or similar and select one or a small sample of positions to determine whether the evaluations are proper. If a unanimous evaluation decision is not reached, the selected position(s) shall be referred to the Job Evaluation Review Board for a majority evaluation decision.

Pay Schedules appear in Appendix B, "Hourly Rates of Pay", which lists minimum and maximum Hay point scores for each pay rate, including a separate column titled "Casuals".

Mr. Mike Parsons, the Union's representative on the parties' joint Job Evaluation Committee and co-chair of that committee, provided testimony with respect to how the current dispute came to be, and the Union's understanding of the proper application of the collective agreement, in particular as the collective agreement relates to the evaluation of jobs and the setting of rates of pay. Mr. Parsons testified that he was contacted by a member employed as a Junior Business Analyst, which led him to write to Jennifer Inch, the Employer's co-chair of the Committee, asking for a job description. Documents show that Ms. Inch emailed back, writing that because the employee concerned was employed as a casual, it was not "a position", therefore there would not be a full job description and no job evaluation would have been performed. Her email stated that pay for the position "would have been based on a statement of duties, and figuring out pay range would be guided by HR Client Services through their processes". Mr. Parsons testified that he made further inquiries to obtain a statement of duties for the position, and queried how a casual employee could dispute their pay. He did not get a response to either question, so the grievance was filed.

Mr. Parsons said that that this was the first either he or the Union was made aware that the Employer applied a separate process for assessing the job rating for casual employees, which he considered to be a violation of arts. 34 and 36, and Appendix 5.

In cross examination, the witness said that the Job Evaluation Committee meets three or four times per year, dealing with three to four appeals at a time. He explained that if the joint committee does not reach consensus on a case it is sent to third party arbitration. He estimated that the whole process "from start to finish" would normally take six months.

In redirect, he said that when a rating is eventually determined, it is applied retroactively to the date when the issue was first raised. (I note parenthetically that I am not clear as to whether "first raised" relates to the date the employee first questioned their rating and/or pay, or the date it reached the joint committee. In any case, I do not understand this question to be an issue between the parties and need not be addressed here.)

The Employer called Mr. Brian Potvin, the Human Resources Client Services Manager, who has held his position since 2019. Mr. Potvin explained the casual recruiting process, referring to parts of the Employer's Human Resources Manual under the section titled Casual Recruiting, which sets out the process including how a wage is established:

> 23. The Human Resource Representative reviews and assesses the duties to be performed along with the required qualifications and confirms the appropriate pay range in consultation with the hiring manager.
>
> 13. Upon receipt of the casual hiring request form, the HR Representative reviews the request and assesses the duties to be performed along with the required qualifications. The HR Representative then reviews the Casual Position Profiles established by Job Evaluation to determine the appropriate pay range in consultation with the employing department, board or agency. Should the duties not resemble those of an established Casual Position Profile, the HR Representative contacts Job Evaluation to assist with determining the appropriate pay range

He went on to say that whatever rate is selected by HR, it is subject to negotiation with the casual employee.

Under cross examination, Mr. Potvin confirmed that when a casual is hired to assume the duties of an existing position, they are paid the same as the existing position, but if they are hired for temporary work that is not directly comparable to a position that has been assessed, the work is given a score based on the duties and skills for the temporary work set out by the hiring manager, but the evaluation is completed by HR rather than the Job Evaluation division. So no

material would got to Job Evaluation, although, he said, they have reached out to Job Evaluation before.

He confirmed the Employer's position that casual employees are not placed in a "position" because they are not appointed; and if a casual wishes to question their wage they can discuss it with their manager.

Submissions:

Union:

The Union maintains that clause 5.03 of Appendix 5 is determinative of this dispute, in that on its face, A5.03 sets out a definitive and exhaustive list of the provisions which do not apply to casual employees, a list which does not include arts. 34 or 36. Hence, it is submitted, the right of a casual employee to access the rights set out in those clauses are not curtailed or eliminated. In Mr. Penner's submission, the words in the opening sentence of A5.03 "except as follows" make it clear that only those provisions listed are inapplicable, and no others, as per the contract construction rule, e*xpressio unius est exclusio alterius.*

Counsel maintains that other provisions in the collective agreement are consistent with that interpretation. In particular, the definition of "employee" in art. 2 explicitly includes casual employees; also from art. 2, "base salary" is determined by placement on the pay grids set out in Appendix B1 which then relies on a rating determined through application of the Hay Guide; and art. 24.01 which establishes that "Employees are entitled to be paid for services rendered for the job evaluation and position to which they are appointed at the pay rates specified in the appendices attached". All of which, it is argued, necessarily involves art. 34.01 which provides for a "statement of duties and responsibilities to which the employee is assigned" which in turn is required for a job evaluation pursuant to art. 36. Therefore the pay for every employee, including casuals, must be determined by an assessment of a statement of duties and assessment pursuant to the Hays Job Evaluation Guide. But if casual employees are denied access to the processes initiated with art. 36 they would have no means of challenging the Hay score unilaterally given their work by the Employer.

Employer:

The central piece of the Employer's argument concerns the appearance of the word "position" in both art. 34 and art. 36. In counsel's submission it was determined in an earlier arbitration award *Union of Northern Workers v Northwest Territories (Minister responsible for the Public Service*

(MacDonald Grievance), [2004] CLAD No 542, [2004] CLAD No 542 ("*MacDonald"*), which among its conclusions related to the employment of casuals, determined, that casual employees cannot be considered to have been appointed into "positions within the Public Service". At para. 22:

> …This, I conclude, could not have included a probationary period as the collective agreement hinges that entitlement/benefit/obligation solely on an appointment or promotion within the Public Service which, as I have said, I cannot find that Appendix A5.01 covers.

Arbitrator Jolliffe's conclusions in *MacDonald* reiterate his conclusions in an earlier award, (Jolliffe, unreported, June 26, 2002 (*"Tessier"*), at page 14:

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> I am unable to equate hiring into continuous periods of casual employment, or even over holding in casual employment so as to arguably create a right to be appointed, with "first appointed to… the Public Service of the Northwest Territories"

In response to the Union' argument that art. A5.03 is definitive of parts of the collective agreement not applying to casuals, counsel points out that probation does not apply to casuals but probation defined in art. 2.01 is not listed in A5.03, because, as with other articles in the collective agreement probation is otherwise not applicable to casual employees. Art. 49, "Deferred Salary Leave" is another article in that category which does not apply to casuals. In other words, some articles are not listed in art. A5.03 because, on their face, they are not applicable to casual employees. It is submitted that art. 34 and art. 36 fall into that category because both of those clauses are only triggered where an employee is "appointed to a position", which, as per the *Public Service Act*, casual employees are not. It is submitted that these distinctions and references to "position" are intentional.

In reference to art. 34, Counsel also maintains that there is a difference between being "assigned" versus being "appointed". Hence, the first paragraph applies to casuals—a current and accurate statement of duties will be provided—but the second paragraph does not—employee to be provided with "the position's job evaluation level and point rating allotted by factor"—because it relates to the employee's "position". Ergo, it is argued, casuals are not entitled to this information because they do not hold a "position".

With respect to art. 36, counsel agrees that the first paragraph requiring that the Hay Job Evaluation Guide be used is applicable, but not the rest of the article which refers to an

employee's' "positions". Because casual employees do not hold positions, there is nothing to appeal.

Reference was made to Arbitrator Ponak's 2013 decision between these parties, *Northwest Territories v. Public Service Alliance of Canada (Union of Northern Workers)* (08-G-00743 Grievance), [2013] C.L.A.D. No. 91 (*"Job Evaluation Appeal Process"*) which confirms a requirement that job evaluation appeals must be processed through art. 36 rather than the grievance procedure. At page 14:

> …While not expressly stated, I conclude that the intention of the parties was to remove challenges to the results of a particular job evaluation from the grievance procedure and have such challenges exclusively governed by the procedures in articles 36.03, 36.04, and 36.05. An employee displeased with the results of his or her job evaluation must file an appeal through articles 36.03, 36.04, and 36.05 and not the grievance procedure.

I take reference to this arbitration decision, for the proposition that a casual cannot replace access to art. 36 by relying on the grievance procedure to challenge the Hay rating of their job. But, counsel maintains, casual employees are not without recourse if they wish to challenge their pay, in that they can grieve an incorrect statement of duties, or some other process element. Or they can negotiate with their manager.

Analysis and Decision:

It is clear from Mr. Potvin's testimony that the pay rate for casual employees is determined through a Hay rating of the duties and responsibilities attached to the work they are required to perform. And there is agreement that a casual is entitled to receive "an accurate statement of duties" on request, but no agreement as to what information the employee is entitled to receive as to how the rating and wage level were arrived at, or how, or if, they can go about conclusively challenging that rating. From that synopsis I take the crux of the dispute to be whether a casual employee has a right to appeal their score through the job evaluation appeal mechanism set out in art. 36, which in practical terms necessarily translates as whether a casual employee has any contractural right to conclusively challenge the rate of pay set by the Employer.

The Union says that since a casual's rate of pay is determined by an assessment of their duties against the Hay Guide, they must be able to challenge the Employer's assessment. And if the parties had meant otherwise, they would have said so in A5.03 as per the *expresio unius* rule. The Employer disputes that conclusion, on the grounds that all of the relavant contract clauses leading up to and including the agreed to job evaluation appeal process, only apply to persons appointed to "positions", which automatically rules out casuals who, they maintain, do not occupy "positions" for purposes of the collective agreement and reflective of the *Public Service Act*. Both counsel present their respective arguments as definitive, but leading to opposite conclusions.

The usual rules applied in deciding contract interpretation disputes are set out in in *Pacific Press v Graphic Communications International Union, Local 25-C (Pressman)*, 1995 CarswellBC 3177:

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

In the current matter there is the added consideration of the interplay between the governing collective agreement and the *Public Service Act*.

Putting consideration of the *Public Service Act* aside for the moment, relevant parts of the collective agreement include a definition of "employee" that includes casual employees (art. 2.01); wage determination through the application of an agreed upon job evaluation plan (arts. 2.01, 34 and 36); a right to grieve interpretations and applications of the collective agreement (art. 37.01); a job evaluation appeal process (art. 36 and an MoU); and A5.03 which explicitly names articles which do not apply to casual employees, a list which does not include either art. 34 or 36, the latter referring to the job evaluation appeal procedure. But there are no definitions for "position" or "appointment".

On one side of the issue, it is clear from those parts of the collective agreement, particularly art. A5.03, that the parties turned their minds to explicitly defining which clauses would not apply to casual employees. Given the accepted rule that "a very important promise is likely to be clearly and unequivocally expressed" it is significant that A5.03 makes no mention of articles 34 and 36. Those are the clauses which provide an employee with a mechanism to dispute their pay rate. It is axiomatic that pay is a main, indeed *the* main, reason for work. A mutual intent to remove a contractual right for an employee to challenge the pay rate unilaterally established by an employer, in a unionized workplace, would be a very important promise indeed, and would be expected to be clearly and unequivocally expressed. Here the parties have turned their minds to defining exemptions, but notably did not exempt a right to appeal pursuant to art. 36 and thereby mount a challenge to their rate of pay. In the result, an application of pt 2 of *Pacific Press*, that "the primary resource for an interpretation is the collective agreement", combined with the principle expressed in pt. 5, support the Union's interpretation.

On the other side of the issue are the Employer's submissions, based on the wording of arts. 34 and 36 combined with existing case law between these parties regarding what can be considered an appointment to a position in the Public Service. Counsel maintains that the term "position" appearing in the collective agreement has the same definitive meaning as it does in the *Act*. Hence, it is submitted, the wording of both articles, on their face, exempt casuals from the rights claimed in the grievance.

The authorities relied on are Arbitrator Jolliffe's decisions in *Tessier, supra,* and, *MacDonald, supra.* The grievance decided in *MacDonald* concerned contiguous casual appointments and whether the grievors should be treated as having automatically become appointed "term" employees. The grievance was sustained, but with status pursuant to the collective agreement but not the Public Service. At para. 22:

> I conclude that the aggrieved employees in question were entitled from outset of their employment to have been appointed on a term basis, at least for purposes of the collective agreement, and entitled to all its provisions from the first day of his or her employment. **This, I conclude, could not have included a probationary period as the collective agreement hinges that entitlement/ benefit/obligation solely on an appointment or promotion within the Public Service which, as I have said, I cannot find that Appendix A5.01 covers.** In that regard, it is interesting to note that the term "appointed" or "appoint" as used either in the Public Service Act, or in Appendix A5.01, is not itself separately defined in art. 2.01. **I conclude that this collectively bargained relationship contemplates that there can be term employees appointed by the Minister into positions within the Public Service and other employees who take on that term status by operation of Appendix A5.01**, which sets out requirements for their being "appointed on a term basis", but without dictating appointments to positions within the Public Service as contemplated by the *Act*.
>
> (emphasis added)

The *Tessier* case involved the rejection on probation of an employee six weeks after he was hired into a one year term position in July 2001, prior to which he had worked 1270.5 hours in a series of contiguous casual appointments. A preliminary objection was raised by the Union, that the grievor should be considered to have become a "term employee" well prior to the term appointment in 2021, and had therefore long since passed a probationary period. The Union's position was rejected on the basis that the grievor in that case had not grieved at any point during his casual appointments with a claim that he had effectively transformed from casual to becoming a "temporary" employee based on the extent of his contiguous casual appointments; plus, as Arbitrator Jolliffe expressed at p. 14 of the *Tessier* decision; "I do not see that casual employment in the context of this collective agreement constitutes an appointment to the Public Service". With respect to the issue of casuals and appointments, the decision states, at pages 12 and 13:

> I should not consider that there is any indication in the collective agreement or the *Act* that a person moving into his first position appointment should somehow be able to avoid probation altogether, as there is no indication by anyone, that a casual is ever assessed in the probationary sense…
>
> …in looking at the grievor's status, at the time of his dismissal, it is necessary for me to note the interplay between the collective agreement and the *Public Service Act*…

The interplay between the collective agreement and the *Public Service Ac*t is reasonably clear where the *Act*, as enabling legislation, is expressly named and addresses the same topic, as is the case with probation mentioned in both of the above cases, where sec. 20 of the *Public Service Act* specifically addresses a probation requirement.

Sec. 20 of the *Act* reads:

> 20. (1) Subject to subsection (2), where an employee is not appointed from within the public service, the employee is on probation after he or she has taken up the duties of his or her position for such period as may be established by the Minister for that position.
>
> (2) The period established as a probationary period under subsection (1) must not be less than six months.
>
> (3) Subject to subsection (4), where an employee is appointed from within the public service, the employee is on probation for six months after he or she has taken up the duties of his or her position.
>
> (4) The Minister may, if he or she considers it appropriate, reduce or waive the probationary period referred to in subsection (3).
>
> (5) The Minister may, in accordance with the regulations, extend the probationary period of an employee that is established under subsection (1) or referred to in subsection (3). RSNWT 1988,c.124 (Supp.),s.11.

Consistent with the Act, "Probation" in the collective agreement is defined as:

> (y) "Probation" means a period of six (6) months from the day upon which an employee is first appointed to, transferred or promoted within the Public Service of the Northwest Territories except that for an employee first

> appointed to a position at Pay Level 13 or higher, it shall be a period of one (1) year. An employee who is appointed to a position which has the same duties, as the employee's previous position shall not serve an additional probationary period. If an employee does not successfully complete their probationary period on transfer or promotion the Employer will make every reasonable effort to appoint the employee to a position comparable to the one from which the employee was transferred or promoted.

The proposition that arts. 34 and 36 are inapplicable on their face, relies on a presumption that reference to an employee's position represents an automatic disqualifier, which in turn relies on the presumption that because the *Public Service Act* uses the word "position" to refer to appointments to the Public Service, the term is necessarily restricted to that meaning in the collective agreement. For reaons that follow, I disagree with that contention.

The main clauses in the current dispute, arts. 34 and 36, are certainly replete with references to "position", (although I note that the collective agreement is not without clauses which link casuals to "position". A5.03 (a) itself prohibits "rehire of casuals into the same positions…". There is also the line on page 219 of the collective agreement related to order of layoff: "a) First, to casual Employees in those specific positions".) But in contrast to the definition of "Probation" in the collective agreement, neither art. 34 or art. 36 specifically refer to positions or appointments "to the Public Service". Neither clause contains the words "Public Service", which goes some way in bringing the current matter in line with the logic expressed at para. 22 of *MacDonald, supra*, reproduced above, which confirmed contractual appointments distinct from appointments to the Public Service by the Minister.

The close interplay between the collective agreement and the *Public Service Act* must be taken into account, because the two documents are closely connected and one could assume that the parties may have wanted to avoid confusion and be consistent with the *Act*. But not because there is a mandatory requirement that the use of a particular word must have precisely the same meaning in both. The collective agreement and the statute are separate documents, and the use of the same word or phrase in both need not indicate precisely the same definition be it wide or narrow. *MacDonald, supra* makes that point by distinguishing between appointments pursuant to the Act and appointments pursuant to the collective agreement. The parties are free to apply their own language provided it does not contradict the *Act*. Where there is conflict, the *Act* prevails. But where the subject covered in the collective agreement is not

addressed in the *Act*, while the parties could otherwise be reasonably presumed to have adopted the use of terms from the *Act* for consistency, in my view, that presumption fades when, outside and distinct from the *Act*, the parties negotiate explicit language as they have in A5.03. The collective agreement cannot conflict with the *Act* in terms of substantive rights, benefits and obligations, but the parties are free to add topics and conditions which are not covered by, or conflict with, the statute. A more inclusive use the word "position" in the collective agreement does not automatically and in every usage, conflict with the *Act*. Nor does allowing casual employees a full right of appeal where they dispute the Employer's determination of their pay rate, conflicte with the *Act, per se.*

I do not view this conclusion to be in conflict with *Tessier, supra,* which addressed the interplay of the *Act* and the collective agreement with respect to probation where the collective agreement explicitly ties probation to an appointment to "the Public Service of the Northwest Territories". The fact pattern before me, including subject and contact language, is absent that direct connection. Unlike the situation with probation periods, which provided the context for *Tessier, supra* and *MacDonald, supra*, I was not referred to any explicit tie between the *Act* and job evaluation.

In the result, I find that absent a statutory restriction/requirement, a presumption that the parties intended the use of the word "position" to be the same term of art as it is in the *Public Service Act* and to thereby infer that the parties intended that casual employees not be allowed to appeal their job's rating and resulting pay rate, does not override the clear wording of A5.03, which directly and explicitly addresses benefits and rights not otherwise inapplicable on their face. In my view, the balance favours the Union's interpretation. Any secondary implication to be had from the parties' use of the word "position" in arts. 34 and 36 cannot override the explicit list in A5.03 in terms of establishing the parties' intentions and the important nature of the issue extant: an employee's pay. The meaning and expression of intent in A5.03 is clear on its face whereas implying intent from the use of the word "position", is not.

In summary: an employee's rate of pay is at the heart of the employment relationship. Relinquishing a right to challenge the Employer's determination of pay would be a very important promise that should be clearly and unequivocally expressed. There is no such clear and unequivocal expression here, rather the opposite: a clear list of exemptions which does not

include arts. 34 and 36. All of which, I find, represents cogent evidence that the parties did not intend to exempt casuals from either clause; evidence which is stronger and more persuasive than a presumption that the parties may have intended the use of the word "position", in that context, to be narrowly applied as it is in the *Act*, to definitively exclude casuals from appealing their rate of pay.

I make no comment about the process the Employer goes through to initially establish a Hay score for casual employees, as described by Mr. Potvin. This decision relates to the ability of a casual employee to know and challenge the result.

In the result, I find that casual employees are not excluded from arts. 34 and 36, and have a contractural right to obtain the information described in art. 34 and, to appeal their pay, which in this collective agreement necessarily means appealing the Hay rating of their job.

Dated in Vancouver, B.C., this 12th day of December, 2023.

Richard Coleman, Arbitrator