**Files:** 367-YG-17 and 18

Yukon *Education*
*Labour Relations Act*

Before an adjudicator

BETWEEN

**RENÉ LAPIERRE**

Grievor

and

**GOVERNMENT OF YUKON**

Employer



In the matter of individual grievances referred to adjudication

**REASONS FOR DECISION**

***Before:*** Steven B. Katkin, adjudicator

***For the Grievor:*** Jocelyn Barrett, counsel

***For the Employer:*** Stephanie Schorr, counsel

Heard at Whitehorse, Yukon,
May 8 to 11, 2012.

## I. Grievances referred to adjudication

[1] René Lapierre ("the grievor") was employed by the Government of Yukon ("the employer") as a teacher at École Émilie-Tremblay (EET) in Whitehorse on a series of temporary contracts. He is represented in this adjudication by his bargaining agent, the Yukon Teachers' Association (YTA or "the bargaining agent").

[2] The grievor filed two grievances under the Yukon *Education Labour Relations Act*, R.S.Y. 2002, c. 62 (*ELRA*). On May 23, 2010, the grievor filed a grievance in response to a notice from the employer that his position would be eliminated for the 2010 - 2011 school year Yukon Teachers Labour Relations Board (YTLRB) File No. 367-YG-17). The corrective measure requested by the grievor was that he be recognized as having the status of a permanent employee. This grievance was referred to adjudication on July 27, 2010.

[3] On April 4, 2011, the grievor's employment was terminated by the employer. He filed a grievance challenging the termination of his employment on April 15, 2011 (YTLRB File No. 367-YG-18), which was referred to adjudication the same day.

[4] The parties agreed to consolidate both grievances for the purposes of the hearing. For the sake of efficiency, the parties agreed that the order of proceedings would begin with the grievor's evidence, commencing with his layoff and continuing with the evidence relating to the termination of his employment.

[5] The applicable collective agreement is that concluded between the Government of Yukon and the YTA effective from July 1, 2009 to June 30, 2012 ("the collective agreement").

## II. Preliminary issues

[6] Two preliminary matters were raised by the parties upon which I have previously ruled, informing the parties that the reasons for the rulings would follow in the final decision. The first such matter concerned an argument of an unfair labour practice that the grievor intended to raise, while the second was a request by the employer to alter the grounds for terminating the grievor's employment.

### A. Admissibility of the unfair labour practice argument

[7] During the course of a pre-hearing conference concerning these matters held on April 19, 2012 and subsequently confirmed by letter of the same date addressed to counsel for the employer, counsel for the grievor served notice on the employer of the

bargaining agent's intention to raise an "argument" of an unfair labour practice at the hearing. The text of the letter is as follows:

> . . .
>
> *The present letter is to provide notice to you that, as discussed during our telephone conversation of yesterday's date, the bargaining agent intends to present an 'unfair labour practice' argument at the hearing, based on Section 85 of the Education Labour Relations Act (Prohibited Practices) and Article 40 (No Discrimination) of the Collective Agreement.*
>
> *The factual grounds for this argument have been disclosed in the Description of the Grievance (notably, in items 17 to 25) and in the Supporting Documents.*
>
> . . .

[8] The employer objected. In view of this, I directed that a second prehearing conference would be held to discuss this matter, which took place on May 2, 2012.

[9] Both counsel submitted written arguments in support of their respective positions. In a letter dated May 1, 2012, counsel for the grievor outlined her argument, the essence of which is captured in the following extract:

> . . .
>
> *The Bargaining Agent intends to argue that the Employer terminated Mr. Lapierre's employment, and the reason he was not 're-hired', was because he approached the Bargaining Agent with his concerns regarding the Superintendent's conflict of interest and harassment in his regard.*
>
> . . .

[10] The statutory provisions governing unfair labour practice complaints are set out beginning at section 85 of the *ELRA*. Subsection 88(1) stipulates that the time limit for complaints is as follows:

| | |
|---|---|
| *88(1) Subject to this section, a complaint pursuant to section 87 shall be made to the board not later than 90 days from the date on which the complainant knew, or in the opinion of the board ought to have known, of the action or circumstances giving rise to the complaint.* | *88(1) Sous réserve des autres dispositions du présent article, les plaintes prévues à l'article 87 doivent être présentées dans les 90 jours qui suivent la date où l'auteur de la plainte a eu — ou selon la Commission, aurait dû avoir — connaissance des mesures ou des circonstances ayant* |

*donné lieu à la plainte.*

[11] The statute contains no provision which explicitly permits me to extend the 90-day time limit.

[12] Counsel for the grievor conceded that the grievor had not filed an unfair labour practice complaint at any time since the termination of his employment. Given the mandatory temporal limitations on the filing of unfair labour practices in the legislation, I am unable to permit the grievor to now file an unfair labour practice, distinct from his grievance. Under the *ELRA*, grievances and unfair labour practices are two distinct mechanisms for redress. As the grievor is unable to file an unfair labour practice complaint, allowing him to "present an unfair labour practice argument" (emphasis added) would subvert the clear intention of the legislation.

[13] However, as mentioned in her letter dated April 19, 2012, the factual grounds on which counsel for the grievor's argument of an unfair labour practice were to be based were set out in paragraphs 17 to 25 of grievance 367-YG-18, filed by the grievor against the termination of his employment. This was reiterated at item 4 of counsel for the grievor's submissions dated May 1, 2012, as follows:

> *4. In support of Mr. Lapierre's position, the Description of the Grievance sets out, at paragraphs 17 to 25, the 'unfair labour practice argument' (TAB 2 of your materials - Reference to Adjudication, April 5, 2011), albeit without actually naming it as such.*

[14] Both counsel agreed that the grievor would be entitled to adduce evidence concerning all the allegations set out in the description of grievance, including at paragraphs 17 to 25. In view of that entitlement, counsel for the grievor conceded that the grievor's position would not be prejudiced if I declined to hear his argument of an unfair labour practice.

[15] For the above reasons, I denied the grievor's request to present an argument of an alleged unfair labour practice.

**B. Alteration of grounds for the termination of the grievor's employment**

[16] In an email dated Thursday, May 3, 2012, counsel for the employer informed the registry of the YTLRB that it wished to raise the preliminary issue of whether it could adduce evidence of just cause as the basis for the termination of the grievor's employment, even though it did not rely on that ground at the time of the termination.

It stated that it was asking to adduce that evidence in response to the grievor's stated allegation in the grievance that his termination was without cause.

[17] Counsel for the grievor objected to the employer's request.

[18] The parties were informed by the YTLRB's registry that I would deal with this matter on the first day of hearing.

[19] At the outset of the hearing, I heard arguments from both parties on the issue. I then adjourned the hearing to consider the matter. Upon the resumption of the hearing, I rendered an oral ruling that the evidence of termination for cause, which the employer sought to introduce, would not be admitted. I provided several reasons for the ruling, which I informed the parties would be amplified in the final decision and that I now confirm.

[20] To place the employer's argument in context, it is appropriate to set out the relevant correspondence. The letter terminating the grievor's employment, dated April 4, 2011 (Exhibit E-1), was signed by Pamela Hine, the employer's deputy minister of education, and reads as follows:

> . . .
>
> *On March 31, 2011 your Principal met with you to discuss a parent's concern with his daughter's second term report card marks. On review of your grade book, the Principal concluded that you had used one mid-term test mark as the entire second term assessment for a Grade 12 Geography course. You were not forthcoming with this information, but later confirmed that it was true. This assessment was contrary to the information that had been provided to students and their parents.*
>
> *Your decision to use one test mark as the assessment for a full term was not only incorrect pedagogically: it was unethical. You have demonstrated a complete lack of care and concern for your students, who are in Grades 11 and 12. The marks that you have placed on their records could be relevant on scholarship and post-secondary applications and may jeopardize their opportunities given that half the class saw their grades drop 20 to 34%.*
>
> *The assessment completed in three other courses you taught, reveals similar circumstances. In addition to the significant issues with your assessment practices, further investigation has also revealed unacceptable planning for your teaching.*
>
> *The paramount responsibility of every Teacher is to encourage students in the pursuit of learning, and to teach them diligently and faithfully. Through this and other*

> *incidents, you have demonstrated a pattern of dishonesty and unprofessional conduct, which has caused your Administrative team to lose trust in your ability to carry out this responsibility. You have also not been collaborative in their efforts to improve your performance and you have broken the bond of trust between yourself and your students.*
>
> *As a result, pursuant to Section 5(1) of the Temporary Employee Regulation 2001/123 of the Education Act, and upon the recommendation of your Principal, I am terminating your employment as a teacher effective immediately. You will be paid fifteen days' pay, at the appropriate rate, in lieu of a notice period.*
>
> . . .

[21] A letter dated April 7, 2011, addressed to Ms. Hine by the president of the YTA, Katherine Mackwood (Exhibit P-34), reads in part as follows:

> *We refer to your letter dated April 4, 2011 to René Lapierre, terminating his employment.*
>
> . . .
>
> *Subsection 119(4) of the* Education Labour Relations Act *requires that prior to a termination by you, Mr. Lapierre be provided an opportunity to make representations and in doing so to be represented by a lawyer or the bargaining agent. Mr. Lapierre was not given this opportunity.*
>
> *We request that you will immediately withdraw the letter of April 4, 2011 and reinstate Mr. Lapierre at École Émilie-Tremblay, with full pay.*
>
> . . .

[22] In a letter dated April 15, 2011 (Exhibit P-1), Ms. Hine replied to Ms. Mackwood as follows:

> . . .
>
> *In response to your letter dated April 7, 2011, regarding the termination of employment of Mr. René Lapierre, I can offer the following clarification.*
>
> *The terms and conditions of Mr. Lapierre's employment are outlined in the Temporary Employees Regulation. My letter dated April 4, 2011 informed Mr. Lapierre that his employment was terminated pursuant to section 5(1) of that regulation, which states:* "The deputy minister may terminate the employment of a temporary employee at any time by giving the employee notice of termination in writing of fifteen instructional days, or by giving the employee fifteen days' pay in lieu of the notice."

> *This section of the regulation does not require demonstration of cause for termination, nor does it grant a hearing or any other form of recourse for the employee.*
>
> *Section 5(2) of the Temporary Employees Regulation states:* "The deputy minister may, at any time, terminate the employment of a temporary employee for just cause without notice of termination or pay in lieu thereof."
>
> *Even though performance issues were identified, Mr. Lapierre has been granted the benefit of the doubt, and my decision was to terminate his employment by giving him 15 days' pay in lieu of notice, subject to section 5(1).*
>
> *Section 119 of the Education Labour Relations Act (ELRA) is not relevant in Mr. Lapierre's case as his termination was pursuant to the Temporary Employees Regulation, and therefore Mr. Lapierre will not be granted the opportunity to make representations.*
>
> . . .

[23] In response to a letter to the employer from the YTLRB's registry requesting a copy of the reply provided at all applicable levels of the grievance process, the employer replied as follows in a letter dated May 13, 2011 (Exhibit P-2):

> . . .
>
> *Attached is a letter from the Deputy Minister to The Yukon Teachers Association dated April 15, 2011. The letter explains the termination was made pursuant to section 5(1) of the Temporary Employee Regulation and not pursuant to section 119 of the Education Labour Relations Act, and therefore no opportunity to make representations was necessary. This is the reply of the Employer at the final level.*
>
> . . .

[24] It is convenient to set out the statutory and regulatory provisions referred to in the correspondence issued by Ms. Hine. The Yukon *Education Act*, R.S.Y. 2002, c. 61, (*Education Act (2002)*) defines "deputy minister" as ". . . a member of the public service responsible for the administration of the department of education."

[25] The *Temporary Employees Regulation*, O.I.C. 2001/123, defines a "temporary employee" as follows:

| | |
|---|---|
| *"temporary employee" includes any teacher, aboriginal language teacher, educational assistant and remedial tutor who is not an employee within the* | *« employé à titre temporaire » comprend tout enseignant, l'enseignant de langue autochtone, l'aide enseignant et l'orthopédagogue, qui ne* |

| | |
|---|---|
| *meaning of subsection 195(1) of the Education Act and who is not a substitute teacher within the meaning of Order-in-Council 1991/185.* *« employé à titre temporaire »* | *sont pas des employés au sens du paragraphe 195(1) de la Loi sur l'éducation et qui ne sont pas des enseignants suppléants au sens du décret 1991/185.* |

[26] The above reference in the *Temporary Employees Regulation* to subsection 195(1) of the *Education Act* . . ." refers to a provision found in a previous statute, the *Education Act*, S.Y. 1989-90, c. 25 ("*Education Act (1990)*"), under which statute the above regulation was made. In that earlier statute, subsection 195(1) excluded temporary employees from the definition of "employee" as follows:

| | |
|---|---|
| *195. (1) In this Part,* | *195. (1) Les définitions qui suivent s'appliquent à la présente partie.* |
| . . . | . . . |
| *"employee" means a person who is employed or appointed under the provisions of this Act, including a person selected by a School Board for appointment, who as a condition of employment must possess a certificate of qualification as a teacher or who is an aboriginal languages teacher or who is a member of the bargaining unit, but does not include* | *« employé » Personne qui est employé ou nommée sous le régime de la présente loi, notamment une personne choisie par une commission scolaire en vue de sa nomination et qui, au titre de ses conditions d'engagement, doit être titulaire d'un brevet d'enseignement, qui est un enseignant de langue autochtone ou qui est membre de l'unité de négociation; la présente définition ne vise toutefois pas les personnes suivantes :* |
| . . . | . . . |
| *(c) a person employed on a relief, casual, or temporary basis unless that person has been so employed for more than ten consecutive and continuous months in any continuous period of 12 months . . . .* | *(c) les personnes employés à titre de remplaçants, à titre occasionnel ou temporaire et ayant travaillé à ce titre pendant moins de dix mois consécutifs dans une période ininterrompue de 12 mois;* |
| . . . | . . . |
| [Emphasis added] | |

[Je souligne]

[27] As will be explained more fully later in this decision, with the promulgation of the *ELRA*, which statute replaced the *Education Act (1990)*, temporary employees were no longer excluded from the definition of "employee." When amendments were made to the *Education Staff Relations Act* by S. Y. 2004, c. 8, its title was changed to *Education Labour Relations Act*.

[28] Section 5 of the *Temporary Employees Regulation* reads as follows:

| | |
|---|---|
| *5(1) The deputy minister may terminate the employment of a temporary employee at any time by giving the employee notice of termination in writing of fifteen instructional days, or by giving the employee fifteen days' pay in lieu of the notice.* | *5(1) Le sous ministre peut licencier un employé à titre temporaire, en tout temps, en lui donnant un avis écrit équivalent à quinze jours d'enseignement, ou en lui remettant une indemnité compensatrice de préavis représentant quinze jours d'enseignement.* |
| *(2) Notwithstanding subsection (1), the deputy minister may, at any time, terminate the employment of a temporary employee for just cause without notice of termination or pay in lieu thereof.* | *(2) Malgré le paragraphe (1), le sous ministre peut, en tout temps, licencier un employé à titre temporaire pour un motif valable, sans avis de licenciement ni d'indemnité compensatrice de préavis.* |

[29] Section 119 of the *ELRA*, referred to in the letter from Ms. Hine to Ms. Mackwood, reads as follows:

| | |
|---|---|
| *119(1) An employee may be disciplined, suspended, or dismissed for cause.* | *119(1) Tout employé peut faire l'objet de mesures disciplinaires, d'une suspension ou d'un licenciement pour motif valable.* |
| *(2) When a superintendent disciplines or suspends an employee, the employee shall be provided with an opportunity to request a review by the deputy minister prior to referring the grievance to adjudication pursuant to section 120.* | *(2) L'employé qui fait l'objet de mesures disciplinaires ou d'une suspension doit se voir accorder la possibilité d'en demander la révision par le sous-ministre avant de renvoyer son grief à l'arbitrage en vertu de l'article 120.* |
| *(3) The deputy minister, on the recommendation of the* | |

| | |
|---|---|
| *superintendent, may, on the request of the employer or principal, terminate an employee's contract of employment or a principal's appointment, for cause.* | *(3) Le sous-ministre, sur la recommandation du surintendant et lorsque l'employeur ou le directeur d'école le demande, peut licencier un employé ou un directeur d'école pour motif valable.* |
| *(4) Prior to a termination by the deputy minister, the deputy minister shall provide an opportunity for the employee or principal to make representations and in doing so to be represented by a lawyer or the bargaining agent.* | *(4) Le sous-ministre est tenu d'accorder, avant le licenciement, la possibilité à l'employé ou au directeur d'école de présenter ses observations et d'être, dans ce cas, assisté par un avocat ou un agent négociateur.* |

[30] At the outset of its argument on this issue, the employer conceded that, in terminating the grievor's employment, it had improperly relied on the *Temporary Employees Regulation*, which does not apply to the grievor. The employer stated that it had informed counsel for the grievor of its concession only late in the week before the hearing.

[31] As stated earlier in this decision, by email dated May 3, 2012, counsel for the employer informed the YTLRB that it wished to adduce evidence of just cause "to address the grievance's allegation that the grievor had been dismissed without cause." At the hearing, however, the employer changed its request. It now submitted that, while it had not alleged cause as a basis for terminating the grievor's employment, it wished to change the grounds for the grievor's termination and lead evidence of cause. The employer submitted in the alternative that such evidence could be admitted for the purpose of fashioning an appropriate remedy.

[32] The employer argued that the principle that an employer may not alter the grounds for discipline it imposed on an employee, which is based on procedural fairness, is subject to exceptions. On that point, the employer referred to the following extracts from Brown and Beatty, *Canadian Labour Arbitration*, 4th edition, at paragraph 7:2200:

> *Arbitrators generally require employers to justify the sanctions they impose on the same grounds they refer to when they actually discipline an employee, even though at common law an employer can rely on any ground to justify a dismissal, regardless of when it was discovered. In* Aerocide

> Dispensers Ltd., *Professor Bora Laskin (later Chief Justice of Canada) first advanced the principle that employers should be held "fairly strictly to the grounds upon which (they have) chosen to act" and that arbitrators should "not . . . permit an assigned cause to be reformed into one different from it merely because the evidence does not support the assigned cause but rather something like it". It was his view that an employer should not be allowed either to enlarge the grounds by adding new allegations, or to change how it characterized the same set of facts.*
>
> . . .
>
> *The principle that an employer cannot justify disciplining an employee on grounds that are different from those it gave when the penalty was actually imposed is, however, neither absolute nor inviolable. Many exceptions and limitations have been recognized. . . .*
>
> . . .

[33] The employer submitted that one such exception to the general principle is if the new grounds are known to the grievor. The employer alleged that, in this matter, the grievor was aware of the evidence of cause that it wished to introduce. The employer also cited *Inventronics Ltd. v. U.S.W., Local 9175* (2010), 192 L.A.C. (4th) 360, in support of its argument.

[34] The grievor submitted that the employer could not at adjudication allege cause for the termination of his employment, as none had previously been alleged. He referred to the correspondence reproduced earlier in this decision (Exhibits E-1, P-1 and P-2).

[35] The grievor further submitted that the employer raised the issue of cause only on the Thursday before the hearing was scheduled to commence on the following Tuesday and that he was taken by surprise.

[36] The grievor argued that, because the employer terminated his employment under the *Temporary Employees Regulation*, he was deprived of the opportunity of grievance hearings at the different levels of the grievance procedure. He submitted that, had the process set out at subsection 119(4) of the *ELRA* been properly followed by the employer at the outset, he would have had notice of the employer's allegations in respect of the termination of his employment and would have been able to make representations at the different levels of the grievance process with the assistance of counsel or his bargaining agent. In support of his argument, the grievor referred to *Shneidman v. Canada (Attorney General)*, 2007 FCA 192.

[37] For the reasons that follow, I ruled that the employer would not be permitted to lead evidence of cause for the termination of the grievor's employment.

[38] The employer consistently took the position that it had not terminated the grievor's employment for cause. While the letter of termination did allege certain deficiencies in the grievor's work performance, the employer expressly chose not to pursue that avenue. On that point, I refer to the penultimate paragraph of Ms. Hine's letter to Ms. Mackwood (Exhibit P-1), which reads as follows:

> *Even though performance issues were identified, Mr. Lapierre has been granted the benefit of the doubt, and my decision was to terminate his employment by giving him 15 days' pay in lieu of notice, subject to section 5(1).*

[39] The employer's stance was reiterated in its letter to the YTLRB's registry (Exhibit P-2), as follows:

> . . .
>
> *Attached is a letter from the Deputy Minister to The Yukon Teachers Association dated April 15, 2011. The letter explains the termination was made pursuant to section 5(1) of the Temporary Employee Regulation and not pursuant to section 119 of the Education Labour Relations Act, and therefore no opportunity to make representations was necessary. This is the reply of the Employer at the final level.*
>
> . . .

[40] Thus, the employer chose not to invoke just cause under subsection 5(2) of the *Temporary Employees Regulation* as the basis for terminating the grievor's employment.

[41] In *Inventronics Ltd.*, the employer had imposed a disciplinary suspension of five days on the grievor. Several days before the first day of hearing, the employer informed the union that it would rely on its harassment policy as well as on the applicable human rights and workplace safety and health legislation to justify its disciplinary decision. The union raised a preliminary objection on the basis that the employer was attempting to change the grounds of discipline by adding claims of breaches of its harassment policy and the relevant legislation.

[42] In rejecting the union's preliminary objection, the arbitrator stated that the issue turned mainly on the wording of the disciplinary notice. He found that the notice contained detailed factual allegations involving potential breaches of the employer's harassment policy and the relevant legislation, even though it did not expressly refer

to them. The arbitrator held that the purpose of the employer's letter to the union was to clarify the legislative provisions it sought to rely upon, which at most involved a change in the legal characterization of the incident and not the introduction of new grounds for discipline.

[43] The decision in *Inventronics Ltd.* may be distinguished from the present matter. In *Inventronics Ltd.*, the union alleged that the employer was adding grounds for discipline in order to justify a penalty already imposed by the employer for disciplinary reasons. In this case, the employer deliberately and emphatically chose to terminate the grievor's employment for non-disciplinary reasons, even though it possessed facts that it alleged at adjudication would support the grievor's termination for cause. At termination, the employer clearly decided not to proceed under section 119 of the *ELRA* concerning disciplinary measures. As a result, the grievor was not afforded the opportunity of asserting his rights under that provision.

[44] What the employer sought at adjudication was not merely to add new grounds to justify its action against the grievor but rather to alter the very legal foundation upon which it based its decision to terminate the grievor's employment. To allow the employer at such a late stage to adduce evidence of cause for terminating the grievor's employment would have been unfair to him. Accordingly, the employer's request to alter the ground for termination was denied.

**III. Summary of the evidence**

[45] The parties provided an "Agreed Statement of Facts," which I will reproduce below for ease of reference. For the documents referred to that were entered into evidence during the course of the hearing, I have inserted the exhibit numbers and identified them in bold.

> 1. *The document attached as Schedule "1" is the Collective Agreement between the Government of Yukon and the Yukon Teachers' Association, effective July 1, 2009 to June 30, 2012.*
>
> 2. *The document attached as Schedule "2" is a translation, commissioned by the Yukon Teachers' Association, of the Collective Agreement between the Government of Yukon and the Yukon Teachers' Association, effective July 1, 2009 to June 30, 2012. However, the Employer does not agree that this French version is authoritative.*
>
> 3. *At all relevant times, the Employer is the Government of Yukon.*

4. *Mr. Lapierre accepted an appointment as a temporary full-time teacher at École Émilie-Tremblay ("EET") for the period of September 5 2007 to June 25 2008. Attached as Schedule "3" is a copy of the letter of offer dated May 17, 2007* **[Exhibit P-6]** *and Department of Education School Based Staff Appointment Form* **[Exhibit P-7]**. *On the Appointment Form it indicates that Mr. Lapierre relocated from Quebec to Whitehorse, Yukon. Mr. Lapierre executed this letter of offer on June 15, 2007.*

5. *Mr. Lapierre accepted a second appointment as a temporary full-time teacher at EET for the period of September 2, 2008 to June 25, 2009. Attached as Schedule "4" is a copy of the letter of offer dated May 12, 2008* **[Exhibit P-9]** *and Department of Education School Based Staff Appointment Form* **[Exhibit P-10]**. *Mr. Lapierre executed this letter of offer on June 11, 2008.*

6. *Mr. Lapierre accepted a third appointment as a temporary full-time teacher at EET for the period August 25, 2009 to June 25, 2010. Attached as Schedule "5" is a copy of the letter of offer* **[Exhibit P-12]** *and Department of Education School Based Staff Appointment Form* **[Exhibit P-13]**.

7. *La Commission Scolaire Francophone du Yukon No. 23 ("CSFY") is the French school board in the Yukon. EET is the only school under the CSFY.*

8. *On May 10, 2010, Mr. Lapierre submitted a grievance regarding the alleged April 28, 2010 decision on the grounds that Mr. Lapierre was, as of the beginning of the 2009-2010 school year, a permanent employee.*

   [For purposes of clarification, grievance 367-YG-17 includes the following details: "On April 28, 2010, the Director General informed René Lapierre that his position would be 'cut' for the 2010-2011 school year."]

9. *A Complaint Level meeting was held on May 20, 2010. At this meeting, the Employer's representatives informed Mr. Lapierre and the Association's representative that the Deputy Minister had delegated her authority to the Director General, Lorraine Taillefer, to renew, under Section 109(2) of the Act, Mr. Lapierre's employment for a third consecutive school year, and to deem there to be 'exceptional circumstances'.*

10. *After the Complaint Level meeting, the Employer's representative informed Mr. Lapierre and the Association's representative that the Deputy Minister in fact had not delegated her authority. Attached as Schedule "6" is an email from Val Stehelin to Jocelyn Barrett dated May 21, 2010* **[Exhibit P-33]**.

11. *By letter dated May 20, 2010* **[Exhibit P-32]**, *attached as Schedule "7", the Deputy Minister of Education states that pursuant to Section 109(2) of the Act, Mr. Lapierre was employed as a temporary employee for a third consecutive school year in circumstances which she deems exceptional. These circumstances were to facilitate the conclusion of an Agreement between the Minister of Education and the President of CSFY enabling a three year pilot project to offer the Fine Arts and Sports/Nature Programs at École Émilie-Tremblay.*

12. *On June 28, 2010, the Employer denied Mr. Lapierre's grievance.*

13. *In June, 2010, Lorraine Taillefer met with Rene Lapierre to inform him that another term position for the 2010-2011 school year would be offered to him.*

14. *On July 27, 2010, the grievance was referred to adjudication. Attached as Schedule "8" is a copy, for convenience, of the reference to adjudication including details (but not all accompanying documents).*

15. *Attached as Schedule "9" is a copy of the letter of offer, dated August 12, 2010, to Mr. Lapierre, for a fourth appointment as a temporary full-time teacher at EET for the period August 25, 2010 to June 22, 2011* **[Exhibit P-14]**.

16. *Neither Mr. Lapierre nor the Association have been notified of any 'exceptional circumstances' for the 2010 - 2011 school year.*

17. *Attached as Schedule "10" is Mr. Lapierre's teacher evaluation report dated May 8, 2008* **[Exhibit P-8]**.

18. *Attached as Schedule "11" is Mr. Lapierre's teacher evaluation report dated June 22, 2009* **[Exhibit P-11]**.

19. *Attached as Schedule "12" is Mr. Lapierre's teacher evaluation report dated September, 2010 for the 2009 - 2010 school year* **[Exhibit P-15]**.

20. *On December 8, 2010, Lorraine Taillefer, Director General, conducted an observation of Mr. Lapierre.*

*Attached as Schedule "13" are handwritten observation notes, prepared by Lorraine Taillefer, regarding Mr. Lapierre* **[Exhibit P-16]**.

21. *Attached as Schedule "14" is the "Agreement – Fine Arts and Sports/Nature Programs for Émilie-Tremblay School" between Government of Yukon and CSFY (June 28, 2007 to June 30, 2010)* **[Exhibit E-3]**.

22. *On March 12, 2011, the Association's President Katherine Mackwood met with an Employer representative to discuss a conflict of interest concern brought forward by Mr. Lapierre regarding Director General Lorraine Taillefer.*

23. *By email dated March 22, 2011, and further to the March 12, 2011 meeting, Association President Katherine Mackwood outlined Mr. Lapierre's concerns regarding Lorraine Taillefer's actions, potential conflict of interest and abuse of authority in relation to Mr. Lapierre. The Association requested that the Employer investigate the application of its Conflict of Interest policy. Attached as Schedule "15" the email correspondence from Katherine Macwood to Peggy Dorosz and Pamela Hine* **[Exhibit P-17]**. *Attached as Schedule "16" is the referenced Conflict of Interest policy.*

24. *During the 2010-2011 school year, Mr. Lapierre taught Geography 12, Physics 11, Biology 11 and Physical Education 11 to École Émilie-Tremblay Director General Lorraine Taillefer's daughter and 5 other students in the 11-12 class.*

25. *During the evening of Sunday, April 3, 2011, École Émilie-Tremblay principal Marc Champagne called Mr. Lapierre at his home. Mr. Champagne informed Mr. Lapierre that he should not attend school the next morning, but that he meet Marc Champagne at Human Resources at the Department of Education building at 9 a.m. on April 4, 2011. Mr. Lapierre did not attend this meeting.*

26. *On April 4, 2011, the Employer delivered the letter dated April 4, 2011 to Mr. Lapierre's home. Attached as Schedule "17" is the letter, by which the Deputy Minister of Education terminated Mr. Lapierre's employment* **[Exhibit E-1]**.

27. *Prior to the termination by the Deputy Minister of Education, Mr. Lapierre was not provided an opportunity*

*to make representations, nor be represented by a lawyer or the bargaining agent.*

*28. By letter dated April 7, 2011, attached as Schedule "18", the Association requested that the Deputy-Minister withdraw the termination letter* **[Exhibit P-34].**

*29. The Deputy-Minister's response, dated April 15, 2011, is attached as Schedule "19"* **[Exhibit P-1].**

*30. On March 2, 2012, the Employer offered a temporary appointment to Mr. Lapierre for the period March 19, 2012 to June 15, 2012 at École Whitehorse Elementary school. Attached as Schedule "20" is the letter of offer* **[Exhibit P-29].**

**A. For the grievor**

**1. Testimony of René Lapierre**

[46] The grievor testified fully and completely about the events leading to his grievances. Given the agreed statement of facts, I have summarized only the points of his testimony that I found were relevant to the matters at hand.

[47] The grievor has approximately 12 years' experience as a teacher. He had already obtained a bachelor's degree in education when he was hired by the Commission scolaire francophone du Yukon ("the CSFY"), headed by Director General Lorraine Taillefer. According to him, in spring 2007, he had an informal interview with Ms. Taillefer while she was in the Montreal area, which lasted an hour or two. The grievor's spouse was also present. Ms. Taillefer explained the Académie Parhélie "sports and nature" program. She told them that the school's funding was guaranteed for three years but that the finance plan covered five years. Ms. Taillefer told the grievor that she would advise him if any positions became available, which she did.

[48] The grievor said that he applied for a full-time teaching position (full-time equivalent) at the EET that was posted in April 2007 (Exhibit P-4) and that he took part in a first telephone interview related to it near the end of April or the beginning of May 2007.

[49] Near the end of the process, the grievor noticed that the job posting on the Internet had been modified and that the permanent position to be filled had become temporary (Exhibit P-5). The job description remained the same. He contacted

Ms. Taillefer. She spoke to him about the three-year funding but did not explain the reasons for the change.

[50] The grievor said that applicants rarely apply for temporary positions in the North because they generally require permanent positions before moving there. The grievor stated that he and his wife had just had a child. Since he did not have permanent status with his employer in Quebec, he requested leave without pay for two years so that he could remain on the priority list. His employer agreed.

[51] The grievor testified that all that remained was an interview with two CSFY commissioners, which took place in May 2007. The day after the interview, he received a letter of offer from Ms. Taillefer for a position teaching grades 11 and 12.

[52] The grievor said that, before accepting the offer, he told Ms. Taillefer that he would not move 6000 kilometres from home for a temporary position. Ms. Taillefer attempted to reassure him, stating that the funding covered three years, while the project extended over five years. The grievor said that he would never have moved to the Yukon without Ms. Taillefer's reassurance. Since he was moving from Quebec to the Yukon, the grievor said that he accepted a temporary teaching position in the hope that it would become permanent.

[53] The grievor testified that he was hired to teach grades 11 and 12. Since there were no grade 11 students in the 2007-2008 school year, he taught grades 9 and 10, along with one student in grade 12.

[54] The grievor pointed out that Rémi Lemoine, the EET principal, was in his first school administrative role, and he tried to help Mr. Lemoine as best he could. The grievor was offered the vice-principal position for the 2007-2008 school year, but he insisted that the job be posted so that teachers with greater seniority could apply. He said that an administrative position had not been in his career plans. He accepted the position only when no one else showed an interest in it.

[55] Mr. Lemoine signed the grievor's evaluation for the 2007-2008 school year, dated May 8, 2008 (Exhibit P-8). As indicated on the evaluation form, the two evaluation choices were "satisfactory" or "unsatisfactory." For each subcategory, the choices were "satisfactory" or "needs improvement." The grievor's performance was rated satisfactory in all teaching categories; so was his overall rating. It was noted that he needed improvement in only one subcategory, using class time. Mr. Lemoine noted on that point on the evaluation form that the grievor's classes started later than

scheduled. The grievor said that it was because the EET had no bell to mark the start and end of classes, which he had to get used to.

[56] The grievor taught grades 11 and 12 during the 2008-2009 school year during which year he was no longer acting as the vice-principal. According to the performance evaluation signed by Mr. Lemoine on June 24, 2009 (Exhibit P-11), the grievor received a satisfactory rating in all categories, including overall.

[57] The grievor said that, in May or June 2009, he had an informal discussion with Ms. Taillefer about the budget and about the possibility of permanent positions becoming available. He asserted that, in 2007-2008 and 2008-2009, no teacher obtained a permanent position. The grievor testified that he told Ms. Taillefer that he was concerned that the budget was for only three years. She told him not to worry about it because there was enough for five years.

[58] The grievor said that he accepted a temporary position for a third year because he wanted to stay in the Yukon. In 2009, he received the Yukon bonus provided under article 29 of the collective agreement.

[59] During the school year, Ms. Taillefer mentioned to the grievor that two permanent positions would be available in the spring for the two temporary teachers with the most seniority, the grievor and Daniel Girouard. In a meeting with Ms. Taillefer around the end of March 2010, she advised the grievor and Mr. Girouard that only one permanent position would open and that a choice would need to be made between them. When they inquired into the available options, Ms. Taillefer told them that she could either restart the interview process or decide based on the date that each had sent his signed contract. Since they could not know those dates, the grievor and Mr. Girouard told her to proceed with the second option. Mr. Girouard became permanent as his contract had been sent a day before the grievor's.

[60] During a general meeting held at the end of the 2009-2010 school year about the budget for elementary and secondary schools, Ms. Taillefer announced that 1.5 teaching positions had to be eliminated. She asked the teachers to discuss it among themselves. In March 2010, the grievor was on parental leave during a two-week school break. Ms. Taillefer called him in to a staffing meeting. She told him that his position was eliminated for the next school year and that he could apply for a position at an elementary school. He was floored by the news, as he knew that many students would

be in the classes that he would have been teaching the following year. He replied that he did not believe that parental leave was meant to be used to find another job.

[61] The grievor said that, when his contract was renewed for 2009-2010, no one informed him of the exceptional circumstances linked to it. Although he did not sign the offer of employment (Exhibit P-12), he acknowledged that he taught in and that he was compensated for 2009-2010. It was at the end of this school year that he filed his grievance claiming that he was a permanent employee (YTLRB File No. 367-YG-17).

[62] The grievor then continued his testimony with an account of his dismissal.

[63] In summer 2010, Ms. Taillefer contacted the grievor. She asked him if he wanted his position back for the 2010-2011 school year and if he would withdraw his grievance. The grievor replied that he would accept the position but that he would maintain his grievance.

[64] Ms. Taillefer completed the grievor's performance evaluation for 2009-2010 (Exhibit P-15). She rated his performance as satisfactory. The grievor said that, at that time, Ms. Taillefer was both the director general of the CSFY and the EET principal, as Mr. Lemoine was no longer the principal.

[65] As stipulated in paragraph 24 of the agreed statement of facts, the grievor taught physics, biology and physical education to grade 11 students and geography to grade 12 students in 2010-2011. He had six students, including Ms. Taillefer's daughter, who was in grade 11, and two other students who were detached from the class but who were still under his supervision.

[66] The grievor mentioned the evaluation notes that Ms. Taillefer wrote (Exhibit P-16) after she observed his class before Christmas 2010. He said that, usually, he and she would meet before her evaluation, and he would explain to her what he would do in the class. According to the grievor, the normal process included three observations, but in his case, the process was interrupted by his dismissal.

[67] In spring 2011, the grievor contacted the YTA for the reasons indicated in paragraph 23 of the agreed statement of facts. Ms. Mackwood forwarded his concerns to Ms. Hine and Peggy Dorosz, Labour Relations Advisor with the Department of Education, in an email on March 22, 2011 (Exhibit P-17). The grievor testified that he brought three examples of conflict of interest to the YTA's attention about Ms. Taillefer's professional duties and private interests.

[68] In the first example, three days before classes began in August 2010, Ms. Taillefer asked the grievor to prepare and teach an industrial arts program to two students on top of his regular duties. Since that program did not exist at the EET, Ms. Taillefer asked him to find workshop time at other schools. The other schools informed him that such a request had to come from the superintendent and not from a teacher.

[69] In the second example that the grievor provided to the YTA, he stated that Ms. Taillefer often dropped in on his class. She emailed him and asked about the credits that her daughter would need to obtain a British Columbia diploma for university admission. She asked him several questions on that subject without expressing the capacity in which she was asking. When the grievor explained to her that it would take two years for that diploma, Ms. Taillefer asked him to complete it in one year. He told her that that was impossible. According to him, the schooling could not be completed in one year without resorting to unethical methods.

[70] Finally, the grievor stated that, in early March 2011, a supply teacher, Catherine Lamarche, informed him that Ms. Taillefer had tried to obtain information about him from her. He emailed Ms. Taillefer, accusing her of a lack of ethics and professionalism by attempting to obtain information from his coworkers. He said that, 20 minutes after he emailed her, he ran into Ms. Taillefer, and she called him into her office. Approximately 15 to 20 minutes later, Ms. Taillefer, accompanied by then Principal Marc Champagne and the Vice-principal, went to the grievor's classroom. He had asked Pierre Picard to act as his union representative. The administrators asked Mr. Picard to leave, but the grievor refused, because he wanted a witness. In the brief meeting, the grievor repeated to Ms. Taillefer the same things that he had stated in his email. When Ms. Taillefer told him that he appeared upset, the grievor replied that he was not but that he did not like it when people went behind his back and that she could have asked him the questions directly.

[71] The grievor said that he feared repercussions from the incident, and in March 2011, he consulted Ms. Mackwood for advice. She strongly advised him to contact the Harassment Prevention Office and the Government of Yukon Public Service Commission's Respectful Workplace Services. On March 28, 2011, the grievor filed a workplace harassment complaint against Ms. Taillefer (Exhibit P-19). The complaint included allegations against Mr. Champagne. When the Harassment Prevention Office

informed the grievor that he could not name two people in the same complaint, he filed a separate complaint against Mr. Champagne on April 1, 2011 (Exhibit P-21).

[72] The grievor testified that he chose to settle his complaints informally via an interview with the assistant deputy minister of education, to whom he described his workplace experiences. She suggested that he continue his efforts with the YTA.

[73] On the evening of Sunday, April 3, 2011, the grievor received a telephone call from Mr. Champagne, who told him to go to the Department of Education the following day, rather than the school. The grievor did not want to go without a union representative. Several times in the past, attempts had been made to take him by surprise when he was unprepared. He tried to contact Ms. Mackwood and John Walsh of the YTA. Because he could not reach either of them, he did not attend the meeting.

[74] At approximately 10:30 on April 4, 2011, the grievor received a telephone call from Mr. Champagne, who advised him that a letter would be delivered to him that same day. He received the letter around noon. It was the termination letter (Exhibit P-1).

[75] The grievor then addressed the claims made against him in the termination letter.

[76] With respect to the allegation that he had used only the grade from a mid-year exam to determine the final grade at the end of the second term of Geography 12, the grievor explained that, in fall 2010, he had taken a 17-day trip with his students to Vancouver Island, which was experimental. He was teaching Biology 11 and Geography 12. The Math teacher, who did not go on the trip, assigned homework to the students, as did the Fine Arts 11 teacher. There was no time for the Physics 11 course or the Math 11 and 12 courses, and there was no time to complete the students' formal tests.

[77] The grievor said that the grades were mostly based on assignments and participation in trip activities. Each student had to keep a logbook. The first report card for the first term demonstrated to the grievor that the grades did not reflect the knowledge learned on the trip.

[78] As for the allegation that he attempted to conceal information about the single grade, which he later admitted, the grievor referred me to the following part of the harassment complaint that he filed against Mr. Champagne (Exhibit P-21) on April 1, 2011:

> . . .
>
> *I was called for a meeting regarding the report cards on Thursday March 31st 2011, after school. M. Champagne never gave me explanations about what we were going to discuss exactly and did not ask me to bring any documents.*
>
> . . .
>
> *Finally, he came to the point of the report cards. After a few moments, I didn't know where that discussion was going. He finally asked me if the students grades were based on the mid year exam (on one subject, Geography 12). I said yes because one of the students was gone for 3 weeks to the Canada Games and it would not be fare for her If she couldn't present her part. This was a team project. M. Champagne then jump off his chair, acting very angry and then walk for 2 or 3 minutes in the classroom. I did'nt know what to think. It look to me like a huge setup, to push me to the limit. They are putting so much pressure on me now, that I'm afraid to do a mistake and have more retributions and more letters in my file. That meeting wasn't about finding solutions. It was just to put me down.*
>
> . . .
>
> [*Sic* throughout]

[79] The grievor said that he asked the union representative, Pierre Picard, to come to the meeting with Mr. Champagne on March 31, 2011. He testified that the meeting began on a negative note and that Mr. Champagne's goal was to put him down. He said that Mr. Champagne bombarded him with questions and that he had a hard time answering them.

[80] The grievor denied the allegation that the evaluation he had done "[translation] did not comply with the information provided to the students and parents." He said that the students knew full well that the grade from the mid-year exam would count toward the grade on the second-term report card.

[81] With respect to the claim that using a single grade to evaluate a term was unacceptable for educational and ethical reasons, the grievor pointed out that Mr. Champagne had experience as an elementary school principal but that he lacked secondary-school evaluation experience.

[82] In response to the allegation that he had shown a lack of concern for the success and well-being of his grade 11 and 12 students, the grievor said that the final exam had counted for a lot in the grade 11 and 12 science classes; in grade 12, it had counted for 40% of the final grade. He said that the purpose of the mid-year exam was

to assess where the students were and their potential to succeed on the final exam, which would determine their success. The grievor said that he agreed with the statement in the termination letter that the grades of half the class had dropped 20 to 34%. However, he added that all the students whose grades had dropped in comparison to the first report card admitted to him that they had not studied. Furthermore, one student who had taken the exam seriously had received a grade of more than 90%.

[83] The grievor then addressed the allegation that his course planning was unsatisfactory. He mentioned a file that he had given to Mr. Champagne containing the planning for all the classes from the start of April 2011 to the start of the exam period in June 2011. The file contained the learning objectives that the grievor had to achieve in each subject. According to him, the allegation of unsatisfactory planning was cited simply because he did not indicate a date for each course. He asserted that, since he had prepared the document for his own purposes, in chronological order, it was not necessary to indicate the dates.

[84] The termination letter also accused the grievor of repeatedly displaying dishonest and unprofessional behaviour in how he supported and backed up his students and in several other situations. The grievor said that it had never been mentioned to him in the past and that he wanted to know why it was in the letter.

[85] The final allegation was that the grievor did not show that he wished to cooperate with the administration and that he breached his students' trust. He began by stating that he wanted to know in what way he had breached his students' trust since most of them still called him, to invite him for coffee.

[86] As for cooperating with the administration, the grievor alluded to trip fundraising activities. He explained how the teachers had been treated by the administration in that context and said that the teachers had to use personal weekend time for those activities. He added that the administration felt that it was the teachers' fault that the parents had not become involved in trip fundraising activities. The grievor said that, when he asked the YTA if fundraising activities were a teacher's responsibility, he was referred to an article of the collective agreement, which stipulated that extracurricular activities were voluntary. The grievor asserted that he had participated in such activities but that he became required to participate more frequently and that he began to participate less often when the activities started to

infringe on his weekends. The grievor said that, at other schools, such as Whitehorse Elementary, the parents' committee handled trip fundraising.

[87] The grievor mentioned the letter of support from Marlène Morin addressed to Ms. Hine, with copies to Ms. Taillefer and the CSFY president (Exhibit P-23), along with the responses from Ms. Hine (Exhibit P-24) and Ms. Taillefer (Exhibit P-25). He said that he had taught Ms. Morin's two children.

[88] The grievor also spoke about emails from Karine Bélanger addressed to Ms. Taillefer and the CSFY president sent on April 12, 2011, copying approximately 58 members of the Franco-Yukon community (Exhibit P-26). The grievor said that Ms. Bélanger had a child at the EET and that she was very involved in the school. He asserted that he was not responsible for sending those emails and that he became aware of them only when he received copies of them. Several members of the community sent emails supporting Ms. Bélanger's initiative (Exhibit P-27).

[89] The grievor's departure was announced at a CSFY public meeting held on April 26, 2011 (Exhibit P-28).

[90] Between April 4, 2011 and March 2, 2012, the grievor applied for seven teaching positions in the Yukon. He was interviewed for a secondary-school position in September 2011 but did not obtain it and was also interviewed for a position at Whitehorse Elementary. He attempted to find out why he was not successful in any of the positions. The principal of F.H. Collins School told him that items had been placed in his file. The grievor accepted an offer for a full-time temporary position at Whitehorse Elementary from March 19 to June 15, 2012 (Exhibit P-29).

[91] The grievor said that his wife attended a CSFY public meeting in May 2011 where three permanent positions were announced. Other teachers were appointed into them.

[92] The grievor said that following his termination, Mark Muckler replaced Mr. Champagne as the EET principal.

[93] The grievor stated that he wanted to remain in the Yukon and to continue to teach. He said that, when he read the termination letter, he felt rage and unjustly treated due to its implications. Only one employer hires teachers in the Yukon, and it had tarnished his name without giving him a chance to explain his version of the facts. He felt like David against Goliath. His dismissal dramatically changed his life and the quality of his children's education.

[94] The grievor showed that, since April 25, 2011, his gross income has been substantially reduced (Exhibit P-30).

[95] In cross-examination, the grievor admitted that his 2007 contract did not provide any employment guarantees after the first year. However, he trusted Ms. Taillefer when she told him that there would be funding for three years and that there would be enough for five years.

[96] When asked about his harassment complaint against Mr. Champagne and whether it had been resolved formally or informally, the grievor said that it was his understanding that follow up would occur with Mr. Champagne.

[97] The grievor was then asked if the allegations stated in the termination letter were true or if he would take any responsibility. He replied that it was question of perception. He did not say that he was not responsible in any way, but he pointed out that, had the administration expressed its concerns sooner, they could have reached an agreement on certain points. However, the administration was trying only to make him seem at fault.

[98] According to the grievor, during the meeting with Mr. Champagne on March 31, 2011, they discussed some of the allegations in the termination letter, particularly those about the mid-year grades. The grievor said that, just because a student does well in one term does not necessarily mean that he or she will do well on the final exam. The grievor reiterated that he stated that the mid-year grades reflected the student's knowledge at that point.

2. <u>Testimony of Katherine Mackwood</u>

[99] Ms. Mackwood, who is completing her third term as YTA president, is a teacher by profession. During her 20 years of experience as a teacher in the Yukon, she taught pre-kindergarten, kindergarten, grades 6 and 7, and grade 10. Ms. Mackwood testified that the Yukon government is the sole employer of public school teachers in the Yukon.

[100] Ms. Mackwood pointed out several benefits of permanent employment for teachers, such as the layoff provisions in the collective agreement, employment security and staffing priority. She referred to the "Yukon Education Staffing Protocol" (Exhibit P-31).

[101] Ms. Mackwood testified that temporary employees cannot be employed indefinitely via a succession of term contracts. While a third consecutive term may be authorized by the deputy minister in exceptional circumstances, Ms. Mackwood said that she would expect the deputy minister to advise the YTA if a determination is made of exceptional circumstances. She said that such a courtesy should be extended to the YTA by the deputy minister so that the YTA could be in a position to assist with the matter. Ms. Mackwood also expected that the teacher concerned would receive such notice before she did. In the grievor's case, Ms. Mackwood said that the YTA was informed of the exceptional circumstances only during the grievance procedure concerning his grievance against his layoff. She stated that the YTA was never given notice of exceptional circumstances concerning the grievor's contract for 2010-2011 prior to that given during the grievance procedure.

[102] Ms. Mackwood then provided background to her email dated March 22, 2011 to Peggy Dorosz, staff relations consultant in the Department of Education (Exhibit P-17), referred to in paragraph 23 of the agreed statement of facts. On March 11, 2011, the grievor met with Ms. Mackwood in her office and provided examples of conflicts of interest involving Ms. Taillefer. He was concerned about bringing the issue to the YTA because he feared repercussions. Ms. Mackwood then called Val Jensen, the human resources director at the Department of Education, to discuss the matter. She was told to write an email to Ms. Dorosz outlining the issue.

[103] In her response by email dated April 29, 2011 (Exhibit P-18), Ms. Dorosz informed Ms. Mackwood that the Deputy Minister had found that there was a perception of conflict of interest between Ms. Taillefer's position of director general of the CSFY and her role as a parent of a student at the EET. In future, any issues or communication concerning her children would be handled by her spouse.

[104] Ms. Mackwood stated that, during her time in office, concerns have been expressed about retribution by the school administration against teachers and that one of the YTA's goals is to rectify those concerns with the employer. She said that a Yukon government document published on the Internet in 2009 stated that a survey had indicated widespread fear and distrust of the government by government employees.

[105] In cross-examination, Ms. Mackwood stated that the expectation was that, if teachers employed on a temporary basis did their jobs well, they would have tenure.

She also stated that her understanding of section 109 of the *ELRA* is that it limits temporary employment under exceptional circumstances to a third term.

[106] When asked whether she was aware of other employees whose temporary employment had been extended due to exceptional circumstances, Ms. Mackwood replied in the affirmative. Asked whether on those occasions the YTA had been provided notice of the exceptional circumstances, she said that she would have to verify the files. She acknowledged that, in the case of the grievor, she had not requested notification of the exceptional circumstances. She added that, in her view, if the deputy minister determines that exceptional circumstances exist, notice should be provided to all parties concerned.

[107] Ms. Mackwood was asked whether, in her capacity as YTA president, she could provide a percentage of grievors who had fears of retaliation by the employer. She replied that she received innumerable phone calls concerning that issue, including from permanent employees. She asserted that, in the present circumstances, it was not uncommon for employees to fear retaliation.

[108] Asked about the layoff provisions of the collective agreement, Ms. Mackwood stated that clause 27.07 limited its application to permanent employees.

[109] In re-examination, Ms. Mackwood stated that the cases in which some teachers had worked for more than two consecutive terms on temporary contracts were not brought to the attention of the employer because those teachers did not wish to grieve for fear of jeopardizing their chances of obtaining permanent positions.

**B. <u>For the employer</u>**

**1. <u>Testimony of Lorraine Taillefer</u>**

[110] Ms. Taillefer has been the CSFY's executive director for six years. She said that the Académie Parhélie program was introduced at the EET in 2007-2008 for students in grades 7 to 12. The program has two components: fine arts, and sports and nature. The teaching method is integrated and experimental. It includes field instruction through educational trips.

[111] According to Ms. Taillefer, teachers at the EET do not have a full teaching schedule as compared to other schools. They have different responsibilities, such as fundraising activities for up to 10% of project costs and planning trips and camping needs.

[112] The teaching staff at the EET consisted of two teachers for grades 7 and 8, 9 and 10, and 11 and 12, and one specialist in English. Ms. Taillefer said that a document was issued to parents and students explaining how students' grades were calculated at each level, with the percentages for exams, assignments, class activities and participation (Exhibit E-2).

[113] With respect to funding for the EET, Ms. Taillefer said that the CSFY asked the government for funding for five years. According to her, when the federal government provides them with financial assistance, an equivalent amount is usually provided by the Government of Yukon. Under the terms of an agreement between the Government of Yukon and the CSFY signed in June 2007 (Exhibit E-3), the Government of Yukon provided financial assistance equal to the cost of a full-time position for three years: 2007-2008, 2008-2009 and 2009-2010. The funding ended in 2010.

[114] Ms. Taillefer acknowledged that, when she met the grievor, she told him that the federal funding request was for five years. She told him that positions would open in 2007 because they needed two secondary-school teachers, one for grades 7 and 8 and one for grades 11 and 12. Ms. Taillefer said that an error appeared in the notice for the two positions indicating that two full-time permanent positions were available (Exhibit P-4). The job posting was corrected before the competition ended by changing the word "permanent" to "temporary" (Exhibit P-5).

[115] Ms. Taillefer testified that, in 2009-2010, Mr. Champagne became principal of the elementary school. During that same period, Ms. Taillefer acted as both the CSFY's director general and the EET's principal, since the person hired as principal had resigned after two months. In 2010-2011, she resumed her director general position on a full-time basis.

[116] Ms. Taillefer recalled the performance evaluation that she completed for the grievor in September 2010 (Exhibit P-15). She said that, at that time, Mr. Champagne was the vice-principal and was the only member of the school's administration. Therefore, she helped him by completing the evaluation. When asked if it raised any concerns, Ms. Taillefer admitted that she was concerned about the grievor's daily and long-term plans. She referred to page 4 of the evaluation. As for her observation of the grievor in December 2010 (Exhibit P-16), she said that they reviewed the questions that she asked that were written on the observation form.

[117] In spring 2009, a permanent position needed to be staffed. Ms. Taillefer met with the grievor and Mr. Girouard about it since they were the two eligible for a permanent position.

[118] Ms. Taillefer testified that they told her they did not require permanent positions and that they had confidence in their abilities to find positions in the Yukon should funding for the Parhélie program be terminated.

[119] Ms. Taillefer told them that the permanent position would be awarded to the person to whom she had first offered a permanent position, which was Mr. Girouard.

[120] Ms. Taillefer said that the grievor was granted parental leave in 2009-2010. Mr. Girouard took parental leave from September 2008 to January 2009. When asked what she thought of teachers who took parental leave during the school year, Ms. Taillefer replied that they were entitled to it and that it was their decision. For teachers with temporary status, the right to parental leave ended when their contracts ended. If their contracts were renewed, the leave entitlement continued into the new contracts.

[121] In spring 2010, the CSFY learned that the funding would end, which meant that one position had to be eliminated. A staff meeting was held at the end of April, where Ms. Taillefer and Mr. Champagne pointed out that they needed to eliminate three positions. They asked staff to make confidential suggestions so that damages could be minimized. However, the EET administration and the CSFY made the final decision.

[122] Ms. Taillefer said that the three individuals whom she met with about the matter were a communications officer, a CSFY pay-equity coordinator and the grievor, whose temporary contract was to end in June 2010 and was not to be renewed.

[123] According to Ms. Taillefer, the main reason for her meeting with the grievor was to inform him of positions becoming available at the same school, in grade 1, and at other schools, as they wanted to give him an opportunity to find a placement. She said that the grievor applied for the grade 1 position. He was interviewed, but he did not get the job.

[124] In August 2010, Ms. Taillefer was able to offer the grievor a temporary position teaching grades 11 and 12 for the 2010-2011 school year. She said that she met with him and that she explained to him that the position being offered was the result of a court decision in favour of the CSFY but that the position could be eliminated during the school year, depending on the appeal. Ms. Taillefer gave the grievor a document

with the details of the position, which mentioned the court decision and the possible consequences (Exhibit E-4).

[125] Ms. Taillefer testified that, when she offered the position to the grievor, she did not ask him to withdraw his grievance. According to her, the grievance was against the government, while the position she was offering was within her control.

[126] In 2010-2011, Ms. Taillefer had two children at the EET, a son in grade 10 and a daughter in the grievor's grade 12 class. In January 2011, she emailed the grievor, asking him for information about the credits required for post-secondary studies, and he sent her a generic document that applied to all students. She emailed him a second time with questions specific to her daughter, which he answered. In February 2011, Ms. Taillefer emailed him again about her daughter's post-secondary studies. She said that he attempted to call her and that he gave her the answers when he saw her at the school.

[127] When asked if she felt whether her roles as the CSFY's director general and as a parent created a conflict of interest, she replied that, when she learned that her daughter had met with Mr. Champagne on March 11, 2011 to discuss her concerns about the grievor, she emailed Mr. Champagne and the CSFY's president, André Bourcier (Exhibit E-6), advising them that she was withdrawing from the situation because she felt that she was in a conflict of interest. She asked Mr. Champagne to contact Ms. Dorosz or Mr. Bourcier for any required follow-up.

[128] Ms. Taillefer said that she was aware of the grievor's dismissal. Mr. Champagne had advised her of it after the termination. She said that she did not take part in the recommendation since it had been arranged with the Department of Education.

[129] Ms. Taillefer said that she was aware of Ms. Bélanger's email to the Francophone community. At the CSFY public meeting on April 27, 2011, several people asked questions about the grievor's contract. However, the CSFY merely responded that it could not answer questions about human resources.

[130] Ms. Taillefer was made aware of the fact that the grievor had contacted the Harassment Prevention Office about his harassment allegations. According to Ms. Taillefer, no follow-up was done with the complaint.

[131] In cross-examination, Ms. Taillefer admitted that three permanent positions were staffed in 2011 and that another was staffed in 2012. According to her, it was

due to a new staffing formula, which allowed for a staffing increase of 15%. She said that the number of students was increasing.

[132] With respect to the meeting that Mr. Picard attended, Ms. Taillefer claimed that he did not attend as the grievor's union representative. She said that Mr. Picard and the grievor were already in the class when she arrived.

2. Testimony of Marc Champagne

[133] Mr. Champagne testified as to his experience. Essentially, since 1996, his teaching career has been at the primary-school level. He has also worked as an administrator. In 2009-2010, he was the interim principal at the EET while a search was conducted for a candidate. During that period, he was responsible for the kindergarten to grade 6 program and Ms. Taillefer bore primary responsibility for the grades 7-12 program. Mr. Champagne said that, during the summer of 2010-2011, a principal was hired, and he was asked to be the interim vice-principal. As the new principal left in October, he was appointed as the principal for the remainder of that school year. He said that he was the only administrator located in the school during that time. Mr. Champagne stated that the main focus of his professional development was assessing students.

[134] Mr. Champagne then testified about his meeting with the grievor on March 31, 2011, the day following the end of the spring break. The first item of discussion concerned the expectations relating to communications between the grievor and the school administration. Mr. Champagne stated that he had asked the grievor to meet with him on two occasions. His first email was ignored. In his second email, he informed the grievor that he wished to discuss the second-term report cards. He said that the grievor replied in one word: "No" during their meeting, Mr. Champagne told the grievor that such a reply was unacceptable and that, if he were unable to meet on the suggested date, it was expected that he propose an alternate date. The grievor was further told that he was expected to respond to requests from the principal.

[135] Mr. Champagne stated that the main focus of his meeting with the grievor was the second-term report cards. He said that a parent and student contacted him during the spring break and expressed concern about how a certain grade had been determined.

[136] Mr. Champagne said that he first asked the grievor a general question, namely, whether he had used tests and homework assignments when calculating the grades.

When the grievor replied in the affirmative, Mr. Champagne asked him for his grade book in order to understand why the student's grades had fallen so precipitously. In one student's case, the grades fell from 80% to 50%, as indicated in an extract from the grievor's grade book (Exhibit E-7).

[137] Mr. Champagne had the report cards with him. When he compared them to the grievor's grade book, he found that the results were identical. He stated that it then dawned on him that the grievor had used only one midterm test as the grade for the entire semester. When Mr. Champagne asked the grievor whether that were the case, the grievor replied at first that he had used other tests. When asked again, he admitted to using only the mid-term test as the final grade for the semester.

[138] Mr. Champagne said that that posed a great problem for him for several reasons. When he asked the grievor whether the students were aware that the mid-term test would count for 100% of the final grade for the semester, the grievor replied that they were not. Mr. Champagne said that the school issued guidelines to parents and students concerning the calculation of grades. He said that the guidelines state that tests and exams are worth up to 50% of the final grade.

[139] Mr. Champagne said that the students had completed other assignments on the understanding that their work would be used in assessing grades for the semester, which was not done. He stated that one-half of the class had done poorly on the mid-term test and that, for seven weeks following that test, the students were given no opportunity to improve or change their marks. Mr. Champagne said that his was a grade 12 course and that a student's grades dropping from 80% to 50% would affect his or her application for university admission, a scholarship or a bursary.

[140] When he asked the grievor how he could have graded that way, the grievor replied that he wanted to show the students the importance of preparing for exams. He felt that the students could make up the grades for the final report card. According to Mr. Champagne, in fact, the students could not make up such a discrepancy in one semester. He said that the grievor did not realize the gravity of his action. When he asked the grievor whether the grade of 50% was a fair assessment of that student's performance over the semester, he replied in the negative, adding that it was probably in the 60% range. Mr. Champagne stated that, at that point, it struck him that he could not meet with the parent and student and defend what had been done.

[141] Mr. Champagne's notes of the meeting with the grievor were written on the same document as the typewritten notes prepared by Mr. Champagne of the items to be discussed (Exhibit E-8).

[142] Mr. Champagne asked the grievor for his daily lesson plan for the second semester up to March 31, 2011 (Exhibit E-9). When he reviewed it, he found it inadequate, as it did not contain any dates or learning outcomes. Furthermore, the period covered by the lesson plan was unclear to him.

[143] Mr. Champagne said that he recommended terminating the grievor's employment to Ms. Hine. He said that he did not consult Ms. Taillefer about it, as she had removed herself from the process because her daughter was in the grievor's class. As he could not consult his immediate supervisor, he said he sought permission from Mr. Bourcier to consult another superintendent.

[144] Mr. Champagne stated that, as the grievor had not attended the meeting at Ms. Dorosz's office, referred to in paragraph 25 of the agreed statement of facts, he and she delivered the termination letter to the grievor at his home.

[145] After the grievor's termination, a public meeting of the CSFY was held on April 26, 2011. Mr. Champagne said that his role as principal included presenting a report of the CSFY's activities to the meeting (Exhibit P-28). He said that there was a discussion of the grievor's departure but that he spoke very little about it. He stated that Ms. Taillefer answered questions relating to the grievor's departure.

[146] In cross-examination, Mr. Champagne said that he had approximately two years' experience in teaching at the secondary-school level. He stated that three report cards per year were issued, in November, in March and at the school year's end.

[147] Mr. Champagne stated that the parent who had contacted him during the spring break in 2011 was Ms. Taillefer's husband; it concerned their daughter. He said that Ms. Taillefer had withdrawn due to a conflict of interest before the spring break.

[148] Mr. Champagne said that, in 2010-2011, Ms. Taillefer was his supervisor and that he was the grievor's supervisor. He said that she had conducted one observation of the grievor, to which, to his knowledge, the grievor had not objected.

[149] In re-examination, Mr. Champagne stated that, as the community was small, teachers taught their own children and those of their colleagues. He said that, when he taught grade 4 at the EET, his son was one of his students.

C. Grievor's reply evidence

1. Testimony of Pierre Picard

[150] Mr. Picard has been teaching at the secondary level at the EET since 1994. In 2010-2011, he taught grade 11 and 12 students.

[151] Mr. Picard said that he attended the meeting on March 31, 2011 with the grievor, Mr. Champagne and the vice-principal, Serge Côté. He said that he was present as a union representative at the grievor's request, who confided in him that he was the only person he could trust. The purpose of the meeting was to discuss grade 11 and 12 students' marks on the second-term report card.

[152] Mr. Picard testified that Mr. Champagne asked the grievor a barrage of questions, to the point that he felt that Mr. Champagne's goal was to corner the grievor and find him at fault. According to Mr. Picard, Mr. Champagne heard the grievor's answers but did not listen to them. Based on his experience, Mr. Picard said that there was a motive behind the questions. There was no intention to find a solution; the goal was to reproach rather than to approach.

[153] When asked if any solution was possible between the grievor and the administration, Mr. Picard pointed out that the assignments done by the student in question could have been reviewed and the weighting changed to give the student a grade that reflected the work done that semester.

[154] Mr. Picard stated that he feared eventual repercussions for testifying.

[155] In cross-examination, Mr. Picard repeated that he attended the meeting as a union representative. When asked if he raised objections to Mr. Champagne, Mr. Picard replied that he was present as a witness and not as a lawyer. It was his first experience as a union representative.

[156] When asked about his teaching experience, Mr. Picard said that he had taught in Quebec and that he had seen many conflicts over students' grades. At every meeting he had attended in Quebec about students' grades, the parties had attempted to find solutions.

[157] Mr. Picard acknowledged that he had never faced such a situation in the Yukon and that no one had attempted to corner him.

[158] According to Mr. Picard, the grievor attempted to accept his share of the blame and admitted that he had made a mistake. Mr. Picard said that, once the grievor acknowledged his mistake, it created the possibility of finding a solution.

2. Testimony of the grievor

[159] The grievor spoke about his course planning (Exhibit E-9) and said that he had identified all the objectives that still had to be achieved by the end of the school year, in chronological order by course.

[160] The grievor repeated that, in his meeting with Ms. Taillefer and Mr. Girouard in spring 2009, he was told that only one permanent position existed. He adamantly denied Ms. Taillefer's testimony that a permanent position was not important to him. According to him, Ms. Taillefer knew how important a permanent position was to him.

[161] In cross-examination, the grievor said that, over the years, he had asked Ms. Taillefer about a permanent position. He repeated that the meeting with Mr. Girouard did not proceed as Ms. Taillefer described. He stated that she asked them to choose between two methods, the interview process or the dates on which the signed employment offers were received.

IV. Summary of the arguments

A. For the grievor

[162] The grievor submitted that he was laid off or that his employment was terminated in 2010 and that his employment was terminated in 2011, contrary to the *ELRA* and the collective agreement. He also submitted that he was a permanent employee in both 2010 and 2011.

[163] The first issue raised in the grievor's argument was that of the alleged lack of procedural fairness. He submitted that he was an employee as defined by the *ELRA* and that, as provided by its subsection 1(2), persons do not cease to be employees within the meaning of the *ELRA* by reason of their termination or release from employment contrary to the *ELRA* or the *Education Act (2002)*.

[164] On that issue, the grievor also submitted that, before the termination of his employment by the deputy minister in 2011, he was deprived of the opportunity to make representations and for such purpose to be represented by a lawyer or the bargaining agent, as stipulated by subsection 119(4) of the *ELRA*. The grievor further

submitted that the employer failed to respect the principles set out in article 11 of the collective agreement, which deals with discipline.

[165] The second issue raised in the grievor's argument was his employment status on his termination or layoff in 2010 and on his termination in 2011. The grievor submitted that he had acquired the status of a permanent employee, and he proposed two scenarios concerning his status. In the first scenario, he argued that he was a temporary employee on probation in each of 2007-2008 and 2008-2009 and that, in both 2009-2010 and 2010-2011, he was a permanent employee.

[166] In the alternative, the grievor submitted that, for his first two years, his status was identical to the first scenario; in 2009-2010, he was a permanent employee on probation, and in 2010-2011, he had the status of a permanent employee.

[167] In support of this argument, the grievor relied on section 108 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, and the Education 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*
>
> ***108(1)*** *Malgré toute entente contraire, les modalités du contrat d'emploi d'un employé sont les suivantes :*
>
> *a) les dispositions de la présente loi et ses règlements ou de la Loi sur l'éducation et ses règlements;*
>
> *b) les conditions d'emploi de la convention collective négociée sous le régime de la présente loi, non incompatibles avec les lois et les règlements;*
>
> *c) les conditions d'emploi non incompatibles avec les alinéas a) et b) qui font l'objet d'une convention entre les employés d'un district scolaire et le surintendant.*

| | |
|---|---|
| *exclude the provisions of this section is void.* | *(2) Est nulle la convention qui déroge ou tente de déroger au présent article.* |

[168] The grievor submitted that, as he met the definition of an employee under the *ELRA*, then it applied to him as provided in section 3, which states as follows:

| | |
|---|---|
| *3 This Act applies to all employees as defined in this Act.* | *3 Les dispositions de la présente loi s'appliquent à tout employé selon la définition de ce terme.* |

[169] The grievor then cited section 109 of the *ELRA*, which deals with temporary employment. It 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.* | *109(1) Un employé peut être embauché à titre temporaire durant une partie ou la totalité d'une année scolaire selon l'entente qu'il peut conclure avec le surintendant; le contrat d'emploi peut être renouvelé pour une partie ou la totalité de l'année scolaire suivante.* |
| *(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.* | *(2) Malgré le paragraphe (1), le sous-ministre peut, dans des cas exceptionnels, renouveler la période d'emploi d'un enseignant qui est embauché à titre temporaire pour plus de deux années scolaires consécutives.* |
| *(3) Any employee who is employed on a temporary basis shall be evaluated at least once in each school year by either the principal or the superintendent.* | *(3) L'employé qui est embauché à titre temporaire fait l'objet d'une évaluation de rendement au moins une fois par année scolaire par le directeur d'école ou le surintendant.* |

[170] The grievor argued that subsection 109(1) of the *ELRA* establishes the general rule that an employee may not be employed on a temporary basis for more than two

years. He further argued that the only exception to that rule is set out in subsection 109(2).

[171] The grievor submitted that, as indicated in the copy of the letter of offer for the 2009-2010 year (Exhibit P-12), his employment on a temporary basis for a third consecutive year was renewed by the superintendent, Ms. Taillefer, and not by the deputy minister. He also submitted that the employer acknowledged that the Deputy Minister had not delegated her authority to the superintendent under subsection 109(2) of the *ELRA* and further that neither he nor the YTA had been notified of any "exceptional circumstances" before the grievance process.

[172] The grievor argued that, if the Deputy Minister deemed that there were exceptional circumstances, it would be expected that notice of them would have been provided to him and to the YTA. He further argued that the deeming of exceptional circumstances must be determined by the deputy minister at the time of the renewal of a contract and not, as in this case, retroactively. The grievor submitted that, unless the conditions stipulated in subsection 109(2) of the *ELRA* have been met, then any contractual terms by which an employee's temporary employment would be extended beyond two years would be unlawful or of no legal effect. In support of his argument, the grievor referred to a third-level grievance decision of the Yukon Public Service Commissioner (grievances YTA 95 to 25 and 96-7 (19960925)).

[173] The grievor's next argument concerned probation for school personnel, as set out in section 106 of the *ELRA*. He submitted that that provision does not distinguish between temporary or permanent employment and that a probationary period may be extended beyond two years only with the agreement of the bargaining agent, the employee and the superintendent. The grievor also argued that a period of temporary employment is counted when calculating the probationary period.

[174] In the grievor's submission, section 106 of the *ELRA* indicates the legislator's intention to restrict the temporary employment of teachers to a maximum of one year and to a maximum of two years with the consent of the employee. Referring to the "mischief rule," the grievor argued that the "mischief to be cured" by the remedy of section 109 is the employer's capacity to indefinitely renew term employment contracts. In support of this argument, the grievor cited the *Interpretation Act*, R.S.Y. 2002, c. 125, and *Heydon's Case*, (1584) 76 E.R. 637.

[175] The grievor argued that section 109 of the *ELRA* should be interpreted in a manner that harmonizes the legislation with established legal principles, such as the principle that an employer cannot avoid the consequences of permanent employment through the vehicle of successive term contracts when the underlying reality of the employment relationship is continuous service. In respect of the principles of statutory construction, the grievor cited Elmer A. Driedger, *Construction of Statutes*, 2nd edition; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42; and *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27.

[176] The grievor also referred to the proceedings of the Yukon Legislative Assembly in 2001 and the statements of the Minister of Education when introducing Bill 47, titled *Education Staff Relations Act*, concerning the objects of the proposed legislation; see *Hansard*, Yukon Legislative Assembly, 30th Legislature, 2nd session, Nov. 14, 2001.

[177] The grievor argued that the purpose of the *ELRA* cannot be to intend to deprive a teacher of job security. He further argued that sections 106 and 109 of the *ELRA* must be interpreted to mean that, unless the deputy minister has deemed that exceptional circumstances exist and has so notified the employee concerned, temporary employees whose term is extended beyond two years must be considered permanent employees who have completed their probationary periods. The grievor submitted that it would be absurd and unfair to empower the deputy minister to deem that exceptional circumstances exist without notifying the teacher concerned and the YTA. In the grievor's submission, to interpret section 109 as permitting the employer to employ teachers on temporary contracts indefinitely would lead to unjust and unreasonable consequences.

[178] The grievor argued that the fact that he received the "Yukon Bonus" entitlement under article 29 of the collective agreement in 2009-2010 and 2010-2011 is evidence that the employer recognized his continuous service. Thus, the grievor could not be considered to have recommenced the probationary period during each of the four years of his employment. In support of this argument, the grievor relied on a third level grievance decision of the Yukon Public Service Commissioner dated October 18, 1996 concerning payment of the Yukon Bonus. Included in the legislative provisions then being considered was section 175 of the *Education Act*, S.Y. 1989-90, c. 25, which is substantively the same as section 109 of the *ELRA*. The grievor referred to the following extract from that decision:

. . .

> *Therefore, absent "exceptional circumstances", a teacher may not be employed on a temporary basis for a third year. It is my opinion that if a teacher was employed for a third school year, the teacher would no longer be a temporary teacher or employed on a temporary basis.*

. . .

[179] The third issue addressed by the grievor was negligent misrepresentation. He submitted in the alternative that, if I determine that he was a temporary employee at the time of his layoff or termination in 2010 and his termination in 2011, then he was induced into agreeing to term teaching positions based on the employer's negligent misrepresentations as to the nature of his employment. The grievor submitted that the employer's representative, Ms. Taillefer, made such representations immediately before he accepted the first term of temporary employment and again during the course of his employment. The grievor argued that the employer should be held responsible for negligent misrepresentation. In support, he cited *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87.

[180] The fourth issue raised by the grievor was that the employer did not allege just cause for dismissal and that, under the terms of clause 11.01(h) of the collective agreement, the standard for dismissal is just and reasonable cause.

[181] The fifth issue raised by the grievor was that, if his termination in 2010 was considered a layoff, then the employer failed to comply with the layoff rights under article 27 of the collective agreement and section 117 of the *ELRA*.

[182] The sixth issue addressed by the grievor was the employer's alleged bad faith and unfair dealing in the course of terminating his employment. He described the legislative history of the *Temporary Employees Regulation* and argued that the employer demonstrated negligence and bad faith in terminating his employment based on the *Temporary Employees Regulation* when it should have known that it did not apply.

[183] The grievor submitted that the evidence demonstrated that he was subjected to a conflict of interest involving his supervisor, Mr. Champagne, and the latter's supervisor, Ms. Taillefer, who was the parent of a student in the grievor's class. The grievor referred to Mr. Champagne's testimony that the allegations set out in the termination letter of April 4, 2011 were made by Mr. Champagne further to a complaint made by Ms. Taillefer's husband about their daughter's marks. The grievor

argued that the employer failed to protect him from the conflict of interest in a timely fashion. The grievor further argued that Ms. Taillefer ceased contacting the grievor about her daughter only at about the same time that Ms. Mackwood approached the employer about the conflict of interest.

[184] The grievor submitted that the employer acted in bad faith by terminating his employment within weeks of him approaching the YTA for assistance and within a month of him filing harassment complaints against his supervisors. He also submitted that he had been subjected to public humiliation and embarrassment through the CSFY's discussing his termination at a public meeting.

[185] The grievor argued that a further indication of the employer's bad faith was its citing issues with his work in the termination letter while depriving him of his right to respond to those allegations. As a consequence, the grievor had difficulty finding employment in other Yukon schools, as the Yukon government is the sole employer of teachers.

[186] In terms of remedy, the grievor submitted that he should be reinstated as a permanent employee and that he should be made whole with respect to lost wages and interest. He further submitted that, based on the employer's bad faith conduct or unfair dealing in the course of his dismissal, he should be awarded aggravated and punitive damages. In support of this argument, the grievor cited *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701.

[187] The grievor submitted in the alternative that, if it were determined that his reinstatement would be inappropriate, then he should be awarded an amount for lost wages and interest based on the approach set out by the arbitrator in *Hay River Health and Social Services Authority v. Public Service Alliance of Canada* (2010), 201 L.A.C. (4th) 345, endorsed in *George Brown College of Applied Arts and Technology v. Ontario Public Service Employees Union* (2011), 214 L.A.C. (4th) 96.

[188] In the further alternative, the grievor submitted that, should it be determined that he did not have the status of a permanent employee at the time of the termination of his employment, then he should be awarded damages for breach of contract and punitive and aggravated damages and that the employer should be ordered to apologize to him.

**B. <u>For the employer</u>**

[189] In reviewing the grievor's employment history, the employer stated that, in the spring of 2010, Ms. Taillefer informed him that he would not be offered a fourth term position for the 2010-2011 school year, as funding from the Government of Yukon had ceased. Consequently, three full-time equivalent positions had to be eliminated, one of which was the grievor's.

[190] The employer stated that Ms. Taillefer testified that the grievor was afforded the opportunity to apply for a grade 1 position at the EET for 2010-2011, but he was unsuccessful.

[191] On May 10 2010, the grievor filed a grievance challenging the decision not to offer him a position for 2010-2011 on the grounds that he was a permanent employee as of the 2009-2010 school year (grievance 367-YG-17).

[192] The employer said that the circumstances that the deputy minster deemed exceptional as a basis to employ the grievor for a third consecutive school year were, as stated in her letter of May 20, 2010, to facilitate the conclusion of an agreement between the Minister of Education and the CSFY president enabling a three-year pilot project to offer the Académie Parhélie (sports and nature) programs at the EET.

[193] The employer referred to Ms. Taillefer's testimony that, by August 2010, in a matter involving the CSFY and the Government of Yukon, a judge had issued an interim order requiring the Government of Yukon to fund three full-time equivalent positions at the EET. The employer stated that in fact the grievor was offered and accepted an appointment as a temporary full-time teacher at the EET for the 2010-2011 school year. The employer submitted that grievance 367-YG-17 is therefore moot and further that no damages flow from Ms. Taillefer's initial decision not to offer the grievor a further term position, should any liability be found.

[194] The employer submitted that, in terminating the grievor's employment, it had relied in good faith on the *Temporary Employees Regulation*. The employer admitted that it had not relied on the just cause provision of the *Temporary Employees Regulation* and conceded that it had not provided the grievor with an administrative appeal to or review by the deputy minister of education with representation by a lawyer or the bargaining agent, as stipulated in the *ELRA*. The employer submitted that, while it might have made administrative errors in the grievor's hiring and termination, both its offers of term positions for the 2009-2010 and 2010-2011 school

years and the termination of his employment were founded and were made in good faith.

[195] As for the two-year probationary period set out at subsection 106(1) of the *ELRA*, the employer submitted that, for the purposes of probation, the grievor's start date of employment was the beginning of each unique term position contract. Thus, at the time of his termination during his fourth term contract, the employer's position is that the grievor was on probation. In its submission, that is consistent with subsection 109(2), which prohibits it from appointing an employee on a temporary basis for more than two consecutive school years in the absence of "exceptional circumstances."

[196] Referring to subsection 106(7) of the *ELRA*, which provides that, unless a notice of termination is given during the probationary period, the employee's contract of employment continues unless terminated in accordance with the *ELRA*, the employer submitted that, as opposed to employees hired into permanent positions, the employment of temporary employees ceases with the expiries of their terms of employment. Thus, there is no requirement for the employer to terminate a temporary employee's employment before or upon completion of his or her term. In the employer's submission, as the *ELRA* allows it to hire employees for both term and permanent positions, then subsection 106(7) must be read to apply only to employees appointed to permanent positions.

[197] The employer also submitted that the meaning of subsection 106(8) of the *ELRA* is that an employee who is hired into a permanent position at a particular school may be credited for the prior temporary position in terms of the calculation of their probationary period.

[198] The employer argued that "exceptional circumstances" did exist when the grievor was offered temporary positions for 2009-2010 and 2010-2011, namely, that the funding agreement for the Académie Parhélie program was in place and that funding for full-time-equivalent positions was unstable. The employer stated that section 109 of the *ELRA* does not require that notice of exceptional circumstances be given to the employee or the YTA and referred to Ms. Mackwood's testimony that the YTA had never received such notice concerning other teachers who had been offered a third term position. The employer pointed out that the YTA had been copied on the offers of term positions accepted by the grievor.

[199] The employer referred to subsection 106(2) of the *ELRA*, which provides that the superintendent may terminate an employee's contract of employment during the probationary period on 30 days' written notice specifying the reasons for the termination. The employer submitted that, as the grievor was on probation when terminated, he was entitled to written reasons for the termination of his employment and to 30 days' notice.

[200] The employer submitted in the alternative that the grievor should have been afforded the rights provided under section 119 of the *ELRA*.

[201] The employer referred to subsection 120(2) of the *ELRA*, which denies the right of an employee to refer a grievance to adjudication whose contract of employment was terminated during a probationary period by the superintendent. In any event, the employer denied that the grievor ever acquired the status of a permanent employee.

[202] The employer stated that the grievor was not entitled to the protection of the layoff provisions under the collective agreement as clause 27.07 stipulates that the expiry of a temporary appointment is not considered a layoff.

[203] The employer submitted that the grievor did not establish a factual basis for a finding of bad faith or unfair dealing with respect to the termination of his employment in April 2011. The employer alleged that the evidence showed that Mr. Champagne had no knowledge of the allegations of harassment made against him and Ms. Taillefer, that Ms. Taillefer self-declared a potential conflict of interest in early March 2011 in connection with her daughter having complained about the grievor to Mr. Champagne, and that Ms. Taillefer was not consulted about the recommendation or decision to terminate the grievor's employment. In addition, the employer stated that both Mr. Champagne and Ms. Taillefer testified that the grievor's termination was not discussed at the CSFY public meeting on April 26, 2011. In support of its argument, the employer cited the following cases: *Wallace*; *Canada (Attorney General) v. Tipple*, 2011 FC 762; and *Honda Canada Inc. v. Keays*, 2008 SCC 39.

[204] As for the grievor's argument of negligent misrepresentation, the employer submitted that the evidence did not disclose any factual basis to support his claim that Ms. Taillefer made misleading statements concerning the nature of the employment opportunity at the EET. The employer referred to her testimony that, when she met the grievor in February 2007, she explained to him that the Académie Parhélie program was a pilot project that was anticipated to continue for five years but that funding for

the program had not yet been secured. The employer also referred to the grievor's testimony that he knew before moving to Yukon that there were no guarantees of employment beyond the initial term and that he hoped that it would become a permanent position.

[205] The employer also referred to the grievor's testimony that, in the spring of 2007, he had requested a two-year leave of absence from his employer in Quebec while exploring teaching positions in Yukon because the leave of absence guaranteed his priority hiring status with that employer. The employer submitted that that constituted evidence of the grievor's acknowledgement that he was being offered temporary employment by Ms. Taillefer and that no representations of a continuing or permanent nature were made. The employer argued that the required elements of the tort of misrepresentation, as set out in *Queen v. Cognos Inc.*, were not met.

[206] With respect to remedy, the employer stated that, if it is found to have breached the grievor's 2010-2011 contract, the appropriate amount of damages would be the grievor's wages from April 4 to June 24, 2011, less the 15 days' wages already paid to him under the *Temporary Employees Regulation.*

[207] The employer submitted in the alternative that, if a bargaining unit employee has been unjustly terminated and is not reinstated, the approach to be followed is that outlined in *Canvil v. I.A.M.A.W., Lodge 1547* (2006), 152 L.A.C. (4th) 378. The employer submitted that according to the *Canvil* principles, the grievor would be entitled to approximately 4 months' wages based on his 3¾ years of continuous employment plus 15% of that amount for lost collective agreement benefits.

[208] In the further alternative, the employer submitted that, if it is found that the grievor was still in its employ, then it would have just and reasonable cause to dismiss him, effective June 15, 2012. In such an event, the employer stated that the extent of the damages owing to the grievor would be his salary for April 4, 2011 to March 19, 2012, less any amount he earned.

[209] The employer submitted that there is no factual basis for punitive damages for bad faith in this matter and that it did not act in bad faith or cause the grievor psychological harm in the manner of his dismissal. The employer referred to *Tipple* with respect to damages for psychological injury and loss of reputation.

## V. Reasons

[210] This case turns on the interpretation of certain provisions of the *ELRA*. Among the issues to be determined is the application of section 106 (probation for school personnel) and whether section 109 (temporary employment) permits the employer to continuously employ teachers on a temporary basis through a series of term contracts. Therefore, it is helpful to briefly refer to the legislative history of the *ELRA*.

[211] In the *Education Act (1990)*, Part 10 was titled "Teachers Staff Relations". When the *Education Act (1990)* was amended in 2002 (R.S.Y. 2002, c. 61), its provisions dealing with teachers staff relations were carved out and brought within the newly created *Education Staff Relations Act*, R.S.Y. 2002, c. 62. When certain provisions were amended in 2004 (S.Y. 2004, c. 8), the title of this statute was changed to the *ELRA*.

[212] The grievor referred to statements made by the Minister of Education when introducing Bill 47, titled *Education Staff Relations Act*, in the Yukon Legislative Assembly. There is no dispute that the object of the *Education Staff Relations Act*, now the *ELRA*, is labour relations legislation governing employment relationships in the Yukon education sector. In any event, I find that nothing in this case turns on what the Minister said.

[213] With respect to the principles of statutory interpretation, the Supreme Court of Canada stated the following in *Rizzo*:

> . . .
>
> *21 Although much has been written about the interpretation of legislation, (see, e.g., Ruth Sullivan,* Statutory Interpretation *(1997); Ruth Sullivan,* Driedger on the Construction of Statutes *(3rd ed. 1994) (hereinafter "*Construction of Statutes*"); Pierre-André Côté,* The Interpretation of Legislation in Canada *(2nd ed. 1991)), Elmer Driedger in* Construction of Statutes *(2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:*
>
> > *Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.*
>
> . . .

> *22 I also rely upon s. 10 of the* Interpretation Act, *R.S.O. 1980, c. 219, which provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".*
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> . . .

[214] Section 10 of the Yukon *Interpretation Act*, which also states that every enactment shall be deemed remedial, reads as follows:

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| *10. Every enactment and every provision thereof shall be deemed remedial and shall be given the fair, large, and liberal interpretation that best insures the attainment of its objects.* | *10. Tous les textes et toutes les dispositions qu'ils contiennent sont censés réparateurs et s'interprètent de la manière la plus juste et la plus large et libérale qui soit compatible avec la réalisation de leur objet.* |

[215] As the grievor filed two grievances, I shall deal with each of them in turn.

**A. Grievance 367-YG-17**

[216] In grievance YTLRB File No. 367-YG-17, the grievor alleged that, on April 28, 2010, he was informed by Ms. Taillefer that his position would be eliminated for the next school year, namely, 2010-2011. The grievance also alleged that the grievor had acquired the status of a permanent employee and that, if Ms. Taillefer's decision constituted a layoff, the employer had failed to comply with the layoff provisions of the collective agreement and the *ELRA*. In addition, the grievor alleged that, if Ms. Taillefer's decision constituted a termination of his employment, then his grievance should be referred to adjudication, pursuant to section 120 of the *ELRA*. The corrective action requested was that the grievor be recognized as a permanent employee and that he be placed in the same or equivalent position, namely, teaching Grades 11 and 12.

[217] The employer based its defence to this grievance on two grounds: mootness and the existence of "exceptional circumstances" under subsection 109(2) of the *ELRA*.

[218] The employer argued that the grievance is moot because the grievor was offered and accepted an appointment as a temporary full-time teacher at the EET for the 2010-2011 school year.

[219] I do not agree with this argument. In April 2010, the grievor was told that his position would be eliminated. This event triggered his grievance, in which he claimed that he had the status of a permanent employee, as the layoff provisions of the collective agreement do not apply to the expiry of a temporary appointment. The fact that the grievor worked for one additional school year as a temporary employee does not, in my view, render the grievance moot. There remains a live issue between the parties, as while the grievor claims permanent status, the employer has consistently denied that he had acquired such status. I therefore reject the employer's argument of mootness.

[220] I shall now deal with the matter of the grievor's employment status.

[221] As of his initial term of employment as a teacher on a temporary basis, the grievor met the definition of an employee under the *ELRA*. Subsection 1(1) of the *ELRA* defines "teacher" as "... a teacher appointed under the *Education Act*." There is no dispute that the grievor was properly appointed under the *Education Act (2002)*.

[222] As mentioned earlier in this decision, while the *Education Act (1990)* expressly excluded employees hired on a temporary basis from the definition of employee in that statute, with the promulgation of the *Education Staff Relations Act* in 2002, they were brought within the definition of employee. The *ELRA* defines "employee" as follows:

| | |
|---|---|
| *1(1) In this Act,* | *1(1) Les définitions qui suivent s'appliquent à la présente loi.* |
| ... | ... |
| *"employee" means a person who is employed under the provisions of this Act, or who is a member of the bargaining unit, but does not include* | *« employé » Personne qui est employée sous le régime de la présente loi, ou qui est membre de l'unité de négociation; la présente définition ne vise toutefois pas les personnes suivantes :* |
| *(a) a person who is an employee within the meaning of the* Public Service Act, | *a) les personnes qui sont des employés au sens de la* Loi sur la fonction publique; |
| *(b) a person employed in a managerial capacity, or* | *b) les personnes* |
| *(c) a person employed* | |

| | |
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| *on a relief, casual, or substitute basis;*<br>« employé » | *employées à un poste de direction;*<br><br>*c) les personnes employées à titre de remplaçants, à titre occasionnel ou temporaire.*<br>"employee" |

[223] This is the same definition of "employee" as was found under the *Education Staff Relations Act.*

[224] Section 3 of the *ELRA* provides that "[t]his Act applies to all employees as defined in this Act." There is also no dispute that the grievor was a member of the bargaining unit represented by the YTA and that he was covered by the provisions of the collective agreement.

[225] The terms and conditions of employment under the *ELRA* are set out at section 108, cited earlier in this decision and reproduced as follows for ease of reference:

| | |
|---|---|
| *108.(1) Despite any agreement to the contrary, the terms and conditions of a contract of employment of an employee shall be* | *108(1) Malgré toute entente contraire, les modalités du contrat d'emploi d'un employé sont les suivantes :* |
| *(a) the provisions of this Act and regulations, and the* Education Act *and regulations;* | *a) les dispositions de la présente loi et ses règlements ou de la* Loi sur l'éducation *et ses règlements;* |
| *(b) the terms and conditions, not inconsistent with any Act and regulations, of the collective agreement negotiated under this Act; and* | *b) les conditions d'emploi de la convention collective négociée sous le régime de la présente loi, non incompatibles avec les lois et les règlements;* |
| *(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.* | *c) les conditions d'emploi non incompatibles avec les alinéas a) et b) qui font l'objet d'une convention entre les employés d'un district scolaire et le surintendant.* |

| | |
|---|---|
| *(2) Any agreement excluding or purporting to exclude the provisions of this section is void.* | *(2) Est nulle la convention qui déroge ou tente de déroger au présent article.* |

[226] I turn now to the issue of whether the grievor was a probationary employee at the time of the termination of his employment. The employer argued that, for the purposes of probation, the grievor's date of commencement of employment was the beginning of each unique term contract. Thus, at the time of his termination during his fourth term contract, the employer's position is that the grievor remained on probation. To determine this issue, an analysis is required of section 106 of the *ELRA*, which deals with probation for school personnel. That provision reads as follows:

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|---|---|
| *106(1) A person employed pursuant to this Act is on probation for two years from the date of commencement of employment.* | *106(1) La période de stage d'une personne embauchée sous le régime de la présente loi est de deux ans à compter de la date d'embauche.* |
| *(2) At any time during the probationary period, the superintendent may terminate the employee's contract of employment on giving 30 days prior written notice specifying the reasons for the termination to the employee.* | *(2) En tout temps durant la période de stage, le surintendant peut mettre fin au contrat d'embauche d'un employé, à la condition de lui donner un préavis motivé de 30 jours.* |
| *(3) The probationary period for an employee may be extended for a period of one year by agreement of the bargaining agent, the employee, and the superintendent.* | *(3) Le stage d'un employé peut être prolongé pour une période d'un an moyennant un accord entre l'agent négociateur, l'employé et le surintendant.* |
| *(4) Any employee who is terminated during a probationary period by a superintendent shall have the right to appeal the decision to the deputy minister and not pursuant to section 63 of this Act.* | *(4) L'employé qui est licencié par le surintendant durant la période de stage a le droit d'interjeter appel de la décision au sous-ministre et non sous le régime de l'article 63.* |
| *(5) An employee who is* | *(5) L'employé stagiaire fait l'objet d'une évaluation de rendement durant la première année de stage et au cours de la* |

*on probation shall be evaluated during the first year of probation and shall be evaluated in the second year of probation on or before March 31 of that year.*

*(6) When the probationary period is extended for a period of one year, the employee who is on probation shall be evaluated in the third year of probation on or before March 31 of that year.*

*(7) When no notice of termination is given during the probationary period, the contract of employment of the employee shall continue until and unless terminated in accordance with this Act.*

*(8) When an employee has been employed on a temporary basis in one teaching position for an entire school year and is on probation for the next school year, the temporary employment period shall be counted in the calculation of the probationary period.*

*seconde année, au plus tard le 31 mars.*

*(6) Lorsque le stage d'un employé est prolongé pour une période d'un an, le stagiaire fait l'objet d'une évaluation de rendement durant la troisième année de stage, au plus tard le 31 mars de cette même année.*

*(7) Lorsqu'aucun avis de licenciement n'est donné durant la période de stage, le contrat d'embauche de l'employé devient permanent; il ne peut y être mis fin qu'en conformité avec la présente loi.*

*(8) Lorsqu'un employé a travaillé à titre temporaire pendant toute une année scolaire et est en stage pour l'année scolaire suivante, la période d'emploi à titre temporaire est assimilée à la première année de stage.*

[227] Section 106 is included in Part 10 of the *ELRA*, titled "School Personnel." Subsection 106(1) refers to a "person employed pursuant to this Act," and the remainder of the subsections refer to an "employee." The only category of probationary employee under the *ELRA* not covered by section 106 is that of principal, the probation of which is dealt with separately in section 105. As stipulated in subsection 106(1), the probationary period is two years from the date of commencement of an employee's employment. The two-year period is also referred to in subsection 106(5) as concerns the evaluation of the employee during each of the two years.

[228] Subsection 106(3) of the *ELRA* provides that the probationary period may be extended for one year upon the agreement of the bargaining agent, the employee and the superintendent. In such a case, subsection 106(6) provides that an evaluation of the employee shall also occur during the third year of probation.

[229] Thus, the language of section 106 provides that the duration of a probationary period for a person employed under the *ELRA* is generally for two years, unless an agreement is reached to extend it for a third year. Accordingly, the maximum probationary period for such an employee is three years.

[230] In the present matter, there is no evidence of an agreement that the grievor's probationary period was extended for a third year.

[231] The employer stated that, in the case of temporary employees such as the grievor, the date of commencement of employment is the beginning of each unique term contract. Thus, the grievor recommenced employment with the employer on four separate occasions.

[232] I disagree. First, section 106 does not distinguish between temporary and permanent employees insofar as the duration of the probationary period is concerned.

[233] Second, the employer's argument conflicts with its application of article 29 (Yukon Bonus) of the collective agreement to the grievor, which reads in part as follows:

| | |
|---|---|
| *ARTICLE 29* | *ARTICLE 29* |
| *YUKON BONUS* | *PRIME DU YUKON* |
| ***Preamble*** | ***Préambule*** |
| *The purpose of this Article is to provide a benefit to those employees who live and reside in the Yukon and remain in the employment of the employer.* | *Le but de cet article est d'accorder une indemnité aux employés qui vivent et résident au Yukon et qui demeurent au service de l'employeur.* |
| *An employee at the time of making an application for a Yukon Bonus must be employed by this employer and, in addition, the employee must have completed a minimum of* | *Un employé qui s'apprête à faire une demande de prime du Yukon doit être au service de l'employeur et avoir complété en plus au moins une (1) année scolaire au service continu de l'employeur.* |

*one school year of continuous service with this employer.*

. . .

*29.02 **Bonus for returning employees***

*The Yukon Bonus provides a benefit to those employees who live and reside in the Yukon and, other than those employees who retire, remain in the employment of the employer. An employee who returns to work in the new school year and resigns within 30 days of its commencement is not entitled to a Yukon Bonus. An employee who retires from the Public Service and who is eligible for an immediate annuity or immediate allowance as defined under the Public Service Superannuation Act will be entitled to a Yukon Bonus (prorated for those employees whose eligibility date for the Yukon Bonus occurs during the school year), provided the employee is employed up to and including the last school day in the school year for the school in which they are employed.*

. . .

*29.04 **Exception – initial qualifying period***

*An employee hired after September 20, 1993 must complete two initial school years of continuous service before being eligible for a Yukon Bonus*

. . .

*29.02 **Prime pour les employés qui restent au service de l'employeur***

*La prime du Yukon offre une indemnité aux employés qui vivent et résident au Yukon et qui, à part les employés qui prennent leur retraite, demeurent au service de l'employeur. Un employé qui retourne au travail dans la nouvelle année scolaire et qui démissionne dans les trente (30) jours qui suivent son retour en poste n'a pas droit à la prime du Yukon. Un employé qui prend sa retraite de la fonction publique et qui est admissible à une rente immédiate ou à une indemnité immédiate, tel qu'il est défini dans la Loi sur la pension des fonctionnaires, a droit à une prime du Yukon (calculée en proportion pour les employés dont la date d'admissibilité à la prime du Yukon survient durant l'année scolaire), à condition que l'employé soit embauché jusqu'au dernier jour d'école de l'année scolaire inclusivement à l'école où il a été embauché.*

. . .

*29.04 **Exception – période de qualification initiale***

*Un employé embauché après le 20 septembre 1993 doit compléter deux (2) années scolaires de service continu avant d'être admissible à la*

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| *which will be paid at the end of the school year, or within a 12 month period from the date upon which the employee completed the second school year of continuous service provided the employee provides advance direction in writing to the Public Service Commission to have it deferred.* | *prime du Yukon qui est période de douze (12) mois de la date à laquelle l'employé a terminé sa deuxième année scolaire de service continu, à condition que l'employé fournisse à l'avance une directive écrite à la Commission de la fonction publique l'informant de reporter le versement de la prime.* |
| *29.05 **Bonus payable each year thereafter*** | *29.05 **Prime payable chaque année par la suite*** |
| *For each full school year of continuous service subsequent to their initial qualifying period of service, an employee is entitled to a Yukon Bonus which will be paid at the end of the school year, or within a 12 month period from the date upon which the employee becomes eligible for the Bonus provided the employee provides written advance direction in writing to the Public Service Commission to have it deferred.* | *Pour chaque année scolaire de service continu après la période de qualification initiale, un employé est admissible à la prime du Yukon, qui est versée à la fin de l'année scolaire ou dans une période de douze (12) mois de la date à laquelle l'employé est devenu admissible à la prime, à condition que l'employé fournisse à l'avance une directive écrite à la Commission de la fonction publique l'informant de reporter le versement de la prime.* |
| . . . | . . . |
| [Emphasis in the original] | |

[234] The term "continuous service" is used throughout article 29 of the collective agreement. Clause 2.01(f) provides the following definition:

| | |
|---|---|
| *"Continuous Service and Continuous Employment" means uninterrupted employment with the Government of the Yukon Territory and includes the service of a lay-off re-hired within a period of two years;* | *« service continu et emploi continu » signifie un emploi sans interruption pour le gouvernement du Yukon et comprend toute période de mise en disponibilité et de réengagement dans une période de deux (2) ans* |

*(Continuous Service and Continuous Employment);*

[235] In accordance with clause 29.04 of the collective agreement, the grievor was subject to the qualifying period of two initial school years of continuous service in order to become eligible for the Yukon Bonus. His uncontradicted testimony was that he first received the bonus following the completion of the 2008-2009 school year. The employer never adduced evidence to explain why the grievor had been paid, given its position on the accumulation of continuous service. I am therefore left to conclude that the employer's interpretation of the Yukon Bonus provision is such that it felt that the grievor was entitled to it.

[236] According to the employer's argument, temporary employees under the *ELRA* hired on consecutive term contracts, as was the grievor, would never become eligible for the Yukon Bonus as, in the employer's view, each individual contract of employment carries a fresh date of commencement of employment. If the employer's interpretation is correct, then such employees would never complete the initial qualifying period of two years entitling them to the Yukon Bonus.

[237] The fact that the grievor received the Yukon Bonus indicates that the employer used the commencement of the grievor's first contract, effective September 5, 2007 (Exhibit P-7; Agreed Statement of Facts, paragraph 4), as the date of commencement of employment for the purposes of his entitlement to the Yukon Bonus. Thus, the employer recognized the grievor's continuous service within the collective agreement definition of that term.

[238] In my view, that date also serves as recognition by the employer of the grievor's date of commencement of employment within the meaning of subsection 106(1) of the *ELRA*. Paragraph 108(1)(*b*) stipulates that the terms and conditions of the collective agreement shall not be inconsistent with any Act. There was no allegation made of any inconsistency between article 29 of the collective agreement and subsection 106(1).

[239] Third, the employer's argument does not support the object of the *ELRA*, namely, labour relations and employment relationships. If the employer's argument were followed to its logical conclusion, employees employed on consecutive term contracts of one school year each for more than two years would be in a continual state of probation throughout the period of their employment. Indeed, the employer argued that the grievor remained on probation during his fourth term contract.

[240] Such a position ignores the purpose of a probationary period, which, as stated in Brown and Beatty, *Canadian Labour Arbitration*, at paragraph 7:5000, ". . . gives an employer the opportunity to evaluate qualifications and general suitability as a regular, full-time employee." If the employer is not satisfied with the employee's suitability, it may terminate the employee's employment during the probationary period, as provided in subsection 106(4) of the *ELRA*. Otherwise, subsection 106(7) provides that the employee's contract of employment continues unless terminated in accordance with the *ELRA*.

[241] Subsection 106(4) of the *ELRA* stipulates that the recourse of an employee whose employment is terminated during the probationary period is restricted to an appeal to the deputy minister, and the employee is not entitled to the grievance procedure pursuant to section 63. In addition, subsection 120(2) prohibits an employee whose employment is terminated during the probationary period from referring a grievance to adjudication. Section 120 provides as follows:

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| *120(1) An employee who has been disciplined, suspended or whose employment has been terminated or who has been declared to have abandoned his or her position has the right to refer the grievance to adjudication, within 14 days of receipt of the final decision of the employer.* | *120(1) L'employé qui fait l'objet de mesures disciplinaires ou d'une suspension, d'un licenciement ou d'une déclaration d'abandon de son poste a le droit de soumettre son grief à l'arbitrage dans les 14 jours suivant la réception de l'avis lui faisant part de la décision finale de l'employeur.* |
| *(2) This section does not apply to a termination by the superintendent of an employee's contract of employment during a probationary period.* | *(2) Le présent article ne s'applique pas au licenciement, par le surintendant, d'un employé durant sa période de stage.* |

[242] It is a well-known labour relations principle that employees who have not completed their probationary periods generally do not enjoy the same level of employment security as those who have. However, if correct, the employer's argument would have the effect that temporary employees employed on successive term contracts would if terminated be denied the right of availing themselves of the grievance procedure or of referring a grievance to adjudication under the *ELRA*, as

each contract year would be considered a separate probationary period. In my view, the denial of such fundamental rights is contrary to the intent of section 106 and, moreover, is inconsistent with the object of the *ELRA*. In addition, the employer's argument appears to infringe on the rights of teachers, as stated in section 167 of the *Education Act (2002)*, which reads as follows:

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|---|---|
| *167 Every teacher has the right to be treated in a fair and reasonable manner free from physical and other abuse.* | *167 Tous les enseignants ont le droit d'être traités de façon juste et raisonnable, à l'abri de tous mauvais traitements physiques ou autres.* |

[243] Therefore, I conclude that, under section 106 of the *ELRA*, in view of the absence of an agreement to extend his probationary period, the grievor was on probation for two years from the date of commencement of his employment, September 5, 2007. Accordingly, the grievor was on probation for the 2007-2008 and 2008-2009 school years, and the evidence showed that his evaluations were satisfactory for each of those years. As his employment was not terminated during the probationary period, the grievor's employment status must now be determined.

[244] Subsection 106(7) of the *ELRA* states that, if the employment of an employee has not been terminated during the probationary period, ". . . the contract . . . of the employee shall continue until and unless terminated in accordance with this Act."

[245] The *ELRA* does not contain any provision concerning the appointment of teachers. Under section 170 of the *Education Act (2002)*, as follows, teachers are hired by the minister, and school boards are empowered to hire teachers as agents of the Government of Yukon:

| | |
|---|---|
| *170(1) The Minister* | *170(1) Le ministre:* |
| . . . | . . . |
| *(c) shall employ teachers, teaching assistants and other technical support staff necessary for the proper functioning of the school.* | *(c) engage des enseignants, des adjoints et le personnel de soutien technique nécessaires au bon fonctionnement de l'école.* |
| *(2) Each School Board shall be empowered to select for appointment employees referred to in subsection (1) that are required by the* | *(2) Les commissions scolaires sont autorisées à choisir les employés visés au paragraphe (1) dont elles ont besoin à l'égard des écoles placées sous leur* |

*School Board for any school operated by it and, in relation to those employees, to exercise powers referred to in this Part and when doing so acts as an agent of the Government of the Yukon.*

. . .

*autorité et à exercer à leur égard les pouvoirs visés par la présente partie; dans ce cas, elles agissent alors à titre de mandataire du gouvernement du Yukon.*

. . .

[246] Section 170 does not distinguish between temporary and permanent employees. In section 1 of the *Education Act (2002)*, "teacher" is defined as follows:

*"teacher" means a person holding a valid and subisting teaching certificate, or a letter of permission, issued pursuant to the regulations who is appointed or employed pursuant to this Act to give instruction or to administer or supervise instructional service in a school but does not include an aboriginal language teacher; « enseignant » ou « enseignante »*

*« enseignant » ou « enseignante » Titulaire d'un certificat d'enseignement en cours de validité ou d'une permission délivrés en conformité avec les règlements, qui est nommé ou employé conformément à la présente loi pour enseigner ou pour gérer ou surveiller les services d'enseignement dans une école; la présente définition ne vise toutefois pas les enseignants des langues autochtones.* "teacher"

[247] The *ELRA* defines "teacher" as "a teacher appointed under the *Education Act*."

[248] The only provision in the *ELRA* that addresses the duration of temporary employment is section 109, which is reproduced for convenience:

*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*

*109(1) Un employé peut être embauché à titre temporaire durant une partie ou la totalité d'une année scolaire selon l'entente qu'il peut conclure avec le surintendant; le contrat d'emploi peut être renouvelé pour une partie ou la totalité de l'année scolaire suivante.*

*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.*

*(3) Any employee who is employed on a temporary basis shall be evaluated at least once in each school year by either the principal or the superintendent.*

*(2) Malgré le paragraphe (1), le sous-ministre peut, dans des cas exceptionnels, renouveler la période d'emploi d'un enseignant qui est embauché à titre temporaire pour plus de deux années scolaires consécutives.*

*(3) L'employé qui est embauché à titre temporaire fait l'objet d'une évaluation de rendement au moins une fois par année scolaire par le directeur d'école ou le surintendant.*

[249] The grievor submitted that section 109 of the *ELRA* must be interpreted as meaning that, barring exceptional circumstances, an employee who has been employed on a temporary basis for a period greater than two years must be considered a permanent employee.

[250] In his argument, the grievor referred to a 1996 third-level hearing decision of the Yukon Public Service Commissioner (grievances YTA 95 to 25 and 96-7 (19960925)). Under section 255 of the *Education Act (1990)*, employees were entitled to present grievances concerning the administration or interpretation of the collective agreement to the Public Service Commissioner, with an appeal to an adjudicator. The issue in those grievances was whether teachers whose employment status had changed from temporary to permanent were entitled to include their period of temporary employment in the calculation of continuous service in the two-year eligibility period for the Yukon Bonus. As explained earlier in this decision, at the time of the *Education Act (1990)*, temporary employees were excluded from the definition of "employee" and therefore from the bargaining unit. The Public Service Commissioner determined that the collective agreement provision clearly stated that the eligibility period was calculated from the date the temporary employee became a member of the bargaining unit. Among other provisions, she considered section 173 of the *Education Act (1990)*, subsections 175(2), (3) and (4) of which are almost identical to section 109 of the ELRA. In her decision, the Public Service Commissioner stated the following:

. . .

> *. . . absent "exceptional circumstances", a teacher may not be employed on a temporary basis for a third year. It is my opinion that if a teacher was employed for a third school year, the teacher would no longer be a temporary teacher or employed on a temporary basis.*

. . .

[251] The decision details the employment history of each of the four grievors affected. None of them was employed on a temporary basis for more than two years.

[252] In the scheme of Part 10 of the *ELRA*, titled "School Personnel," section 109 is an exception to the principle of permanent employment. Subsection 109(1) stipulates that the period of temporary employment must be agreed to by the employee and the superintendent. The *ELRA* does not specify any such provision with respect to permanent employment. That is commensurate with the employment relationship of an employee who has acquired permanent status, as in such a case, there is no requirement for an agreement between employer and employee for the purposes of renewing the contract of employment on a periodic basis.

[253] Subsection 109(1) of the *ELRA* refers to an initial period of temporary employment during all or part of a school year, which ". . . may be renewed for part or all of the next school year [emphasis added]." Subsection 109(2) states that, exceptionally, the period of temporary employment ". . . may be renewed for more than 2 consecutive school years [emphasis added] . . . ."

[254] Another indicator in section 109 of the *ELRA* that the period of temporary employment should not normally exceed two years is the fact that, for the initial and second years of temporary employment, the period of employment must be agreed to between the employee and the superintendent. However, only the deputy minister is authorized by the legislation to extend the period of temporary employment beyond two years, and then only in exceptional circumstances.

[255] Therefore, I conclude that the normal and ordinary meaning of the language of subsections 109(1) and (2) of the *ELRA* clearly indicates that, absent exceptional circumstances deemed by the deputy minister, an employee under the *ELRA* may not be employed on a temporary basis for more than two consecutive school years.

[256] The grievor successfully completed the two-year probationary period, during which he was employed on a temporary basis. Based on the above, I find that, upon the

completion of his second year of temporary employment, barring the existence of "exceptional circumstances" as determined by the deputy minister, the grievor was no longer employed on a temporary basis, but had acquired the status of a permanent full-time employee with all the rights that flow therefrom, including the layoff provisions under the collective agreement.

[257] I now turn to the employer's argument concerning the existence of "exceptional circumstances."

[258] The employer submitted that the grievor's temporary employment was extended for a third term due to the existence of "exceptional circumstances" as deemed by the deputy minister pursuant to subsection 109 of the *ELRA*. It is convenient to refer to the chronology of this issue by reproducing the relevant sections of the Agreed Statement of Facts:

> . . .
>
> *8. On May 10, 2010, Mr. Lapierre submitted a grievance regarding the alleged April 28, 2010 decision on the grounds that Mr. Lapierre was, as of the beginning of the 2009-2010 school year, a permanent employee.*
>
> [For purposes of clarification, among the details of grievance 367-YG-17 contains the following: "On April 28, 2010, the Director General informed René Lapierre that his position would be 'cut' for the 2010-2011 school year."]
>
> *9. A Complaint Level meeting was held on May 20, 2010. At this meeting, the Employer's representatives informed Mr. Lapierre and the Association's representative that the Deputy Minister had delegated her authority to the Director General, Lorraine Taillefer, to renew, under Section 109(2) of the Act, Mr. Lapierre's employment for a third consecutive school year, and to deem there to be 'exceptional circumstances'.*
>
> *10. After the Complaint Level meeting, the Employer's representative informed Mr. Lapierre and the Association's representative that the Deputy Minister in fact had not delegated her authority. Attached as Schedule "6" is an email from Val Stehelin to Jocelyn Barrett dated May 21, 2010* **[Exhibit P-33]**.
>
> *11. By letter dated May 20, 2010* **[Exhibit P-32]**, *attached as Schedule "7", the Deputy Minister of Education states that pursuant to Section 109(2) of the Act, Mr. Lapierre was*

> *employed as a temporary employee for a third consecutive school year in circumstances which she deems exceptional. These circumstances were to facilitate the conclusion of an Agreement between the Minister of Education and the President of CSFY enabling a three year pilot project to offer the Fine Arts and Sports/Nature Programs at École Émilie-Tremblay.*
>
> . . .

[259] As stated in paragraph 6 of the Agreed Statement of Facts, the grievor was offered a third appointment as a temporary full-time teacher for the period August 25, 2009 to June 25, 2010. The letter of offer of employment, signed by Ms. Taillefer, is dated June 15, 2009 (Exhibit P-12). The Department of Education School Based Staff Appointment Form was dated June 18, 2009 (Exhibit P-13). Neither document contains any reference to the existence of exceptional circumstances giving rise to the necessity for the Deputy Minister to exercise her discretion to extend the grievor's temporary employment status for a third consecutive school year.

[260] The grievor and the YTA were not informed of the decision to extend the grievor's employment on a temporary basis before a complaint level meeting held May 20, 2010. In response to an email from counsel for the YTA to the Department of Education, dated May 21, 2010, the YTA and the grievor were informed by email of the same date (Exhibit P-33) that the Deputy Minister had prepared a letter affirming that exceptional circumstances existed and would be faxed later the same morning.

[261] The Deputy Minister's letter (Exhibit P-32), dated May 20, 2010, reads as follows:

> . . .
>
> *Pursuant to Section 109(2) of the Education Labour Relations Act, I can affirm that Mr. René Lapierre was employed as a temporary employee for a third consecutive school year in circumstances which I deem exceptional. Those circumstances were to facilitate the conclusion of an Agreement between the Minister of Education and the President of the Commission scolaire francophone du Yukon #23 enabling a three year pilot project to offer the Fine Arts and Sports/Nature Programs at École Émilie-Tremblay.*
>
> . . .

[262] The grievor argued that, under subsection 109(2) of the *ELRA*, both he and the YTA should have been notified of the existence of exceptional circumstances at the time of the renewal of the temporary employment. The employer argued that exceptional circumstances did exist at the time of the renewal of the grievor's

temporary contract, in that there was a three-year funding agreement in place, and funding for full-time equivalents was unstable. In addition, section 109 does not explicitly stipulate any notice provisions.

[263] To deal with this argument, the structure of subsections 109(1) and (2) of the *ELRA* must be considered. As stated earlier in this decision, subsection 109(2) is an exception to what I have concluded is the meaning of subsection 109(1), namely, that a teacher may not normally be employed on a temporary basis for more than two consecutive school years.

[264] Subsection 109(2) of the *ELRA* states that the employee's period of temporary employment "may be renewed ... by the deputy minister in exceptional circumstances." In my view, the normal and ordinary meaning of this language presupposes that the exceptional circumstances must exist contemporaneously with the renewal of the temporary contract. Otherwise, there would be no legally valid basis for the deputy minister to exercise his or her discretion to extend an employee's temporary employment status for a third consecutive school year.

[265] It would be illogical to construe subsection 109(2) of the *ELRA* to mean that the deputy minister may exercise his or her discretion at any time after the renewal of an employee's third consecutive school year of temporary employment. Such a construction would mean that the deputy minister could with impunity prolong an employee's temporary status indefinitely by claiming the existence of exceptional circumstances during the employee's term of employment. This would make it all too easy for the employer to subvert the intention of the legislation and justify its decision after the fact. In so doing, the employer would evade the obligations it may have towards employees who have completed the initial two-year period of temporary employment under subsection 109(1). Moreover, the effect of such action would interfere with an employee's expectation and right to end their temporary employment status after two consecutive school years. That cannot be the intent of subsection 109(2).

[266] With respect to the notification of the employee and the YTA as bargaining agent of the existence of exceptional circumstances, it is true that section 109 of the *ELRA* does not explicitly stipulate such a requirement. Ms. Mackwood testified that the YTA would have expected to have received such notice. It is of interest that clause 9.08 of the collective agreement provides as follows:

| | |
|---|---|
| *9.08 The employer agrees to supply the Association with copies of employer directives, policies and related information pertaining to working conditions not covered by this Agreement, the Education Act or pursuant Regulations, the* Education *Labour Relations Act or pursuant Regulations, which affect members of the bargaining unit.* | *9.08 L'employeur accepte de fournir à l'Association des exemplaires de ses directives, de ses politiques et de tout renseignement relatif aux conditions de travail qui ne sont pas couvertes par la présente convention, par la Loi sur l'éducation ou ses règlements, et par la* Loi sur les relations de travail dans le secteur de l'éducation *ou ses règlements et qui concernent les membres de l'unité de négociation.* |

[267] When the deputy minister exercises his or her discretion to derogate from what I have concluded is a maximum of two years of temporary employment, it only makes good labour relations sense that the employer notify the bargaining agent and the affected employee of such a significant decision affecting the employee's employment status. The employer argued that Ms. Mackwood had testified that while she knew of teachers whose employment had been extended due to exceptional circumstances, she admitted that the YTA had not been notified by the employer in the past. That is a misstatement of the evidence. On cross-examination, Ms. Mackwood did not make such an admission; she stated that she would have to verify the YTA's files on that point.

[268] However, I need not decide whether notification is required under the *ELRA* because in this case, there are two reasons why I consider the Deputy Minister's exercise of her discretion to have been inappropriate. First, contrary to the intent of subsection 109(2) of the *ELRA* that the determination of exceptional circumstances must be made by the deputy minister at the time of renewal of the period of employment and not *ex post facto*, she exercised it retroactively following a complaint-level meeting that arose out of a grievance filed by the grievor.

[269] The letter offering the grievor employment for the 2009-2010 school year was signed by Ms. Taillefer (Exhibit P-12). As stipulated in paragraphs 9 to 11 inclusive of the Agreed Statement of Facts, during the complaint level meeting held May 20, 2010, the employer asserted that the deputy minister had delegated her authority to Ms. Taillefer to renew the grievor's employment for a third consecutive school year and to deem there to be exceptional circumstances. The next day, contrary to its initial

assertion, the employer admitted that the deputy minister had in fact not delegated her authority to Ms. Taillefer. It was only then that the deputy minister exercised her authority under subsection 109(2) of the *ELRA*. In light of the fact that it was the superintendent and not the deputy minister who exercised the authority given only to the deputy minister under subsection 109(2), I find that the employer could not have complied with that subsection and so cannot justify extending the grievor's temporary employment on the basis of exceptional circumstances.

[270] Second, in her letter dated May 20, 2010 justifying her decision, the deputy minister described the exceptional circumstances as follows:

> . . .
>
> *. . . Those circumstances were to facilitate the conclusion of an Agreement between the Minister of Education and the President of the Commission scolaire francophone du Yukon #23 enabling a three year pilot project to offer the Fine Arts and Sports/Nature Programs at École Émilie-Tremblay.*
>
> . . .
>
> [Emphasis added]

[271] The agreement referred to in the Deputy Minister's letter was executed on June 27 and 28, 2007 by the president of the CSFY and the Minister of Education respectively and had an expiry date of June 30, 2010 (Exhibit E-3). Yet, the deputy minister claimed that an extension of the grievor's temporary employment for a third consecutive year from September 2, 2009 to June 25, 2010 was required in order to facilitate the conclusion of this agreement, which in fact had occurred almost three years earlier and would expire some five weeks following the date of her letter. Although the agreement was in force on June 15, 2009, the date of the employer's offer of employment to the grievor (Exhibit P-12) and the appointment form dated June 18, 2009 (Exhibit P-12), it was not referred to in those documents. No other document contemporaneous with the employment offer or appointment form referring to that agreement was entered into evidence. Based on those facts, it appears to me that the Deputy Minister's stated justification for deeming exceptional circumstances to extend the grievor's temporary employment status was conceived in hindsight.

[272] I therefore reject the employer's argument based on the existence of exceptional circumstances under subsection 109(2) of the *ELRA*. Accordingly, my conclusion that the grievor had acquired permanent status stands and the grievance will be allowed. In

view of my conclusion concerning the termination grievance, I need not order compensation or damages as a result of this grievance alone.

**B. Grievance 367-YG-18**

[273] Earlier in this decision, I set out the reasons for having denied the employer's request to alter the grounds for terminating the grievor's employment. The employer conceded that it improperly relied on the *Temporary Employees Regulation*, as it did not apply to the grievor in the circumstances of this case. The employer also admitted that it chose not to rely on just cause in terminating the grievor's employment. Accordingly, I find that the grievor was dismissed from his employment without just and reasonable cause. The grievance challenging the termination of his employment is allowed.

[274] In its submissions on remedy, the employer argued that, should it be found that the grievor was still in its employ, then it would have just and reasonable cause to dismiss him, effective June 15, 2012, being the date of the completion of his employment at Whitehorse Elementary school from March 19 to June 15, 2012. I have found that the grievor was a permanent full-time employee of the employer upon the completion of his second year of temporary employment, and I therefore reject the employer's argument, given that it was based on what the employer alleged was his temporary status.

[275] As I stated earlier, while the letter terminating the grievor's employment alleged certain deficiencies in his work performance, the employer nonetheless deliberately chose not to rely on just cause as a basis for the dismissal and reiterated that position in subsequent correspondence. Furthermore, the employer conceded that, in terminating the grievor's employment, it had improperly relied on the *Temporary Employees Regulation*. Finally, the fact that the employer offered the grievor employment in one of its schools after having characterized his alleged conduct as warranting his discharge serves to undermine the employer's position.

[276] As for the parties' submissions on punitive damages, in my view, the facts of this matter do not support such an award. While the employer acted clumsily and tactlessly in the manner of terminating the grievor's employment, there was no evidence that it was motivated by bad faith or that it dealt unfairly with the grievor.

[277] For all of the above reasons, I make the following order:

*(The Order appears on the next page)*

## VI. Order

[278] In YTLRB File No. 367-YG-17, the grievance is allowed.

[279] In YTLRB File No. 367-YG-18, the grievance is allowed. The employer is directed to reinstate the grievor to employment as a teacher with the status of a permanent full-time employee of the employer effective the beginning of the 2009-2010 school year, with all the rights and benefits that flow from that status.

[280] The employer is directed to reimburse the grievor for lost wages flowing from this order, less any monies earned by the grievor since April 4, 2011.

[281] The employer is directed to remove the letter of termination and any related documentation from the grievor's disciplinary file and personnel record.

[282] I will remain seized of the grievances for a period of 90 days from the date of this decision for the purpose of resolving any dispute that may arise concerning the implementation of this order.

July 10, 2013.

**Steven B. Katkin,**
**adjudicator**