

GNWT v. The Union of Northern Workers, 2015 NWTSC 61

S-1-CV-2015-000067

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

THE GOVERNMENT OF THE NORTHWEST TERRITORIES

Applicant

- and -

THE UNION OF NORTHERN WORKERS

Respondent

Transcript of the Oral Decision delivered by The Honourable
Justice A. M. Mahar, sitting in Yellowknife, in the
Northwest Territories, on the 20th day of November, 2015.

APPEARANCES:

Ms. A. Walker and
Ms. L. Jeffrey:

Counsel for the Applicant

Ms. A. Montague-Reinholdt:

Counsel for the Respondent

Official Court Reporters

1 THE COURT: The Government of the
2 Northwest Territories has applied for judicial
3 review of an arbitration award issued on March
4 18th, 2015, by Arbitrator Tom Joliffe.

5 At issue was the interpretation of
6 paragraphs 41(1.7)(f) and (i) of the Public
7 Service Act of the Northwest Territories, which
8 sets out positions which will be excluded from
9 the bargaining unit. These paragraphs read as
10 follows:

11 (1.7) An employee, other than an
12 employee of the Northwest
13 Territories Power Corporation or a
14 teacher, is not eligible for
membership in a bargaining unit
where, in the opinion of the
Minister, the employee is employed

15 (a) as a deputy head, a head of a
16 secretariat of the Executive Council,
17 an assistant deputy minister, a
18 director, a regional director, an
assistant director, an area director,
a regional superintendent or an
auditor;

19 (b) in a position in a division or section
20 of the Financial Management Board
21 Secretariat with duties and
22 responsibilities that include
23 developing and administering policies,
procedures and guidelines respecting
human resource management, program
evaluation, financial planning and
resource allocation;

24 (c) in a position that provides support
25 or advice directly to the Executive
26 Council, a committee of the Executive
Council or a member of the Executive
Council;

27 (d) as a legal officer or in a position

- 1 that provides translation services
2 to a legal officer on a regular
 basis;
- 3 (e) in a position with duties and
4 responsibilities that include
5 providing advice and assistance, on
6 a regular basis, respecting the
 terms and conditions of employment,
 including collective bargaining;
- 7 (f) in a position with duties and
8 responsibilities that include
 carrying out the following on a
 regular basis:
- 9 (i) staffing,
10 (ii) interpreting employment contracts,
11 (iii) resolving workplace disputes,
12 (iv) responding to grievances, or
 (v) providing advice in respect of
 the matters referred to in
 subparagraphs (i) to (iv);
- 13 (g) in a position with management
14 responsibility that includes directly
15 assigning work to, assessing the
 performance of and imposing
 discipline on other employees;
- 16 (h) a dentist or medical practitioner; or
- 17 (i) in a position that provides
18 administrative or secretarial support
 directly
- 19 (i) to a person referred to in
20 paragraphs (a), (c) or (d), or
21 (ii) to a person referred to in
22 paragraphs (b), (e), (f) or (g)
 in respect of the duties and
 responsibilities referred to in
 those paragraphs.

23 The Union of Northern Workers argued that
24 before a position would be excluded from the
25 bargaining unit under paragraph 41(1.7) (f),
26 except where subparagraph 41(1.7) (f) (v) applied,
27 the position must include all of the duties and

1 responsibilities listed is subparagraphs (i)
2 through (iv). The Government of the Northwest
3 Territories argued that a position would be
4 excluded if it included any of these duties and
5 responsibilities.

6 The Arbitrator accepted the Union of
7 Northern Workers' interpretation.

8 Both parties agree that the standard of
9 review I must use is reasonableness. I concur.
10 The legislation in question lies at the heart of
11 the decision-maker's expertise.

12 I do not to propose to rely on the
13 affidavits filed by the applicant and therefore
14 do not need to decide the issue of their
15 admissibility. To the extent that certain
16 legislative drafting conventions, which may have
17 been referred to the affidavits, inform this
18 decision, this is because they are acknowledged
19 to be in existence by both parties and they
20 should have formed part of the legal framework
21 within which the Arbitrator made his decision.

22 An Arbitrator is presumed to know these
23 things. It would have been helpful if counsel
24 had made these issues clear at the time of the
25 original hearing before the Arbitrator, but it is
26 not fatal for a party not to fully inform an
27 adjudicator of the law. It also cannot be

1 construed as an attempt to raise new evidence or
2 issues on review when a party raises legal
3 principles or conventions that should have been
4 known by the adjudicator. This would make
5 reviews and appeals practically impossible since
6 the parties cannot know what adjudicators are
7 going to do until they do it.

8 The legislative drafting conventions at
9 issue in this review, and the rulings of the
10 Arbitrator with respect to their application, are
11 as follows:

- 12 - When a single "or" appears at the end of the
13 penultimate clause in a series of subclauses,
14 it cannot be taken to imply the addition of
15 an "and" after all of the preceding clauses,
16 so as to make them operate solely in a
17 conjunctive fashion. Several examples of
18 Northwest Territories legislation were
19 provided in which this implication would be
20 nonsensical. There is no requirement that
21 an "or" be added after each subordinate
22 clause in order to make it operate
23 independently.
- 24 - the use of commas to separate subclauses,
25 as opposed to semicolons which are used to
26 separate clauses, is simply a convention
27 meant to distinguish clauses from subclauses

1 and carries no meaning insofar as whether or
2 not the clauses are to be read as
3 conjunctive, or, as the Arbitrator put it,
4 as a "continuous list".

5 The Arbitrator made the following rulings
6 with respect to these issues. I am now referring
7 to the award at pages 112 and 13:

8 The use of commas in separating out
9 one subparagraph from the next, and
10 not semicolons or periods, suggest
11 no break in the continuum of the
12 list, nor any disconnection from one
13 item to the next; nor does it
14 suggest the concept of "either or"
15 somehow being implied.

16 Further:

17 There is only the single use of the
18 term "or" as if to incorporate a
19 disjunctive meaning at that point,
20 but only in respect of subparagraph
21 (v) in separating it out from the
22 first four paragraphs ...

23 And further:

24 Generally speaking, it might be said
25 that commas are used to avoid
26 ambiguity concerning a list of
27 relevant items as meaning every
28 single item on the list needs to
29 exist, and "or" is used to indicate
30 that any one of the items need only
31 be shown ... the use of commas
32 denotes the inclusiveness of the
33 entire list.

34 These statements are wrong as they relate to
35 principles of legislative drafting and, were we
36 relying on a correctness standard of review,
37 would be fatal.

1 A more commonly known and over-arching
2 principle of legislative interpretation is that
3 both French and English versions of a statute are
4 of equal force and they may be used to assist in
5 the interpretation of each other. In the French
6 version of Article 41(1.7)(f), the addition of
7 *selon le cas*, after *pour un poste don't les*
8 *attributions portent regulierement* clearly
9 indicates that the list provides alternatives and
10 operates in a disjunctive fashion. In Robert,
11 the definition of this phrase is given as:
12 *employe dans une phrase marquant l'alternative.*
13 The English equivalent is: *as the case may be.*
14 This meaning is clear and unambiguous; one can
15 only wish that the drafters of the English
16 version had achieved a similar level of clarity.

17 On pages 11 and 12 of the Award, the
18 Arbitrator stated the following:

19 The Employer has requested that I
20 consider the French language version
21 of article 41(1.7) which I do not
22 see as making this interpretation
23 exercise any easier in that, as with
24 the English language version, the
25 Legislature has chosen to use only
26 punctuation - commas - to separate
27 at the listed items ... and not use
"or" to show a disjunctive
intention.

26 This analysis is contrary to the clear
27 meaning of the words used in the French version.

1 It relies solely on the Arbitrator's
2 interpretation of the punctuation used as opposed
3 to the words themselves. Again, if we were
4 applying a correctness standard of review, this
5 would be fatal.

6 Under the reasonableness standard of review,
7 the test is quite different. The question is not
8 whether I agree or disagree with the Arbitrator's
9 interpretation of Article 41(1.7) (f), but whether
10 the interpretation under review is a reasonable
11 one, given the wording of the legislation and the
12 context in which it is meant to operate.

13 The Arbitrator and counsel for the Union at
14 this application have commented on the need to
15 avoid redundancy in legislation. It is suggested
16 that, unless subsection (f) is read
17 conjunctively, "... much of its language would be
18 redundant by reference to subsections (e) and
19 (g)".

20 I agree that redundancy is to be avoided in
21 the interpretation of legislation, but redundancy
22 has to be analyzed in context. A certain amount
23 of overlap can occur without the legislation in
24 question becoming misleadingly redundant or
25 repetitive. There was no evidence called at the
26 arbitration with respect to particular jobs and
27 their duties, but I am allowed to make some

1 common sense observations. Subsection (a)
2 through (e), as well as (g), are quite specific.
3 Subsection (f) is much more general. In
4 practice, it will likely be relied on when none
5 of the other, more specific, subsections apply.
6 It provides a more broadly defined exclusion
7 based on the qualities of employment that would
8 put an employee in a conflict of interest
9 situation. In this sense, there is no
10 redundancy. Again, it would have been helpful if
11 the legislation was clearer in this regard.

12 Another underlying principle of statutory
13 interpretation is that statutes are to be
14 interpreted in a way that does not lead to
15 absurdity. If subsection (f) is interpreted as
16 requiring a position to carry out all of the
17 delineated duties, it would create, in my
18 respectful view, an absurd situation wherein the
19 employer would be forced to maintain an
20 artificial connection between job
21 responsibilities regardless of the volume of work
22 involved. It makes no sense, as an example, that
23 the employer would be unable to have one set of
24 employees involved in staffing and another with
25 responding to grievances without running afoul of
26 this statute. Faced with the possibility of
27 redundancy on one interpretation and that of

1 Dunsmuir criteria are met.

2 Were this simply a question of what I have
3 characterized as the potentially absurd
4 consequences of this decision, I would defer to
5 the expertise of the Arbitrator. As well, if the
6 only issue was the mistaken emphasis placed on
7 the use of commas, or the placement of the
8 conjunction "or", I would also be inclined to
9 allow this decision to stand.

10 The most serious problem with the outcome in
11 this case is that it is directly contrary to the
12 meaning of the French version of the subsection
13 at issue. There is really only one possible
14 interpretation of the statute in the French
15 version - that the various subclauses in
16 subsection (f) are alternatives that operate in
17 an "any or all" way. There is also nothing in
18 the more ambiguous wording of the English
19 version, which as an aside I would have
20 interpreted disjunctively as well, that would
21 compromise the obvious meaning in French.

22 A conclusion cannot be within the range of
23 acceptable outcomes if it requires an
24 interpretation of the legislation that cannot be
25 supported by the language of the legislation.
26 Given the drafting conventions identified above,
27 and the clear meaning of the French version

1 containing selon le cas, the interpretation of
2 the Arbitrator is simply not possible and is
3 therefore unreasonable. There is also nothing so
4 compelling in the contextual analysis of this
5 decision that would compel me to allow the
6 decision to stand in spite of this.

7 The government of the Northwest Territories
8 concedes that the Arbitrator's interpretation of
9 subsection (f)(v) "providing advice in respect of
10 the matters referred to in subparagraphs (i) to
11 (iv)" is not unreasonable. The language supports
12 the interpretation that advice must be given
13 about all four subheadings and it is therefore
14 not unreasonable to find so. I agree in terms of
15 the language, but this complicates the order that
16 I would otherwise make.

17 While it is tempting, given the categorical
18 meaning of the French version of subsection (f)
19 and the lack of other reasonable interpretations
20 available, to simply substitute my interpretation
21 for the Arbitrator's, I decline to do so. There
22 are two reasons for this. First, it is an
23 unusual step to take and one that must be taken
24 carefully and, second, and more importantly, the
25 ambiguous meaning of subsection (f)(v) must be
26 interpreted in light of the findings made here
27 today, and it would be more appropriate for the

1 Arbitrator to undertake this analysis than the
2 court. It also makes sense to allow the
3 Arbitrator to do so in the context of an
4 interpretation of the subsection as a whole.

5 I make the following order:

- 6 1. The decision of the Arbitrator dated March 18,
7 2015, is set aside.
- 8 2. The interpretive issue with respect to
9 paragraphs 41(1.7)(f)(i) through (iv) of the
10 Public Service Act is sent back to the
11 Arbitrator for a decision.

12 I am not going to make a specific order with
13 respect to paragraph 41(1.7)(i), though this
14 decision will provide the Arbitrator an
15 opportunity to provide an interpretation of that
16 subsection as well.

17 I decline to make an order for costs.

18 I once again want to thank you all. We will
19 conclude.

20

21
22
23
24
25
26
27

Certified Pursuant to Rule 723
of the Rules of Court

Jane Romanowich, CSR(A)
Court Reporter

