Case Name:

Vancouver (City) (Re)

Between
City of Vancouver (the "employer"), and
International Association of Fire Fighters,
Local No. 18 (the "union")

[2006] B.C.L.R.B.D. No. 170

BCLRB Decision No. B170/2006

Case Nos. 54769 and 54811

British Columbia Labour Relations Board

G.J. Mullaly (Vice-Chair)

Decision: July 21, 2006.

(24 paras.)

Counsel:

C.G. Harrison, for the Employer

Allan E. Black, Q.C., for the Union

DECISION OF THE BOARD

I. INTRODUCTION

1 The Employer applies under Section 99 of the Labour Relations Code (the "Code") for review of two arbitration awards issued by Robert Diebolt, Q.C. (the "Arbitrator"). The first award (the "Preliminary Ruling") was issued on April 4, 2006; the second award (the "Final Award") was issued on April 19, 2006. Both applications raise the same issue, i.e., whether, as the Employer contends and the Union disputes, the Arbitrator's refusal to permit the Employer to lead bargaining history evidence was inconsistent with principles expressed or implied in the Code and denied the Employer a fair hearing.

II. BACKGROUND

2 The arbitration resulted from a Union grievance disputing the Employer's interpretation of the overtime provisions of the parties' collective agreement (the "Collective Agreement"). At the outset of the arbitration the Employer indicated it would seek to adduce evidence of bargaining history to assist in the interpretation of the overtime provisions. The Union objected and the Arbitrator, after giving the parties the opportunity to lead evidence and make submis-

sions on the issue, issued the Preliminary Ruling the following day, April 4, 2006. In it he concluded that "while evidence of bargaining history is ordinarily admissible as an interpretative aid, in this case it should not [be] because the parties agreed to exclude it" (p. 6).

3 The facts that led the Arbitrator to find that the parties had agreed to exclude evidence of bargaining history are found in the following passages from the Preliminary Decision:

> On July 23, 2003 the parties commenced bargaining leading to the current Collective Agreement with an exchange of written proposals. Near the top of the first page of the Union's set of proposals the words "WITHOUT PREJUDICE" appeared in upper case boldface type and with underlining. Those words did not appear in the Employer's initial set of proposals.
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> No reference was made to the term without prejudice on July 23, 2003. However, bargaining notes prepared by the Union record Mr. Rod MacDonald, the Union's chief spokesperson, as making a statement to the effect that the parties had experienced a troubled relationship in the past and that the current round of bargaining presented an opportunity to develop new and better relationships in the future.
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> The without prejudice basis of the Union's proposal was discussed once, at an August 28, 2003 bargaining session. Three sets of bargaining notes refer to that discussion. Two sets were Union documents and the third set was prepared by the Employer. One Union set recorded the Employer's chief spokesperson, Mr. Malcolm Graham, as stating that the Employer wouldn't "necessarily" accept the Union's blanket statement that the Union's proposals were without prejudice. The second Union set recorded Graham as stating they (the Employer) "don't" accept the without prejudice basis expressed in the Union's set of proposals. The Employer set recorded Graham as stating that the Employer did not accept the without prejudice basis in the Union's set of proposals.
>
> MacDonald gave evidence about his understanding of the basis on which negotiations proceeded. He testified that he did not understand Graham's comments to constitute an emphatic rejection of without prejudice negotiations. Further, he indicated that it was his understanding negotiations would and did proceed on a without prejudice basis.
>
> Moving forward in time, the parties both began to exchange sets of proposals that commenced with an introduction containing the expression "Without Prejudice". The introduction in both the Union and the Employer proposals was the same, subject to one modification to indicate whose document it was. For example, the first page of the Employer's December 18, 2003 document reads:
>
> FRAMEWORK FOR SETTLEMENT
>
> 2003 December 18
>
> Introduction
>
> The following package of items is to be considered a Framework for Settlement submitted by the Employer to the Union to conclude the 2003 round of bargaining.
>
> The framework is presented in a package format and on a Without Prejudice basis. Any issue not included in the package from the original set of proposals submitted by both the Employer and the Union are deemed to be withdrawn. Where the package is not accepted as a whole, none of the specific provisions of the package remain agreed nor are any of the items left out of the package considered to be withdrawn.

(Preliminary Ruling, pp. 2-3)

4 The hearing of the merits of the Union's grievance took place on April 4, 2006 and two weeks later the Arbitrator issued the Final Award in which he upheld the Union's grievance in part.

5 The Employer brought a Section 99 application with respect to the Preliminary Ruling before the Final Award was issued. It later brought a Section 99 application with respect to the Final Award on the same basis that it had challenged the Preliminary Ruling. The Employer's applications have been consolidated.

III. POSITIONS OF THE PARTIES

6 The Employer alleges that the Arbitrator made three errors. First, it submits that the expression "without prejudice" has a "notoriously uncertain meaning" and the Arbitrator fails to explain how such an expression "could be taken to create a general evidentiary privilege". Second, the Employer submits that the Preliminary Award fails to explain "how that privilege could extend to documents and exchanges other than the documents it was attached to, or how it could apply retroactively to exchanges that he had found were not privileged in any way when they took place." Finally, although in the Preliminary Ruling the Arbitrator states that he did not understand the Employer to be taking issue with the proposition that evidence of bargaining history should be ruled inadmissible where the parties have agreed that evidence of their bargaining would be inadmissible in a future arbitration (Award, p. 4), in its Section 99 application the Employer also submits that that it is a denial of a fair hearing to refuse to consider admissible, probative evidence such as evidence of bargaining history.

7 The Union submits that neither the Preliminary Ruling or the Final Award is inconsistent with principles expressed or implied in the Code and it also submits that the Employer was not denied a fair hearing.

IV. ANALYSIS AND DECISION

8 In my view, this application raises three principal issues. First, if parties agree in bargaining that evidence of their bargaining will be inadmissible in any future arbitration, does an arbitrator commit a reviewable error if he or she excludes such evidence because of such an agreement? Second, what was the basis of the Arbitrator's Preliminary Award? Did he, as the Employer contends, find that a general evidentiary privilege had been created by the parties use of the words "without prejudice" during bargaining or did he rule the evidence inadmissible because he found that the parties had agreed to exclude it? Finally, if the basis of the Arbitrator's Preliminary Ruling was a finding that the parties had agreed to exclude bargaining history evidence, did he make a reviewable error in making that finding? I will consider each issue in turn.

Are parties free to agree to exclude evidence of bargaining history?

9 The Employer relies on four Board decisions to support its submission that even if parties have agreed that evidence of bargaining history will not be admissible in arbitrations, an arbitrator who refuses to consider such evidence denies the parties a fair hearing: University of British Columbia, BCLRB No. 42/76, [1977] 1 Can LRBR 13 ("UBC"); City of Kelowna, BCLRB No. B253/96, 42 CLRBR (2d) 297 ("City of Kelowna"); Summit Logistics Inc., BCLRB No. B44/98 ("Summit Logistics"); and Health Employers Association of British Columbia, BCLRB No. B84/2003 (Reconsideration of BCLRB No. B108/2002) ("HEABC").

10 In my view, none of the decisions cited by the Employer clearly stand for the proposition that an arbitrator must consider evidence of bargaining history even if he or she finds that the parties agreed in bargaining that such evidence would not be admissible at arbitrations.

11 In UBC the Board dealt with an arbitrator's reliance on a common law rule of evidence (the parol evidence rule) to refuse to consider oral evidence regarding negotiations. There are passages in the decision that can be read as an unqualified requirement that arbitrators consider such evidence. For example, in UBC the Board stated:

> One perennial issue within that jurisprudence [of the collective agreement] is whether and when it may be proper for arbitrators to go behind the formal collective agreement and consider the history of negotiations which produced that written document. That is the legal issue raised by the facts of this case.
>
> * * *

> ... in any case in which there is a bona fide doubt about the proper meaning of the language in the agreement -- and the experience of arbitrators is that such cases are quite common -- arbitrators must have available to them a broad range of evidence about the meaning which was mutually intended by the negotiators. In our judgment, it is not consistent with s. 92 of the Code for arbitrators to be prevented by artificial legal blinkers from looking at material which in real-life is clearly relevant to an accurate reading of disputed contract language.
>
> * * *
>
> The primary issue raised by this application concerns the legal principle under which evidence of negotiations is to be considered by an arbitrator hearing a grievance under a collective agreement. We have formulated this principle of labour law as requiring the arbitrator to admit such evidence if it is offered for purposes of interpretation, as contrasted with variation, of the agreement. In light of that requirement of the Labour Code, this award must be set aside and the matter remitted to the arbitrator to receive and consider the further material offered by the Union.
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> ... the arbitrator is looking for the mutual agreement of both parties, not the unilateral intentions of the one side. Without some reciprocal assent from the other side, the fact that one party had an intention may indicate no more than what it wished to achieve and it is question-begging to conclude from this evidence alone that its wish has been fulfilled. For that reason, arbitrators should be very cautious in using the private documents or communications of either side. Otherwise, as counsel for the University put it, there would be an open invitation to fraud. But again, it is a mistake to erect a total, artificial barrier to the admission of any such evidence. Written material, prepared at the time, and especially if available to the other side, can be cogent items in a total body of circumstantial evidence. Sometimes it may be decisive.
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> (pp. 14, 18-20, italics in original, underlining added)

12 However, the facts of the case (which did not involve an agreement by the parties to preclude the use of bargaining history evidence) and the Board's references to "artificial legal blinkers" and "a total, artificial barrier" (emphasis added) to the admission of such evidence make it possible to question whether the Board in UBC intended arbitrators to admit bargaining history evidence even if the parties had agreed in bargaining it should not be admitted.

13 In City of Kelowna, the Board found that although an arbitrator had accepted into evidence certain extrinsic evidence proffered by the employer (the wording of the previous provision in the collective agreement), he had not considered that evidence before concluding that he had no doubt about the meaning of the provision in question. The Board remitted the matter to the arbitrator because it concluded that "under University of British Columbia, as confirmed in Nanaimo Times Ltd., he was required to do so prior to concluding that he entertained no doubt as to the meaning of the provision in question" (para. 22). The Board's reasoning in City of Kelowna contains no consideration of the significance, if any, of an agreement that an arbitrator not consider bargaining history evidence.

14 In Summit Logistics the Board allowed a Section 99 application after finding that although an arbitrator had considered extrinsic evidence to decide whether the parties had amended or modified their collective agreement, he had failed to consider that evidence as a potential aid to the interpretation of the agreement (para. 32). However, the decision does not address the issue of whether the Board should permit arbitrators to give effect to an agreement that bargaining history evidence will not be relied on in arbitrations.

15 The final decision the Employer relies on to argue that the Arbitrator erred by refusing to allow it to lead evidence of bargaining history is HEABC. In that case the Board stated that its " ... role with respect to issues involving the use of extrinsic evidence by an arbitrator in his or her interpretation and application of a collective agreement provision is to ensure that the extrinsic evidence has been taken into consideration in the appropriate circumstances" (para. 12, emphasis added). The decision does not involve any consideration of whether such appropriate circumstances include a circumstance in which parties have earlier agreed that bargaining history evidence cannot be led on in arbitrations.

16 The fact that previous Board decisions are not on point is not a complete answer to the Employer's objection that arbitrators should not give effect to parties' agreements that evidence of bargaining history will be inadmissible in arbitrations. Regardless of why bargaining history is excluded, the outcome is likely to be the same, i.e., because of such

exclusions arbitrators will on some occasions fail to ascertain the clear, but poorly expressed, understanding the parties had about the bargain they have reached. That does not mean that the Board should direct arbitrators to ignore such agreements. As a panel chaired by Chair Lanyon stated in Columbia Hydro Constructors, BCLRB No. B36/94, 22 CLRBR (2d) 161:

> It is a fundamental premise of the legislation and the Board's policy (R.M. Hardy and Cicuto & Sons Contractors Ltd., IRC No. C271/88, (1989) 1 CLRBR 63 are consistent with this) to not interfere in the parties' private ordering of their contractual affairs. ... (p. 210)

17 Nevertheless, given the potential harmful consequences of excluding evidence of bargaining history when interpreting collective agreement provisions, arbitrators should not do so unless there is clear and unequivocal evidence that is what the parties agreed to.

Why did the arbitrator find evidence of bargaining history inadmissable?

18 The Employer maintains that the Arbitrator ruled evidence of bargaining history inadmissible because he found that a general evidentiary privilege had been created by the parties' use of the words "without prejudice" during bargaining. I do not agree with this interpretation of the Arbitrator's reasoning. I find that he ruled evidence of bargaining history inadmissible because he found that the parties had agreed to exclude such evidence. The Arbitrator's reasoning (which I quote in its entirety) makes this clear:

> ... I did not understand the Employer to disagree with the proposition that evidence of bargaining history should be ruled inadmissible where the parties have agreed to bargain on a without prejudice basis in the sense that evidence of their bargaining would be inadmissible in a future arbitration.
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> I therefore pose this question. Did the parties agree to conduct their negotiations on a without prejudice basis in the sense that the negotiation evidence would be inadmissible for use against a party in a future arbitration? I have concluded that they did. My reasons follow.
>
> I am unable to conclude that the parties reached such an agreement on July 23, 2003, the day the parties commenced negotiations by exchanging written proposals. On that day the Union unilaterally expressed its proposals to be advanced on a without prejudice basis, but the Employer did not then agree to such a basis. As noted, the Employer proposal was silent on that issue and no discussion about it occurred that day. I reach this factual conclusion despite MacDonald's subjectively held belief that bargaining would proceed on a without prejudice basis.
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> Moving forward in time, I am also unable to conclude that the August 28, 2003 bargaining session yielded an agreement to proceed on a without prejudice basis. Indeed, to the contrary, the previously mentioned bargaining notes, on any view, cannot be interpreted to mean that both parties subjectively intended to reach such an agreement or, objectively, should be taken to have done so. At a minimum, the Employer was expressing reservation. At a maximum, it was declining to proceed on a without prejudice basis.
>
> In my view, however, the Employer's stance changed when both it and the Union began to make and receive written proposals expressed to be made "on a without prejudice basis" Given that development, and assessing the issue according to an objective standard, use of those introductions leads me to conclude that the parties must be taken to have agreed to bargain on a without prejudice basis in the sense that evidence of bargaining would not be used in a proceeding such as this.
>
> In reaching the foregoing conclusion I have been mindful of the Employer's submission about the intended meaning of the words "on a Without Prejudice basis" appearing in the introductions. Essentially, its position was that the language of the second paragraph of the introduc-

> tion contained the parties' own special definition of the words "without prejudice". That definition, it submitted, was that neither party could accept a proffered proposal in part; it must be accepted wholly or not at all.
>
> In my view the Employer's interpretation is a strained and unnatural construction to place on the language of the introduction. First, it is not the ordinary and natural meaning of the expression "without prejudice". Secondly, it overlooks the disjunctive nature of the first sentence of the second paragraph of the introductions. To repeat, it reads with emphasis added: "The Framework is presented in a package format and on a Without Prejudice basis". Given the ordinary meaning of the words without prejudice and the disjunctive nature of the first sentence, my view is that the following two sentences should be taken to address the package nature of the proposals and to affirm an intention that a proposal could not be partially accepted. The words "on a without prejudice basis", in my view, should be taken to have expressed a different thought, namely, that the proposals would not be admissible in a future proceeding such as this.
>
> In conclusion, therefore, while evidence of bargaining history is ordinarily admissible as an interpretive aid, in this case it should not because the parties agreed to exclude it. I therefore rule the disputed evidence inadmissible for the purposes of this arbitration.
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> (Preliminary Ruling, pp. 4-6, emphasis added)

Was there clear and unequivocal evidence that the parties agreed to exclude evidence of bargaining history?

19 In addressing the issue of whether the Arbitrator had clear and unequivocal evidence that the parties had agreed in bargaining that evidence of bargaining history would be inadmissible at arbitration I note that after he set out the evidence quoted above, the Arbitrator stated:

> The foregoing, although not a complete review of the evidence, is sufficient to permit me to begin to address the issue to be determined, namely, should the evidence of bargaining history be ruled admissible or inadmissible? (Preliminary Ruling, p. 3, emphasis added)

20 I also note that the Union appends to its reply submission a Statutory Declaration made by Rod MacDonald, the Union's President. In it he deposes, in part:

> 1. That I was present throughout the arbitration proceedings herein which are the subject matter of these proceedings and was a witness for the Union during the course of the said arbitration proceedings.
> 5. That during my testimony before the arbitration board, I advised the board that I had been involved in numerous exchanges, discussions, and negotiations with the Employer and matters had been discussed, negotiated and resolved on a "without prejudice" basis. I testified that the clear and consistent mutual understanding when that term was used by representatives of the Employer and/or the Union in dealing with labour relations matters, was that the matters under discussion and/or their resolution could not be used by one side as evidence against the other side in subsequent proceedings of any kind, including arbitration proceedings. My evidence was not challenged by the Employer at the arbitration.
> 12. The Employer called no evidence to explain what it meant when it included the words "without prejudice" on its negotiating proposals of December 3, 2003. However, during the course of argument, counsel for the Employer asserted that the words "without prejudice" contained in the Employer's proposals related specifically to the subsequent sentences identified directly after the use of those words contained in the introduction section; namely, that neither party could accept a proposal "in part". Rather, they were a package and as such, it must be accepted wholly or not at all.
> 17. The Employer did not provide any legal authority for its interpretation or application of the words "without prejudice". The only authorities that it produced for the

Arbitrator on this point, dealt with the admissibility of negotiating history and were the following cases: UBC and CUPE, Local 116 (1977), 1 Can LRBR 13; Board of School Trustees of School District No. 57 (Prince George) and IUOE, Local 858, BCLRB No. 41/76; and Corporation of the District of Burnaby and CUPE, Local 23 (1978), 2 Can LRBR 77.

21 In its final submission the Employer does not dispute any of MacDonald's assertions.

22 Although the Arbitrator concluded that the parties agreed that evidence of bargaining history would be inadmissible at arbitration, he did not, understandably, articulate any conclusion about whether he found the evidence of such an agreement to be clear and unequivocal. I find that to this limited extent, the decision is inconsistent with principles expressed or implied in the Code. I wish to emphasize that I intend no criticism of the Arbitrator's reasoning; before the articulation of the policy in this decision, he could not reasonably have anticipated the need to decide whether there was clear and unequivocal evidence that the parties had agreed that evidence of bargaining history would be inadmissible at arbitration.

23 In accordance with the principles stated in Fording Coal Limited, BCLRB No. B165/2000 (Leave for Reconsideration of BCLRB No. B366/99), 59 CLRBR (2d) 223, I remit this matter to the Arbitrator to decide whether there was clear and unequivocal evidence that the parties agreed that all evidence of bargaining history would be inadmissible at arbitration. If he concludes that the evidence was of that character he will be obliged, given the principles enunciated in Drifter Motor Hotel (Rupert Management Ltd.), BCLRB No. 29/78, to provide his reasons for reaching that conclusion. If the Arbitrator concludes that while there was evidence that the parties agreed that all evidence of bargaining history would be inadmissible at arbitration, it was not clear and unequivocal, the arbitration should resume, the parties should be given the opportunity to lead evidence of bargaining history, and the Arbitrator should decide the merits on the Union's grievance of the basis of all the admissible evidence led.

V. CONCLUSION

24 For the reasons given above, the Employer's application is allowed in part and the matter is remitted to the Arbitrator in accordance with the terms set out in the preceding paragraph.

G.J. MULLALY, VICE-CHAIR

cp/e/qlebh