IN THE MATTER OF AN ARBITRATION

BETWEEN:

CITY OF VANCOUVER

(the "Employer")

AND:

VANCOUVER FIRE FIGHTERS' UNION, LOCAL 18

(the "Union")

(Ditchburn Grievance)

PRELIMINARY RULING

Date and Place of Hearing:	April 3, 2006 Vancouver, B.C.
Board of Arbitration:	Robert Diebolt, Q.C.
Counsel for the Employer:	Charles Harrison
Counsel for the Union:	Alan Black, Q.C.
Date of Ruling:	April 4, 2006

This arbitration arises out of a dispute about the interpretation and application of overtime provisions in the Collective Agreement between the parties. At the outset of the hearing the Employer indicated that it would seek to adduce evidence of bargaining history as an extrinsic aid to assist in the interpretation of the disputed provisions. The Union objected to the admissibility of that evidence. This ruling is confined to the issue of the admissibility of the evidence of bargaining history.

I will begin with an abbreviated account of the factual background relevant to the issue. 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.

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.

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.

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? I will begin with some observations of what I understand the law to be on this issue.

It is well settled in British Columbia that evidence of bargaining history is ordinarily an admissible aid to assist in the interpretation of a collective agreement. Further, such extrinsic evidence is admissible whether or not there is an ambiguity in the language of the agreement, subject to the limitation that it cannot contradict language that an arbitrator finds to be clear and unambiguous: *University of British Columbia and Canadian Union of Public Employees*, unreported, July 7, 1976, B.CL.R.B. (Weiler).

I said in the previous paragraph that evidence of bargaining history is ordinarily admissible as an interpretive aid. But I do not understand the law to be that such evidence is always admissible, regardless of the factual context in which an admissibility issue arises. More specifically, if the parties agree to conduct negotiations on the basis that evidence of their negotiations will not be used to a party's disadvantage in a future dispute, such as arbitration, an arbitrator should respect that agreement and rule the evidence inadmissible.

Such an agreement can make good industrial relations sense, because it may facilitate open discussion and resolution of issues between the parties. Further, to admit the evidence in the face of an agreement not to would have a "chilling" effect on without prejudice discussions and agreements. That rationale is well articulated in *Ontario Public Service Employees Union v. Ontario (Ministry of Attorney General)*, [2004] O.G.S.B.A. No. 124 (Abramsky). Indeed, 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.

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.

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 introduction 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.

Robert Diebolt, Q.C.