BCLRB No. B81/2014

BRITISH COLUMBIA LABOUR RELATIONS BOARD

FINNING (CANADA), A DIVISION OF FINNING INTERNATIONAL

(the "Employer")

-and-

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, LODGE NO. 692

(the "Union")

PANEL:	James Carwana, Vice-Chair
APPEARANCES:	A. Paul Devine, for the Employer Leo McGrady, Q.C., for the Union
CASE NO.:	65961
DATE OF HEARING:	February 25, 2014
DATE OF DECISION:	May 6, 2014

DECISION OF THE BOARD

I. NATURE OF THE APPLICATION

1 The Employer applies under Section 99 of the *Labour Relations Code* (the "Code") for review of an arbitration award, Ministry No. A-66/13, dated August 28, 2013 (the "Award") issued by Arbitrator Stan Lanyon, Q.C. (the "Arbitrator"). At issue before the Arbitrator was a Letter of Understanding (LOU No. 1 - Defined Benefit Pension Plan) ("LOU #1") in the parties' Collective Agreement. LOU #1 reads, in part, as follows:

> Re: Defined Benefit Pension Plan
>
> 1. The present Defined Benefit Pension plan shall continue to be available for existing employees/participants in the Defined Benefit Pension Plan. (Award, para. 2)

2 In addition to the written submissions of the parties on the Section 99 application, the Board heard oral argument by counsel for the parties. I wish to thank counsel for their helpful submissions in that regard.

II. THE AWARD

3 The Award concerned a dispute about a change to the Defined Benefit Pension Plan referred to above. The Defined Benefit Pension Plan had been in place for a significant length of time and there were 210 employees in the bargaining unit represented by the Union who belonged to the Defined Benefit Pension Plan. The dispute arose when notification was given by the Employer in January 2011 that as of January 1, 2016 all existing members of the Defined Benefit Pension Plan "would cease earning future service benefits under the Defined Benefit Pension Plan" (Award, para. 69). The pension arrangement which those members would be subject to thereafter was described by counsel for the Employer in oral argument as having a Defined Contribution design.

4 The Union's response to the notification from the Employer was that the Employer did "not have the unilateral right to discontinue" the Defined Benefit Pension Plan for members of the Union belonging to the Plan (Award, para. 73). The Employer's position was that it had "the right to unilaterally change" the Defined Benefit Pension Plan (Award, para. 1).

5 The Defined Benefit Pension Plan was a part of the Finning International Retirement Plan, which is administered by Finning International. The Employer relied on a provision in the Finning International Retirement Plan relating to the right to amend or terminate the Plan.

6 The Arbitrator notes that the parties "adduced comprehensive negotiation evidence over a number of years" regarding the interpretation of the Collective Agreement (Award, para. 3). In the Facts section of the Award, the Arbitrator reviews such evidence over the course of approximately 33 pages. The Arbitrator examines the

2003 collective bargaining, the 2004-2010 time period, and the 2011 collective bargaining. The Arbitrator further reviews the evidence regarding the Finning International Retirement Plan given by the Employer's final witness, Ms. Randi Topp, who "is currently the Director of Total Compensation" at Finning International and a Pension Actuary.

7 The negotiation evidence was that there were discussions about pensions during the 2003 round of collective bargaining. The Employer expressed a preference for defined contribution pension plans and discussed developing such a plan for the employees. The Union wanted existing employees to be able to remain in the current Defined Benefit Pension Plan. During the 2003 negotiations, the Employer sent a letter to the Union stating "**Employees in the BC DB Plan will be allowed to stay in the BC DB Plan**" (Award, para. 43, emphasis in original). The wording at issue in LOU #1 was ultimately agreed to in the 2003 round of collective bargaining and approved by the Finning International Pension Committee.

8 In 2004, a Pension Choice Form was drafted by the Employer and given to the employees. This Form contained "an option of either transferring to a new Defined Contribution Plan or remaining in their existing Defined Benefit Plan" (Award, para. 61). The Pension Choice Form included the following wording:

> Option 2 – Stay in the *current* Defined Benefit Pension Plan
>
> I would like to continue to earn service in the current defined pension plan.
>
> I understand that I will not have an opportunity in the future to participate in the new defined contribution pension plan. (emphasis added in the Award, para. 62)

9 In the 2011 collective bargaining negotiations, the Employer proposed wording changes to LOU #1 which included revising the language to state that the Defined Benefit Pension Plan would only continue until December 31, 2015:

> 1. The present Defined Benefit Pension Plan shall continue until December 31, 2015. Effective January 1, 2016, employees will become members of the Defined Contribution Pension Plan. (Award, para. 74)

10 The Employer's proposal was rejected by the Union and the changes sought to LOU #1 were not made. Nevertheless, during the 2011 bargaining the Employer did advise the Union of the Employer's position that such revisions to the language were not needed for the Employer to make the amendments to the Defined Benefit Pension Plan it had identified in its notification to employees.

11 In the Analysis and Decision portion of the Award, the Arbitrator identifies the dispute as involving "the interpretation of Letter of Understanding #1 in the parties' current Collective Agreement" (Award, para. 92). The Arbitrator notes the Union argued "the parties have agreed under LOU #1 that the Defined Benefit Plan 'shall continue' for all existing members of the Plan, and as a result, the Employer does not have the unilateral right to discontinue that Plan" (Award, para. 93). The Arbitrator quotes from the Employer's written argument before him indicating the "Employer argues that 'LOU

#1 does not fetter the power of Finning International to amend the Retirement Plan in whole or in part'" (Award, para. 95). The Arbitrator further sets out the Employer's position that "Finning (Canada), the Employer under the Collective Agreement, has no authority over the Retirement Plan", and that "only the Administrator of the Plan, Finning (International), has the authority to amend or terminate the Plan" (Award, para. 94).

12 Having put forward the arguments of both parties about LOU #1, the Arbitrator then described the issue as: "does Finning (Canada), the Employer under the Collective Agreement, have the right to unilaterally discontinue the Defined Benefit Plan set out in the Collective Agreement (LOU #1)?" (Award, para. 96). In reviewing the evidence, the Arbitrator examined the role played by Finning International, particularly in the collective bargaining negotiations. The Arbitrator found that in the 2003 round of collective bargaining Finning International had approved the wording at issue in LOU #1 (Award, paras. 146 and 163). Later, as the Employer notes in its submission, "it was Finning International that gave directions" on the issue of "proposed changes to LOU #1 during bargaining in 2011". In this respect, it was not disputed that no changes were made to LOU #1 for the 2011-2015 Collective Agreement (Award, para. 158).

13 The Arbitrator "concluded, based upon the wording of the collective agreement, and the negotiation evidence, both Finning (Canada) and Finning (International) have in the 2011 – 2015 Collective Agreement, promised to continue the Defined Benefit Plan on behalf of its existing members until the expiry of the current collective agreement" (Award, para. 162). Furthermore, given the Duration Clause in the Collective Agreement and Section 45(2) of the Code, the Arbitrator held that "Finning (Canada) must bargain any changes to LOU #1" and "[i]t cannot unilaterally delete the accrual of earned benefits under the Defined Benefit Pension Plan from the Collective Agreement" (Award, para. 175).

III. POSITION OF THE PARTIES

THE EMPLOYER

14 The Employer puts forward a number of grounds for review. The first ground is an alleged error of law by the Arbitrator in asking the wrong question. The Employer says that the Arbitrator "fell into an error in the manner in which he described the issue in dispute between the parties". Instead of the Arbitrator describing the issue as previously noted (in paragraph 12 above), the Employer says "the issue was whether or not there was anything in negotiations or agreement leading to LOU #1 that fettered the power of Finning International Inc., a stranger to the Collective Agreement, to exercise its powers to revise or terminate the Retirement Plan in whole or in part". The Employer claims that this led to the Arbitrator "answering the wrong question, and thereby denied the Employer an opportunity to correct his misapprehension of the appropriate issue".

15 The second ground raised by the Employer is an alleged lack of reasoned analysis on the part of Arbitrator. The Employer says that "parties are entitled to expect a reasoned analysis of the issues before the arbitration board, and failure to provide such an analysis will limit the inclination of the Board to give an award a sympathetic reading". In this respect, the Employer asserts "the Arbitrator omitted and/or misapplied key evidence and argument" concerning collective bargaining.

16 The Employer further claims the Arbitrator relied on case authorities which were not cited by either party during the arbitration and which led "the Arbitrator into a misunderstanding of the position of Finning (Canada)". The Employer acknowledges that "[w]hile some of the principles may be considered trite" for which the cases were mentioned by the Arbitrator, the Employer further submits that "it is fundamental that the parties be given an opportunity to make submissions on the jurisprudence which the decision-maker is relying upon" and this resulted in denial of a fair hearing.

17 The next basis for review raised by the Employer is the alleged failure of the Arbitrator "to address the legal authorities and arguments of the Employer that had a direct bearing on the position which it advanced during the arbitration hearing". The Employer says this again constituted a failure to provide a reasoned analysis of the issues before the Arbitrator. In addition, the Employer asserts there is a requirement that an arbitration board "provide a final and binding resolution to the dispute between the parties" and says that this requirement "may require an examination and analysis of certain key issues".

18 The Employer's submission to the Board reviews a number of cases which were put to the Arbitrator and how they relate to the issue before the Arbitrator. In particular, the Employer alleges that by failing to address authorities and arguments provided by the Employer, the Arbitrator erred in effectively binding a third party, Finning International, through the Award. The Employer says:

> Nevertheless, notwithstanding this jurisprudence, the Arbitrator concluded that the parties to the Collective Agreement were able to agree to a term that would bind a third party pension plan that existed outside of the collective agreement and belonged to a party outside of the collective bargaining regimen. The Arbitrator failed to address our arguments based on this authority, and why it was not applicable to the facts before him.

19 Running through many of the Employer's grounds for review is the allegation that the Arbitrator affected the rights of a third party. The Employer's position is that "Finning International is not a party to the Collective Agreement", and that the effect of the Award is to limit the powers of Finning International as Administrator of the Finning International Retirement Plan including the Defined Benefit Pension Plan. This specific allegation relating to third parties is mentioned in the Introduction section of the Employer's submission to the Board where it is alleged the Arbitrator erroneously limited "the rights of a third party that was a stranger to the arbitration proceedings".

20 In its submission, the Employer also takes issue with a number of evidentiary findings made by the Arbitrator. For example, in the section of the Employer's submission dealing with the failure to address authorities and argument, the Employer states:

> The only way that the powers of Finning International as the Administrator [of the Retirement Plan] could be fettered is if there was evidence that it had agreed to restrict these powers. With respect, we submit that the evidence is entirely lacking.

21 Similarly, in relation to the allegation about a lack of reasoned analysis, the Employer refers to the Arbitrator's conclusion "that Finning International had agreed to limit its authority to amend or terminate the Retirement Plan" and says "[t]here was no evidence of such a limitation, and the Arbitrator had no *in personam* authority to limit the powers of a third [party] to the dispute".

22 The Employer cites the evidence of Randi Topp, who "was the only witness from Finning International Inc. to testify". Her testimony was "that in her view, LOU#1 did not impact the right of Finning International to amend or terminate the Retirement Plan". The Employer notes that the Arbitrator "rejected her 'opinion' because of his view of the evidence and law". According to the Employer, "which law or evidence the Arbitrator was relying upon" in this respect is not clear, and the "'evidence' that the Arbitrator relies upon does not support his conclusion".

23 In dealing with this matter, the Employer raises the "plain reading of LOU #1". The Employer says that "[t]here is nothing in a plain reading of LOU #1...that would fetter or limit the power of Finning International" under the Article of the Finning International Retirement Plan which provides Finning International with the authority "to amend or terminate the plan". According to the Employer, a plain reading of the language in LOU #1 supports the Employer's position that "the employees who are within the Defined Benefit plan remain as members of the plan but are subject to its provisions, including the power of amendment".

THE UNION

24 First, with respect to whether the wrong question was asked by the Arbitrator, the Union says "the Employer seeks to totally recast/reinvent the issue presented to the Arbitrator". The Union takes the position that the Arbitrator's description of the issue as set out in paragraph one of the Award is consistent with the language of the grievance at issue here which complains that the proposed change to the Defined Benefit Pension Plan "would be in violation of the express terms of the collective agreement".

25 Second, the Union denies there has been a lack of reasoned analysis. According to the Union, the Arbitrator "engaged in an exhaustive and detailed reasoned analysis of the evidence and the careful application of the obvious principles of law". The Union relies on Board case law indicating "[i]t is not the Board's role to re-try the facts of the case and to second guess calls made with respect to admissibility or the weight of evidence".

26 Regarding the case authorities that were relied upon by the Arbitrator but not cited by either party, the Union says that "the legal propositions they stand for are amongst the most elemental principles applicable to arbitral law in this Province". According to the Union, it would be "extremely imaginative" for there to be a suggestion "that prejudice would flow from these principles being applied by an arbitrator without those authorities first being cited by counsel". Furthermore, the Union submits that "there is no legal principle of adjudication that prevents an Arbitrator from considering case law – particularly, case law some of which even the Employer in this case characterizes as trite – that has not been cited by counsel".

27 In response to the Employer's claim there was a failure to address the legal authorities and related arguments which the Employer "advanced during the arbitration hearing", the Union says that it does not constitute a denial of a fair hearing to merely omit "reference to cases that are not relevant because of significant factual differences, or because of inapplicable points of law ". This is particularly so according to the Union in this case, where the Arbitrator has undertaken the type of exhaustive analysis of the evidence and the careful application of law previously mentioned. Thus, the Union asserts "this is a case that merits a sympathetic reading". The Union goes on to say that "although the Employer has cited the failure to consider a key argument as part of its ground, it fails to identify such a failure".

28 The Union deals with the authorities reviewed by the Employer on its application. By and large, the position of the Union is, again, that such authorities were simply not relevant to the case before the Arbitrator. In addition, the Union says that certain case law put forward by the Employer relates to an argument "that the plan was part of the collective agreement", which argument "the Employer's counsel did not make" before the Arbitrator.

29 With respect to the Employer's allegations regarding the Award binding a third party, the Union argues that the Award does not involve an order against such a third party. The Union says that there is "no language in which the Arbitrator has awarded a remedy against Finning International".

30 In terms of the Arbitrator not accepting the evidence of Ms. Topp about LOU #1, the Union says that the meaning of LOU #1 was for the Arbitrator to decide and that Ms. Topp "was not tendered as an expert witness". Regarding Finning International's role, there were "a number of sources, both Union and management, throughout the hearing" which, according to the Union, made it clear "LOU#1 received the prior approval of Finning International". Furthermore, "[t]here was no suggestion by anyone that repeated consent of Finning International was required from agreement to agreement for this same language that it had initially agreed to". The Union cites a number of paragraphs in the Award where evidence is recounted by the Arbitrator indicating that "the Employer would not have acted with respect to the pension plan without specific instructions from Finning International".

31 In various portions of its response to the Employer's submission, the Union says that the Employer is really disputing findings of fact by the Arbitrator. The Union refers to the Board's jurisprudence to the effect that the test with regard to a review of factual findings is "a rigorous one". The Union says that "the Board's usual restrictive approach to review of findings of fact" ought to be applied in the circumstances here (see *Choices Market, (1998) Ltd.*, BCLRB No. B79/2002, at para.13 (Leave for Reconsideration of BCLRB No. B428/2001) ("*Choices*").

THE EMPLOYER'S REPLY

32 In its reply, the Employer deals at some length with the status of Finning International. The Employer notes the acknowledgement of the Arbitrator that Finning International was only restricted in its administration of the Retirement Plan where it chose to place some restrictions upon itself. The Employer refers to this matter as

being "the crux of the Application for reconsideration" and submits "there is absolutely no evidence" that Finning International made a commitment "to permit Finning (Canada) to maintain the Defined Benefit Plan in the collective agreement".

33 In other parts of its reply, the Employer makes the same point. With respect to the evidence, the Employer says:

> ...There is absolutely no evidence that the Union or the Company intended to impose any restrictions on the ability of Finning International Inc. to exercise its powers in the Retirement Plan in accordance with its terms. There is also no evidence that Finning International Inc. agreed to any such restriction.

IV. ANALYSIS AND DECISION

34 Under Section 99 of the Code, the Board has jurisdiction to review an arbitration award on the following grounds:

> (a) a party to the arbitration has been or is likely to be denied a fair hearing, or
>
> (b) the decision or award of the arbitration board is inconsistent with the principles expressed or implied in this Code or another Act dealing with labour relations.

35 In *The Board of School Trustees of School District No. 36 (Surrey)*, BCLRB No. B152/2011 ("*School District No. 36*"), the Board discussed the "Statutory Provisions and Policy Considerations Informing the Board's Standard of Review" as follows:

> Section 99 of the Code authorizes the Board to review arbitration awards for consistency with fair hearing requirements as well as principles expressed or implied in the Code or another Act dealing with labour relations.
>
> The test for reviewing an arbitrator's interpretation of a collective agreement is well established: does the award show that the arbitrator has made a genuine effort to resolve the dispute on the basis of relevant provisions of the collective agreement? (*Lornex Mining Corporation Limited*, BCLRB No. 96/76, [1977] 1 Canadian LRBR 377 ("*Lornex*") at p. 381.) This deferential standard is intended to promote arbitration as an expeditious and final means of dispute resolution: *Lornex*; *Canadian Corps of Commissionaires (Victoria, The Islands and Yukon)*, BCLRB No. B42/2009 (Leave for Reconsideration of BCLRB No. B5/2009), para. 7. Those principles are found in Sections 82, 84(2) and 89 of the Code. The fair hearing requirement for arbitration awards is also assessed in furtherance of these Code principles.
>
> The central issue under the foregoing provisions and under Section 99, is whether the arbitrator has fulfilled their statutory mandate to resolve the grievance having "...regard to the real substance of the matters in dispute and the respective merit of the positions of the parties to it under the terms of the collective agreement...": Section 82(2)... .

* * *

> ... An arbitrator is not required to accept the parties' portrayal of the issues or explicitly confront all the parties' arguments. The Board may conclude that a party's argument on a significant issue is implicitly addressed by findings of fact or reasoning on the face of the award: *Castlegar*, para. 20. In short, an award must show the Arbitrator had regard for the "*...respective merit of the positions of the parties*...under the terms of the collective agreement", as opposed to directly confronting all of the parties' *arguments*: Section 82(2), emphasis added.(paras. 19-22, emphasis in the quote)

36 The above demonstrates that an arbitrator is given leeway in portraying the issues, with the arbitrator's task being to resolve "the grievance having '...regard to the real substance of the matters in dispute and the respective merit of the positions of the parties to it under the terms of the collective agreement'".

37 The Board applies a "limited standard of review under Section 99, both with respect to matters of collective agreement interpretation and findings of fact" (*Vancouver Coastal Health Authority (Richmond Community Home Support)*, BCLRB No. B41/2009 (Reconsideration granted on other grounds BCLRB No. B165/2009), at para. 45). In terms of an arbitrator's interpretation of a collective agreement, the test under Section 99 is meant to reflect a deferential standard: "does the award show that the arbitrator has made a genuine effort to resolve the dispute on the basis of relevant provisions of the collective agreement?" (*School District No. 36*, at para. 20). In terms of factual findings, the Board's "restrictive approach" (*Choices*, at para. 13) requires an error of fact be "palpable and overriding" in order to be reviewable: *P.T. Savage Enterprises Ltd.*, BCLRB No. B445/99 (Leave for Reconsideration of BCLRB No. B26/99), 55 C.L.R.B.R. (2d) 161.

38 In dealing with the first ground for review and the Arbitrator's description of the issue before him, I note the Arbitrator in this case was appointed to deal with a grievance by the Union under LOU #1 of the Collective Agreement. The Union's grievance was attached to material filed on the Section 99 application. The grievance states in part:

> It is our position that the Company's proposed change is a violation of the express terms of the Collective Agreement, which states, in part: "The present Defined Benefit Pension Plan shall continue to be available for existing employees/participants in the Defined Benefit Pension Plan."
>
> It is our view that the Company does not have the right to unilaterally remove this benefit. Should the Company proceed with their efforts to discontinue the Pension Plan, *this letter shall constitute the Union's Policy Grievance of this matter.* We claim this is a violation of Letter of Understanding #1 and any other terms of the Collective Agreement. (emphasis in original)

39 As the Union argues, the Arbitrator's description of the issue before him was consistent with the grievance.

40 The Employer's written submission to the Arbitrator was also part of the material presented to the Board on the Section 99 application. In its written submission to the Arbitrator the Employer described the issue in the grievance as follows:

> At issue in this grievance is the Letter of Understanding (LOU) #1 – Defined Benefit Pension Plan which reads, in part:
>
> > The present Defined Benefit Pension Plan shall continue to be available for existing employees/participants in the Defined Benefit Pension Plan.

41 The Employer's written submission to the Arbitrator also deals with "The Grievance". Under this heading, the Employer references a Labour-Management Meeting where the Employer notified the Union that it "would discontinue allowing employees to accrue service" in the Defined Benefit Pension Plan effective January 1, 2016. Thus, the Arbitrator's description of the issue, as involving whether the Defined Benefit Pension Plan under the LOU #1 had to be continued, was consistent with the Employer's own description of the matter in its written submission to the Arbitrator as well as the Union's grievance.

42 In my view, the Arbitrator did not err in defining the issue as he did by referring to whether the Defined Benefit Pension Plan could be discontinued for Union members who belonged to the plan. One argument of the Employer on that issue was that Finning International was a stranger to the Collective Agreement and its powers in connection with the Retirement Plan meant that the defined benefit element of the pension plan could be amended or terminated. Similarly, it was another argument of the Employer in its written submission to the Arbitrator that the "Collective Agreement, properly interpreted, does not promise that the Retirement Plan will not be amended during the term of the agreement". Those are both arguments as to why the Employer said it did not need to continue the plan as the Union alleged. But the issue remained whether it was necessary to continue the defined benefit aspects of the plan. In my view, the Arbitrator's characterization of the issue was in line with the real substance of the matters in dispute.

43 In its Section 99 application, the Employer says "the issue was whether or not there was anything in negotiations or agreement leading to LOU #1 that fettered the power of Finning International Inc., a stranger to the Collective Agreement, to exercise its powers to revise or terminate the Retirement Plan in whole or in part". On this point, the Arbitrator specifically identifies the Employer's argument that "LOU #1 does not fetter the power of Finning International to amend the Retirement Plan in full or in part" (Award, para. 159). The Arbitrator was aware of the Employer's position relating to Finning International not being a party to the Collective Agreement and the impact which the third party aspect had on the matter before him (Award, para. 165). The Arbitrator was not under a misapprehension in this regard and the merit of the Employer's position on this issue was addressed in the Award and in particular from paragraphs 159 to 168.

44 As stated in the Section 99 application, the Employer's position on this matter is that the "only way that the powers of Finning international as the Administrator [of the

Retirement Plan] could be fettered is if there was evidence that it had agreed to restrict these powers". The Arbitrator recognized this and said that Finning International had "a free hand to make whatever amendments it sees as desirable" and that the "only restrictions on this general power are those that it chooses to place on itself" (Award, para. 165). However, the Arbitrator found the wording of LOU #1 and the extrinsic evidence indicated that both Finning International and Finning Canada had agreed to restrictions and had "promised to continue the Defined Benefit Plan" (Award, para. 162). For example, the Arbitrator held that "[i]n 2003 Finning (International) gave its approval to Finning (Canada) to introduce a new Defined Benefit Contribution Plan, and at the same time approved the continuation of the Defined Benefit Plan for its existing members" (Award, para. 163).

45 I find that the Award demonstrates the Arbitrator had regard for the merit of the Employer's position on the fettering of Finning International. While the Arbitrator came to a different conclusion than the Employer sought on that matter, the Arbitrator met the requirement of the Board's jurisprudence under Section 99. To the extent the Employer disagrees with the Arbitrator's interpretation of LOU #1 as well as his related findings of fact, I find the Board's test for interfering with such matters has not been met by the Employer.

46 I turn now to the ground of the Employer's application that alleges the Arbitrator relied on case authorities which were not cited by either party during the arbitration and which allegedly led "the Arbitrator into a misunderstanding of the position of Finning (Canada)." With respect to the principles for which the Arbitrator referred to such cases, I agree with the portions of the submissions of both parties indicating that such principles can be considered "trite". The cases referenced in this portion of the Section 99 application reflect law of long standing and deal with interpreting collective agreements as well as the use of extrinsic evidence. The arbitration clearly involved the interpretation of LOU #1 and the calling of a good deal of extrinsic evidence. The Employer referred to the interpretation of LOU #1 and "the evidence of the parties' negotiations and their past practice" in its written submission to the Arbitrator. It ought not to have been a surprise that the Arbitrator would reference cases regarding the interpretation of collective agreements or the use of extrinsic evidence standing for "trite" principles.

47 The Employer says the failure to allow comment on such authorities "is especially relevant when the rights of a third party to the dispute are in issue". The Employer claims that as a result of this failure the Arbitrator was led into a misunderstanding regarding the position of Finning (Canada). The Employer asserts that, if the Employer had known the Arbitrator was going to refer to these authorities, the Employer would have referred to the Supreme Court of Canada decision in *Bisaillon v. Concordia University*, 2006 SCC 19, [2006] 1 SCR. 666, ("*Bisaillon*") regarding third parties, as well as *Telecommunications Workers Union v. Telus Communications Inc.*, 2010 BCSC 748 which deals with a disability insurer and references *Bisaillon*.

48 In this respect, I find the Arbitrator was not led into a misunderstanding of the position of Finning (Canada) regarding third parties, as alleged by the Employer. As previously noted, the position of the Employer on this point was specifically identified by the Arbitrator and dealt with in the Award. The Employer's written submission to the

Arbitrator addressed the issue about third parties and the Employer could have dealt with the *Bisaillon* case on that issue in its submission. The issue relating to third parties was not new and did not become a new matter because the Arbitrator referred, for example, to a labour arbitration textbook.

49 I find the Arbitrator's reference to such authorities in this case did not constitute a denial of fair hearing or amount to a lack of reasoned analysis.

50 The next basis for which review is sought under Section 99 is the allegation that the Arbitrator did not provide a reasoned analysis by failing "to address the legal authorities and arguments of the Employer that had a direct bearing on the position which it advanced during the arbitration hearing". In *Westfair Foods Ltd.*, BCLRB No. B208/2009 ("*Westfair*"), the Board discussed "how the presence of 'reasoned analysis' figures into the Board's review of arbitration awards":

> The Employer's application raises the issue of how the presence of "reasoned analysis" figures into the Board's review of arbitration awards, with respect to the fair hearing standard and for consistency with Code principles. That question was recently addressed in *Vancouver Coastal Health Authority (Richmond Community Home Support)*, BCLRB No. B41/2009 (Reconsideration granted on other grounds BCLRB No. B165/2009) as follows:
>
> > The Board's interpretation of its review jurisdiction under Section 99 is based on Code principles promoting finality, expedition and the private ordering of collective bargaining relationships: *Lornex* [*Lornex Mining Corporation Limited*, BCLRB No. 96/76, [1977] 1 Canadian LRBR 377]. These principles are found under Sections 82, 84(2) and 89 of the Code. The critical issue under these provisions and under Section 99, is whether the arbitrator has fulfilled her statutory mandate to resolve the grievance having "...regard to the real substance of the matters in dispute and the respective merit of the positions of the parties to it under the terms of the collective agreement...": Section 82(2). The Board looks for the presence of a reasoned analysis to answer that question and to decide whether the Arbitrator has provided a fair hearing (by explaining the basis for the award): *Fording Coal Limited*, BCLRB No. B165/2000 (Leave for Reconsideration of BCLRB No. B366/99), 59 C.L.R.B.R. (2d) 223 ("*Fording Coal*") at para. 10; *Drifter Motor Hotel*, BCLRB No. 29/78 ("*Drifter*").
> >
> > The elements of the reasoned analysis are as follows: does the Award reveal the facts, issues, collective agreement provisions and reasoning process that led to the resolution of the substance of

the matter in dispute?: *Nanaimo Times Ltd.*, BCLRB No. B40/96 ("*Nanaimo Times*") at para. 36.

> The application of this ground is guided by a number of considerations. First, the expectation for a reasoned analysis does not mark a departure from the Board's limited standard of review under Section 99, both with respect to matters of collective agreement interpretation and findings of fact: *Fording Coal,* para. 14. Second, the Board has cautioned that it is necessary to read *Drifter* with an appreciation of its unique facts; namely, an absence of reasons applying the elements of the just cause standard (thus engaging the law of the statute and reviewed against a standard of correctness): *Nanaimo* Times, para. 36; *Otis Canada Inc.*, BCLRB No. B307/98 at para. 21. Third, the requirement under Section 82(2) that an arbitrator have regard to the merit of the party's positions, arises solely in relation to those positions the arbitrator determines are necessary to decide the substance of the dispute. Therefore, it is not inconsistent with Code principles or a denial of a fair hearing if an arbitrator finds facts or interprets a collective agreement in a way that makes it unnecessary to decide a particular issue or to confront a particular argument, even when that argument is determinative within a party's theory of the case: *Western Pulp Incorporated Limited Partnership, Port Alice Operation*, BCLRB No. B380/2004, ("*Western Pulp*") at paras. 25-31. Fourth, the Board gives awards a sympathetic reading, recognizing that arbitrators are tasked with interpreting collective agreements that are often imprecise and "...allowing broad scope for judgment in their application": *Simon Fraser*, at p. 59. (paras. 43-45)

In *Western Pulp Incorporated Limited Partnership, Port Alice Operation*, BCLRB No. B380/2004, ("*Western Pulp*"), the Board explained that the fair hearing standard does not require that an arbitrator accept the manner in which the parties have framed the issues or explicitly address every argument before them. Further, the Board held that it may conclude that a party's argument on a significant issue is implicitly addressed by findings of fact or reasoning on the face of the Award:

> Further to these principles and objectives [under Section 82(2)], the Board does not require an Arbitrator to accept the precise manner in which the parties have framed the issues. Nor does the Board review awards to ensure that every argument has been recited and disposed of, that every authority

has been reconciled or to ensure that the arbitrator has paused to consider the implications of their reasoning under every article of the collective agreement. Accordingly, the Board may infer a reasoned analysis from findings of fact and reasoning on the face of an award. In *Castlegar and District Hospital*, BCLRB No. B380/99, the Board described this approach as follows:

> In our opinion, it is inconsistent with both Sections 82(2) and Section 2(1)(d) of the Code to encourage this approach to labour relations dispute resolution. While an arbitrator must have regard to the respective merits of the positions of the parties, this does not, in our view, require an arbitrator to expressly address in the award every twist and turn of a party's argument. *It is sufficient that the award clearly reflects an understanding and appreciation of the essential elements of each party's position on the significant issue or issues in order to fulfil the requirements of Section 82(2). This may mean, for example, that a party's argument on a significant issue is implicitly rather than expressly addressed or negated by the findings of fact or the reasoning of the arbitrator.* (at para. 20) (para. 30, emphasis added)

I now turn to the Employer's reliance on the Board's analysis in *EDS*. In that case the union grieved on two alternative grounds. The arbitrator only addressed one of the union's grounds and dismissed the grievance. The Board held that an arbitrator's failure to address a party's key argument *may* amount to denial of a fair hearing. In the context of that case, the Board ruled that the failure to address the union's alternative position denied the union a fair hearing. In upholding that decision, the reconsideration panel in *EDS* was careful to observe at paragraph 10 of its decision that the Board does not assume that an arbitrator failed to consider evidence, a collective agreement provision or an argument *merely* because it is not mentioned on the face of the award. See *Lomex Mining Corporation Limited*, BCLRB No. 96/76, [1977] 1 Canadian LRBR 377 at pp. 380-381 and *Western Mines Limited*, BCLRB No. 81/76, [1977] 1 Canadian LRBR 52 at p. 56.

The Board's ruling in *EDS* illustrates that a line can be drawn between awards that completely fail to address a determinative issue and awards that decide the issue in a way that

> confronts the respective merits of the parties' positions, either expressly or by necessary implication. A traditional formulation of the test used to mark that line is whether the "the result of the award appears incongruous in light of the positions of the parties": *Drifter Motor Hotel (Rupert Management Ltd.)*, BCLRB No. 29/78, p. 9; *639385 B.C. Ltd. (Central Park Manor)*, BCLRB No. B21/2009, paras. 14-25. (*Westfair*, paras. 26-29, emphasis in original)

51 In the case before me, the Employer relies on *Drifter Motor Hotel*, BCLRB No. 29/78 ("*Drifter*"); *Castlegar and District Hospital*, BCLRB No. B380/99, 54 C.L.R.B.R. (2d) 87 ("*Castlegar and District Hospital*"); and *The Government of the Province of British Columbia*, BCLRB No. B386/2001 (Leave for Reconsideration Denied, BCLRB No. B479/2001) ("*EDS*"). Those authorities are reviewed in the above quote from *Westfair* and I adopt the reasoning from *Westfair* in terms of the Board's approach regarding those cases. Thus, I note "the Board has cautioned that it is necessary to read *Drifter* with an appreciation of its unique facts"; the Board in *Castlegar and District Hospital* indicated that an arbitrator did not need to "expressly address in the award every twist and turn of a party's argument"; and the Board in *EDS*, "was careful to observe...that the Board does not assume that an arbitrator failed to consider evidence, a collective agreement provision or an argument *merely* because it is not mentioned on the face of the award".

52 In addition to the foregoing, a review of *Westfair* and the cases cited therein indicates the following aspects to the approach of the Board when dealing with a Section 99 application making allegations about a lack of reasoned analysis similar to those made by the Employer here:

1. "it is not inconsistent with Code principles or a denial of a fair hearing if an arbitrator finds facts or interprets a collective agreement in a way that makes it unnecessary to decide a particular issue or to confront a particular argument, even when that argument is determinative within a party's theory of the case";
2. the fact that an arbitrator is not required to "expressly address in the award every twist and turn of a party's argument...may mean, for example, that a party's argument on a significant issue is implicitly rather than explicitly addressed or negated by the findings of fact or the reasoning of the arbitrator";
3. in examining whether an award completely fails to address a determinative issue or decides the issue "in a way that confronts the respective merits of the parties' positions, either expressly or by necessary implication", consideration is given to "whether the 'result of the award appears incongruous in light of the positions of the parties'";
4. a test developed in the case law is whether the award reveals "the facts, issues, collective agreement provisions and reasoning process that led to the resolution of the substance of the matter in dispute."

53 The Board has further explained that the test for reasoned analysis under Section 99 is not meant to provide an avenue for reviewing the correctness of an arbitrator's interpretation. As the Board said in *British Columbia Ferry Services Inc.*, BCLRB No. B74/2011 (Application for Reconsideration Denied, BCLRB No. B100/2011):

> It is well established that errors of interpretation are not errors of labour relations policy (para. 65)

54 In claiming there was a lack of reasoned analysis, the Employer examines a number of arbitral cases which it had argued before the Arbitrator and which it says were not addressed. For example, the Employer identifies "[o]ne of the key cases" it relied upon was *St. Mary's Cement v. United Steelworkers Local 9235*, (2010), 194 L.A.C. (4th) 72. The Employer indicates this case was submitted for the proposition that "clear and express wording" was necessary to limit the authority to amend a pension plan, and that "there had to be clear evidence" a third party pension administrator "had ceded its authority to one of the parties in the dispute".

55 The Employer reviews other arbitral law and evidence which was before the Arbitrator and says "[t]he only way that the powers of Finning International as the Administrator could be fettered is if there was evidence that it had agreed to restrict these powers". The Employer asserts that evidence to this effect is "entirely lacking" and says "a plain reading of LOU #1" reveals nothing "that would fetter or limit the power of Finning International under this Article".

56 While I understand the Employer's position on the language of LOU #1, a review of the Award reveals that the Arbitrator had a different view about the plain meaning of the language than the Employer. At paragraph 103 of the Award, the Arbitrator found the "plain and literal meaning" of the language in LOU #1 amounted "to a binding commitment" that existing members could remain in the Defined Benefit Pension Plan during the term of the current Collective Agreement. After reviewing the negotiation evidence from the 2003 bargaining, the Arbitrator held that such evidence was "consistent with the plain and literal meaning of the words as set out in LOU #1", and supported his view of the language. (Award, para. 134).

57 The Arbitrator found other extrinsic evidence was also consistent with his conclusions about the interpretation of LOU #1. He held the 2004 Pension Choice Form drafted by the Employer (and referenced at paragraph 8 above) "makes clear not only the ability of members to stay in the current Defined Pension Benefit Plan but also that they would 'continue to earn service' in the Defined Pension Benefit Plan" (Award, para. 150).

58 As previously noted, the Arbitrator understood the Employer's position about third parties and the Retirement Plan. While the Employer argues that the evidence was "entirely lacking" about Finning International agreeing to restrict its powers, the Arbitrator found otherwise. For example, the Arbitrator noted the language used in LOU #1, which he found to be restrictive, was approved by the Finning International Pension Committee (Award, para 146).

59 With respect to the Employer's allegations about a lack of reasoned analysis, I find it was unnecessary for the Arbitrator to specifically deal with the cases cited by the Employer based on the Arbitrator's interpretation of the Collective Agreement and his related findings from the extrinsic evidence. The case law relied upon by the Employer before the Arbitrator and referenced on the Section 99 application was negated by the reasoning of the Arbitrator regarding his interpretation of the plain meaning of LOU #1 as well as his findings of fact in connection with the extrinsic evidence. The Arbitrator dealt with the respective merits of the parties' positions and the result was not incongruous in light of those positions.

60 In dealing with whether the Award reveals a reasoned analysis, I have examined the matter with the elements identified in *Westfair* in mind. I find the Award reveals "the facts, issues, collective agreement provisions and reasoning process that led to the resolution of the substance of the matter in dispute" (*Westfair*, para. 26).

61 On the question of the adequacy of reasons, counsel for the Union referred to the Supreme Court of Canada decision in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708 ("*Newfoundland Nurses*"). That case involved the judicial review of an arbitration award where the Court dealt with allegations about the adequacy of reasons. The Board has discussed *Newfoundland Nurses* as well as the subsequent Supreme Court of Canada judgment in *Driver Iron Inc.*, 2012 SCC 65 with respect to issues relating to the adequacy of reasons. In *Richard Thibodeau*, BCLRB No. B115/2013 (Leave for Reconsideration of BCLRB No. B93/2013), 228 C.L.R.B.R. (2d) 108 ("*Thibodeau*"), the Board said:

> The core and gist of these decisions is captured in the following, brief explanation by the Court in *Driver Iron Inc.*:
>
> > The Board did not have to explicitly address all possible shades of meaning of these provisions. This Court has strongly emphasized that administrative tribunals do not have to consider and comment upon every issue raised by the parties in their reasons... .(at para. 8)

62 Along this line, the Board in *Insurance Corporation of British Columbia*, BCLRB No. B213/2012 (Leave for Reconsideration of BCLRB Letter Decision dated August 10, 2012), 218 C.L.R.B.R. (2d) 78 ("*ICBC*") stated as follows regarding *Newfoundland Nurses*:

> In terms of the arbitration award before it, the Court explained:
>
> > The arbitrator in this case was called upon to engage in a simple interpretive exercise: Were casual employees entitled, under the collective agreement, to accumulate time towards vacation entitlements? This is classic fare for labour arbitrators. They are not writing for the

> courts, they are writing for the parties who have to live together for the duration of the agreement. Though not always easily realizable, the goal is to be as expeditious as possible. (para. 23)
>
> Going on to further explain the nature of labour relations in the following paragraphs, the Court concluded "this process would be paralyzed if arbitrators were expected to respond to every argument or line of possible analysis" (para. 25).
>
> Taking this approach which the Court had so clearly set forth in its decision, the Court could and did briefly conclude, "[i]n this case, the reasons showed that the arbitrator was alive to the question at issue and came to a result well within the range of reasonable outcomes" (para. 26).
>
> Thus, the adequacy of reasons is to be addressed in an organic manner in which the issue is "whether the decision is reasonable in light of the outcome and the reasons" (para. 15). The test is "if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes" (para. 16). If so, "the *Dunsmuir* criteria are met" (*ibid.*).
>
> Further, in "reviewing a decision of an administrative body on the reasonableness standard, the guiding principle is deference" (para. 18). The reasons are to be reviewed contextually and they "do not have to be perfect...[or] comprehensive" (*ibid.*). It is not necessary for the decision "to respond to every argument or line of possible analysis" (para. 25). (*ICBC*, paras. 25-29)

63 Approaching the question of the adequacy of reasons here in terms of the analysis adopted from the Supreme Court of Canada decisions, I find the Arbitrator's reasons allow the Board "to understand why the tribunal made its decision" and further permit the Board "to determine whether the conclusion is within the range of acceptable outcomes" (*ICBC*, para. 28). The reasons demonstrate the Arbitrator "was alive to the question at issue" about the meaning of LOU #1, and the effect on the matters at issue due to the involvement of a third party, being Finning International (*ICBC*, para. 27). The Award reflects "a result well within the range of reasonable outcomes" (*ICBC*, para. 27), particularly bearing in mind the "guiding principle" of deference (*ICBC*, para. 29). In the circumstances, on the basis of both the Supreme Court of Canada cases and the Board jurisprudence, I find the Arbitrator did not need to specifically deal with the authorities and arguments based on them cited by the Employer.

64 In my view, a number of the Employer's arguments on this Section 99 application turn either on a difference between the Arbitrator and the Employer regarding the interpretation of the Collective Agreement language in LOU #1 or on a difference about the findings of fact which should be derived from the evidence before the Arbitrator. As previously explained, the Arbitrator came to a different conclusion than that put forward by the Employer about the plain meaning of the language in LOU #1. Similarly, while the Employer submits that the evidence did not support a factual finding that Finning

International had agreed to restrict its powers, the Arbitrator came to a different conclusion based on the evidence.

65 The Employer relies on the evidence of Ms. Topp regarding Finning International. In my view, the Arbitrator was entitled to come to a different conclusion about the wording of LOU #1 than Ms. Topp. Although the Employer raises the point that Ms. Topp was a witness from Finning International, the view of a party's representative about the interpretation or impact of a document, even a third party's representative, is not determinative of the matter. Different parties may often have different views about the interpretation or impact of a document and that is why an arbitrator must determine the matter.

66 Further, the Award indicates that Ms. Topp "has been employed by Finning (International) since 2007" (at para. 88), and it does not appear that Ms. Topp was involved with the 2003 approval by Finning International of the language which became LOU #1. It is unclear therefore whether she gave testimony as to what was intended at the time the language at issue in LOU #1 was approved in 2003. In any event, the fact that the Arbitrator came to a different interpretation than Ms. Topp about the impact of the LOU #1 language, based on its wording and the extrinsic evidence, is not a basis for setting aside the Award, and the Arbitrator was not required to decide the matter in accordance with Ms. Topp's view.

67 In regard to the Arbitrator's interpretation of the Collective Agreement, I find the Award shows that the Arbitrator has made a genuine effort to resolve the dispute on the basis of relevant provisions of the Collective Agreement in accordance with the test set out in the case law. Similarly, I find the Award demonstrates evidence to support the Arbitrator's factual findings and the Arbitrator did not make a palpable and overriding factual error warranting review under Section 99. In terms of whether the Arbitrator was correct in his interpretation of the language of LOU #1, or correct in his factual conclusions based on the extrinsic evidence, the Employer's allegations about such matters do not constitute grounds for disturbing the Award. I dismiss the Employer's request for review based on its challenge to the Arbitrator's interpretation of LOU #1 and its challenge to the Arbitrator's factual findings.

68 The final matter I turn to is the status of Finning International as a third party, which is the basis underlying many of the Employer's grounds for seeking review. For example, in the Employer's wrong question allegation, the Employer said that the question ought to have centered on Finning International as a stranger to the Collective Agreement. Likewise, regarding its allegation about the Arbitrator using authorities not cited, the Employer said it would have raised the *Bisaillon* case about third parties. And as previously noted, the focus of the Employer's reply submission was the status of Finning International as a third party.

69 During oral argument, I asked counsel for the Employer to clarify the relationship between Finning Canada and Finning International. He indicated that Finning Canada was not separate corporately from Finning International. It was further indicated that Finning Canada is a division of Finning International and not a company in its own right. When counsel for the Union made his oral submissions in response, he stated that this was the first time he had heard this description of the relationship between Finning

Canada and Finning International and this information may impact the matter. Counsel for the Union further indicated this bears on the accuracy of describing Finning International as a third party, and this close relationship may further help to explain the relative ease with which the agreement of Finning International was obtained in relation to the pension plan.

70 I mention this point because at law Finning International may not be a third party or "stranger" as alleged, but in fact the contracting party. In other words, a division of a corporation which is not separate corporately may not be considered a separate legal entity, and a collective agreement with Finning (Canada), a Division of Finning International Inc., may legally be a collective agreement with Finning International Inc. Having said that, I have nevertheless considered the Employer's submissions regarding Finning International on the basis that Finning International was a third party since that is the basis on which the arbitration proceeded before the Arbitrator.

71 With respect to the third party issue, the Employer's submission is again: "[t]he only way that the powers of Finning International as the Administrator [of the Retirement Plan] could be fettered is if there was evidence that it had agreed to restrict these powers". In other words, the Employer's position is that fettering the third party's powers is possible, but that the evidence did not demonstrate this had occurred in the case before the Arbitrator. As previously noted, the Employer had described this matter as "the crux" of its Section 99 application in its reply submission to the Board.

72 On this matter, I repeat what was said earlier about the evidence. The Arbitrator came to the conclusion that Finning International had agreed to restrict its powers as Administrator as indicated in the Award, based on the Arbitrator's interpretation of the plain wording of the language in LOU #1, which Finning International had approved, and his factual findings in connection with the extrinsic evidence. Such aspects of the Award regarding the interpretation of the Collective Agreement language in LOU #1 and related findings of fact are matters over which the Board will show deference to an arbitrator in a review under Section 99. I do not find any reason to vary from this approach here and dismiss this basis for the Employer seeking review.

V. SUMMARY

73 To summarize my findings, I find the Employer has not been denied a fair hearing, nor is the Award inconsistent with the principles expressed or implied in the Code, as alleged by the Employer. I find the Arbitrator fulfilled his "statutory mandate to resolve the grievance having '...regard to the real substance of the matters in dispute and the respective merit of the positions of the parties to it under the terms of the collective agreement...'" (*School District No. 36*, para. 21). In particular, the Arbitrator dealt with the merits of the Employer's position concerning the effect, on the matters in dispute before him, of Finning International as a third party administrator of the Retirement Plan.

74 While there are differences between the Employer and the Arbitrator regarding the findings to be made on the evidence about Finning International, as well as differences about the interpretation of the Collective Agreement, the allegations of the Employer about such matters here do not meet the Board's tests for setting aside the

Award under Section 99. There is not a lack of reasoned analysis as alleged by the Employer and the Arbitrator's reasons explain why he made his decision. The Award reveals "the facts, issues, collective agreement provisions and reasoning process that led to the resolution of the substance of the matter in dispute" (*Westfair*, para. 26).

75 For the reasons given herein, I find that the Arbitrator did not commit an error under Section 99 of the Code as alleged by the Employer.

VI. CONCLUSION

76 The Employer's application pursuant to Section 99 of the Code is dismissed.

LABOUR RELATIONS BOARD

JAMES CARWANA
VICE-CHAIR