

**USW-COASTAL FOREST INDUSTRY HEALTH AND WELFARE PLAN**

**THIRD PARTY DECISION RE:**

**BENEFIT COVERAGE DURING LABOUR DISPUTE**

**RECONSIDERATION**

**April 21, 2023**

**VANCOUVER, B.C.**

**THIRD PARTY**

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In *Bromley v. Getzie*, 2023 BCSC 446 the court directed me to reconsider the Clarification Decision referred to below with reference to the estoppel argument put forth by the Union Trustees. The results of my reconsideration are set forth herein.

**BACKGROUND**

On January 24, 2020 I issued a decision in this matter (the "Decision"). The first question put to me and the first part of the answer given in the Decision follows:

1. Are plan members who are engaged in a lawful strike covered under the Plan during the duration of that lawful strike on the basis set out in the April 1, 1993 Trustees' Resolution?

The answer must be given in two parts.

Yes, but in respect of members who are employed by an employer who is a FIR member company as per the Plan No. 1 '93 Resolution only as long as section 62 of the Labour Code is in force.

Counsel agreed that I would provide clarification of the Decision pursuant to section 27 (4) of the Arbitration Act by answering the following question:

Are each of Western Forest Products and the other non-member employers referenced in paragraph 26 of the Agreed Statement of Facts a “FIR member company” for the purposes of the first part of the answer to question 1 of the Decision?

Paragraph 26 of the Agreed Statement of Facts is reproduced below. The reference to Tab 8 is to the 1986 Agreement discussed below.

In 1993 (and for many years before) FIR was the accredited bargaining agent for all major companies in the coastal forest industry with the authority to negotiate for and bind all employers to collective agreements. WFP, the largest Coastal forest company, withdrew from FIR March 1, 2008. Thereafter, FIR was the accredited bargaining agent for a small number of independent companies and could no longer bind WFP or other non-members to collective agreements or ancillary documents, such as Tab 8.

On July 23, 2020 I issued a Clarification Decision (the “Clarification Decision”) which answered the clarification question in the negative, i.e. that Western Forest Products and the other non-member employers were not a “FIR member company for the purpose of the first part of the answer to question 1 of the Decision”.

The Clarification Decision included two key determinations relevant to this reconsideration. The first clarified that for the purposes of the Plan the nature of the Plan No. 1 '93 Resolution was an administrative practice and the second clarified that it continued what was essentially a labour relations agreement intended to only apply to FIR accredited employees (see Tab 3 & 4 Supplemental Book of Documents section 8 of the 1988 and 2004 Participation Agreements which provide that Plan 1 participation ends on cessation of FIR membership.)

In 1993 there were two separate plans, Plan 1 and Plan 2. The participating employers of Plan 1 were FIR accredited employers and one half of the trustees were appointed by FIR. The participating employers of Plan 2 were not FIR accredited employers (Tab 6 second Book of Documents Reciprocal Benefits Agreement). Both plans contemplated the continuation of benefits during a labour dispute. The trustees of Plan 1 did so by means of a policy being the Plan No. 1 '93 Resolution. Plan 2 required that there be an underlying agreement between union and employer before benefits under the plan would continue during a labour dispute. Plan 1 did not call for such an underlying agreement because the participating employers were FIR accredited and FIR appointed one half of the board of trustees.

As stated in the Decision and the Clarification Decision continuation of benefits coverage during a strike was never incorporated into the Plan 1 text. The original document brief submitted with the Agreed Statement of Facts reflects the fact that the Continuation of Benefits During Labour Dispute provisions were contained in the Plan 1 Administration Manual (Tab 14 July 26, 2007 memo Plan Administrator to Participating Employers (if affected by the current strike)). So, while the continuation of benefits during a labour dispute was part of the “benefit package” the Clarification Decision found that the requisite underpinning for this was a de facto labour relations agreement and not a plan provision per se. Hence only FIR accredited employers were affected.

The continuation of benefits during a labour dispute is a marked departure from the situation under the general law and section 62 of the Labour Code. In the circumstances I have determined that the intent of the Plan No. 1 '93 Resolution was that it would only apply to FIR accredited employers.

## THE ESTOPPEL ARGUMENT

The Union Trustees' estoppel argument is found at paragraphs 22 to 34 of the Union Trustees' Written Position on the Clarification.

The submission briefly summarized the equitable doctrine of estoppel as follows:

“Where a party has made an unequivocal representation, detrimentally relied upon by the other party, the first party is estopped from reversing its position.”

The Union Trustees submit that:

- FIR and the Benefits Only Members (i.e. Western Forest Products and others) held themselves out as FIR members for the purpose of the Trust;
- the Trustees relied on that representation and permitted the Benefits Only Members to remain in Plan 1 without amending the trust; and
- the reliance on the representation was financially detrimental to Plan 1.

More particularly, the Union Trustees assert that:

- the Parties must be estopped from treating the Benefits Only Members of FIR as anything other than members of FIR, or from requiring accreditation in FIR as a prerequisite to being considered a member of FIR for the purpose of the Trust;
- equity demands that FIR, WFP Inc. and the Industry Trustees be estopped from Maintaining Benefits Only members of FIR are not a “FIR member company” for the purpose of the first part of Question 1; and
- it would be an injustice to the Plan and its members to permit those parties to escape the application of the 1993 Plan 1 Resolution by parsing categories of membership in FIR such that the rules of Plan 1, which should be applicable to all those who were participants in the plan, only apply to those who are accredited to FIR.

The FIR Trustees assert that:

- estoppel does not apply to these facts;
- there was no representation as asserted by the Union Trustees; and
- even if there was a representation there was no reliance.

## **BENEFITS ONLY MEMBERS**

In June of 2005 FIR introduced a new category of membership called "Benefits Only Members". The FIR Board Proposal dated June 14, 2005 (Tab 7 Supplemental Book of Documents) explained Benefits Only Members are not part of FIR accreditation but participate in Plan 1 and the FIR-Dental and EH Plan.

Details of Benefits Only Membership were stated to be:

- employers to pay FIR an admin fee of 3.25% of PBC premiums retroactive to Nov. 2004;
- WI experience rating to be modified to ensure there is no net subsidy to any Benefits Only Member on an ongoing basis; and
- Benefits Only Members or FIR may end the arrangement on three months' written notice.

On June 22, 2005 one FIR Trustee and one Union Trustee signed an LOU to permit Benefits Only Members to participate in Plan 1 and to provide that the parties adopt an interpretation of section 1.03 of the trust agreement to the effect that "a member of FIR" will include both accredited members and such "benefits only" members that are duly named by FIR.

The full board of Plan 1 met March 27, 2006 and the minutes (Tab 11 Supplemental Book of Documents) include the following:

- Previous teleconferences of June 23, 2005 and July 14, 2005 approving Benefits Only Members participating in the plan are adopted as part of the minutes;
- The Plan administrator indicated section 1.03 of the trust agreement did not require amendment as "FIR Member" would on a plain meaning include Benefits Only Members and that legal counsel concurred in that view;
- Separate experience rating for Benefits Only Members proposed in a report from the plan actuary was adopted.

Effective March 1, 2008 Western Forest Products withdrew from FIR (Tab 12 Supplemental Book of Documents). Trustee minutes of November 6, 2008 (Tab 14 Supplemental Book of Documents) confirms Western Forest Products was now a Benefits Only Member effective March 1, 2008 and would remain in the plan.

The Union Trustees maintain as a key part of their estoppel argument that it is not just to parse categories of membership in FIR such that the plan rules only apply to accredited FIR members. This proposition is squarely at odds with the nature and character of the Plan No. 1 '93 Resolution as explained in the Clarification Decision. It follows that the FIR Trustees are not resiling from the Plan No. 1 '93 Resolution as it is properly understood.

Therefore the doctrine of estoppel has no application to the facts of this case. Moreover, I have also determined there was no representation or detrimental reliance which would support an estoppel argument.

## REPRESENTATION

I find nothing on the facts presented to suggest that some form of representation was made by any party which suggested that Benefits Only Members would be bound by the Plan No. 1 '93 Resolution. During the 2007 strike several employers refused to continue benefit coverage. The reaction of the trustees thereafter was to implore the employers and union to negotiate an agreement concerning the continuation of benefits during a labour dispute. In a letter from the Plan Administrator to The Negotiating Committees, FIR and the union dated January 2, 2009 it was stated that "the issue is beyond the scope of the Board of Trustees" (Tab 16 First Book of Documents). The contents of that letter are consistent with minutes of trustee meetings of February 22, 2008 (Tab 13 First Book of Documents), April 24, 2008 (Tab 14 First Book of Documents), and November 6, 2008 (Tab 15 First Book of Documents). I infer from this course of conduct that the trustees were clearly of the understanding that the Benefits Only Members were not bound by Plan No.1 '93 Resolution and that no representation to the contrary had ever been made. I also note the letter from the Plan Administrator was approved by the FIR Trustee caucus and the Union Trustee caucus (Trustee meeting minutes of May 5, 2009 at Tab 17 First Book of Documents).

## DETRIMENTAL RELIANCE

While conceding there was some benefit to Plan 1 in admitting Benefits Only Members, the Union Trustees assert that the impact on Plan 1 was primarily negative, citing that FIR was paid an admin fee of 3.25% of premiums and the plan retained liabilities which would otherwise have been transferred to Plan 2. The evidence does not support this contention. In particular:

- The 3.25% admin fee was paid by the employers and merely collected by the plan as a convenience to FIR (Tab 11 Supplemental Book of Documents, trustee meeting minutes March 27, 2006);
- The admission of Benefits Only Members was done on the understanding the WI experience rating would be revised to ensure no subsidy for Benefits Only Members;
- Incurred liabilities were amortized as per the plan actuary's report and recommendation considered at the trustee meeting of March 27, 2006 referred to above; and
- The trustees could and appear to have managed and mitigated any adverse financial impacts (Tab 13 Supplemental Book of Documents memo to WFP confirming no cross-subsidy)

## SUMMARY

The doctrine of estoppel does not apply to the facts of this case and in any event the necessary elements of a representation and detrimental reliance thereon are not present on the facts. Therefore, the Clarification Decision stands as issued.

*Shawn Hatch*

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Shawn Hatch