IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Bromley v. Getzie,*
2023 BCSC 446

Date: 20230323
Docket: S209449
Registry: Vancouver

Between:

Jeff Bromley, Glen Cheetham, Pat Kinney and Scott McRitchie
Petitioners

And

Tom Getzie, Doug Regier, Stephen Butterfield and Dwight Elliott
Respondents

Before: The Honourable Mr. Justice Brongers

Application for leave to appeal and to set aside an order of an arbitrator appointed under the *Arbitration Act,* RSBC 1996, c. 55, dated July 23, 2020

Reasons for Judgment

Counsel for the Petitioners:	S.I. Banister, K.C.
Counsel for the Respondents:	C.E. Leenheer
Place and Date of Hearing:	Vancouver, B.C. December 16, 2022
Place and Date of Judgment:	Vancouver, B.C. March 23, 2023

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INTRODUCTION

[1] This is an application for leave to appeal and to set aside an arbitration award under ss. 31 and 30 of the *Arbitration Act,* R.S.B.C. 1996, c. 55 [*Act*].

[2] The proceeding arises out of a dispute between the trustees of a health and welfare benefit plan that covers certain forest industry workers. The general issue is whether benefits under the plan are payable to these workers during a strike or lockout. The union trustees argue that they are; the employer trustees argue that they are not.

[3] The trustees agreed to have their dispute resolved by an arbitrator. The arbitrator effectively concluded that the workers in question were not entitled to benefits under the plan during work stoppages. This conclusion was based largely on the arbitrator's assessment of the connection between the employers of the workers in question, and the employers' organization that is a party to the plan's trust agreement. The arbitrator found that these particular employers were not members of the employers' organization. The union trustees disagree with the arbitrator's assessment. They now seek to have it quashed through these proceedings.

[4] Having reviewed the arbitrator's reasons and the petition record, I am not persuaded that they reveal a basis that would justify granting leave to appeal on a question of law arising from the arbitration award. I also do not accept the union trustees' argument that the arbitrator exceeded his jurisdiction. However, I agree with the union trustees that the arbitrator did not provide adequate reasons in respect of one of their central arguments, and that this constitutes a denial of natural justice. This petition will therefore be allowed, and the arbitrator will be directed to reconsider his award.

BACKGROUND

The Plan and the Parties

[5] The USW-Coastal Forest Industry Health and Welfare Plan (the “Plan”) is a jointly trusteed health and welfare plan managed by eight trustees. The Plan provides for various employee benefits, including life insurance, accidental death and dismemberment insurance, and weekly indemnity insurance.

[6] The Plan’s trustees are appointed pursuant to the USW-Coastal Forest Industry Health and Welfare Plan Restated Agreement and Declaration of Trust effective January 1, 2010 (the “Trust Agreement”). The parties to the Trust Agreement are:

(1) the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (a trade union, referenced as “USW”);

(2) Forest Industrial Relations Ltd. (an employers’ organization, referenced as “FIR”); and

(3) the eight individual trustees.

[7] Under the Trust Agreement, four of the individual trustees are appointed by USW (the “Union Trustees”), and four are appointed by FIR (the “Employer Trustees”). The two groups of trustees have equal voting power, with each being entitled to cast one vote collectively. In the event of a deadlocked vote, the Trust Agreement provides for final and binding arbitration to resolve such disputes.

The Dispute

[8] Between July 1, 2019 and February 15, 2020, the United Steelworkers, Local 1-1937 (the “Union”), which is a participating union in the Plan, engaged in strike action against Western Forest Products (“WFP”) and a number of WFP’s logging contractors on Vancouver Island. WFP and these contractors are referenced collectively as the “Employers” in these reasons.

[9] Just prior to the strike, the Plan's trustees issued a memorandum dated August 13, 2019 that was addressed to the Plan's "participating employers". It states:

> 1. During a legal strike, the collective agreement between the parties is not in force. As such when a strike occurs, all obligations of the employer to pay any compensation (wages and <u>benefits</u>) to employees cease, and the employer is free to terminate all benefits and benefit plan contributions. …
>
> 2. Section 62 of the BC Labour Code provides the Union an option to ensure continuation of benefits for its striking members by paying the required premiums, in advance, to the Plan carrier (Pacific Blue Cross). USW Local 1937 has, to date, declined this option.
>
> [Emphasis in original.]

[10] Section 62 of the *Labour Relations Code*, R.S.B.C. 1996, c. 244 [*Code*] does indeed provide for the possibility that health and welfare benefits for striking employees may be continued if the union agrees to pay for the premiums. During the strike, the WFP took the position that its employees' benefits would only continue if the Union were to exercise this option in accordance with s. 62 of the *Code.* The Union did not do so.

[11] Instead, the Union Trustees took the position that the Plan required the Employers to continue remitting premiums for their striking employees during labour disputes, thereby ensuring the continuation of benefits for the workers while they are on strike. In support of this, the Union Trustees referenced a Trustees' Resolution dated April 1, 1993 (the "Plan No. 1 '93 Resolution"). It states:

> To formally adopt the past industry practice (as in the 1981 and 1986 strikes), for the period that Section 62 of the Labour Code remains in effect.
>
> The key features of the past practice are:
>
> - Premiums continue to be paid for all benefits except WI [*Weekly Indemnity*].
> - Premiums are paid by the Employer, reimbursed by the employees after return to work.
> - Benefit coverage continues as usual except WI:
>   - For disabilities beginning before work stoppage, WI payments continue;

> - For disabilities beginning during the work stoppage, WI waiting period starts on the day the other employees return to work.

[12] The Employer Trustees, on the other hand, took the position that the striking employees were not entitled to benefits. With respect to the Plan No. 1 '93 Resolution, they argued that it was no longer effective and that, in any event, it does not operate to compel an employer to make premium contributions during a strike.

[13] This disagreement led to a deadlock of the Plan's trustees, resulting in the referral of the matter to a "third person" arbitrator pursuant to the terms of the Trust Agreement. On October 28, 2019, Shawn Hatch (the "Arbitrator"), a British Columbia lawyer who specializes in pension and benefit plan law, agreed to arbitrate the trustees' dispute as the "third person".

The Arbitrator's Original Award

[14] The Arbitrator was asked to answer four questions, of which the most significant for the purposes of this proceeding is the following (the "Original Question"):

> 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?

[15] The arbitration hearing took place on January 9 and 10, 2020, based on an agreed statement of facts and a document brief. The Arbitrator issued his decision on January 24, 2020 (the "Original Award").

[16] In his reasons, the Arbitrator noted that the Plan as presently constituted is a merger of separate health and welfare plans established pursuant to collective bargaining in the forest industry. In particular:

> The first plan had its origins in the Forest Products Industries Coast Region British Columbia Master Agreement for 1961-1962 to provide group life, weekly indemnity and accidental death and dismemberment coverage. A few basic details and principles were laid out in the agreement with a trust agreement between the bargaining agents to follow. In fact separate plans were established for FIR employers and their employees, referred to as

> **"Plan No. 1"**, and a second for independent employers and their employees **"Plan No. 2"**.
>
> [Emphasis in original.]

[17] The Arbitrator set out the text of the Plan No. 1 '93 Resolution and that of a similar resolution in respect of Plan No. 2 (the "Plan No. 2 '93 Resolution"). He found that the two resolutions form part of the benefit package offered by the two plans, as follows:

> While the Plan No. 1 '93 Resolution and the Plan No. 2 '93 Resolution do not appear to have been reflected in an amendment to the Plan text (which would have been the better practice) I am of the opinion that these resolutions were intended to and do form part of the benefit package offered by these two plans.

[18] The Arbitrator also concluded that the Plan No. 1 '93 Resolution and the Plan No. 2 '93 Resolution have not been revoked and are therefore still part of the present day benefit package under the Plan.

[19] The Arbitrator then went on to consider whether or not the obligations created by the Plan documents survive a strike or lockout. The Arbitrator ultimately found that they do, and answered the Original Question as 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.
>
> Yes, but in respect of members who are employed by an independent employer only if there is an agreement between the employer and local union that benefits will continue as per the Plan No. 2 '93 Resolution.

The Arbitrator's Clarification Award

[20] The trustees did not seek to appeal or set aside the Original Award. However, they felt that the Original Award did not clearly determine the issue of whether the Employers were "FIR member companies", such that their striking employees would be entitled to benefits in accordance with the terms of the Plan No. 1 '93 Resolution.

[21] A conference call was held between counsel for the parties and the Arbitrator to discuss this concern in late January 2020. During the call, counsel for the Union Trustees requested a clarification of the Original Award. An exchange of correspondence then followed, culminating in a letter dated March 17, 2020 from the Arbitrator addressed to counsel for the parties regarding the specific form of the question to be posed for clarification. In that letter, the Arbitrator proposed the following “Clarification 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 [*i.e., the Original Question*]?

[22] It should be noted that “[p]aragraph 26 of the Agreed Statement of Facts” is worded as follows:

> In 1993 (and for many years before) FIR was the accredited bargaining agent for all major companies in the coastal forest industry with 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.

[23] It should also be noted that “Tab 8” referenced in para. 26 of the Agreed Statement of Facts is a document titled “Agreement With Respect to Continuation of Benefits Under I.W.A. - - Forest Industry Health & Welfare Plan” dated July 29, 1986. It provides for the continuation of employee benefits during strikes or lockouts on the basis that employers will pay for the premiums and then be able to recover them following the employees’ return to work.

[24] The Arbitrator concluded his March 17, 2020 letter by inviting the parties to express any objections to having him answer the Clarification Question on jurisdictional grounds. Apparently, there were none.

[25] A hearing with respect to the Clarification Question was held on July 20, 2020. The evidence before the Arbitrator was supplemented by an additional agreed statement of facts and documents, as well as two “will say” statements.

[26] On July 23, 2020, the Arbitrator issued his clarification decision (the "Clarification Award"). The Arbitrator concluded that the Employers are <u>not</u> FIR member companies for the purpose of the first part of the answer to the Original Question. In his reasons for reaching this conclusion, the Arbitrator explained as follows:

> The Plan No. 1 ['93] Resolution was different [from the Plan No. 2 '93 Resolution] in that an agreement between union and employer was not a pre-condition for the continuation of benefits during a strike or lockout. This was also understandable since the employers were all accredited to FIR. In effect the foundational agreement between labour and management to the continuation of benefits during a strike or lockout was subsumed in the Plan No. 1 '93 Resolution by virtue of the governance structure of Plan No. 1.
>
> Long after the Plan No. 1 '93 Resolution was passed a number of events transpired which could not possibly have been within the contemplation of the trustees of Plan No. 1 at the time that resolution was passed. In particular, the plan witnessed many employers de-accrediting from FIR. This would normally have resulted in these employers moving to Plan No. 2. However, FIR also modified its membership criteria to provide for benefits only membership and the trustees of Plan No. 1 agreed to accept these benefits only employers as participating employers even though they were not accredited to FIR. In addition, the two plans merged.
>
> As I noted in the [Original Award], the Plan No. 1 '93 Resolution was never incorporated into the plan text by way of a plan amendment. This limits the efficacy of the Plan No. 1 '93 Resolution to that of an administrative practice intended to bind FIR accredited employers.
>
> Putting the Plan No. 1 '93 Resolution into historical context and applying a purposive interpretation, I am of the opinion that the Plan No. 1 '93 Resolution only binds Plan No. 1 employers that are accredited to FIR. This is consistent with the conduct of the parties. On July 2, 2009 [*sic: July 2, 2019*] Western Forest Products wrote to the union clearly stating it would not continue benefit contributions during the strike but acknowledged it would comply with section 62 of the Labour Relations Code. In response the union proposed a return to the "past agreement" whereby employer contributions continued and were repaid by employees after the strike (Tab 22 Original Book of Documents).
>
> Therefore, in answer to the question put for clarification, each of Western Forest Products and the other non-member employers referenced in paragraph 26 of the Agreed Statement of Facts is not a "Fir [*sic: FIR*] member company" for the purposes of the first part of the answer to question 1 of the Decision.

The Petition

[27] On September 21, 2020, the current Union Trustees (Jeff Bromley, Glen Cheetham, Pat Kinney, and Scott McRitchie) filed the present petition with the Court. The ultimate and preferred relief sought by the Union Trustees is that the Clarification Award be amended so that it effectively provides that the Employers <u>are</u> considered to be FIR member companies for the purpose of the first part of the answer to the Original Question. In the alternative, they ask that the Clarification Award be set aside, or that the matter be remitted to the Arbitrator for reconsideration with directions from the Court. The Union Trustees also seek their costs of this proceeding.

[28] The petition names the current Employer Trustees (Tom Getzie, Doug Regier, Stephen Butterfield, and Dwight Elliott) as respondents. They filed their response to petition on October 19, 2020. The Employer Trustees ask that the petition be dismissed, with costs. In the alternative, if the petition is allowed, they submit that the matter should be returned to the Arbitrator for reconsideration in accordance with the Court's guidance.

ISSUES

[29] Adjudication of this petition requires consideration of the three grounds advanced by the Union Trustees to challenge the Arbitrator's Clarification Award. They give rise to the following questions:

(a) Did the Arbitrator commit an error of law by relying on the conduct of the Employers and the Union to make his decision?

(b) Did the Arbitrator breach principles of natural justice and deny the Union Trustees a fair hearing by not considering their estoppel argument?

(c) Did the Arbitrator exceed his jurisdiction by amending the Original Award rather than simply clarifying it when he found that the Plan No. 1 '93 Resolution was a mere administrative practice after previously finding that it was incorporated into the Plan?

(d) If the answer to (a), (b) or (c) is yes, what remedy should be granted?

[30] These questions will be addressed after a discussion of the legislative framework that applies to this petition.

ANALYSIS

Legislative Framework

[31] There is no dispute that this petition has been properly brought pursuant to the *Act* notwithstanding its repeal and replacement by the new *Arbitration Act*, S.B.C. 2020, c. 2 [*New Act*]. The transitional provision in the *New Act* (s. 70) limits its application to arbitral proceedings commenced on or after its coming in to force, which occurred on September 1, 2020. In the present case, the proceedings before the Arbitrator commenced well before that, on October 28, 2019.

[32] As has already been noted, the Union Trustees have invoked two provisions in the *Act* which empower the Court to review arbitral awards: ss. 31 and 30. This legislation is set out here.

Section 31 of the Act (Appeals from Arbitral Awards)

[33] Section 31 of the *Act* is titled "Appeal to the court". The relevant portions provide:

> 31(1) A party to an arbitration, other than an arbitration in respect of a family law dispute, may appeal to the court on any question of law arising out of the award if
>
> > (a) all of the parties to the arbitration consent, or
> >
> > (b) the court grants leave to appeal.
>
> (2) In an application for leave under subsection (1) (b), the court may grant leave if it determines that
>
> > (a) the importance of the result of the arbitration to the parties justifies the intervention of the court and the determination of the point of law may prevent a miscarriage of justice,
> >
> > (b) the point of law is of importance to some class or body of persons of which the applicant is a member, or
> >
> > (c) the point of law is of general or public importance.

> (3) If the court grants leave to appeal under subsection (2), it may attach conditions to the order granting leave that it considers just.
>
> …
>
> (4) On an appeal to the court, the court may
>
> > (a) confirm, amend or set aside the award, or
> >
> > (b) remit the award to the arbitrator together with the court's opinion on the question of law that was the subject of the appeal.

[34] In other words, it is possible to appeal arbitral awards to the Court, but only on a "question of law arising out of the award". However, unless the parties to the arbitration consent, such appeals may only be brought if leave to appeal is granted first. Furthermore, the Court may only grant such leave if it finds that the proposed appeal is of sufficient "importance", in any of the three senses stipulated by s. 31(2) of the *Act.*

[35] The principles that apply to the adjudication of s. 31 leave to appeal applications have been set out often in the jurisprudence of this Court, our Court of Appeal, and the Supreme Court of Canada. Many of these authorities were brought to my attention by counsel for the parties at the hearing. I found the most helpful one to be our Court of Appeal's judgment in *MSI Methylation Sciences, Inc. v. Quark Venture Inc.*, 2019 BCCA 448 [*MSI*]. It contains a thorough review of both the historical basis for the right to appeal arbitration awards in British Columbia, and the jurisprudence that has interpreted the scope of that right, including the leading Supreme Court of Canada decisions of *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 and *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32. Based on these authorities and the legislative evolution of s. 31 of the *Act,* Justice Hunter summarized the applicable arbitration award appeal principles as follows in para. 72 of *MSI*:

> (a) Appeals are limited to questions of law arising out of the award. If the proposed question is not a question of law arising out of the award, there is no jurisdiction to grant leave to appeal.
>
> (b) A question of law may be explicit or implicit in the award. If the question of law is explicit in the award, the statutory precondition is met. If the asserted question of law is implicit in the award, in the sense that it must be extricated from the application of the law to the facts, care must be taken to distinguish

> between an argument that a legal test has been altered in the course of its application (a question of law) and an argument that application of the legal test should have resulted in a different outcome (a question of mixed fact and law).
>
> (c) One means of determining whether the challenged proposition is a question of law or part of a question of mixed fact and law is to consider the level of generality of the question. If the answer to the proposed question can be expected to have precedential value beyond the parties to the particular dispute, the question is more likely to be characterized as a question of law. On the other hand, if the answer to the proposed question is so tied to the particular circumstances of the parties to the arbitration that its resolution is unlikely to be useful for other litigants, the question will likely be considered a question of mixed fact and law. I would add to this that when the “question” is stated as a ground of appeal that is integrally tied to the facts of the case, it will more likely be characterized as a question of mixed fact and law, the answer to which cannot be of general application because of the integration of the particular facts of the case to the question. The more the question can be abstracted from the particular facts to a question of principle, the more likely it is that the challenged proposition will be characterized as a question of law with potential precedential value.
>
> (d) A narrow scope for what constitutes extricable questions of law is consistent with finality in commercial arbitration.

[36] Accordingly, I will apply these principles when considering the Union Trustees’ application for leave to appeal the Arbitrator’s Clarification Award under my discussion of “Issue 1”.

Section 30 of the Act (Setting Aside Arbitral Awards)

[37] Section 30 of the *Act* is titled “Court may set aside award”. The relevant portions provide:

> 30(1) If an award has been improperly procured or an arbitrator has committed an arbitral error, the court may
>
> > (a) set aside the award, or
> >
> > (b) remit the award to the arbitrator for reconsideration.
>
> (2) The court may refuse to set aside an award on the grounds of arbitral error if
>
> > (a) the error consists of a defect in form or a technical irregularity, and
> >
> > (b) the refusal would not constitute a substantial wrong or miscarriage of justice.

> (3) Except as provided in section 31, the court must not set aside or remit an award on the grounds of an error of fact or law on the face of the award.
>
> …

[38] Section 1 of the *Act* defines “arbitral error” as follows:

> 1 In this Act:
>
> "arbitral error" means an error that is made by an arbitrator in the course of an arbitration and that consists of one or more of the following:
>
> (a) corrupt or fraudulent conduct;
>
> (b) bias;
>
> (c) exceeding the arbitrator's powers;
>
> (d) failure to observe the rules of natural justice;

[39] In other words, s. 30 of the *Act* bestows a limited right to dispute an arbitral award that differs considerably from the one specified in s. 31 of the *Act.* While s. 31 is designed for substantive challenges to such awards, s. 30 deals with challenges that are more procedural in nature. Another difference is that while the former (s. 31) can only proceed with the consent of the parties or leave of the Court, the latter (s. 30) can be brought as of right. The two processes are somewhat similar, however, in that they generally require the Court to be satisfied that the defect in the arbitral award is of sufficient significance to warrant a remedy. This is done through the notion of “importance” set out in s. 31(2), and by giving the Court the discretion at s. 30(2) to refuse to set aside an award if the issue is just one of form or a technical irregularity - unless such a refusal to intervene would cause a substantial wrong or a miscarriage of justice. It should also be noted that this s. 30(2) discretion does not apply if the Court decides to remit the award to the arbitrator for reconsideration pursuant to s. 30(1)(b), as opposed to setting aside the award pursuant to s. 30(1)(a).

[40] In the case at bar, the Union Trustees’ s. 30 challenge is not founded on an allegation that the Clarification Award was “improperly procured”. Instead, they argue that the Arbitrator committed two “arbitral errors” when he issued the Clarification Award: (1) failing to observe the rules of natural justice; and (2)

exceeding his powers. The two arguments will be considered separately below under my discussion of "Issue 2" and "Issue 3".

Issue 1: Section 31 Application - Proposed Appeal on a Question of Law

The Parties' Positions

[41] The Union Trustees' primary ground for challenging the Clarification Award is that the Arbitrator committed an error of law by determining the applicability of the Plan No. 1 '93 Resolution by reference to the conduct of WFP and the Union. The Union Trustees say that WFP and the Union were simply participants in the Plan, with no ability to direct or affect its administration, and therefore the conduct of WFP and the Union is irrelevant. Instead, the applicability of the Plan No. 1 '93 Resolution could only have been determined by the conduct of the trustees who have the actual power to establish, amend, and clarify the terms of the Plan. Even if evidence of the conduct of WPF and the Union was relevant, however, the Union Trustees say that it is woefully insufficient to substantiate the suggestion that WFP was not bound by the Plan No. 1 '93 Resolution. Accordingly, the Union Trustees submit that leave to appeal should be granted, and that the proposed appeal should be allowed.

[42] The Employer Trustees disagree. They submit that the Union Trustees have simply raised an issue of contractual interpretation that is a mixed question of fact and law. Even if it is an extricable question of law, the Employer Trustees say that it is not of sufficient importance to warrant granting leave to appeal. In the alternative, if leave to appeal is granted, the Employer Trustees say that the error alleged by the Union Trustees reflects a misreading of the relevant paragraphs of the Clarification Award. The Arbitrator's reference to the conduct of WFP and the Union was made to address an estoppel argument raised by the Union Trustees, and was not part of the Arbitrator's interpretation of the Plan No. 1 '93 Resolution and its applicability to the Employers and the Union. Even if the conduct of WFP and the Union was considered by the Arbitrator, however, the Employer Trustees argue that it was not unreasonable for him to do so. As such, the application for leave should be

dismissed, or, if leave is granted, the proposed appeal should be decided and dismissed.

Discussion

[43] As a preliminary observation, it is important to keep in mind that this is an application for leave to appeal an arbitral award pursuant to s. 31 of the *Act.* While counsel for the Union Trustees highlighted authority to the effect that where leave is granted it is open to the court to decide the merits of the appeal at the same time (*UBC v. Assoc. of Administrative and Professional Staff on behalf of Bill Wong and Glasner, Q.C.*, 2005 BCSC 1286 at para. 44), the Court's analytical focus must initially be directed to whether the statutory preconditions for granting leave have been met. This requires the Court to first examine whether there is a proposed question of law arising from the Clarification Award that could be the subject of an appeal.

[44] In this case, the Union Trustees submit that there is such a question. It is said to be whether the past practice of parties who are not the trustees of a trust agreement can be relevant to determining the applicability of the agreement to those parties. The Union Trustees point to the following passage in the Clarification Award in support of its assertion that the Arbitrator erred in considering this question:

> Putting the Plan No. 1 '93 Resolution into historical context and applying a purposive interpretation, I am of the opinion that the Plan No. 1 '93 Resolution only binds Plan No. 1 employers that are accredited to FIR. This is consistent with the conduct of the parties. On July 2, 2009 [*sic: July 2, 2019*] Western Forest Products wrote to the union clearly stating it would not continue benefit contributions during the strike but acknowledged it would comply with section 62 of the Labour Relations Code. In response the union proposed a return to the "past agreement" whereby employer contributions continued and were repaid by employees after the strike (Tab 22 Original Book of Documents).
>
> [Emphasis added.]

[45] In my view, however, this is not a question of law that arises from the Clarification Award.

[46] When read in conjunction with the Original Award, a review of the Clarification Award reveals that the Clarification Question before the Arbitrator was relatively straightforward. He was only asked to determine whether each of WFP and the other non-member employers referenced in para. 26 of the Agreed Statement of Facts are a "FIR member company" for the purposes of the first part of the answer to the Original Question. In his Original Award, the Arbitrator answered that first question by finding that only Plan members employed by employers who are FIR member companies as per the Plan No. 1 '93 Resolution are covered by the Plan, but did not expressly indicate whether WFP and other FIR non-members are such employers.

[47] Paragraph 26 of the Agreed Statement of Facts stated that WFP had withdrawn from FIR effective March 1, 2008, and that, thereafter, FIR could no longer bind WFP or other non-members to collective agreements or ancillary documents such as the one at "Tab 8". As noted earlier, this document was a 1986 agreement that provided for the continuation of benefits during a work stoppage, with premiums being paid by the employer but subject to a right of recovery from the employees after their return to work.

[48] Given this wording of para. 26, therefore, it is perhaps not surprising that the Arbitrator concluded that WFP and the other non-member employers referenced therein are <u>not</u> FIR member companies for the purpose of the first part of the answer to the Original Question. In his reasons, the Arbitrator effectively explained his conclusion by reference to the fact that WFP and the other employers had long been de-accredited from FIR. It is also perhaps implicit in his reasons that the Arbitrator did not feel that there were other factors which would have warranted subjecting WFP and other non-FIR member employers to the terms for continuation of employee benefits during a work stoppage as set out in the Plan No. 1 '93 Resolution. That said, the Arbitrator's reasons do not expressly address the latter issue.

[49] In any event, regardless of the sufficiency of his reasons, this assessment by the Arbitrator was clearly a determination of a mixed question of fact and law relating

to an issue of contractual interpretation. Paraphrasing the words of Hunter J. in *MSI,* it is an answer to a question that is integrally tied to the facts of the case, and which cannot be readily abstracted from the facts to a question of principle. It does not give rise to an extricable question of law, particularly not the one proposed by the Union Trustees.

[50] In addition, I am not persuaded that the Arbitrator's fundamental assessment of the contractual interpretation issue before him was founded upon the Arbitrator's understanding of what transpired between WFP and the Union in 2019. Instead, I agree with the Employer Trustees that this discussion was likely included in the Arbitrator's reasons in an attempt to partially respond to the Union Trustees' estoppel argument, even though the Arbitrator also noted that these findings were consistent with his primary conclusion. I further agree with the Employer Trustees' assertions in paras. 40 and 41 of their Response to Petition that the parties' submissions before the Arbitrator likely explain this aspect of the Arbitrator's reasons:

> 40. The fact that this portion of the Clarification Award relates to the estoppel argument and not the interpretation argument is clear when the text of the award is put in the context of the Parties' submissions:
>
> > a. The Union Trustees' written submissions with respect to estoppel put in issue the conduct of "FIR and the Benefits Only Member of FIR" (including WFP) (Exhibit "G" to the Bromley Affidavit, para. 27);
> >
> > b. The Employer Trustees' written submissions in response to that issue specifically referred the Arbitrator to the correspondence at Tab 22 of the original Book of Documents to show that "the Union was not of the view that the 1993 Resolution Applied to WFP" (Exhibit "I" to the Bromley Affidavit, page 619); and
> >
> > c. The evidence that the Arbitrator describes following the sentence "This is consistent with the conduct of the Parties" is expressly the same evidence at Tab 22 that was referred to in the Employer Trustees' written submission rebutting the estoppel argument.
>
> 41. Accordingly, on a fair and contextual reading of the Clarification Award, there can be no suggestion that the Arbitrator relied on the conduct of WFP or the Union in his interpretation of the relevant instruments.

[51] In sum, I find that the Union Trustees have not identified a question of law arising out of the Clarification Award. In the absence of such a question, the Court

cannot grant leave to appeal the award pursuant to s. 31 of the *Act*, regardless of its potential importance, and regardless of the Court's view on whether the Arbitrator's conclusion is substantively flawed. The Union Trustees' leave application is therefore denied.

Issue 2: Section 30 Application – Alleged Arbitral Error from Breach of Natural Justice

The Parties' Positions

[52] The first arbitral error alleged by the Union Trustees relates to the estoppel argument just discussed above. The Union Trustees say that the Arbitrator failed to properly address or decide it, which constitutes a failure to observe the rules of natural justice. They assert that this argument was central to the Union Trustees' position on clarification, as evidenced by the fact that they dedicated a third of their written submissions to it.

[53] The Employer Trustees provide three arguments in response. First, they point to the Arbitrator's discussion of the correspondence between WFP and the Union as evidence that the Arbitrator turned his mind to the substance of the Union Trustees' Argument, even though he did not use the word "estoppel" in his reasons. Second, the Employer Trustees argue in the alternative that an arbitrator is not obliged to address every issue raised in their reasons, particularly if the determination of an issue is patently obvious on the record, as it is here. Third, the Employer Trustees argue that, in any event, the Union Trustees ought to have either sought further clarification from the Arbitrator, or brought an application for a reasoned award pursuant to s. 33 of the *Act.* By not pursuing these alternative remedies, the Employer Trustees are precluded from obtaining any relief under s. 30 of the *Act*.

Discussion

[54] A helpful review of the principles that apply to adjudicating applications to challenge arbitral awards under s. 30 of the *Act* on the basis of allegedly deficient reasons can be found in Justice MacDonald's decision in *Economical Mutual*

Insurance Company v. Intact Insurance Company, 2021 BCSC 1772 at paras. 44 to 46. The following are worth highlighting:

(a) arbitrators are required to give comprehensible reasons, but such reasons need not recite every submission and outline why every submission was accepted or rejected (*Hotel Georgia Development Ltd. v. The Owners, Strata Plan EPS849*, 2021 BCSC 1236 at para. 70);

(b) natural justice may be denied when the arbitrator fails to give a party the opportunity to present its case, refuses to admit relevant evidence, or fails to deal with all issues for determination (*Arbutus Software Inc. v. ACL Services Ltd.*, 2012 BCSC 1834 at para. 81);

(c) the principles of natural justice include an informed analysis such that the parties can understand how the arbitrator came to their conclusions (*0718698 B.C. Ltd. v. Ogopogo Beach Resorts Ltd.*, 2019 BCSC 1503 at paras. 21-27); and

(d) while reasons need not address every issue raised by the parties nor all of the evidence adduced, on the central issues there must be sufficient clarity to allow the parties and a reviewing court to understand how and why the decision was reached (*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para. 16).

[55] In the case at bar, the Union Trustees did indeed present a detailed estoppel argument to the Arbitrator for the purpose of determining the Clarification Question, in addition to their primary contractual interpretation argument regarding the relevant trust documents.

[56] In particular, the Union Trustees alleged that FIR and the "Benefits Only Members" of FIR such as WFP held themselves out as members of FIR for the purpose of the Plan, and that the Plan's trustees relied on that representation in order to permit the Benefits Only Members to remain in Plan 1 without amending the

trust document. Further, the Union Trustees argued that while FIR and the Benefits Only Members benefitted from this, there were negative economic consequences for the Plan caused by the lower contribution rates and higher liabilities relating to the Benefits Only Members. Accordingly, the Union Trustees argued that equity demands that FIR, WFP, and the Employer Trustees be estopped from maintaining that Benefits Only Members such as WFP are not each a “FIR member company” for the purpose of answering the first part of the Original Question.

[57] As has already been noted earlier in these reasons, a response to the Union Trustees’ estoppel argument was provided by the Employer Trustees. They denied that the Employer Trustees, if not all of the Plan trustees, were consistently of the opinion that the Plan No. 1 ’93 Resolution continued to apply to WFP and the other independent employers. They also pointed to the July 2019 correspondence between WFP and the Union that allegedly demonstrates that the Union did not view the Plan No. 1 ’93 Resolution as applying to WFP either. As such, the Employer Trustees argued that there was neither a representation nor any reliance that could give rise to a valid estoppel argument.

[58] Notwithstanding this engagement between the parties on the estoppel argument, the Arbitrator did not see fit to expressly address and clearly decide it in his Clarification Award. This is a surprising omission given that the Arbitrator appears to have been aware of the estoppel issue given his brief discussion of the July 2019 correspondence between WFP and the Union that is mentioned in his reasons, correspondence that was highlighted by the Employer Trustees in their response to the Union Trustees’ estoppel argument.

[59] In my view, whether the doctrine of estoppel applies was one of the central issues on the Clarification Question. It is also not “patently obvious” that the argument is without merit, as the Employer Trustees suggest. Accordingly, the Arbitrator’s lack of reasons in respect of this argument, one that was squarely raised by the Union Trustees, constitutes a failure to observe the rules of natural justice. This is an arbitral error that is deserving of a remedy, to be discussed below.

[60] In reaching this conclusion, I have considered the Employer Trustees' assertion that such relief should not be granted given that the Union Trustees did not seek a further clarification or bring an application for a reasoned award pursuant to s. 33 of the *Act.* I understand this to be an attempt to argue that the doctrine of exhaustion or adequate alternative remedies should somehow be applied to this petition, although the argument was not presented in these terms. In any event, these are administrative law principles and I was not made aware of any jurisprudence in which they have been applied in the arbitration context. When asked at the hearing whether he could cite any authorities in support of this proposition, counsel for the Employer Trustees candidly responded in the negative. In these circumstances, I am not prepared to accede to this argument here.

Issue 3: Section 30 Application – Alleged Arbitral Error from Excess of Jurisdiction

The Parties' Positions

[61] The other arbitral error alleged by the Union Trustees is that the Arbitrator exceeded his jurisdiction by amending, rather than clarifying, the Original Decision with respect to the Clarification Question. They say that in the Original Decision the Arbitrator found that the Plan No. 1 '93 Resolution had been incorporated into the Plan, notwithstanding it not having been included in a trustees' resolution. In the Clarification Award, however, the Arbitrator found that the fact that there had been no amendment to the Plan limited the efficacy of the Plan No. 1 '93 Resolution to that of an "administrative practice". The Union Trustees say that this amounted to amending the Original Award, which constitutes an impermissible excess of jurisdiction that warrants an order setting aside the Clarification Award.

[62] The Employer Trustees do not agree that the Arbitrator amended the Original Award. They note that the Arbitrator's actual finding was that the Plan No. 1 '93 Resolution was never reflected in an amendment to the Plan but was "intended to and do[es] form a part of the benefit package offered by these two plans". In other words, while the Arbitrator found that the Plan No. 1 '93 Resolution was part of the "benefit package", the Arbitrator did not say that it forms part of the Plan. In his

Clarification Award, the Arbitrator simply clarified that the Plan No. 1 ’93 Resolution was an “administrative practice intended to bind FIR accredited employers”. This is consistent with the Original Award, with the ultimate effect of the two awards being a finding that the Part No. 1 ’93 Resolution is an “administrative practice” that forms part of the “benefit package”. Accordingly, the Employer Trustees say that the Arbitrator did not exceed his jurisdiction.

Discussion

[63] In *Voong v. GPUN Broadway Investment Inc.*, 2017 BCSC 1521 at paras. 44 to 47, Justice Warren helpfully canvassed the guiding principles for applications to challenge arbitral awards on the basis of an alleged excess of jurisdiction under s. 30 of the *Act*. They can be summarized as follows:

(a) an arbitrator’s jurisdiction flows from the parties’ arbitration agreement, and is generally limited to answering the question submitted by the parties and any questions necessary for a determination of that question (*Student Assn. of the British Columbia Institute of Technology v. British Columbia Institute of Technology*, [1999] B.C.J. No. 554 at para. 31; aff’d 2000 BCCA 62);

(b) the parties to an arbitration agreement are not presumed to have agreed to submit all matters that may arise between them to arbitration (*Cut & Run Holdings v. Booze Bros. Holdings et al.*, 2005 BCSC 167 at paras. 24-25);

(c) if the arbitrator issues an award that goes beyond the scope of their arbitration agreement, they will have exceeded their jurisdiction and committed arbitral error (*BC Gas Inc. v. Westcoast Energy Inc.*, [1990] B.C.J. No. 2924 at paras. 22 and 40); and

(d) the scope of an arbitration agreement is determined by an analysis of the nature of the disagreement, the words of the arbitration clause, and the

terms of the contract as whole in their factual context (*St. Pierre v. Chriscan Enterprises Ltd.*, 2011 BCCA 97 at para. 21).

[64] It is evident that the starting point for an assessment of arbitral excess of jurisdiction arguments is the parties' arbitration agreement. Curiously, however, no actual arbitration agreement has been included in the petition record filed in the case at bar. Furthermore, neither counsel referenced the specific terms of the agreement in their argument on this issue. Instead, the Union Trustees' excess of jurisdiction argument is based solely on the wording of the Clarification Question.

[65] Given the record before me, I cannot accept the Union Trustees' argument. The only clear evidence regarding the circumstances surrounding the parties' agreement to seek clarification of the Original Award is the Arbitrator's letter of March 17, 2020 to counsel for the parties. It effectively confirms that the parties had agreed upon the Clarification Question, and that no jurisdictional concerns had been raised at that time. Furthermore, a review of the Clarification Award reveals that it contains an answer to the Clarification Question, albeit one that the Union Trustees disagree with. As for the characterization of the Plan No. 1 '93 Resolution as "an administrative practice intended to bind FIR accredited employers", I fail to see how this statement by the Arbitrator in his reasons for the Clarification Award falls outside the scope of the matters that the parties agreed that he would consider and address.

[66] In sum, I do not find that the Arbitrator committed an arbitral error by exceeding his jurisdiction. This argument of the Union Trustees is rejected.

Conclusion and Remedy

[67] I have concluded that the Arbitrator committed an arbitral error by failing to observe the rules of natural justice as a result of the insufficiency of his reasons in respect of the Union Trustees' estoppel argument. Accordingly, I will exercise my authority pursuant to s. 30(1)(b) of the *Act* and remit the Clarification Award to the Arbitrator for reconsideration in accordance with these reasons.

[68] I also note parenthetically that as I am not inclined to set aside the Arbitrator's award pursuant to s. 30(1)(a) of the *Act*, there is no need to consider whether such relief ought to be refused pursuant to s. 30(2) of the *Act.* Even if this provision did apply, however, I would not have exercised such discretion to deny the Union Trustees relief in relation to the arbitral error in any event.

DISPOSITION

[69] For the reasons set out above, I order the following:

(a) the Union Trustees' petition is allowed;

(b) the Clarification Award is remitted to the Arbitrator for reconsideration; and

(c) the Arbitrator is directed to reconsider the Clarification Question in accordance with these reasons as soon as is reasonably practicable.

[70] In light of the outcome of this petition, the Union Trustees would ordinary be entitled to a costs award. In my discretion, however, I have concluded that such an award would not be appropriate in this case, for two reasons. First, the Employer Trustees cannot be blamed for the inadequacy of the Arbitrator's reasons with respect to the Union Trustees' estoppel argument. Second, the Employer Trustees' opposition to this petition was well-founded in respect of the other two of the three grounds raised by the Union Trustees in its petition. Accordingly, the parties shall each bear their own costs of this proceeding.

"Brongers J."