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

employee of the Northwest

12 Territories Power Corporation or a

teacher, is not eligible for

13 membership in a bargaining unit

where, in the opinion of the

14 Minister, the employee is employed

15 (a) as a deputy head, a head of a

secretariat of the Executive Council,

16 an assistant deputy minister, a

director, a regional director, an

17 assistant director, an area director,

a regional superintendent or an

18 auditor;

19 (b) in a position in a division or section

of the Financial Management Board

20 Secretariat with duties and

responsibilities that include

21 developing and administering policies,

procedures and guidelines respecting

22 human resource management, program

evaluation, financial planning and

23 resource allocation;

24 (c) in a position that provides support

or advice directly to the Executive

25 Council, a committee of the Executive

Council or a member of the Executive

26 Council;

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

Official Court Reporters

1

1 that provides translation services

to a legal officer on a regular

2 basis;

3 (e) in a position with duties and

responsibilities that include

4 providing advice and assistance, on

a regular basis, respecting the

5 terms and conditions of employment,

including collective bargaining;

6

(f) in a position with duties and

7 responsibilities that include

carrying out the following on a

8 regular basis:

9 (i) staffing,

(ii) interpreting employment contracts,

10 (iii) resolving workplace disputes,

(iv) responding to grievances, or

11 (v) providing advice in respect of

the matters referred to in

12 subparagraphs (i) to (iv);

13 (g) in a position with management

responsibility that includes directly

14 assigning work to, assessing the

performance of and imposing

15 discipline on other employees;

16 (h) a dentist or medical practitioner; or

17 (i) in a position that provides

administrative or secretarial support

18 directly

19 (i) to a person referred to in

paragraphs (a), (c) or (d), or

20 (ii) to a person referred to in

paragraphs (b), (e), (f) or (g)

21 in respect of the duties and

responsibilities referred to in

22 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

Official Court Reporters

2

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

Official Court Reporters

3

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

Official Court Reporters

4

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 l12 and 13:

8

The use of commas in separating out

9 one subparagraph from the next, and

not semicolons or periods, suggest

10 no break in the continuum of the

list, nor any disconnection from one

11 item to the next; nor does it

suggest the concept of "either or"

12 somehow being implied.

13 Further:

14 There is only the single use of the

term "or" as if to incorporate a

15 disjunctive meaning at that point,

but only in respect of subparagraph

16 (v) in separating it out from the

first four paragraphs ...

17

And further:

18

Generally speaking, it might be said

19 that commas are used to avoid

ambiguity concerning a list of

20 relevant items as meaning every

single item on the list needs to

21 exist, and "or" is used to indicate

that any one of the items need only

22 be shown ... the use of commas

denotes the inclusiveness of the

23 entire list.

24 These statements are wrong as they relate to

25 principles of legislative drafting and, were we

26 relying on a correctness standard of review,

27 would be fatal.

Official Court Reporters

5

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

of article 41(1.7) which I do not

21 see as making this interpretation

exercise any easier in that, as with

22 the English language version, the

Legislature has chosen to use only

23 punctuation - commas - to separate

at the listed items ... and not use

24 "or" to show a disjunctive

intention.

25

26 This analysis is contrary to the clear

27 meaning of the words used in the French version.

Official Court Reporters

6

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

Official Court Reporters

7

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

Official Court Reporters

8

1 absurdity on the other, with reasonableness as

2 the guiding criteria, I find redundancy to be the

3 less potentially harmful of the two.

4 I am mindful of the caselaw in applying the

5 reasonableness standard to the decision under

6 review. The following excerpt from the Supreme

7 Court decision in Dunsmuir (Dunsmuir v. New

8 Brunswick, 2008 SCC 9), found in the respondent's

9 materials, sets out the guiding principles I must

10 follow:

11

Deference is both an attitude of the

12 court and a requirement of the law

of judicial review. It does not

13 mean that courts are subservient to

the determinations of decision

14 makers, or that courts should show

blind reverence for their

15 interpretations, or that they may be

content to pay lip service to the

16 concept of reasonableness review

while in fact imposing their regard

17 to both the facts and the law.

18 The Supreme Court went on to clarify this

19 process in the Newfoundland decision

20 (Newfoundland and Labrador Nurses' Union v

21 Newfoundland and Labrador (Treasury Board), 2011

22 SCC 62):

23 ... the reasons must be read

together with the outcome and serve

24 the purpose of showing whether the

result falls within a range of

25 possible outcomes ... if the reasons

allow the reviewing court to

26 understand why the tribunal made its

decision and permit it to determine

27 whether the conclusion is within the

range of acceptable outcomes, the

Official Court Reporters

9

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

Official Court Reporters

10

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

Official Court Reporters

11

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 Certified Pursuant to Rule 723

of the Rules of Court

23

24

25

Jane Romanowich, CSR(A)

26 Court Reporter

27

Official Court Reporters

12