GNWT v Union of Northern Workers, 2018 NWTSC 19

Date: 2018 03 19
Docket: S-1-CV-2016-000 352

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

THE GOVERNMENT OF THE NORTHWEST TERRITORIES

Applicant

- and -

THE UNION OF NORTHERN WORKERS

Respondent

RULING AS TO REMEDY

I) INTRODUCTION AND BACKGROUND

[1] On November 10, 2017, I granted an Application for judicial review, brought by the Government of the Northwest Territories (GNWT), challenging the decision of an Arbitrator. *GNWT v Union of Northern Workers*, 2017 NWTSC 84.

[2] The issue of remedy had been addressed briefly at the hearing, but I gave the parties an opportunity to present additional submissions in light of my decision on the merits. The Applicant and Respondent filed written submissions in February 2018.

[3] To put the parties' positions in context, I will refer briefly to some of the issues raised at the hearing and to my decision.

[4] The judicial review was about the Arbitrator's interpretation of certain Articles of a Collective Agreement between the GNWT and the Union of Northern Workers (UNW). The dispute between the parties centered on entitlement to financial assistance for relocation when an employee stops working for the GNWT (Ultimate Removal Assistance).

[5] Two Articles of the Collective Agreement were at issue: Article 42.02(a)(i), which sets out the entitlement to Ultimate Removal Assistance, and Article 2.01, which defines "Continuous Service":

> 42.02(a)(i) Length of service
>
> An employee's entitlement to Ultimate Removal Assistance is based on years of continuous service with the Government of the Northwest Territories as follows:
> (...)
> (a) Subject to Article 42.02(a), employees hired after August 5, 1976, whose community of residence remains the same as his/her point of recruitment will be entitled to removal assistance as follows:
>
> after 10 years of service, 100%
>
> (...)
>
> 2.01 For the purposes of this Agreement:
>
> (...)
>
> (e)(i) "Continuous Employment" and "Continuous Service" means:
>
> (1) uninterrupted employment with the Government of the Northwest Territories;
> (2) prior service in the Public Service of the Government of Canada providing an employee was recruited or transferred from the Public Service within three (3) months of terminating his/her previous employment with such government; except where a function of the Federal Government is transferred to the Northwest Territories Government; and

> (3) prior service with the municipalities and hamlets of the Northwest Territories providing he/she was recruited or transferred within three (3) months of terminating his/her previous employment.
>
> (...)

[6] The first issue was whether the definition of "Continuous Service" should be read conjunctively or disjunctively. The Arbitrator concluded that it should be read

conjunctively, meaning that "Continuous Service" represents the total years of service with the three employers listed in the definition. I found this interpretation to be reasonable. *GNWT v Union of Northern Workers*, paras 31 to 37.

[7] In interpreting Article 42.02(a)(i), the Arbitrator concluded that the entitlement to Ultimate Removal Assistance should also be determined by adding the years of service with the three employers included in the definition of Continuous Service. He concluded that the words "with the Government of the Northwest Territories" at Article 42.02(a) (i) are superfluous and do not restrict that broad definition.

[8] On review, I concluded that this interpretation was unreasonable. For ease of reference, I reproduce here the part of my Ruling that deals with that issue:

> [39] The Arbitrator noted that where parties to an agreement, through a definition, augment the ordinary meaning of a word, that intent must be respected. He opined that when parties intend a definition to be presumptive and subject to a more specific intent, they customarily include in the definition words such as "unless the context requires otherwise". He noted that those words do not appear in the definition of "Continuous Service". He also referred to a text on the interpretation of contracts and quoted an excerpt that emphasizes the importance of giving effect to clear language used by the parties.
>
> [40] The Arbitrator concluded:
>
>> 'I find that the words of the definition are clear. Ms. Maquire's (sic) prior service with the Government of Canada is included within that definition of continuous service, except to the extent of the earlier period of her service before interruption, which is conceded to be ineligible. The argument that section 42.02 indicates a contrary intention or leaves words

> redundant is not persuasive. The parties have by definition added to the ordinary meaning of continuous service, which without the definition would be limited to service with the Employer. I do not find an intention in 42.02(a)(i) to reduce that agreed upon definition's scope. I do not view the definition clause as one of those "general clauses" to be overridden by the more specific words in 42.02.'

Arbitrator's Award, Record, Tab 2, p.6.

[41] The Arbitrator noted that the definition of "Continuous Service" did not include any words that would indicate an intent by the parties to have that definition subject to other provisions of the Agreement. He does not appear to have considered the possibility that such an intent could equally be expressed elsewhere in the Agreement.

[42] When he considered Article 2.01, the Arbitrator emphasized the importance of giving effect to the words chosen by the parties in the Agreement and of upholding their intent. In my view, he did the opposite in his consideration of Article 42.02, because he effectively disregarded the words used by the parties in that provision.

[43] Article 42.02 is of central importance because it is the provision of the Agreement that creates the benefit at issue. It states that "an employee's entitlement to Ultimate Removal Assistance is based on continuous service with the Government of the Northwest Territories". These words, on their face, are unambiguous: they make the years of service with only one employer, the GNWT, relevant for the purposes of entitlement to this particular benefit.

[44] The Arbitrator did not explain why he did not think that this language was clear or why he did not think it indicated a clear intention by the parties to restrict the broad scope of "Continuous Service" for the purposes of entitlement to Ultimate Removal Assistance.

[45] Effectively, the Arbitrator concluded that these words mean nothing at all, and are redundant and superfluous. That conclusion, which flies in the face of the wording of Article 42.02, required an explanation. But the Arbitrator did not give one. He did not explain why, having emphasized the importance of giving effect to the intention of the parties shown by the words they use, he nonetheless concluded that the specific words in Article 42.02 could be disregarded. He merely stated that he found the GNWT's argument unpersuasive.

[46] I find, with the greatest of respect, that the Arbitrator's approach to the interpretation of the Agreement was internally inconsistent, and that he failed to

> give effect to the principles that he himself had identified as fundamentally important in the earlier part of his analysis.
>
> [47] As noted in the excerpt of *Dunsmuir v New Brunswick* quoted above at Paragraph 27, the reasonableness standard is concerned with the existence of justification, transparency and intelligibility within the decision-making process as well as whether the decision falls within a range of possible, acceptable outcomes. In my respectful view, the Arbitrator's decision is contrary to the clear language of Article 42.02 and is not within the range of acceptable outcomes. Moreover, the reasons given for his interpretation of Article 42.02 lack the justification and transparency required to meet the standard of reasonableness. His decision on that point cannot stand.

GNWT v Union of Northern Workers, paras 39 to 47.

[9] As I noted at the outset, the issue that now arises is that of remedy. The GNWT argues that I should quash the Award, substitute my view for that of the Arbitrator, and dismiss the grievance. The UNW agrees that, in light of my Ruling, the Award should be quashed, but it argues that I should remit the matter to the Arbitrator for further consideration.

II) ANALYSIS

1. Governing principles

[10] There is no dispute about the applicable legal principles. In judicial review, when a court concludes that a decision should be quashed, the proper remedy is generally to remit the matter to the decision-maker. There are, however, exceptions to that general rule:

> (...) once it has been determined that an administrative tribunal has exceeded its jurisdiction by rendering an unreasonable decision on a matter within its jurisdiction, the case must, in theory, be sent back to it.
>
> A court of law may not substitute its decision for that of an administrative decision-maker lightly or arbitrarily. It must have serious grounds for doing so. A court of law may render a decision on the merits if returning the case to the administrative tribunal would be pointless (…). Such is also the case when, once an illegality has been corrected, the administrative decision-maker's

> jurisdiction has no foundation in law (…). The courts may also intervene in cases where, in light of the circumstances and the evidence in the record, only one interpretation or solution is possible, that is, where any other interpretation or solution would be unreasonable (...)

Giguère v Chambre des notaires du Québec, 2004 SCC 1, para 66 (citations omitted).

2. The proper remedy

[11] The GNWT argues that it would be pointless to remit the matter to the Arbitrator because there are only two possible interpretations of Article 42.02: the one that the Arbitrator adopted and has now been overturned, and the one that the GNWT had advocated. This is why the GNWT argues that there is nothing left for the Arbitrator to decide and that it would be pointless to remit the matter to him.

[12] The UNW disagrees for a number of reasons. It argues that the matter should be remitted to the Arbitrator to give him an opportunity to better articulate the reasons for his conclusions. Moreover, it disagrees that my Ruling leaves open only one possible interpretation of Article 42.02. Finally, it argues that the matter should be remitted to maintain the parties' access to the Arbitrator to help resolve issues between them as to other employees' entitlement to Ultimate Removal Assistance. The UNW points out that at the conclusion of the Award, the Arbitrator, at the request of the parties, reserved his remedial jurisdiction to address other cases captured by this grievance.

[13] I disagree that the matter should be remitted for the purpose of allowing the Arbitrator to provide additional reasons for his conclusions.

[14] As I mentioned in my Ruling, in the context of judicial review, the standard of reasonableness is concerned with the existence of justification, transparency and intelligibility within the decision-making process, and also with whether the decision falls within a range of possible, acceptable outcomes. *GNWT v Union of Northern Workers*, paras 27 and 47.

[15] In my Ruling, I found, among other things, that:

a) the wording of Article 42.02(a)(i), as opposed to the general definition of "Continuous Service", is of central importance to the scope of Ultimate Removal Assistance because Article 42.02 creates the entitlement to that benefit;
b) the words "with the Government of the Northwest Territories" in Article 42.02 are unambiguous;
c) the Arbitrator's interpretation of the Agreement was internally inconsistent, in that he emphasized the importance of giving effect to the intentions of the parties when interpreting the definition of "Continuous Service" at Article 2.02 but disregarded the words used by the parties when he interpreted Article 42.02.

[16] I concluded that:

> (...) the Arbitrator's decision is contrary to the clear language of Article 42.02 and is not within the range of acceptable outcomes. Moreover, the reasons given for his interpretation of Article 42.02(a)(i) lack the justification and transparency required to meet the standard of reasonableness. (...)

GNWT v UNW, para 47.

[17] With respect, the UNW's assertion that insufficiency of the Arbitrator's reasons was the "primary" or "central" reason why I concluded that his decision was unreasonable is not accurate. I concluded that the Arbitrator's interpretation did not fall within the range of possible outcomes *and* that his reasons for not giving effect to the words used by the parties in Article 42.02 were deficient. Since I have concluded that the Arbitrator's interpretation does not fall within a range of acceptable outcomes, it would be pointless to remit the matter to him to provide him an opportunity to elaborate on his reasons.

[18] The next question is whether, in light of my decision, there remains more than one possible interpretation of Article 42.02. The UNW says that there are and offers two examples.

[19] The first is that employment with municipalities and hamlets could qualify as service "with the Government of the Northwest Territories", for the purposes of Article 42.02, because local governments are statutory extensions of the GNWT. That interpretation is inconsistent with my Ruling. I have concluded that the words "with the Government of the Northwest Territories" have precedence over

the broad definition of "Continuous Service" and that their effect is to restrict that definition. If the intent of the parties was to include years of service with hamlets and municipalities for the purposes of the calculation of entitlement to Ultimate Removal Assistance, hamlets and municipalities would have also been specifically included at Article 42.02.

[20] The second example that the UNW offers is that Article 42.02 may be interpreted as including years of service with a function of the federal government that has since been transferred to the GNWT. I do not have the benefit of full submissions on that topic. I cannot say that it does not warrant consideration because in recent years, several functions of the federal government have been devolved to the GNWT. In the context of the interpretation of Article 42.02, it creates a unique situation. The examination of this issue falls squarely within the area of expertise of the Arbitrator.

[21] Having so concluded, I do not need to consider whether the fact that the parties proceeded by way of policy grievance and the fact that the Arbitrator remained seized of the matter make any difference to whether the matter should be remitted.

[22] The cases relied on by the GNWT in support of its position involved situations where the administrative decisions were overturned because the reviewing court found that the tribunal's conclusions were unreasonable in light of the evidence. *Canadian Airlines International Ltd v C.A.L.P.A.* 1997 CarswellBC 1516; *Telus Communications Inc. and TWU (Underwood) Re*, 2014 ABCA 199. Once such a conclusion is reached about factual matters, there truly is little point in remitting the matter to the administrative tribunal.

[23] The situation here is very different, because the Arbitrator's Award was not based on factual findings. It was purely a matter of interpretation of the relevant Articles of the Collective Agreement. My Ruling on the merits has considerably narrowed the range of possible interpretations of Article 42.02, but there remain areas that have not been the subject of submissions by the parties, such as the one evoked at Paragraph 20.

[24] The cardinal principle that must govern this Court's approach in judicial review is restraint. Any doubt about the appropriate remedy should be resolved in favour of quashing the decision and remitting the matter back for reconsideration by the administrative decision-maker. D. Brown and J. Evans, *Judicial Review of Administrative Action in Canada* (Thomson: Toronto, 2017), 5:2200.

[25] I conclude that this is not a case where this Court should take the unusual step of rendering its own decision on the matter. The matter should be remitted back to the Arbitrator. It goes without saying that it is not open to him to adopt an interpretation of Article 42.02 that cannot be reconciled with my November 2017 Ruling or this one.

4. Costs

[26] The parties were given an opportunity to make submissions on costs. The GNWT has not made any submissions on that issue. The UNW argues that each party should bear its own costs given that success was divided on the Application.

[27] While the GNWT was ultimately successful on its Application, its position on the standard of review did not prevail, nor did its position as to the interpretation of the definition of "Continuous Service". Under the circumstances, there will be no order as to costs.

III) CONCLUSION

[28] For these reasons, the Arbitrator's Award is quashed and I direct that the matter be remitted back to him for reconsideration. Each party shall bear its own costs.

L.A. Charbonneau
J.S.C.

Dated at Yellowknife, NT, this
19th day of March, 2018

Counsel for the Applicant: Sandra S. Jungles
Counsel for the Respondent: Morgan Rowe

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