CITATION: Clarion Lakeside Inn v. UFCW Local 175, 2022 ONSC 3850
DIVISIONAL COURT FILE NO.: DC-21-00000004-00JR
DATE: 20220630

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Matheson, Kurz, and O'Brien JJ

BETWEEN:	
CLARION LAKESIDE INN AND CONFERENCE CENTRE Applicant	*T. Valgardson*, for the Applicant
– and –	
UFCW LOCAL 175 and UFCW LOCAL 633 Respondents	*J. Hurtado and A. Veenendaal*, for the Respondents
	HEARD at Thunder Bay: June 20, 2022 (by videoconference)

O'BRIEN J.

REASONS FOR DECISION

Overview

[1] On January 17, 2020, the Clarion Lakeside Inn & Conference Centre, a hotel in Kenora, Ontario, suffered a fire that caused significant damage. As a result of the fire, the Clarion was closed, its employees were laid off, and business operations ceased, though with an intention to reopen. When the Clarion (which I will also refer to as the "employer") failed to pay its employees termination or severance pay, the bargaining agent for most of the hotel employees, the Respondent union UFCW Locals 175 & 633, initiated grievances.

[2] The grievances proceeded to arbitration on the basis of an agreed statement of facts, with no *viva voce* evidence. The union sought termination pay for its members who had been laid off, or in the alternative, severance pay. The employer argued that it was exempt from the obligation

to pay termination pay under the *Employment Standards Act, 2000*[1] by a provision in Ontario Regulation 288/01 (the "*Regulation*"). Specifically, s. 2(1.4) of the *Regulation* provides that employees are not entitled to termination pay where their "contract of employment has become impossible to perform or has been frustrated by a fortuitous or unforeseeable event or circumstance." In response to the union's alternative argument, the employer argued that it was not required to pay severance pay. It submitted that pursuant to s. 64(1)(a) of the *ESA*, there had been no "permanent discontinuance" of all or part of its business.

[3] In a decision dated November 8, 2021, the arbitrator granted the union's claim for termination pay but dismissed the claim for severance pay. The Applicant employer seeks judicial review of the arbitrator's decision that the union's members were entitled to termination pay. The union does not seek judicial review of the severance pay determination.

[4] The central question is whether the arbitrator erred in finding the employment contracts of the union members were not frustrated when, since the date of the fire and continuously thereafter, the Clarion fully intended to reopen.

[5] The employer makes two principal arguments. First, it submits that the arbitrator applied the wrong test for frustration. Specifically, the arbitrator asked whether there had been a "substantial change in the nature of the business," rather than whether the performance of the contract had become "a thing radically different from what which was undertaken by the contract," which is the test articulated by the Supreme Court of Canada in *Naylor Group Inc. v. Ellis-Don Construction Ltd.*, 2001 SCC 58, at para 53 [*Naylor Group Inc.*].[2]

[6] Second, according to the employer, the arbitrator erred in his understanding of when frustration should be determined. In the employer's submission, frustration should not depend on the occurrence of an unknown future event, such as the reopening of the hotel. Instead, the question of frustration crystallized when the employees had been laid-off for 35 weeks. At that time, pursuant to s. 63(1)(c) of the *ESA*, their contracts of employment terminated. As the hotel was not yet reopened at that time, the employer submits the contracts of employment were frustrated.

[7] The employer raised other arguments in its factum, specifically that (i) the arbitrator relied on considerations irrelevant to the test under s. 2(1.4) of the *Regulation* and s. 55 of the *ESA*; and (ii) that the arbitrator had improperly found ambiguity in s. 56(1) of the *ESA* and s. 2(1.4) of the *Regulation*. However, counsel acknowledged in oral submissions that, even if he was successful on these points, they would not rise to the level of warranting this Court's intervention. Therefore, I will address only the two principal arguments.

[8] It is agreed that the standard of review for the decision of a labour arbitrator is reasonableness. For the reasons that follow, I find his decision to be reasonable.

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[1] S.O. 2000, c. 41 [the *ESA*].

[2] In support of this formulation of the test for frustration, the Supreme Court cites: *Peter Kiewit Sons Co. v. Eakins Construction Ltd.*, [1960] S.C.R. 361, per Judson J., at p. 368 [*Peter Kiewit Sons*], quoting *Davis Contractors Ltd. v. Fareham Urban District Council*, [1956] A.C. 696 (U.K. H.L.), at p. 729.

Test for Frustration

[9] I do not agree that the arbitrator erred in his interpretation and application of the test for frustration in the *Regulation*. In applying the reasonableness standard, reviewing courts will take a deferential approach to the administrative decision-maker's interpretation of the governing statute.[3] Here, in addressing s. 2(1.4), the arbitrator considered and applied the test relied on by the employer. That is, he applied the test for frustration articulated by the Supreme Court of Canada in *Peter Kiewit Sons* and more recently in *Naylor Group Inc.*

[10] Both cases ask whether to compel performance of the contract would be to order something radically different than what the parties agreed to. *Peter Kiewit Sons* goes on to further describe circumstances in which performance under a contract would become radically different. To that end, when summarizing the union's submissions, the arbitrator reproduced a passage from *Peter Kiewit Sons* emphasizing that "hardship or inconvenience" is not enough. There must be "a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for."[4]

[11] The arbitrator reasonably concluded that this common law test was not met in the circumstances of this case. Specifically, he found that the contract between the parties was not "something radically different" because the nature of the employer's business had not substantially changed as a result of the fire. He explained that there was no evidence the character of the hotel would change to any degree. The hotel would not become a different enterprise but instead would reopen as a hotel.

[12] In addition, he reasoned that the fire in this case had caused a temporary rather than permanent break in operations. The break in operations did not render future employment impossible. Indeed, the duration of the break in this case was "considerably less than could be considered to create an impossibility." Although this statement arose in his discussion of whether the contract had become impossible to perform, the concept of impossibility may be employed in the frustration analysis.[5]

[13] The arbitrator's conclusions were open to him on the record. The agreed facts did not support a finding that there was any intention to change the character of the hotel. Instead, there was an immediate and ongoing intention for the break in operations to be temporary and for the hotel to reopen as a hotel.

[14] In the agreed facts, the parties stated that hotel reconstruction started at the conclusion of the fire investigations. While it was originally estimated that the reconstruction of the hotel would be completed by the late fall of 2020 to the early spring of 2021, by the time of the arbitration hearing, according to the agreed statement of facts, it was anticipated that it would not be

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[3] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at para. 306 [*Vavilov*].
[4] *Peter Kiewit Sons*, at para. 11.
[5] See, for example, *Cowie v. Blue Heron Charity Casino*, 2011 ONSC 6357 [*Cowie*], a case relied on by the employer. There, at paras. 20-21, this court adopted comments in G.H.L. Fridman, the Law of Contract in Canada, 4th ed. that tied the concept of frustration to the idea of a contract that had become impossible to perform.

completed until the early spring to early summer 2022. The parties agreed that, at that time, "the Clarion will resume operations."

[15] The agreed statement of facts further specified that although the parties' collective agreement was originally due to expire in August 2020, they had extended it to August 31, 2022. Finally, in its submissions on the severance pay issue, the employer submitted that there would be no permanent discontinuance of the business because "the employer fully intended to re-open." The arbitrator specifically found that "[i]n this case…the employer always intended to re-commence operations."

[16] Given that, on the record, the employer intended from the outset and continuously to reopen its business, it was reasonable for the arbitrator to conclude that the nature of the operation was not changing and that the break in operations was temporary. On these findings, the fire did not cause the agreement between the parties to become something "radically different."

When Frustration Crystallizes

[17] The arbitrator did not specifically address the employer's second principal argument before this court -- that is, the question of when frustration crystallized. In the context of this case, I do not find this to be an error. The Supreme Court of Canada recognized in *Vavilov* that the reasons given for a decision will not necessarily address all arguments before the administrative decision-maker. The reviewing court is entitled to review the decisions in the context of the entire proceedings, including the evidence before the decision-maker.[6]

[18] Given the record before the arbitrator, in my view, he was not required to determine when frustration crystallized. Regardless of whether frustration was assessed at the date of the fire, at 35 weeks after the fire (the date connected to termination under s. 63(1)(c) of the *ESA*), or on the date of the arbitration, the parties agreed there was an immediate and ongoing intention for the employer to recommence operations. As set out above, at all moments in time, the hotel intended to reopen as a hotel and the break in operations was temporary. This made it unnecessary to specify the timing that frustration needed to be assessed. The outcome would be the same regardless of which moment was chosen for the assessment.

[19] There is support for the proposition that frustration should be determined on the date of dismissal. In *Ciszkowski v. Canac Kitchens*, 2015 ONSC 73, for example, the question was whether an employee's long-term disability rendered the employment contract frustrated at the time of dismissal. The Court found that it would be unfair for an employer to dismiss an employee and rely on subsequently-disclosed evidence about the post-termination extent of an employee's disability if that evidence was not relevant to the dismissal date. However, in determining that the employer had not shown frustration, the Court looked primarily at the parties' knowledge of the disability as of the date of dismissal. As the employee was not known to be totally disabled and unable to return to work, frustration was not made out. By analogy, here, the parties never considered the closure of the hotel to be permanent. On the contrary, they had agreed it would reopen.

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[6] *Vavilov*, at paras 91, and 94.

[20] That said, it may be an error to rely on a speculative future occurrence to avoid a finding of frustration. In *Cowie*, the employee was dismissed as a result of new legislation requiring employees to have a "clean criminal record" in order to retain a position as a casino security guard.[7] This Court found that the trial judge erred in considering subsequent evidence that the employee obtained a pardon to conclude that the circumstance disrupting the contract was a temporary inconvenience.[8]

[21] That case was very different. The circumstances that might have rendered the interruption in employment temporary – the pardon and renewed licence – were entirely discretionary and outside of either party's control. The Court stated at para. 31 that it was "pure speculation" to predict if and when either the pardon or licence would be granted. By contrast, in the current case, the arbitrator was entitled to proceed on the understanding that the reopening of the hotel was not speculative. Indeed, the employer, who was in the best position to predict the hotel's reopening, not only agreed that it intended to reopen but specifically urged this position on the arbitrator.

[22] In these circumstances, it did not matter whether frustration was assessed at the date of the fire, at 35 weeks, or at the date of the arbitration. At each point in time, the employer had a steadfast intention to reopen.

Conclusion

[23] In the specific circumstances of this case, the arbitrator was entitled to conclude that the employment contracts of the union's members were not frustrated. I do not find a basis to interfere in the arbitrator's decision. Therefore, I would dismiss the application.

[24] During the hearing, the parties advised that they had reached an agreement that costs would be capped at $7,500. Pursuant to that agreement, the employer is required to pay costs of the application in the amount of $7,500.

O'Brien, J.

I agree

Matheson, J.

I agree

Kurz, J.

Released: June 30, 2022

[7] *Cowie*, at para. 5.
[8] *Cowie*, at para 30.

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