IN THE MATTER OF AN ARBITRATION

BETWEEN:

THE UNION OF NORTHERN WORKERS
(the "**Union**")

– and –

THE GOVERNMENT OF THE NORTHWEST TERRITORIES
(the "**Employer**")

PRELIMINARY AWARD

Policy Grievance regarding Pay and Benefits

(#17-P-02163)

BEFORE:

John Moreau, Q.C. - Arbitrator

IN ATTENDANCE FOR THE UNION:

Rebecca Thompson - Grievance & Adjudication Officer
Avery Parle - Service Officer, Witness
Anne Marie Thistle - Director, Membership Services
Jacques B. Roberge - Observer

IN ATTENDANCE FOR THE EMPLOYER:

Maren Zimmer - Counsel, Department of Justice, GNWT
Georgina Rolt - Adjudication Advisor, GNWT
Kathleen O'Brien - Observer

The Hearing was held in Yellowknife, NWT on May 27, 2019.

AWARD

INTRODUCTION:

The Union submitted policy grievance #17-P-02163 at the Final Level on August 14, 2017 claiming that a number of members in the bargaining unit had not been provided benefits within the accepted timelines set out in the collective agreement. Two examples from members were cited in the grievance. The Employer claimed in reply on October 6, 2017 that the two examples were isolated incidents and that it would continue with its longstanding practice to address individual concerns as they arose.

The Union referred the grievance to arbitration on October 6, 2017. Several other individual examples arose subsequent to the grievance being referred to arbitration involving delays regarding both benefits and pay issues. In a conference call prior to the arbitration, the Employer indicated that it was reserving its right to raise a preliminary objection relating to the scope of the grievance.

The hearing began on May 27, 2019 at which time I heard evidence and submissions on the preliminary objection of the Employer. I agreed with the request of the Employer, and over the objection of the Union, that I would issue a Preliminary Award dealing with the Employer's preliminary objection with respect to the scope of the hearing before hearing any further evidence on the merits of the grievance.

The Employer called Georgina Rolt, Adjudication Advisor GNWT, to testify on the preliminary issue regarding the scope of the grievance. The Union replied with the testimony of Avery Parle, Service Officer, UNW.

TESTIMONY OF THE WITNESSES

Ms. Rolt held the position of Labour Relations Advisor with the Employer before being promoted to the position of Adjudication Advisor in January 2018. She explained that all First Level and Final Level grievances are assigned to one of five Labour Relations Advisors who cover the individual GNWT Departments. In the event a grievance is not resolved and is forwarded to arbitration, the Labour Relations Advisor prepares the grievance file for Ms. Rolt.

Ms. Rolt first became acquainted with the current grievance in August 2017 when she held the position of Labour Relations Advisor. Ms. Rolt emailed the Union's Mr. Parle on August 16, 2017 requesting that she be provided with *"…all the specifics and documents from employees in relationship to the allegations of benefits not being provided within a reasonable time frame."* Mr. Parle provided further examples subsequent to the filing of the grievance of individuals, including casual employees, who had not been provided benefits. Mr. Parle noted in one email dated September 26, 2017 several examples of the types of benefits that were outstanding. He noted in that regard the following: *"Some examples are inclusive but not limited to Medical, Dental, Pension, Relief Bank, Relocation Allowance, Ultimate removal etc."* In each case, Ms. Rolt investigated the issues as they were brought to her attention by Mr. Avery.

Ms. Rolt and Mr. Avery continued to address individual examples in email correspondence in 2017 and in 2018 where members of the bargaining unit were claiming that they were not being provided with benefits in a timely manner. Some of the individual issues did not strictly speaking involve benefits but rather also touched on pay issues. For example, in one case, an individual did not have his pay automatically deposited into his bank account but rather was paid by cheque, which caused a delay. The matter was investigated by the Employer and it was determined that the employee's cheque had to be physically deposited to the individual's bank account because it was an off-cycle payment which fell outside the 26-week pay period during which time automatic bank deposits took place. In another instance, a correctional officer claimed that he was not being paid in a timely manner for hours worked. Ms. Rolt responded to Mr. Parle requesting details of this claim, including the dates worked and whether the individual had made contact with the supervisors.

In all of her email correspondence involving each of the issues raised during the 2017 to 2018 period, Ms. Rolt acknowledged in her response emails that the Union maintained the right to raise the concern of the member as part of this arbitration. In that regard she stated in reference to the individual's concern: *"I have noted the example and the union's position which I understand the union intends to rely on for Grievance #17-P-02163".*

Ms. Rolt further testified in these proceedings that she recognized that the Union wished to raise pay issues along with benefits issues at this arbitration. In her view, however, pay is compensation for work performed and is dealt with as a stand-alone item

through the GNWT payroll system. In her words: *"…pay is never a benefit".* Under cross-examination, Ms. Rolt confirmed that benefits deductions are typically set out on an employee's pay cheque.

Mr. Avery testified that he had only recently been hired as a Service Officer for the UNW when he completed and filed the current grievance on August 14, 2017. He reviewed in his testimony the template of the grievance form which includes a drop-down menu entitled *"Nature of the Grievance".* In this case, he testified that he picked the section of the menu identifying the grievance as a *"Pension/Insurance"* issue. In the narrative portion of the grievance, under the heading *"We request that",* Mr. Parle noted that the first four paragraphs were standard clauses typically used in all their grievances. The last three paragraphs focussed on the relief being requested by the Union. Grievance #17-P-02163 reads:

> …
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> 5. That the employer complete an audit to ensure all bargaining unit members are receiving their benefits within accepted timelines and that members applications are not getting lost, misplaced or forgotten about and the benefits department is ensuring it is responding to all inquiries in a timely manner.
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> 6. That all affected members who have not received their benefits in a timely manner to the fault of the employer be compensated for all out of pocket expenses that would have been covered retroactively and that their issues with setting up benefits be remedied immediately.
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> 7. That all affected members be awarded damages in the amount of 10,000 dollars.

Mr. Avery further testified that the main issue leading up to the grievance was that members of the Union were experiencing delays having their benefits set up, including not receiving any responses to their repeated requests for assistance. Employees also

expressed dissatisfaction with the Employer's "Helpdesk" and the backlog that appeared to be taking place at the Human Resources Department. Given the number of employees with outstanding benefit issues, he determined that the most appropriate way to go forward was to sum up the issue through a policy grievance. Mr. Avery did say, however, that the issues have improved over time; in his words "it was not as egregious as it once was" for employees.

Mr. Avery was asked about his interpretation of Ms. Rolt's email and in particular her statement that she *"…noted the example and the union's position which I understand the union intends to rely on for Grievance #17-P-02163".* Mr. Avery testified that he understood the email response to be an acknowledgement of the concern raised by the Union on behalf of the member(s) and that it "would go on the file with the rest of them." He further understood from the email responses during that period of time that the Employer recognized the issue and that there was no need for him to file separate grievance for each claim. Had there been an objection by the Employer to including the individual pay issues which arose after the grievance was filed, Mr. Avery testified that he would have filed a separate grievance for each of them.

Mr. Avery reiterated that the overall underlying issue was the length of time it took to obtain a response by the Human Resources Department, and in particular from the Helpdesk, to his member's concerns. In his view, pay is in itself a type of a benefit given that, similar to all other benefits enumerated in the collective agreement, benefits are earned if an employee works in the same way as pay is earned for work performed.

EMPLOYER SUBMISSIONS

Counsel noted that under article 37.19, a difference which arises between the parties may only be referred to arbitration "after exhausting the grievance procedure". The Union is therefore prevented from raising a new issue after a grievance has been referred to arbitration. See: *GNWT v. UNW* (2011) N.W.T.S.C. 32 (Richard J.); *St. Joseph's Health Centre, Toronto v Ontario Nurses Association* (Slotnick) (Ontario)(October 24, 2018).

A reading of the grievance indicates that the concern over pay as an issue in dispute was never raised by the Union in the original policy grievance. What was raised is clearly issues involving claims of delay in the payment of benefits. Pay was never in the mind of the Union or the Employer when this grievance was referred to arbitration. See: *Nadeau v. Deputy Head (Corrections Canada)* 2014 P.S.L.R..B 82 in support of the proposition that the Employer should know the specifics of a grievor's complaint in order that it may address and try to resolve it during the course of the grievance procedure.

The Employer further submits that the principles of arbitration require that there be a "back and forth" discussion of the issue in dispute through the steps in the grievance procedure. In this case, the Union is attempting to expand the scope of the grievance to include pay.

The Employer noted in that regard that the issue of pay was admittedly raised by the Union in its correspondence, but only to the extent that it would be argued at arbitration. The Employer did not waive its rights in the email correspondence to object to the jurisdiction of the arbitrator to hear the pay issue.

The unresolved issue, and the essence of the grievance, was the matter of benefits not being delivered in a timely manner i.e. employees were not receiving reimbursement for their dental plan or relocation expenses. Pay is a separate provision with all its particulars set out expressly under article 24 and Appendix B.

Counsel for the Employer further notes that pay was never referenced in the particulars of the grievance document nor is there an allegation that article 24 was breached. The issue of pay was never brought up prior to the filing of the grievance and the Union is prevented on the basis of the applicable arbitral principles from doing so now.

UNION SUBMISSIONS

The Union submits that raising the issue of pay does not change the fundamental nature of the grievance. It is simply another example of a type of benefit that is not being provided in a timely manner by the Employer. In the Union's view, benefits are grouped together under the collective agreement and any questions that arise, whether they be in relation to matters of relocation or pay, for example, all go the Human Resources Helpdesk for a response. The fundamental nature, and the crux of the grievance, has not changed. It includes a broad scope of items such as pensions, health and welfare benefits and insurance. Like pay, they all have a monetary value and are part of the compensation package for employees under the collective agreement.

The Union also asserts that the Employer was fully aware of the issue raised by the Union with respect to delays in the processing of pay and benefit claims prior to the referral of this grievance to arbitration. Counsel notes that in one case a Ms. Chaisson, who was employed in Sachs Harbor, was not being paid as a result of issues she was

experiencing with the payroll system (Peoplesoft) and filed a grievance (17-E-02213) on December 12, 2017. That grievance was resolved. The same pay issues were raised by the Union again when Ms. Chiasson experienced similar pay issues resulting from work completed between August 29 and September 10, 2018. The Employer, similar to all the other examples adduced in evidence, acknowledged the understanding that her issues would be included in the current grievance (17-P-02163).

The Union submits that the Employer failed to put the Union on notice in its correspondence that it was objecting to the scope of the grievance. Indeed, the Employer acknowledged that the various claimants pay and benefit issues with Human Resources Department, and the Helpdesk in particular, would be added to the current grievance at arbitration. The Employer acquiesced to the addition of the items by acknowledging in writing in each case that the Union intended to rely on the example provided at arbitration. By objecting some two years later to the hearing of the pay issue the Employer has denied the Union the opportunity to resolve these issues at an earlier time. From the Union's perspective, this amounts to a breach of article 1.01 to maintain a harmonious and mutually beneficial relationship between the parties.

The Union further submits that the Employer's objection to raising a pay issue is a technicality. At the core of the Union's grievance, as noted, is a system which failed to deliver proper services involving compensation items which employees are entitled to under the collective agreement. The facts here, in the Union's view, are similar to those set out in a decision of Arbitrator Ponak *GNWT v. PSAC (Rest and Meal breaks)* (April 22, 2018) where he found in the exchange of documents that senior Union and Employer representatives understood the broad scope of the grievance. Further, the absence of a

reference to Article 24 as part of the general recitation of alleged breached provisions in the grievance does not preclude the arbitrator from dealing with it in the context of the collective agreement as a whole.

EMPLOYER REPLY

Counsel for the Employer noted that the discussions between the Union and the Employer in the decision of Arbitrator Ponak involving *Rest and Meal Breaks* occurred both before and after the grievance was referred to arbitration. The additional pay issues raised by the Union here occurred only after the arbitration process was engaged. Counsel also notes that, in reading the grievance, one would objectively not understand that the issue concerned pay arising out of the payroll system but rather reimbursement issues involving benefits. All indications in the grievance point to the issue being limited to one of benefits. Unlike the benefits concerns, the pay issue was not exhausted through the steps of the grievance procedure before being referred to arbitration. The Union, if that was their intent, should have drafted the grievance to show that the core issue was a failure within the system to process pay and benefits promptly rather than just a failure to pay benefits.

ANALYSIS

The Employer has raised a preliminary objection that my jurisdiction should not extend to resolving those pay issues that arose since the referral to arbitration.

It is helpful to start with the principle that grievance documents, unlike court pleadings, should be broadly construed in order to deal with the issue at the heart of the dispute. I note in that regard the comments of the Ontario Court of Appeal in *Blouin*

Drywall (1975) 57 D.L.R. (3d) 199 at 204 (Brooke J.), as cited by Arbitrator Sims in his Preliminary Award in *UNW v. GNWT (medical centre transportation*) (June 17, 2015) at p. 9:

> "No doubt it is the practice that grievances be submitted in writing and that the dispute be clearly stated, but these cases should not be won or lost on the technicality of form, rather on the merits and as provided in the contract and so the dispute may be finally and fairly resolved with simplicity and dispatch".
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> He went on to state:
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> "Certainly, the board is bound by the grievance before it but the grievance should be liberally construed so that the real complaint is dealt with and the appropriate remedy provided to give effect to the agreement provisions".

I also note the comments at p. 11 in the Sims award where a reference is made to *St. Lawrence College v. CUPE, Local 2107* 238 L.AC. (4th) 263 at para 42:

> The foregoing authorities indicate the written grievance is not determinative in defining the full extent of the dispute; but rather in ascertaining the scope of the grievance one is to consider all of the surrounding circumstances, which is a non-exhaustive list of factors that includes the context of which the grievance arises, the relevant discussions of the parties leading up to and in the course of the grievance procedure, as well as an assessment of whether an issue not explicitly identified in writing or even the subject of oral or written dialogue between the parties is nonetheless implicit or inherently joined with the grievance filed, applying a broad prospective in that analysis.

The importance of not broadening the scope of a grievance at arbitration was addressed by Justice Richard in the June 9, 2011 *UNW v GNWT* decision where an issue involving union representation was raised for the first time at arbitration:

> [22] In my view the internal grievance procedure that the employer and the union have agreed to in the collective agreement must be allowed to work as intended. The newly-raised issue of a breach of union representation rights in May 2007 ought to have been addressed by the timely presentation of such a grievance in

> the internal grievance procedure (and perhaps resolved by the parties) rather than presenting the grievance, for the first time, directly to the Arbitrator. Under the terms of the collective agreement between the parties, the Arbitrator simply does not have jurisdiction to deal with the newly-raised issue of a breach of Article 37.07(d).

The Employer in my view has a point in arguing that although both pay and benefits do have a compensatory aspect to them, they are nevertheless treated separately within the normal course of the employment relationship. Pay for work performed is a basic precept of the employment relationship. Indeed, article 24 of the collective agreement, entitled “Pay”, sets out that employees are entitled to “be paid for services” according to their position and the pay rates set out in the appendices. There is no reference to benefits in article 24, such as moving allowances or dental plans, to cite two examples, in the pay provision. Benefits are separately negotiated items that are dealt with individually under the collective agreement. In addition, I note there was no reference to pay as a stand-alone issue in the grievance. Indeed, as the Employer pointed out, the Union only mentions “benefits” in their Call Out to the membership:

> *Are you a GNWT employee experiencing problems with benefits, then we want to hear from you! The UNW has an open/active grievance regarding employee benefits.*
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> *(For more information, see our poster).*

I agree that it is clearly important, as Justice Richard notes, that the parties try and resolve their dispute through the steps of the grievance procedure and that each side knows the case they have to meet once the matter has been referred to arbitration. On the other hand, a principle that has been stressed through the years is the importance in

the grievance and arbitration process of dealing with the issue at the heart of the dispute. As noted by Arbitrator Stanley in the *Liquid Carbonic Inc.* decision, cited in the Sims award at p. 10, it is important to keep the proceedings flexible but not at the cost of denying the parties the benefit of the grievance procedure.

The main complaint of the Union was articulated by Mr. Avery when he noted that employees were not having their claims processed in a timely manner through the Helpdesk and the Human Resources Department personnel. That in my view is at the core of this dispute. Although pay and benefits are dealt with separately under the collective agreement, there is a sufficient link between the two in this case to fall within the scope of the grievance given that the real issue is one of delayed reimbursement rather than a strict claim for pay that would otherwise fall under article 24, such as a claim for overtime.

The fact that the pay issues arose after the grievance was filed is not a sufficient basis in this particular case to find that the pay issue falls outside the scope of the grievance. A review of the email correspondence demonstrates that the Employer was alive to the issue that there were delays in both pay and benefits as the grievance proceeded towards the arbitration hearing. It would be an error in my view to preclude the pay examples being heard in these proceedings simply because they were raised after the grievance was processed to arbitration. That would undermine the flexibility of the grievance and arbitration process which aims to resolve these kinds of disputes in an expeditious manner.

I would add that the email correspondence between the Employer and the Union indicates that the Employer was aware that the Union intended to rely on the pay delays experienced by a number of individual employees at the current arbitration hearing. I accept Mr. Avery's testimony that he would simply have filed separate grievances for the individuals, as he had done in the past, had the Employer objected to the pay concerns of the individual employees being heard in these proceedings. In short, it is my view that the Employer is now estopped from objecting to the inclusion of individual pay examples of certain employees as part of this grievance given the express representation to Mr. Avery (*"I have noted the example and the Union's position, which I understand the Union intends to rely on for Grievance #17-P-02163*) that the issue of pay would be dealt with as part of these proceedings and Mr. Avery's reliance on that representation to his detriment.

For all the above reasons, the preliminary objection of the Employer is dismissed and the parties may reconvene to deal with the merits of the grievance, including all benefits and pay examples.

JOHN M. MOREAU QC
June 20, 2019