YUKON TEACHERS LABOUR RELATIONS BOARD
COMMISSION DES RELATIONS DE TRAVAIL
DU PERSONNEL ENSEIGNANT DU YUKON

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February 26, 2018

Reference No No de référence
366-YG-31, 35, 42, 43, 44, 48, 52 & 54

Mr. Ethan Emery
Executive Director
Yukon Teachers' Association
2064 - 2nd Avenue
Whitehorse YT Y1A 1A9

Mr. Gary Adams
A/Director, Labour Relations
Public Service Commission
Government of Yukon
Box 2703
Whitehorse, Yukon Y1A 2C6

Re: **Grievor:** **Lindsay Hutchinson and others**
Before: **Paul Love**
Date of decision: **February 26, 2018**

Enclosed is a copy of the decision concerning the above-cited matters.

Yours truly,

Caitlin Foster
Registry Officer
(613) 990-1828

Encl.

c.c.: I. H. Fraser
C. Foy
L. Hutchinson
M. Geisler
E. Claes
P. Dawson
A. Cunningham
T. Dennis
L. Bateman
B. Gillard

CF/abd

Files: 366-YG-31,
35, 42 to 44,
48, 52, and 54

Yukon *Education*
Labour Relations Act

Before an adjudicator
appointed by the Yukon Teachers
Labour Relations Board

BETWEEN

LINDSAY HUTCHINSON, MATTAEUS GEISLER, EMILY CLAES, PRICILLA DAWSON, ALLISON CUNNINGHAM, TRINE DENNIS, LAURA BATEMAN, AND BRUCE GILLARD

Grievors

and

GOVERNMENT OF YUKON

Employer

Before: Paul Love, adjudicator

For the Grievors: Christopher J. Foy

For the Employer: Ian H. Fraser

Decided on the basis of written submissions
filed November 24 and December 1, 7, and 8, 2017.

I. Grievances referred to adjudication

[1] The grievors, Lindsay Hutchinson, Mattaeus Geisler, Emily Claes, Pricilla Dawson, Allison Cunningham, Trine Dennis, Laura Bateman, and Bruce Gillard, were represented by the Yukon Teachers' Association ("the bargaining agent" or YTA) in their grievances and were employed on temporary contracts as teachers with the Government of the Yukon ("the employer") for two or more years. Their grievances concern the employer's extension of their temporary employment status because of exceptional circumstances. Ms. Dennis and Mr. Geisler became indeterminate employees at some point after they filed their grievances.

[2] In a decision rendered on July 20, 2017, I made the following orders:

. . .

> *[152] The grievances are upheld.*
>
> *[153] I declare that the Government of the Yukon has violated s. 109 of the* ELRA *by employing the grievors as temporary employees after their second and subsequent years of employment.*
>
> *[154] All the grievors who have completed two consecutive school years of employment are entitled to hiring preferences as indeterminate employees.*
>
> *[155] All the grievors who have completed two consecutive school years of employment are indeterminate employees effective the beginning of their third school year, with all the rights and benefits that flow from that status.*
>
> *[156] The two-year probationary period under s. 106(1) of the* ELRA *commences on the start of the first day of temporary employment with the employer. Those grievors who have completed two years of employment as temporary employees complete the two-year probationary period under s. 106(1). The grievors have completed their probations.*
>
> *[157] I reserve jurisdiction over the implementation of this decision for a period of 90 days.*

[3] The parties were unable to agree on the remedy.

[4] The grievors claim general damages of $25 000 payable to the YTA for loss of representational rights, $5000 payable to each of them, and damages for the loss of opportunity for each grievor, discounted to 75% of the wages that they would have

earned. The employer argues that there is no jurisdiction to award damages, the YTA has no standing to claim damages, and the loss-of-opportunity damages were not proven.

[5] The parties agreed to a process of the simultaneous exchange of written submissions, with replies, as the employer bore the burden of its jurisdictional objection and the grievors bore the burden of the damages claims.

[6] I thank the parties for the care and detail in their written submissions. I have done my best to condense the arguments for the purpose of this decision.

[7] I turn first to the jurisdictional arguments.

II. Jurisdiction to award damages

A. Summary of the arguments

1. For the employer

[8] The employer submits that in grievance adjudication under s. 65(7) of the *Education Labour Relations Act* (*ELRA*), a grievor's remedy is confined to the declaratory relief set out in s. 65(7)(b). Under a statutory regime such as the *ELRA*, adjudicators are confined to the relief provided in the statute. No at-large relief is available; see *Weber v. Ontario Hydro*, [1995] SCR 929 at paras. 61 and 67; and *Canadian Union of Public Employees v. Labour Relations Board (N.S.)*, [1983] 2 SCR 311 at 326, 327, and 357.

[9] While common law generally provides that there is no right without a remedy, this does not mean that every remedy sought must be lodged within the same adjudicative body; see *Weber*, at para. 57; *Brotherhood of Maintenance of Way Employees Canadian Pacific System Federation v. Canadian Pacific Ltd.*, [1996] 2 SCR 495 at paras. 4 and 8 to 10; and *Murdoch v. Canada (Royal Canadian Mounted Police)*, [2005] 4 FC 340 at paras. 21 and 26 to 29.

[10] A distinction should be drawn between arbitration under a commercial or collective agreement and adjudication pursuant to a statute. Under a statutory regime, there can be different processes and different remedies; see *Carrier Lumber Ltd. v. Joe Martin & Sons Ltd.*, 2003 BCSC 1038 at paras. 12 and 65 to 68.

[11] The employer stated as follows at paragraph 7 of its arguments:

> *The jurisdiction and authority of an adjudicator under s. 65(7) of the* ELRA *is expressed in language that is mandatory, specific, limited, and unambiguous. The adjudicator is directed to* "determine whether the employer has acted in accordance with an Act *[and certain other specified categories of instruments]*" . . . .

[12] There is no power to grant damages under s. 65(7) of the *ELRA*. This contrasts with other statutes in which a clear intent is expressed to grant remedial powers, such as in s. 57(1) of the *Canada Labour Code* (R.S.C. 1985, c. L-2), which provides for the ". . . final settlement without stoppage of work, by arbitration or otherwise, of all differences between the parties . . .".

[13] Unlike grievance adjudication under s. 65(7) of the *ELRA*, full remedial authority to deal with disciplinary matters is specified under s. 71 and 72, as well as complaints under s. 90.

[14] When a legislature intends to grant broad remedial power, it does so explicitly. The principle of *expression unius est exclusio alterius* (the expression of one thing precludes the other) applies; see *Labour Relations Board (N.S.)*, at 357.

2. For the grievors

[15] The issue raised by the employer has been settled for more than 40 years in jurisdictions with similar statutory language. An adjudicator has broad jurisdiction to grant remedies, including damages, as part of his or her jurisdiction; see *Polymer Corp. v. Oil, Chemical & Atomic Workers*, [1959] O.L.A.A. No. 1 (QL). This is supported by s. 73(1) of the *ELRA*, which provides as follows:

> ***Implementation of adjudicator's decision***
>
> *73(1) Where a decision on any matter referred to adjudication requires any action by or on the part of the employer, the employer shall take such action.*

[16] That language is similar to s. 96(4) of the *Public Service Staff Relations Act* (R.S.C., 1985, c. P-35; *PSSRA*), which states as follows: "Where a decision on any grievance referred to adjudication requires any action by or on the part of the employer, the employer shall take such action."

[17] The language "the employer shall take such action" means more than just declaratory relief. The adjudicator is empowered to determine the action, and the employer must implement it; see *Public Service Alliance of Canada v. Canada (Treasury Board) (Engineering and Scientific Support Group - Technical Category)*, PSSRB File No. 161-2-24 (19700121), [1970] C.P.S.S.R.B. No. 2 (QL) ("*PSAC*") at para. 16.

[18] The language in s. 73 is broader than that of s. 96(4) of the *PSSRA* because the words "any matter" are used rather than "any grievance".

[19] There is no limitation in the *ELRA* on an adjudicator's power to award damages.

[20] The employer suggests that the remedy lies with the courts. However, the Board was established to provide recourse without resorting to the courts. No gap in the legislation requires a grievor to apply to court for a remedy as the Board has full power to grant remedies, including damages. Similar language has been considered in *Canada Employment and Immigration Commission v. Dale Lewis*, [1986] 1 F.C. 70 ("*Lewis*") at 17, and that empowered an adjudicator to award damages.

[21] The *Interpretation Act*, RSY 2002, c.125, at s. 10 mandates that both ss. 65(7) and 73(1) of the *ELRA* be read broadly, be deemed remedial, and must be given a fair, large, and liberal interpretation. The legislature created a specialized and expert board to resolve issues expeditiously without the need to resort to relief in multiple forums.

[22] In summary, nothing in s. 65(7)(c) of the *ELRA* limits the type of remedial action the YTA seeks, and nothing in s. 73(1) limits the type of remedial action that an adjudicator may prescribe.

3. <u>The employer's reply</u>

[23] The employer argues that s. 73(1) of the *ELRA* does not create or enlarge an adjudicator's jurisdiction; it simply provides that the parties must comply with the adjudicator's order.

[24] In *PSAC*, the Board did not award damages but stated that the only award available was a declaration, and damages are not available for a breach of a statutory obligation.

[25] The employer reiterates that there is a difference between adjudication conducted pursuant to statute and arbitration under a collective agreement.

[26] The grievor's reference to *Lewis* is of no assistance as that case is limited to confirming that if a grievor is reinstated, the employer is required to comply with the Board's order.

[27] Paragraph 65(7)(c) of the *ELRA* is not related to an adjudicator's power to award damages but to the distinction between coercive and non-coercive declarations; see *Reid v. Manufacturers Life Insurance Co.*, 2010 ONSC 4645 at paras. 21, 23, 41, and 42. A declaratory order can have the same impact as an order of mandamus (an order requiring an official to act); see *Minister of Employment and Immigration v. Jiminez-Perez*, [1984] 2 SCR 565 at 567 to 569.

[28] There is no need to resort to interpretive maxims to understand the purpose of s. 65(7)(c) of the *ELRA*. Once the adjudicator has made the determination, his or her statutory authority is spent.

[29] The inclusion of language preventing an adjudicator's order from requiring the amendment of certified specified instruments does not negate from the general proposition that in the absence of a statutory provision, there is no inherent power to award damages for not complying with a statutory obligation; see *PSAC*, at para. 18.

[30] It is not controversial that an adjudicator has authority under a collective agreement to order that a wrongfully dismissed employee be reinstated, with damages.

B. Ruling

[31] I am persuaded that I have jurisdiction to award damages. There is no bar in s. 65 of the *ELRA* to awarding damages. However, other provisions of that Act expressly provide the power to award damages — those dealing with discipline and unfair labour practice complaints. This is the basis for the employer's argument, along with the use of the word "determine" in s. 65(7).

[32] The employer seeks to confine the adjudicator to making declarations as the sole remedy under s. 65(7) of the *ELRA*. However, the word "declaration" is absent from that subsection, which reads as follows, along with s. 73:

> *65(7) When a grievance is referred to adjudication that does not arise either in whole or in part out of the administration or interpretation of a provision of a collective agreement or arbitral award, the adjudicator shall*

> *(a) determine the grievance on an expedited basis;*
>
> *(b) review the grievance in order to determine whether the employer has acted in accordance with an Act, regulation, bylaw, direction or other instrument or policy made or issued by the employer;*
>
> *(c) not require the amendment of any collective agreement or arbitral award or Act, regulation, bylaw, direction other instrument or policy made or issued by the employer;*
>
> *(d) render a decision thereon which shall not be referred to in any future decision, shall be final and binding and not subject to any judicial review including the review referred to in section 95 of this Act. . . .*
>
> . . .
>
> *73(1) Where a decision on any matter referred to adjudication requires any action by or on the part of the employer, the employer shall take such action.*
>
> *(2) If a decision on any grievance requires any action by or on the part of an employee or bargaining agent or both of them, the employee or bargaining agent, or both as the case may be, shall take such action. . . .*
>
> [Emphasis added]

[33] This can be contrasted with ss. 80 and 81 of the *ELRA*, in Part 8, which deal with Board powers about the legality of a strike or lockout, upon application by a party, and limit relief to a declaration.

[34] The language in s. 65(7)(d) is that the Board is to "render a decision thereon", which must be implemented by the employer under s. 73(1).

[35] I have reviewed the employer's authorities. I am not persuaded that they support the position advanced in this case. The employer referred to the *Canada Labour Code*. However, that legislation provides no express grant of an arbitral power to award damages; yet, an arbitrator can award them.

[36] *Weber* provides for expansive powers to labour arbitrators in labour relations matters — including granting remedies under the *Canadian Charter of Rights and Freedoms* — provided that the arbitrator can identify jurisdictional support for exercising that power.

[37] The employer relies on *Murdoch*, which is not a labour arbitration or adjudication case but a *Privacy Act* case. The privacy commissioner has the authority only to make findings and recommendations and to report and not to award remedies for breaches of privacy. *Murdoch* is of little assistance in determining the powers of an adjudicator under the *ELRA*.

[38] The employer relies on *Labour Relations Board (N.S.)*, which dealt with Board orders about the duty to bargain in good faith. At issue were specific board orders made in the context of a dispute about bargaining in good faith — some were within the Board's jurisdiction, and some were outside it. The Board was looking at a balance between the obligation to bargain in good faith and the context of what it could or could not require an employer to do. It is difficult to draw any principles of general application in that case to the current grievances, other than that an adjudicator must have jurisdiction to make the orders sought.

[39] The employer also relied on *Brotherhood of Maintenance of Way Employees Canadian Pacific System Federation*, which dealt with whether the courts had any residual jurisdiction to issue an injunction to restrain an employer from implementing a work schedule pending the arbitration of the dispute. The union filed a grievance but sought an injunction from the courts before the arbitrator was appointed. The Supreme Court of Canada supported the injunction on the basis that there was no means to postpone implementing the new work schedule pending an arbitrator's decision. It held that the postponement right did not arise from the collective agreement; therefore, the Court's jurisdiction was not ousted in favour of the arbitration process.

[40] That decision does not advance the employer's case as it did not involve a question about the arbitrator's power to make a particular order. Injunctions are a form of equitable relief developed by the courts, and it would take clear language to oust that jurisdiction. Further, granting an injunction in support of an arbitration process is not inconsistent with deferring the substance of the matter to arbitral determination. While arbitrators can grant interim orders under the *Canada Labour Code*, there is no express power to issue injunctions, including for the Canada Industrial Relations Board. Injunctions are often not within the jurisdiction of an arbitrator or a labour board. Under the *ELRA*, the Board's jurisdiction to grant relief with respect to strikes and picketing is governed by Part 9 and appears limited

expressly to making declarations; it cannot provide injunctive relief.

[41] I had the opportunity recently in *Ratcliff v. Government of the Yukon* (2018), File No. 366-YG-17, to analyze a similar argument by the employer on the lack of jurisdiction to award damages. I noted at paragraph 172 as follows:

> *[172] In Polymer, at para. 12, the arbitrators went on to deal with the issue of the separation of a rights violation declaration and a damages remedy. The arbitrators found that it was possible for them to be separated but that that is not ordinarily done, either in the Courts or in commercial arbitration, and that separation was inconsistent with the desirability of completeness and finality in arbitration. In my view, Polymer does not turn on the wording of the particular statute but rather on a functional and historical analysis of the context of grievance arbitration. As grievance adjudication under the ELRA shares some attributes of labour arbitration under a collective agreement, I find the comments helpful in interpreting the scheme in the ELRA.*The intention of s. 65(7)(d) of the *ELRA* is that an adjudicator's decision is to be final and binding and that the employer must implement it under s. 71.

[42] In my view, it is not necessarily helpful to interpret the *ELRA* in the abstract and argue that because express powers are granted in one part of it, they are not available in other parts. The employer argued that the more detailed remedies, including damages, available in discipline cases and complaints show a legislative intention to limit an adjudicator's jurisdiction to a declaratory award when adjudicating a grievance under s. 65(7). I do not agree.

[43] The Board deals with a number of labour relations problems, including certifications and decertifications, strikes and lockouts, complaints by unions and employers against each other and by employees against unions, and adjudicating disputes or grievances arising during the term of a collective agreement. It is my view that the legislature gave the Board the tools it needs to deal with a range of labour relations problems, consistent with the "Wagner Model" -a process of labour relations established in the United States of America under National Labor Relations Act of 1935 (49 Stat. 449) 29 U.S.C. § 151-169, (also known as the Wagner Act), which has been adopted throughout Canada in a modified form.

[44] For example, it was important for the legislature to deal more fully with remedies in discipline cases to ensure that Board adjudicators follow a "labour

relations approach in contrast to a common law approach in dealing with employer discipline. Historically, teachers were engaged as servants in a master-servant relationship. At common law, the usual remedy for an unjust dismissal was damages for a notice period based on factors such as age, length of service, the availability of alternative equivalent employment, and the nature of the job. Reinstatement was not available as a remedy. At common law, an employer could not suspend an employee without pay as that would constitute constructive dismissal. The discipline provisions in s. 90 of the *ELRA* ensure that an adjudicator deals with discipline or dismissal in a progressive labour relations manner, rather than in a common law manner.

[45] For example, the Board is entrusted with dealing with complaints against the employer and bargaining agents arising from violations of individual rights or bargaining agent representational rights or complaints of bargaining agent interference in management rights. As such complaints can be far-ranging, it is apparent that the legislature wished the Board to have a full toolbox for dealing with those types of labour relations problems, ranging from declaratory orders to damages, or even consenting to a prosecution in court under s. 92 of the *ELRA* for prohibited practices (s. 85 and 86).

[46] I am not persuaded that it makes any labour relations sense to interpret s. 65(7) of the *ELRA* to leave some remedies with the Board and some with the courts — unless that is clearly what the legislature expressed. The employer's argument runs contrary to a system of arbitration supervised by labour boards that has been the model of dealing with labour relations in Canada for many years. There are nuances in public-sector labour relations, but the Wagner Model is the underlying basis.

[47] In the Yukon, the legislature created a labour relations board to deal with labour relations problems involving teachers, with rights adjudicated by the Board. The courts are not empowered to deal with teacher grievances, although they do supervise some of the Board's actions by way of judicial review. There are gaps in the right to adjudication — for example, probationary employees who do not have a right to adjudication before the Board — but that is of no concern in this grievance.

[48] The word in s. 65(7) is "determine", not "declaration". In my view, "determine is a broader word. The legislature did use "declaration" in conjunction with the Board's jurisdiction about strikes and lockouts.

[49] If an adjudicator's jurisdiction were limited to making declarations, there would be little need for further action to implement decisions, or no need for s. 73 of the *ELRA*. Obviously, the legislature did not intend an adjudicator to issue sterile remedies; see *Polymer Corp.* Hence the need for s. 73 for the parties to implement an adjudicator's decisions. There are no limits to the range of determinations or decisions available to the Board in s. 65(7). In my view, it would be an error in jurisdiction for an adjudicator to limit the exercise of jurisdiction to making a declaration when clearly more may be required to deal with the facts proven in a particular grievance.

[50] The language in s. 65(7)(c) exists for a purpose, although I do not accept that it is for the purpose argued by the employer — to deal with mandamus like orders. The paragraph reads as follows:

> *65(7) When a grievance is referred to adjudication that does not arise either in whole or in part out of the administration or interpretation of a provision of a collective agreement or arbitral award, the adjudicator shall*
>
> . . .
>
> *(c) not require the amendment of any collective agreement or arbitral award or Act, regulation, bylaw, direction other instrument or policy made or issued by the employer . . . .*

[51] This is typical language in many public-sector settings, and the language about amending a collective agreement can be found in many collective agreements. An adjudicator cannot issue a decision that overwrites the provisions of a statute or requires a statutory amendment — statutes must be amended by the legislature. Likewise, an adjudicator must respect the terms of a collective agreement, which were bargained by the parties to it. The adjudicator adjudicates rights and interprets agreements but does not make the parties' agreement — that is dealt with in bargaining.

[52] The employer has argued that there can be no damages for a breach of a statutory obligation such as s. 109 of the *ELRA*. However, a breach of a statute that also amounts to a breach of a contractual right can be the subject of a damage award; see *Carrier Lumber Ltd.*

[53] It is important to consider what is being adjudicated in this case — a violation of s. 109 of the *ELRA*, which reads as follows:

> *109(1) An employee may be employed on a temporary basis during part or all of a school year as may be agreed to by the employee and the superintendent and the employment may be renewed for part or all of the next school year.*
>
> *(2) Despite subsection (1), the period of employment for an employee who is employed on a temporary basis may be renewed for more than 2 consecutive school years by the deputy minister in exceptional circumstances.*

[54] This provision has been incorporated into the terms and conditions of employment by virtue of s. 108(1) of the *ELRA*, which reads as follows:

> *108(1) Despite any agreement to the contrary, the terms and conditions of a contract of employment of an employee shall be*
>
> *(a) the provisions of this Act and regulations . . .*
>
> *(b) the terms and conditions, not inconsistent with any Act and regulations, of the collective agreement negotiated under this Act; and*
>
> *(c) the terms and conditions not inconsistent with paragraphs (a) and (b) agreed to between the employees employed in an attendance area and the superintendent.*
>
> *(2) Any agreement excluding or purporting to exclude the provisions of this section is void. . . .*

[55] Under the collective agreement, certain rights are available only to indeterminate employees. In my earlier decision, I found that the employer erred in its application of s. 109. This means that it also administered the collective agreement improperly by treating employees as temporary teachers when they should have had indeterminate status. The right to damages can be tied to the breach of a term and condition of employment — a contractual right, which can be adjudicated under s. 65(7) of the *ELRA*.

[56] A remedy limited to declaratory relief would be sterile — all the employer would be required to do is to correct the classification from temporary to permanent and prospectively provide collective agreement entitlements. It is my view that s. 109 is an important minimum standard for teacher employment.

[57] For all of the above reasons, I find that I have jurisdiction to award damages for a breach of the grievors' right to become indeterminate employees.

III. Assessment of damages

A. Summary of the arguments

[58] The parties have made arguments about damages, which I have summarized as follows.

1. For the grievors

[59] The YTA claims general damages for each of the grievors in the amount of $5000 and $25 000 for itself. It also seeks damages for the lost opportunity of each grievor equal to any loss of wages as a result of his or her continued temporary status, discounted to 75%. The YTA asks me to reserve my decision over the wage loss to permit the parties an opportunity to settle this claim.

[60] The YTA states that damages can be awarded for or against a bargaining agent for non-monetary losses or general damages, and it cited the following cases and their remedies:

- *British Columbia Teachers' Federation v. British Columbia Public School Employers' Association*, [1998] B.C.C.A.A.A. No. 88 (QL) - two days' pay;
- *Communications, Energy and Paperworkers Union, Local 1123 v. TFL Forest Ltd.*, [2007] B.C.C.A.A.A. No. 145 (QL) - $38 000;
- *Blouin Drywall Contractors Ltd. v. United Brotherhood of Carpenters and Joiners of America, Local 2486* (1975), 8 O.R. (2d) 103 - appeal allowed;
- *Canada Post Corp. v. Canadian Union of Postal Workers*, [2011] C.L.A.D. No. 31 (QL) - $15 535 in compensatory damages, and $35 000 in punitive damages;
- *Canada Post Corp. v. Canadian Union of Postal Workers*, [2016] C.L.A.D. No. 56 (QL) - $50,000 in punitive damages; and
- *West Park Healthcare Centre v. S.E.I.U., Loc. l.ON*, [2005] O.L.A.A. No. 780 (QL) - $10 000 to the bargaining agent, and $1000 to each employee.

[61] The interpretative issue about s. 109 of the *ELRA* was decided in *Lapierre v. Government of Yukon* (2012), 367-YG-17 and 18, which was upheld on judicial review. The Yukon Court of Appeal came to a similar conclusion in *Commission scolaire*

francophone du Yukon no. 23 v. Yukon (Procureure générale), 2014 YKCA 4 ("*Commission scolaire*") at para. 10.

[62] The YTA relies on the key findings I made at paragraphs 124, 146, and 147 of *Hutchinson v. Government of the Yukon* (2017), File Nos. 366-YG-31, 35, 42 to 44, 48, 52, and 54, issued on July 20, 2017, which read as follows:

> *[124] . . . The purpose of s.109 of the* ELRA *is to ensure that the employer cannot have a pool of perpetual temporary contractors to address its ordinary staffing needs. Holding an employee in a state of perpetual limbo to convenience the employer in its annual school staffing process is unfair.*
>
> . . .
>
> *[146] . . . The employer has had very clear direction from the ruling in* Lapierre, *which has been available as guidance for the parties since 2013. The employer seems to want to ignore those findings, despite the fact that the decision was upheld on judicial review.*
>
> *[147] I agree with the YTA that many of the issues surrounding the interpretation of ss. 106 and 109 of the* ELRA *that were determined in* Lapierre, *were reargued by the employer in this case. . . .*

[63] The YTA relies on *Unifor Vancouver Container Truckers Assn. v. Aheer Transportation Ltd.*, [2017] B.C.C.A.A.A. No. 83 (QL) at paras. 259 and 260, as a recent articulation of the following principles. An arbitrator can award damages for non-monetary losses arising from a breach of a collective agreement to ensure that such a breach is adequately addressed and to serve as a deterrent to future violations. Damages can be granted to a bargaining agent as well as to affected employees.

[64] Following the hearing, the YTA's counsel drew to my attention that *Aheer*, was upheld by the B.C. Labour Relations Board upon a review under s. 99 of the *Labour Relations Code*, R.S.B.C. 1996, c. 244. The parties did not wish to make further submissions.

[65] An arbitrator may award damages as compensation for violation of "rights of . . . intrinsic value"; see *West Park Healthcare Centre*. The YTA states that s. 109 of the *ELRA* is such a right.

[66] The employer ignored *Lapierre*. Its actions that caused the breach of s. 109 were premeditated, which is a factor that an arbitrator can consider when assessing damages; see *Green Grove Foods Corp. v. United Food and Commercial Workers Canada, Local 175* (2012), 218 L.A.C. (4th) 267 at para. 27.

[67] At paragraph 23 of its written argument, the YTA states that there is a strong public interest component at stake in these proceedings, and ". . . that the Board's decisions should not be ignored, that instability and wasting of scarce resources should not be tolerated and the Collective Agreement and statutory requirements cannot be ignored with impunity." Those public interests should be reflected in the general damages award; see *Toronto Police Services Board v. Toronto Police Assn.*, [2008] O.L.A.A. No 479 (QL).

[68] As elements of general damages, the YTA states that the grievors were denied collective agreement and statutory rights because of their temporary and probationary status, including the following:

- lost seniority;
- lost representational rights during substitute teaching;
- lost protections under the collective agreement about layoffs, discipline, and termination;
- negative stress on the grievors and their families due to the perpetual temporary status and lack of certainty; and
- misapplication of the "Staffing Protocol", impacting the grievors' eligibility for selection for permanent positions. The Staffing Protocol provides differing priorities for selection; one of the factors is whether the grievor is a permanent employee.

[69] The YTA states that it was denied representational rights, had to defend its reputation, and had to relitigate issues decided in *Lapierre*.

[70] The employer benefitted from continuing breaches of ss. 106 and 109 of the *ELRA* as it had an available pool of temporary contractors to address staffing needs, at a lower cost, with teachers who had no layoff protection and no severance pay and

recall rights under articles 27 and 28 of the collective agreement. Some were substitute teachers who had no YTA representation.

[71] The YTA also seeks loss-of-opportunity damages for each grievor and asks that I reserve jurisdiction over that aspect of the decision. The YTA states that the grievors lost the opportunities to work that come with indeterminate status, for example, to compete for work and earn wages at a higher level on the pay grid; see *Ontario (Ministry of Community, Family and Children's Services) v. O.P.S.E.U.*, [2004] O.G.S.B.A. No. 192 at paras. 14 to 21; *Alberta Health Services v. Alberta Union of Provincial Employees*, [2011] A.G.A.A. No. 43 at paras. 37 to 47; *Ontario Public Service Employees Union v. Ontario (St. Lawrence Parks Commission)*, [2010] O.G.S.B.A. No. 113 (QL; "*OPSEU*") at paras. 14 to 27; and *Grand Yellowhead Regional Division No. 35 v. Canadian Union of Public Employees, Local 1357*, [2010] A.G.A.A. No. 47 (QL) at paras. 16 to 21.

[72] The YTA relies on *OPSEU*, at para. 21, which reads as follows:

> *. . . Compensation for that loss does not depend upon their assignment being a certainty but for the breach. And by the same token, that loss may still be assigned some value even in a circumstance where the opportunity may not have resulted in an assignment of the work.*

2. <u>For the employer</u>

[73] The employer argues that the YTA has no standing to make a claim for damages. The grievances filed under s. 63(1) of the *ELRA* and referred to adjudication under s. 64(1) are individual grievances. While the grievors have the right to be represented by the YTA, it has no interest in the outcome. It is merely their representative.

[74] The scheme in the *ELRA* provides that an employee has a veto over whether he or she is represented by the YTA by virtue of s. 66, but the YTA has no veto about grievances under s. 63(1)(a)(i) involving the interpretation of the *ELRA* or the *Education Act* (RSY 2002, c.61).

[75] The YTA can present grievances on its own behalf only when no right is granted for an individual to file a grievance; see ss. 68(1)(b) and 76(1)(b) of the *ELRA*.

[76] The YTA does not have party status for grievances under the collective agreement as clause 10.01 provides that an employee or group of employees may present a grievance.

[77] The employer submits the following:

> *11. In short, under the statutory regime that governs this adjudication, the bargaining agent is not a party to the proceeding, has no independent standing in it, and is therefore precluded from bringing any claims for relief in its own right.*

a. **General damages**

[78] The employer states that the damage claim is based on a statutory right and not on a right based in a collective agreement, so the YTA's cases are not relevant or helpful.

[79] The factors alleged by the YTA do not support a claim for general damages. The employer detailed its arguments at pages 7 to 10 of its written submission. In particular, the evidence does not establish anything more than minor or transient upsets to the grievors who testified at the hearing, which cannot be the basis for a damages claim; see *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 at para. 9; and *Saadati v. Moorhead*, 2017 SCC 28 at para. 37.

[80] Previous decisions made under s. 65(7) of the *ELRA* are of no precedential value. The employer has the right to relitigate issues, and such relitigation is not an actionable wrong supporting an award of general damages.

[81] The employer argues that none of the grievors suffered a loss as s. 63(5) of the *ELRA* and clause 10(a) of the collective agreement limit losses to the 10-day period before a grievance is filed.

[82] The grievors have not proven any loss of opportunity. The claims must be dismissed because of a lack of an evidentiary basis; see *Wood v. Grand Valley Rwy. Co.*, (1915) 51 SCR 283 at 300 and 301; and *Sheet Metal Workers International Association, Local 537 v. Electrical Power Systems Construction Association*, 1993 CanLII 7893 at paras. 17 and 18. The grievors have not demonstrated that an opportunity was lost, the full value of the opportunity, and the value of the chance that was lost. The burden of proof rested with the YTA, which it failed to discharge.

3. The YTA's reply

[83] The YTA made a lengthy written reply canvassing the Wagner Model to labour relations, which it stated is the backdrop to the *ELRA*, and the interpretation of the *ELRA* should not be divorced from that background. If the literal approach taken by the employer were granted, there would be bargaining chaos, with the YTA characterized as a mere advocate for employees who have individual and not collective rights.

[84] The YTA is the exclusive bargaining agent for teachers who have collective rights — based in part on the collective agreement and in part on the *ELRA* and the *Education Act*. The YTA has carriage of all grievances, and its activities are supervised by the Board in its unfair labour practice jurisdiction; see *Canadian Merchant Service Guild v. Gagnon*, [1984] 1 SCR 509; and *Ontario (Management Board of Cabinet)*, [1996] O.L.R.D. No. 2097 (QL). It clearly has an interest in the outcome of all grievances — whether or not they are based on the collective agreement. There is often no bright line between a grievance based on statute and one based on a collective agreement, and delineating that would allow for technical arguments rather than resolving grievances on their true labour relations substance.

[85] The YTA is not a mere conduit of individual employee wishes; it represents the bargaining unit as a whole. A bargaining agent has exclusive control so that it can martial its resources effectively; see *Judd v. Communications, Energy and Paperworkers' Union of Canada, Local 2000*, [2003] B.C.L.R.B.D. No. 63 (QL).

[86] The *ELRA* is not a radical departure from the Wagner Model. It has bargaining agents, duties to bargain in good faith, restrictions on the employer's ability to interfere in a bargaining agent's activities, restrictions on the timing of strikes and lockouts, and the availability of adjudication processes during the collective agreement term. The terms of collective agreements have statutory requirements (the *ELRA*, at s. 27) and are properly interpreted in accordance with the law, including other employment-related statutes; see *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, [2003] 2 SCR 157.

[87] The Yukon Court of Appeal, in *Alford v. Yukon*, 2006 YKCA 9, a grievance under the *Public Service Act*, RSY 2002, c.183, and the *Public Service Staff Relations Act*, RSY 2002, c.185, held that the bargaining agent had representational rights with respect to

grievances. The language is similar to that in the *ELRA*.

[88] In particular, the YTA states that it has a direct interest in whether employees are probationary with very limited rights, indeterminate, or temporary as it is charged with administering the collective agreement. It has an interest in ensuring that the employer complies with its legal obligations under the *ELRA*; see *Elliot v. Canadian Merchant Service Guild*, 2008 PSLRB 3 at para. 172.

[89] The YTA has a duty to fairly represent employees as set out in s. 85(3)(d) of the *ELRA*, which mentions presenting grievances and references to adjudication. It also is recognized under the *Teaching Profession Act*, RSY 2002, c.215.

[90] At paragraph 55 of its argument, the YTA states as follows:

> *55. More specifically in this case, the YTA has an obvious interest in acting on behalf of the bargaining unit as a whole in respect of the question of temporary versus indeterminate employee status. This is not some marginal issue of no consequence to the bargaining unit or the relationship between the bargaining agent and the Employer. This issue engages nothing less than the question of who, at any given time, will have what rights - if any at all- under the Collective Agreement.*

[91] In failing to apply the law — ss. 106 and 109 of the *ELRA* — properly, the employer failed to administer the collective agreement properly. General damages should be awarded to recognize the denial of a statutory right which has intrinsic value; see *AGDA Group Consultants Inc. v. Lane* (2008), 91 O.R. (3d) 649. These sections are minimum standards in the employer's treatment of employees and have intrinsic value to individuals and to the bargaining unit; see *Rizzo and Rizzo Shoes Ltd.*, [1998] 1 SCR 27. The YTA has an interest as it is charged with the exclusive representation of teachers.

[92] The employer has relied on personal injury damage cases (*Mustapha*); however, authorities provided by the YTA suggest otherwise; see *West Park Healthcare.*

[93] Paragraph 65(7)(d) of the *ELRA* does not imply that remedies should be assessed in a vacuum. An adjudicator should apply labour relations principles when assessing damages. The employer has not followed the clear guidance in *Lapierre*, which is a factor that should be considered when assessing general damages.

B. Analysis

[94] In my view, the *ELRA* provides for a labour relations scheme based on the Wagner Model. The YTA is the exclusive bargaining agent and is responsible for carrying all grievances by teachers. It is supervised in its activities — including grievance handling and references to adjudication — by the Board under its unfair labour practices jurisdiction. The YTA has standing to represent grievors and to seek to enforce the collective agreement and statutory obligations the employer owes its employees. The YTA is not simply an advocacy service for individual employees with individual employment rights.

[95] The legislature created the Yukon Teachers Labour Relations Board to provide labour relations stability, as education is an important public good. Part of the fundamental bargain underlying labour relations in the Wagner Model is that unions have given up the right to strike for disputes arising during the term of a collective agreement in return for a system of arbitration or adjudication of grievances. Before the Wagner Model was implemented, the normal recourse was to strike in retaliation for disputed employer decisions; see *Polymer Corp.* Employees work now and grieve later. Adjudicators make decisions that the parties should use as guidance in their labour relations, regardless of whether a decision is considered to have no precedential value in terms of the litigation of other grievances. Common sense should prevail.

1. General damages

[96] This case is about the denial of collective agreement entitlements to the grievors because the employer, for whatever reason, chose to ignore the interpretation of s. 109 in *Lapierre*, which was upheld on judicial review.

[97] In my view, s. 109 is an important employment standard for teachers in the Yukon; see *Rizzo and Rizzo Shoes Ltd.* Teachers also have a reasonable expectation of being treated fairly by the Yukon government in their employment, given that s. 167 of the *Education Act* specifically sets out that "[e]very teacher has the right to be treated in a fair and reasonable manner . . .".

[98] The general impact on the grievors is that they did not receive the benefits they were entitled to under the collective agreement, including during the summer; they were not given priority in selection processes applying the Staffing Protocol; and they might have lost opportunities. They were left in a state of uncertainty about continuing

employment. Individual employees might have been paid incorrectly per the grid set out in the collective agreement. And those who were substitute teachers did not have access to YTA representation.

[99] The YTA has been put to the expense of relitigating issues that have been decided, which impacts representational rights and, in particular, wastes resources that could be spent on other bargaining unit issues.

[100] The employer's actions are worthy of condemnation, which merits awarding general damages to the YTA and the grievors. This case need not have been litigated. It was, because of the employer's misapplication of s. 109 of the *ELRA*. There is a great advantage to the employer in having a large perpetual pool of contractors to address its staffing needs, for flexibility, but that is not allowed by s. 109. The statutory provision is also a term and condition of the grievors' employment.

[101] In my view, something more than simply a declaration is required to fully address the grievances. A declaration will not adequately address the wrong as the employer's breach was deliberate, known, and persistent; see *Toronto Police Services Board*. It is disturbing that the employer has not followed *Lapierre* or *Commission scolaire*. It has a duty under the *ELRA* to take action to implement adjudication decisions. In my view, that involves more than simply granting a remedy to Mr. Lapierre and ignoring its obligations under s. 109 to other employees until it is challenged again. I note the importance of bringing this home to the employer as it persists in its view expressed in its written argument that it has the right to relitigate the interpretation of s. 109. This is not sound labour relations. It borders on abuse of process.

[102] The Yukon government should not be permitted to overwhelm the YTA on the issue of temporary teachers' rights — it has far greater resources than a bargaining agent that is funded through dues.

[103] The YTA, as the exclusive bargaining agent, has an ongoing interest in holding the employer accountable in administering the collective agreement. An appropriate award of damages to the YTA is $25 000, which in my view is a measured response, in light of the case law cited, particularly *Unifor Vancouver Container Truckers Assn.*, at paras. 270 and 271, in which $45 000 in general damages was awarded for a deliberate and planned contravention of a collective agreement.

[104] Each grievor is also entitled to an award of general damages. The Supreme Court of Canada has recognized the fundamental importance of work in a person's life. In *Wallace v. United Grain Growers Ltd.*, [1997] 3 SCR 701 at para. 93, citing *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR 313 at 368, a majority of the Supreme Court noted as follows:

> *Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.*

[105] At the very least, work provides structure and stability. The values of that structure, stability, and fairness are at the heart of s. 109 of the *ELRA* — employees are to become permanent after two years, unless the circumstances are exceptional. There is a difference between being an indeterminate employee and a temporary employee in terms of economic and emotional stability. I note that this is distinct from proving psychological injuries in tort. I heard evidence on this point from a number of the grievors, and in my view, this applies to all of them. Teachers who are temporary do not have the structure or economic stability that indeterminate employees have. This is not a transient emotional or psychological response. The employer wrongfully deprived each grievor of his or her right to indeterminate status. It is difficult to quantify this peace-of-mind type of claim. Most of the grievors were left to languish in this temporary state for some time. I accept the YTA's submission that an appropriate measure of this is an award of $5000 per grievor.

2. <u>Loss of opportunity damages</u>

[106] It is difficult to assess the losses of opportunity for each grievor based on the information before me. I heard from some but not all of them. I was informed at the outset of the hearing that the parties had agreed to bifurcate the issue of entitlement from remedy. In my view, that was likely to prevent calling unnecessary evidence.

[107] The written submissions process has worked well to isolate the areas of principle that needed to be determined before assessing the individual claims for loss of opportunity.

[108] The individual circumstances of each grievor's claim for loss of opportunity should be the subject of a further evidentiary hearing. That way, I can hear those

circumstances and render a decision based on facts rather than assumptions. That would also provide an opportunity for the employer to challenge the claims. It is also open to the parties to attempt to negotiate a resolution of these claims. If the parties are unable to negotiate a settlement, this matter will require a case management meeting to assess the further time required and hopefully to streamline the process to achieve a timely and fair result.

[109] I do not accept the employer's argument that the grievors' entitlement is limited to a loss accrued within a 10-day period of the grievance being filed. This is not supported in the *ELRA*, and the employer did not cite any supporting authority.

[110] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

IV. Order

[111] I order that the Government of the Yukon immediately pay to the YTA general damages of $25 000.

[112] I order that the Government of the Yukon immediately pay to the YTA general damages of $40 000 in the form of $5000 to each of the eight grievors.

[113] I remain seized of this matter, including the claims for damages for loss of opportunity, for a period of 90 days.

February 26, 2018.

Paul Love,
adjudicator