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

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 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.

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 APPEARANCES:

 Ms. A. Walker and

 Ms. L. Jeffrey: Counsel for the Applicant

 Ms. A. Montague-Reinholdt: Counsel for the Respondent

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 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

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 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

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 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

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 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

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 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.

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 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.

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 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

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 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

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 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

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 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

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 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

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 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

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 Jane Romanowich, CSR(A)

 26 Court Reporter

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