ARBITRATION

BETWEEN:

GOVERNMENT OF THE NORTHWEST TERRITORIES

- and -

UNION OF NORTHERN WORKERS

Concerning a grievance over an entitlement to Ultimate Removal Benefit

---

AWARD

BEFORE:

Andrew C.L. Sims, Q.C..... Arbitrator

REPRESENTATIVE FOR GOVERNMENT OF THE NORTHWEST TERRITORIES

Sarah A.E. Kay ..... Counsel
Steven St. Amand..... Labour Relations Advisor

REPRESENTATIVE FOR UNION OF NORTHERN WORKERS

Rebecca Thompson..... Grievance & Adjudication Officer
Anne Marie Thistle..... UNW – Director of Membership Services

HEARD in Yellowknife, NWT on September 7, 2016

AWARD ISSUED on November 1, 2016

Our file: 7862

AWARD

This case raises a straightforward question of interpretation. The collective agreement defines the terms "continuous services" and "continuous service" to include, in part, certain prior service with the Public Service of Canada and the municipalities and hamlets of the Northwest Territories. The agreement also provides a negotiated benefit called "Ultimate Removal Assistance". The entitlement to that benefit is based on "years of continuous service with the Government of the Northwest Territories". The question before me is does this mean years of service as defined, or years of service only with the Government of the Northwest Territories, excluding the two added parts, for service with Canada and municipalities and hamlets that the definition includes.

The parties argued this case on the basis of the following agreed statement of facts supplemented by brief evidence from two witnesses for the Employer.

> WHEREAS the parties have reached an agreement as to certain facts in relation to Grievance 16-P-01868 which is scheduled for hearing beginning on September 7, 2016 before Arbitrator Andy Sims.
>
> The following are the terms and conditions the parties mutually agree to as facts:
>
> 1. The UNW filed Policy Grievance 16-P-01868 alleging a breach of the Collective Agreement on the basis of a misinterpretation of Article 42. (Exhibit 1)
>
> 2. The Collective Agreement in effect during the period in question expired March 31, 2016.
>
> 3. The parties through the presentation of the aforesaid grievance and the Collective Agreement agree to the composition of the Board and submit to its jurisdiction.
>
> 4. Article 2.01(e)(i) sets out a general definition of "Continuous Service". (Exhibit 2)
>
> 5. Article 42.02(a)(i) sets out an employee's entitlement to Ultimate Removal Assistance. (Exhibit 3)
>
> 6. Joanna Maguire was an employee of the Government of Canada from November 28, 2001 to July 8, 2006. She was on Leave Without Pay from the GOC commencing on September 2, 2003. (Exhibit 4)
>
> 7. Ms. Maguire commenced her employment with the Government of the Northwest Territories on April 11, 2006 and ended her employment on September 2, 2015. Ms. Maguire moved from her community of residence within eighteen months as required by Article 42.03(c). Ms. Maguire's community of residence at the conclusion of her employment (Yellowknife) was the same as her point of recruitment. (Exhibit 5)
>
> 8. In accordance with Clause 42.02(a)(i), the Employer calculated that Ms. Maguire had 9 years, 4 months and 23 days of service with the GNWT and was not eligible for the Ultimate Removal Benefit.
>
> 9. Each party remains at liberty to present and tender such further evidence as it feels necessary.

The grievance is a policy grievance alleging breaches of Articles 2 and 42.

> The Union of Northern Workers hereby files this Second Level grievance on behalf of all employees/former employees affected, including Joanna Maguire, in accordance with Article 37 of the Collective Agreement. The Employer is in violation of Article 42 and any other related Articles of the Collective Agreement, pertinent Legislation, and/or Regulations, Policies and past practices.

Therefore We request that:

1. A declaration that the Employer has misinterpreted, misapplied, and/or violated the Collective Agreement;
2. That all employees/former employees affected, including Joanna Maguire, be made whole in all respects without restriction, including being awarded interest on monies owing or made part of redress, and further to be awarded monetary damages.
3. That all employees/former employees affected, including Joanna Maguire, be paid applicable Ultimate Removal assistance, as outlined in Article 42 of the collective agreement, with the addition of interest, compounded daily and calculated at prime plus 2%.
4. That the employer, for the purposes of Ultimate Removal Assistance, use the definition of "continuous service" as outlined in article 2.01(e).
5. Any other remedy that is deemed just to address the concerns that present and as are disclosed through the evidence the Union will adduce at any stage of the grievance process, including arbitration.

Details

The Union of Northern Workers alleges that the employer's interpretation of the term "continuous service" for the purposes of Article 42 – Ultimate Removal Assistance, is incorrect.

The Union specifically asserts that other issues may present and it places the Employer on notice that as the Union becomes aware of such it shall put the Employer on notice, either through the processing of this grievance or through the filing of a further grievance. The Union maintains that where those other issues are so determined, the Union does not regard itself restricted, and such can be raised through to the commencement of an arbitration hearing.

The two articles in question, in significant part, read:

ARTICLE 2
INTERPRETATION AND DEFINITIONS

2.01 For the purpose 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.

(ii) With reference to re-appointment of a lay-off, his/her employment in the position held by him/her at the time he/she was laid off, and his/her employment in the position to which he/she is appointed shall constitute continuous employment provided the lay-off occurred subsequent to 1st April 1970.

(iii) Where an employee other than a casual employee ceases to be employed for a reason other than dismissal, abandonment of position or rejection on probation, and is re-employed within a period of three months, his/her periods of employment for purposes of sick leave, severance pay, and vacation leave entitlement shall be considered as continuous service in the Public Service.

ARTICLE 42

ULTIMATE REMOVAL ASSISTANCE

42.01 (1) An employee who terminates his/her employment with the N.W.T. Public Service and certifies his/her intention of leaving the Northwest Territories or moving to another settlement within the Northwest Territories will be entitled to Ultimate Removal Assistance, as outlined in this Article.

…

ENTITLEMENT

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:

ENTITLEMENT

Length of Service	Entitlement
Less than 3 years	None
3 years but less than 4	50%
4 years but less than 5	60%
5 years but less than 6	70%
6 years but less than 7	80%
7 years but less than 8	90%
8 years and over	100%

A year of service is the twelve (12) month period to the anniversary date of initial appointment.

…

(c) 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% entitlement

The Union argues that the definition in s. 2.01(e) is conjunctive, as indicated by the use of the word "and" after Article 2.01(e)(i)(2). In support of this it refers to the opinion of authors Brown and Beatty, *Canadian Labour Arbitration*, 4:2152:

4:2152 — "And" and "or"

It is necessary to look at the context in which the words are found to determine whether "and" is to be construed conjunctively or disjunctively. Normally, "and" is read conjunctively and will not be interpreted as meaning "or" except where the context requires such an interpretation. One arbitrator has summarized the applicable rules of construction in this connection as follows:

> (1) The word "and" used in any written instrument, including a collective agreement, must be construed conjunctively, or copulatively (as Lord Cranworth quaintly described it) unless such a construction be repugnant to the sense of the clause in which the word is used, or the scope and effect of the whole instrument in which the clause appears.
>
> (2) In the latter case, and in the latter case only, can the word "and" be read and construed disjunctively or distributively, that is whether the word "or" can be substituted for it.

The Employer argues that this is not necessarily so and refers to the decision in:

> *Government of Northwest Territories and the Union of Northern Workers* (Oral decision, Mahar J, November 20, 2015)

I note the Union point that this case was actually decided on the conflict between the award under review and the French text of the legislation being interpreted, and Justice Mahar's indication that without that he may have upheld the original award. That said, I do not find the decision helpful in this situation. If the words in 2.01(e)(i) are not conjunctive, then they make no sense, because it would imply that continuous service might have a meaning excluding the service in 2.01(e)(i)(I). I find the article is conjunctive as to the three subparagraphs.

Ms. Shipra Priyamrada testified that Ms. Joanna Maquire's service date is 04/11/2006 which is the start of, and limited to, her service directly with the GNWT. Her benefits date, which includes prior service is 11/28/2001. This figure, she says, is only used for Pensionable Service and Dental Benefits. Her vacation leave effective date is 04/11/2002. The first instance Ms. Maquire was hired with the GNWT was 05/13/1999. Ms. Priyamrada was unable to give any evidence as to entitlement to the Ultimate Removal Benefit as it is beyond her area of responsibility.

The Employer asserts and Ms. Williams' testimony supports the proposition that past practice for this allowance has been to ignore prior service, as spoken of in 2.01(a)(2) and (3) in the calculation of the Ultimate Leave Allowance. It submits two very brief reports of expedited arbitrations to establish this fact. The Union objects that, as expedited arbitration decisions, they should not be considered. Both are from 1994 and were decided by Arbitrator Ready, one for Dawn Kitt and one for Rick Mills.

The suggestion that I can and should consider these awards: (see *Trail* (*infra*) at 21), is dampened by their status as expedited arbitrations and their very summary reasons.

Neither award expressly supports the Employer's position in this case. In Mr. Mills' case, he had a break in service of more than 3 months, so did not meet the extended definition (see para. 6). In Ms. Kitt's case, the collective agreement term there, as referred to in the decision, required continuous service, and the evidence was that her service was interrupted. The decision (which predates Mills) contains no reference to any specific definition section.

Ms. Sandi Williams processes people's entitlements to the s. 42.01 Ultimate Removal Allowance. She gave clear evidence as to the basis on which she has done so. Her practice has been to view continuous service with the Government of the Northwest Territories as being defined by Article 2.01(e)(i)(1), but

without consideration of 2.01(e)(i)(2) or (3). The simple question upon which this case turns is whether that is the correct approach, given my finding that the sub-clauses are conjunctive.

The GNWT argues that meaning has to be given to the words "with the Government of the Northwest Territories" in Article 42.02(a)(i) and that if you use the full definition from Article 2.01(e)(2) and (3) this deprives those words of meaning. Further, the principles of interpretation require one to look at the words in the context of the entire agreement, and specific provisions like 42.02(a)(i) take precedence over general provisions like Article 2.01(e). It yet further argues that, since Article 42.02(a)(i) confers a benefit, it needs to do so in clear and unambiguous language. The Employer refers to an extract from Brown and Beatty, *Canadian Labour Arbitration*, 4:2120 on these points. It also refers to the decision on the principles of interpretation in:

> *RRR SAS Capital Facilities Inc. and SEIU-West (Kraus)* (2015) 123 CLAS 304 (Hood)

As to the principle that the specific should prevail over the general, the Employer also draws upon.

> *City of Trail and CUPE Local 2087* (2013) 237 L.A.C. (4th) 298 (Kinzie) at 18

It notes that the parties specified, as part of the definition in 2.01(e)(iii), that sick leave severance pay and vacation leave entitlement has 3 month bridging protection for breaks in service with the GNWT, but that Ultimate Removal Assistance is not listed, and therefore is not included. The Union answers their last point by noting that subsection (iii) deals with just one specific circumstance which is a 3 month break in service. That is not the issue here.

When parties choose to define certain words in a collective agreement, those definitions, often altering or augmenting their ordinary meaning, are to be respected. If the parties intend those definitions to be presumptive, but subject to a more specific intent, they will customarily say so by adding words of the type used for definitions in *Interpretation Acts* such as "unless the context requires otherwise" or some such phrase. This agreement contains no such phrase.

Justice Kim Lewison's text "The Interpretation of Contracts" 5th edition, Sweet and Maxwell, expresses the following opinion:

> 11. DEFINITION CLAUSES
>
> Where a word or expression is expressly defined by the contract the court will give effect to the agreed definition in preference to the conventional meaning of the word or expression.
>
> 5.11 Parties are, of course, free to provide express definitions of terms which they employ in their contract. If they do so the court will uphold the definitions so agreed, even where the meaning attributed to

> the defined term by the definition is not its ordinary meaning. If a contract defines a term, there is no permissible basis for ignoring it save in exceptional circumstances.

The text cites a number of authorities for this proposition including the following:

> I do not consider that there is any legitimate process of interpretation which can yield the meaning for which the Royal contends, either on the basis of an appeal to the idea of something having gone wrong with the words, or on the basis of an appeal to the factual matrix. The exclusion contains its own specific definition of "pneumoconiosis" and there is no permissible basis for ignoring that express definition. I accept T&N's case that any attempt by the Royal to widen the factual matrix for the purpose of putting a different, wider meaning on the word "pneumoconiosis" will plainly be not for the purpose of explaining the words used, but rather for the purpose of contradicting them, i.e. that "white is black and that a dollar is fifty cents".
>
> *T & N Ltd. (in administration) v. Royal and Sun Alliance Plc* [2003] 2 All E.R. (Comm) 939
>
> It would be a highly unusual approach to interpretation to give the expression in cl 15(g) a meaning other than that expressly ascribed to it by the parties, especially since the parties did not state that the definition was subject to any contrary intention apparent from the Agreement.
>
> *Pierse Developments Ltd. v Liberty Property Investment Ltd.* [2009] EWCA Cir 1423

I find that the words of the definition section are clear. Ms. Maquire's 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 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.

Taking a functional view, I do not find that in any way incongruous with the labour relations realities. The history of the GNWT includes assuming responsibility for government functions, and with that, taking on employees who, but for that governmental adjustment of responsibility, often and essentially engaged in continuous service, which it would have made logical sense, at the time of the transfer of responsibility, to recognize.

I find the Union's interpretation is the more probable and that, for the purposes of s. 42, continuous service includes the prior service recognized in the extended definition in sections 2.01(e)(i) (2) and (3). Other prior service (with other employers or followed by a break) is not included. As a result, the grievance is upheld. The Union asks as a remedy that I direct an audit of all cases of a similar misapplication of the definition, dating back to 35 days before the filing of the grievance. The parties have also asked that I retain jurisdiction over any issues of remedy. If, after reviewing the records from that date forward, other cases emerge that they cannot resolve, I include the questions thus raised in my overall reservation of remedial jurisdiction.

DATED at Edmonton, Alberta this 1st day of November, 2016.

ANDREW C.L. SIMS, Q.C.