COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Morrison v. 0812652 B.C. Ltd. dba Timberland Consultants,* 2024 BCCA 321

Date: 20240911
Docket: CA49253

Between:

Corey Morrison

Appellant
(Plaintiff)

And

0812652 B.C. Ltd. dba Timberland Consultants

Respondent
(Defendant)

Corrected Judgment: The text of the judgment was corrected at paragraph 92 on September 12, 2024.

Before: The Honourable Mr. Justice Willcock
The Honourable Justice Griffin
The Honourable Mr. Justice Voith

On appeal from: An order of an arbitrator, dated July 7, 2023 (*Morrison v. 0812652 B.C. Ltd. dba Timberland Consultants*).

Counsel for the Appellant:	A. Staley L. Moody
Counsel for the Respondent:	T.W. Pearkes
Place and Date of Hearing:	Vancouver, British Columbia May 29, 2024
Place and Date of Judgment:	Vancouver, British Columbia September 11, 2024

Written Reasons by:
The Honourable Mr. Justice Voith

Concurring Reasons by: (Page 16, para. 50)
The Honourable Mr. Justice Willcock

Dissenting Reasons by: (Page 18, para. 56)
The Honourable Justice Griffin

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Summary:

The appellant brought a wrongful dismissal claim against the respondent. The appellant claimed he had been laid off and that the deemed termination provisions of the Employment Standards Act [ESA] were engaged. An arbitrator dismissed the appellant's claim, finding that the appellant had not been terminated and had instead asked for some time off in the winter months as he had in many previous years. The appellant now contends the arbitrator erroneously drew a distinction between an employer-initiated layoff and an employee-initiated layoff when the arbitrator concluded the ESA did not apply to the latter category of layoff. Held: Appeal dismissed. Though the arbitrator's reasons could have been clearer, the arbitrator did not draw the principled distinction the appellant relies on. The real dispute before the arbitrator was factual. When the arbitrator's reasons are read as a whole, and in context, it is clear the arbitrator found that in the circumstances of this particular case, the appellant's request for time off did not engage the ESA. The dissent is of the view that the arbitrator made a material error in interpreting the ESA and would remit the matter to arbitration.

Reasons for Judgment of the Honourable Mr. Justice Voith:

[1] The appellant, Mr. Morrison, brought a constructive dismissal claim against the respondent. He argued he had been laid off and the deemed termination provisions of the *Employment Standards Act*, R.S.B.C. 1996, c. 113 [*ESA*] were engaged. The dispute was heard by an arbitrator who dismissed the appellant's claim.

[2] The appellant argues the arbitrator erroneously drew a distinction between a company-initiated layoff and an employee-initiated layoff when he concluded the deemed termination provisions of the *ESA* did not apply to the latter category of layoff.

[3] Though the language used by the arbitrator could have been clearer, it is apparent that the arbitrator's award (the "Award"), considered functionally and in context, did not draw any such principled distinction. Instead, the enquiry before the arbitration was largely fact-driven. The arbitrator did not accept the appellant's evidence in various respects and found that the appellant had asked for some time off over the winter months, as he did most years.

[4] Accordingly, I would dismiss the appeal.

i) Background

[5] The parties agreed on aspects of the history of the parties' relationship. For ease of reference I have used the defined expressions used by the parties and the arbitrator.

[6] Mr. Morrison is a forest technologist. He commenced work for the respondent 0812652 B.C. Ltd., doing business as Timberland Consultants ("Timberland"), in 2001 when it acquired an earlier business. Mr. Morrison had been employed by that earlier business since 1992. There was no written contract of employment in place between the parties.

[7] For approximately the past 15 years, Mr. Morrison's primary duties had involved the management of what are known as Total Chance Planning contracts ("TCP Contracts") in the Kootenay Lake, Rocky Mountain, Boundary and Arrow regions in British Columbia. These TCP Contracts were administered by BC Timber Sales ("BCTS"), a government body. The duties Mr. Morrison was required to fulfill were determined by BCTS and varied by contract, business area and season. The "field season" took place when field work could be conducted. The "off-season" typically ran from whenever the snowpack arrived until early spring. The off-season resulted in the field season, and field work, being placed on hold. The description "off-season" is something of a misnomer as office work would generally continue throughout the winter. Thus, the descriptors "field season" and "off-season" speak to the types of work that were done at different times of the year. They do not suggest, as is the case in some industries, that no work or limited work was available during the "off-season".

[8] Throughout Mr. Morrison's 15-year involvement with the TCP Contracts, the Kootenay Lake region was allocated a significant portion of the available BCTS budget.

[9] This changed in 2020. At issue in the arbitration was what, if any, significance that change had on Mr. Morrison's ongoing employment with the respondent. Similarly, at issue was whether Mr. Morrison was laid off by Timberland or,

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alternatively, took some time off in October 2020 or at the end of that year's field season. Finally, Mr. Morrison went to work with a competitor, Atlas Information Systems ("Atlas"), in March and April 2021. The parties disagreed on what impact Mr. Morrison's employment with that company had on his employment with Timberland.

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ii) How the arbitration unfolded

[10] On August 11, 2021, counsel for the appellant sent a letter to Timberland advising that Mr. Morrison had a constructive dismissal claim against Timberland. In light of the parties' significantly divergent views of what had transpired between them, counsel for the respective parties agreed they would exchange the direct evidence of their clients in affidavit form. If the parties were unable to settle the matter, they would proceed to arbitration.

[11] The parties were unable to resolve their differences. Mr. Morrison filed a Notice to Arbitrate under the *Arbitration Act*, S.B.C. 2020, c. 2. Timberland filed a Response to the Notice to Arbitrate. As I understand it, the parties each filed written submissions that were based on the evidence in the affidavits of their respective clients. Both the affidavits and the written submission of each of the parties are in the record.

[12] Thereafter, Mr. Morrison gave further direct evidence before the arbitrator. He was then cross-examined and re-examined. Similarly, Messrs. MacDonald and Anderson, each a director of Timberland, gave further direct evidence and were both cross-examined before the arbitrator. Mr. MacDonald was also re-examined. Finally, the parties made their respective oral submissions to the arbitrator. None of this *viva voce* evidence, nor any of these further oral submissions, was captured in a transcript or recording.

iii) The arguments and positions of the parties

[13] The principal positions advanced by the parties before the arbitrator can be discerned from the pleadings (here, the Notice to Arbitrate and the Response to

Notice to Arbitrate), from the parties' respective affidavits and written submissions and from the Award.

[14] The Notice to Arbitrate advances a constructive dismissal claim. The Notice asserts that Timberland removed Mr. Morrison without discussion or notice, from management of the BCTS work in the Kootenay Lake region. The Notice states that Mr. Morrison was "singled out" when that region was removed from his oversight and that he was thereby "denied … the ability to undertake assignments". The Notice states that, on or about October 15, 2020, Mr. Morrison was placed on a "temporary layoff" with the understanding that the layoff would be for a short period of time. The Notice also states that in contrast "to the previous (15) years" where he had been provided with work to bridge the off-season, he was, in 2020, "not provided with the ability to complete additional work or work on additional assignments". Finally, the Notice claims that as of "May 27, 2021, well past the expiration of the statutory period of thirteen (13) weeks, [Mr. Morrison] had not been recalled from his layoff". The 13-week period being referred to is found in the definition of "temporary layoff" in s. 1 of the *ESA*. The specific language of s. 1 and of s. 63(5) of the *ESA* are set out in parts of the Award that I will come to.

[15] The affidavit and written submissions filed by Mr. Morrison are both consistent with the Notice to Arbitrate that was filed on his behalf. The appellant, in his affidavit, stated that he worked as a project manager in the management of TCP Contracts for 15 years. BCTS was the client for these contracts and was the primary entity to which he reported, though he accepted he reported to the owners of Timberland as well. He deposed that during the course of the 2020 field season it became apparent that assignments were being diverted from him. He deposed that in the 2020 season, and for the first time in 15 years, Timberland removed him from the management of the Kootenay Lake contract region. This was important because this region was allocated approximately half the annual TCP Contracts budget.

[16] Mr. Morrison further deposed that at the end of each field season he had "always engaged in office work until the next field season or contract began". He

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said that, effective October 15, 2020, he was placed on a temporary layoff by Timberland due to the early cancellation of the development project he was working on. He said Timberland had never overtly expressed any intention to end his employment. Instead, it had placed the blame for the shortage of work on TCP budgetary factors. He was issued a record of employment dated October 28, 2020 which listed the reason for its issuance as "shortage of work or end of contract or season". He had some modest communications with Timberland in May and June 2021. He said he was advised by Timberland that the TCP Contract was not being renewed but that Timberland was prepared to discuss other employment options. Though he asked for details, he said Timberland failed to respond to his enquiries.

[17] He deposed that in order to find work, and to mitigate his losses, he contacted various other potential employers, including Atlas. He was hired by Atlas on a project-by-project basis, albeit at a lower level position than he had occupied with Timberland.

[18] The written argument filed by Mr. Morrison asserted that among the primary issues in the arbitration was the question of whether Mr. Morrison was terminated on October 15, 2020 or on January 14, 2021 or, alternatively, whether he "resigned" from his employment. The submission reasserted that Mr. Morrison was typically able to work for Timberland during the off-season, but that he was removed from the Kootenay Lake area, his duties were diverted from him and he was denied the resources and information necessary to work during the off-season.

[19] Mr. Morrison argued he had been terminated by Timberland and he relied on s. 63(5) of the *ESA* to fix the date of that termination. He further argued that by the time he went to work for Atlas his contract with Timberland was at an end and there was no "employment contract, agreement, or relationship in force to repudiate". Mr. Morrison's submissions then turned to what period of notice and compensation he was entitled to.

[20] Timberland's Response to Notice to Arbitrate and its affidavits told a very different story. Timberland's Response emphasized that Mr. Morrison had

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consistently chosen to take the winter months off over the last number of years. Notwithstanding the fact that Timberland had ample work, Mr. Morrison preferred to collect unemployment insurance and enjoy his time off. The respondent asserted that the layoff provisions of the *ESA* were not engaged because Timberland had suitable work available and it was Mr. Morrison's "choice not to work".

[21] Mr. MacDonald agreed Mr. Morrison acted as a project manager on the TCP Contracts and that he reported primarily to BCTS. He denied Timberland had diverted work from the appellant. Rather, any changes to his workload and responsibilities were made by BCTS "to meet the needs of their priorities".

[22] Importantly for present purposes, Mr. MacDonald deposed that Timberland had "issued [Mr. Morrison] a record of employment at his request". Further, he deposed that Mr. Morrison "had requested a record of employment and took a layoff" in each of 2012, 2013, 2016, 2017, 2018 and 2020. He denied that Timberland had refused to provide work to Mr. Morrison or that he had been told there was no work for him. He deposed that there was work available for Mr. Morrison if he wished to be occupied.

[23] The affidavit of Mr. Anderson was to similar effect. He deposed that COVID-19 had depleted Timberland's work force and that if "[Mr. Morrison] had been willing to work with us he would have remained fully employed".

[24] The written submission of Timberland further developed this evidence. Timberland argued the appellant had "quit his employment" and described aspects of Mr. Morrison's claim as "disingenuous". Timberland contended it did not take any action to precipitate Mr. Morrison's layoff. Instead, Mr. Morrison asked, as he had in prior years, to be laid off during the off-season. Finally, it emphasized Mr. Morrison never asked for any additional work. Aspects of these submissions are captured in the following paragraph of its written brief:

> 7. This was not a temporary layoff by the employer as contemplated by the provisions of the *ESA*, rather this "layoff" was initiated by the claimant and respected by the employer with the expectation that the claimant would return

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> to work when he wished to do so as in prior years. This fact pattern does not fall within the *ESA* temporary layoff provisions.
>
> [Emphasis added.]

[25] This aspect of Timberland's position is further crystallized, under the heading "Legal Basis", in the following two submissions:

> a. The claimant was not laid off by the employer due to seasonal work ending or an absence of work;
>
> b. The claimant requested layoff so that he could collect EI and enjoy some downtime as he had worked far more in the previous year than in any prior year.

[26] Ultimately then, though Mr. Morrison's claim and Timberland's response raised various legal issues, resolution of the dispute required that the arbitrator make findings to address the markedly different accounts of what had transpired between the parties.

iv) The Award

[27] The Award is extremely succinct. The following paragraphs of the Award are relevant to the principal basis on which the arbitrator dismissed Mr. Morrison's claim and to the issue raised on appeal:

> **Introduction**
>
> 1. This is an employment matter. The claimant, Mr. Morrison, says that he was wrongfully dismissed, after being laid off on October 15, 2020, and never called back to work. He says that he is entitled to damages as a result of not being provided with reasonable notice. The respondent ("Timberland") says that Mr. Morrison resigned, and that he does not have a claim for wrongful dismissal. The respondent also says Mr. Morrison's conduct after the layoff was in bad faith, and amounts to either grounds for dismissal, or a repudiation of his contract of employment.
>
> …
>
> 4. Mr. Morrison says that his work was split into two roles: field season, and off-season. Mr. Morrison says that he was not consistently subject to seasonal layoffs, and that he typically maintained year-round employment. Timberland says that this was not the case, and that its records indicate that Mr. Morrison did not work in the off season in 2012, 2013, 2016, 2017, 2018, and 2020, and further, that he had requested a layoff in each of those years. Consistent with Timberland's position, and in evidence before me were Records of Employment ("ROE"s) dated December 16, 2014, December 17,

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2016, November 29, 2017, December 18, 2018, and March 9, 2020, all of which referred to "Shortage of work / End of contract or season" as the reason for their issuance.

The October 15, 2020 layoff

5. On October 27, 2020 Mr. Morrison sent an email to Timberland which stated, *inter alia*:

> Good morning Deb and Suzanne.
>
> Could you please prepare an ROE for me, with my last day of work being 15th October 2020. The last TCP project that was awaiting funding has been cancelled, and haven't had [sic] any new assignments. Will be doing a nominal amount of work when GIS gets caught up, and will used my banked time up whenever that work gets done.

…

Issues

14. I must first decide whether Mr. Morrison was terminated, or whether he resigned. If I find that he was terminated, I must then consider his length of service, the appropriate length of notice, and the appropriate measure of damages. If I find that Mr. Morrison resigned, I need not address these other issues.

15. I must also address whether Mr. Morrison's conduct after the October 15, 2020 layoff, and in particular, whether it was grounds for dismissal or constituted a repudiation of his contract of employment.

Whether Mr. Morrison terminated or resigned

16. Mr. Morrison says that he was terminated. He says that pursuant to the ***Employment Standards Act***, RSBC 1996, c.113 (the *"Act*") he was deemed to have been terminated on January 14, 2021, 13 weeks following his layoff on October 15, 2020. Mr. Morrison goes on to say, however, that his termination is backdated to October 15, 2020 for the purposes of calculating his entitlements to wages, and for the calculation of statutory severance pay. The specific provisions in the *Act* that are relied upon are as follows:

> s. 1(1)
>
> "temporary layoff" means … a layoff of up to 13 weeks in any period of 20 consecutive weeks;
>
> "termination of employment" includes a layoff other than temporary layoff;
>
> s. 63(5)
>
> For the purpose of determining the termination date under this section, the employment of an employee who is laid off for more than a temporary layoff is deemed to have been terminated at the beginning of the layoff.

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> 17. Mr. Morrison says that he has an entitlement to both statutory and common law damages as a result of the foregoing.
>
> 18. Timberland says that the layoff was requested by Mr. Morrison, so that he could collect Employment Insurance, and enjoy some "downtime". It says that this was consistent with what had occurred in the past.
>
> 19. Timberland does not take the position that the "deemed termination" provisions of the *Act* were waived, or that the parties contracted out of them. It stresses that the layoff was initiated by Mr. Morrison.
>
> …
>
> 22. On the evidence, it is clear to me that the layoff was initiated by Mr. Morrison. This was consistent with what had occurred in December 2014, December 2016, November 2017, December 2018, and March 2020. It is also clear to me that if Mr. Morrison had requested work from Timberland outside of the TCP Contracts, it would have been provided. However, no work was requested. These facts do not support an application of the deemed termination provisions set out in the *Act*, which contemplate a layoff initiated by the employer.
>
> [Emphasis added.]

[28] The arbitrator also developed the evidence in relation to the separate issue of Mr. Morrison doing work for Atlas. He referred to correspondence between the parties in May, June and July 2021 when Timberland reached out to Mr. Morrison to enquire about Mr. Morrison's plans and he noted that in "March through April, Mr. Morrison assisted [Atlas] in preparing a bid on the Kootenay Lake Multiplex contract, a project administered by BCTS, and one that Timberland also bid on".

[29] The arbitrator found:

> 24. Timberland says that Mr. Morrison's actions in consulting with Atlas in March and April 2021 were dishonest, and disloyal. I agree. Mr. Morrison had to have been of the view that he was still an employee of Timberland in March and April 2021, as he advised Timberland on May 27, 2021 that **"To be clear, I have not resigned"** (emphasis in the original). I agree with Timberland's submission that Mr. Morrison's consultations likely constituted grounds for dismissal. Regardless, and at a minimum, in my view they constituted a repudiation of his contract of employment.

[30] As Mr. Morrison's claims were dismissed, there was no need for the arbitrator to address the assessment of damages arising from Mr. Morrison's claim.

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v) The leave to appeal application

[31] The appellant sought leave to appeal the arbitrator's decision under s. 59 of the *Arbitration Act*. The application was heard by Justice Horsman, whose reasons are unreported.

[32] The appellant raised two potential grounds of appeal before Justice Horsman. The first ground, for which leave was granted and is now the issue raised on appeal, was that the arbitrator had misinterpreted the *ESA* by finding that the temporary layoff provisions did not apply to "employee-initiated layoffs".

[33] The second issue the appellant sought to raise focused on the arbitrator's finding, at para. 22 of the Award, that if Mr. Morrison "had requested work from Timberland outside of the TCP Contracts, it would have been provided". Justice Horsman was not persuaded the appellant had identified an extricable error of law arising from this aspect of the Award. Nor did she accept that any of the circumstances of s. 59(4) of the *Arbitration Act*, which deal with applications for leave to appeal an arbitration award, were engaged.

[34] Accordingly, she granted leave on the single question of "the arbitrator's interpretation of the *ESA*".

vi) Analysis

[35] The appellant contends the arbitrator dismissed his wrongful dismissal claim on the basis of an erroneous legal interpretation of the *ESA*. More specifically, the appellant submits the arbitrator dismissed his claim by drawing a distinction between a layoff initiated by an employee and one initiated by an employer, finding that only the latter could result in the termination of employment. The appellant argues that "[t]his distinction was created entirely by the [a]rbitrator and relied upon as the determinative factor in dismissing the [a]ppellant's claim".

[36] Aspects of the Award support the appellant's position. In particular, Mr. Morrison emphasizes para. 22 of the Award, where the arbitrator concluded that it was "clear … that the layoff was initiated by Mr. Morrison". He further concluded

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that his various findings did "not support an application of the deemed termination provisions set out in the [*ESA*], which contemplate a layoff initiated by the employer".

[37] Viewed in isolation, these conclusions are problematic. I agree with the appellant that the *ESA* does not draw any distinction between a layoff initiated by an employer and a layoff initiated by the employee. Both events can, depending on the circumstances, engage the application of the *ESA* and, in particular, of ss. 1(1) and 63(5).

[38] For example, in *Blomme v. Princeton Standard Pellet Corporation*, 2023 BCSC 652, the business of the defendant employer was struggling during the COVID-19 pandemic. The plaintiff, a 20-year employee, considered taking a layoff to assist the employer financially, if she could afford to do so. She ultimately decided she could not afford a layoff but then was laid off by the respondent company. The decision illustrates that there may be circumstances, albeit much less common, where an employee initiates, or in a sense volunteers for, a layoff that is nevertheless governed by the *ESA*.

[39] This conclusion is also supported by application of the modern approach to statutory interpretation: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21, 1998 CanLII 837. The word "layoff" is not defined in the *ESA*. Nevertheless, the plain meaning of the word is "an occasion when a company stops employing someone, sometimes temporarily, because the company does not have enough money or enough work": *Cambridge Dictionary*, *sub verbo* "layoff", July 2024 <https://dictionary.cambridge.org/>. This definition will normally be associated with a company-driven initiative but I do not consider that need necessarily be the case.

[40] The common meaning of "layoff" is also supported by the relevant authorities. In *Canada Safeway Ltd. v. RWDSU, Local 454*, [1998] 1 S.C.R. 1079, 1998 CanLII 780, the Court explained that the term "layoff", in the labour context, generally refers to a denial of work to an employee: para. 70. This is because a "layoff" generally involves a "cessation of employment where there is the possibility or expectation of a return to work … because of this expectation, the employer-employee relationship is

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said to be suspended rather than terminated", even though the expectation may never materialize: *Canada Safeway* at para. 73. The suspension of the employer-employee relationship, arising as a result of the employer's removing work from the employee, can be considered a "temporary discharge" or "disruption" from employment: *Canada Safeway* at paras. 71–74, relying on *Air-Care Ltd. v. United Steel Workers of America et al.*, [1976] 1 S.C.R. 2 at 6, 1974 CanLII 200 and see *University Hospital v. Services Employees International Union*, *Local 333 U.H.*, 26 D.L.R. (4th) 248 at 28, 1986 CanLII 2911 (Sask. C.A.).

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[41] Further, a generous and purposive interpretation of the word "layoff" is consistent with the objects of the *ESA* as set out in s. 2 of the legislation. This Court has confirmed that the *ESA* is "benefits-conferring legislation" and is in the nature of "program legislation": *Beach Place Ventures Ltd. v. Employment Standards Tribunal*, 2022 BCCA 147 at para. 62, relying on *Rizzo* at para. 36 and Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham, Ont.: LexisNexis, 2014) at 265–67. Program legislation, as described by Sullivan, has distinctive features which affect its interpretation in multiple ways. This includes an emphasis on the function of rules and enlarging the concept of purpose to include broader social and economic policies and long-range goals. Those purposes, broadly speaking, include the protection of an employee's wages and the interests of the employee generally: *Canadian-Automatic Data Processing Services Ltd. v. Bentley*, 2004 BCCA 408 at para. 31; *Bell v. British Columbia (Director of Employment Standards)*, 136 D.L.R. (4th) 564 at paras. 17–21, 1996 CanLII 1438 (B.C.C.A.); *Helping Hands Agency Ltd. v. British Columbia (Director of Employment Standards)*, 131 D.L.R. (4th) 336 at para. 19, 1995 CanLII 439 (B.C.C.A.).

[42] However, the appellant's submissions, and his focus on those portions of the Award I have identified, seek to raise a legal issue in the abstract and one that is divorced from the record, the live issues that were before the arbitrator, and a reading of the Award as a whole. Reasons for judgment, or an arbitrator's award, are to be read functionally and using a contextual approach. This means that reasons are to be read as a whole, in the context of the issues at trial (or arbitration) and

informed by the positions taken by the parties: *R. v. R.E.M.*, 2008 SCC 51 at paras. 29–35; *R. v. G.F.*, 2021 SCC 20 at para. 69; *R. v. Mohsenipour*, 2023 BCCA 6 at para. 35; *Campbell v. The Bloom Group*, 2023 BCCA 84 at paras. 40–43**.**

[43] In this case the issue that is now raised by the appellant played no role in the arbitration. The question for the arbitrator was not whether an employee-initiated layoff as opposed to a company-initiated layoff engaged the *ESA*. The question, as described by both Mr. Morrison and the arbitrator was whether Mr. Morrison was "terminated" or he "resigned".

[44] I have said that the primary position of each of the parties, as reflected in their respective pleadings, affidavit evidence and submissions, centred around a factual dispute. Mr. Morrison's case for dismissal was based on the work he had done for many years being "diverted" from him, on his being "placed" on a layoff, on his not receiving or there not being any work for him during the off-season, and on this being the first time he had not worked through the off-season.

[45] Timberland contested each of these assertions. It submitted that it was the BCTS that chose to suspend parts of Timberland's TCP Contract work and that it had reached out to Mr. Morrison, who was uninterested, to do other work. Importantly, it argued there was ample work for Mr. Morrison to do and that it was Mr. Morrison who chose, as he had in most years over the last number of years, to take the winter off. Timberland argued Mr. Morrison preferred to collect unemployment insurance and to enjoy some "downtime" during the off-season. It explained that its "expectation [was] that [Mr. Morrison] would return to work when he wished to do so as in prior years". It argued that Mr. Morrison's request to take time off did not engage the *ESA*.

[46] The arbitrator accepted Timberland's evidence. He found that what occurred in 2020 "was consistent with what had occurred" in numerous previous years. He also found that if Mr. Morrison had sought work from Timberland during the 2020 off-season, that work would have been provided to him.

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[47] It was based on these findings that the arbitrator concluded Mr. Morrison was not terminated and that the deemed termination provisions in the *ESA* were not applicable. Further, it was in the context of the factual matrix I have described that the arbitrator's impugned statements in the Award must be viewed. Though not expressed clearly, I am satisfied that, in context and properly understood, the arbitrator was not saying that layoffs initiated by an employee do not, as a matter of interpretation or principle, fall within the *ESA*. More specifically, I am satisfied the arbitrator did no more than confirm that an employee who independently asks for an extended holiday, or a sabbatical, or personal "downtime" does not thereby engage or activate the "temporary layoff" provisions of the *ESA*.

[48] A further matter is relevant. Had Mr. Morrison been terminated by Timberland it would have obviously been open to him to seek employment with Atlas or any other employer. However, as the arbitrator found Mr. Morrison was not terminated, he turned to consider the legal significance of Mr. Morrison going to work for one of Timberland's competitors. He found that Mr. Morrison's conduct "at a minimum" constituted a repudiation of his contract of employment. That separate finding is not appealed.

vii) Disposition

[49] In my view, the appeal should be dismissed.

"The Honourable Mr. Justice Voith"

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Reasons for Judgment of the Honourable Mr. Justice Willcock:

[50] I agree with my colleague, Justice Voith, that the appellant's contention the award is founded upon an erroneous interpretation of the *ESA* is not supported by the record. In my view, we must accept the arbitrator's conclusion that "on the evidence, it is clear … that the layoff was initiated by Mr. Morrison … [and] that if Mr. Morrison had requested work from Timberland outside of the TCP Contracts, it would have been provided".

[51] It was in light of these facts, both the fact that Mr. Morrison initiated the layoff and the fact that he could have returned to work earlier had he chosen to do so, that the arbitrator found the deemed termination provision in the *Act* to be inapplicable. As Justice Voith points out, the appellant sought leave to challenge the arbitrator's finding that work outside of the TCP Contracts was available to him. Justice Horsman described the appellant's submission as follows:

> [20] The applicant also alleges that the arbitrator erred in law by misapprehending the relevant evidence. The alleged error relates to the arbitrator's finding in para. 22 of the Award that if the applicant "had requested work from Timberland outside of the TCP Contracts, it would have been provided." The applicant says that this conclusion was "directly contradicted by the evidence." The applicant cites *Escape 101 Ventures Inc. v. March of Dimes Canada*, 2022 BCCA 294 at paras. 43 and 76 in support of the proposition that this alleged misapprehension of the evidence is an extricable error of law.

[52] She dismissed the application for leave to appeal on that ground for the following reason:

> [41] …[T]he applicant's complaint about the arbitrator's factual finding appears to be more concerned with the arbitrator's interpretation of the evidence than with any material misapprehension. There is, of course, the further problem that the absence of a complete evidentiary record on appeal—which is the result of the choice of the parties as to how the arbitration would be conducted—renders it virtually impossible to determine if there is any merit to the applicant's complaint.

[53] For that reason, we are unable to identify the evidence upon which the arbitrator relied in concluding that Mr. Morrison could have returned to work during the off-season if he had chosen to do so. We are neither invited to weigh that

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evidence nor competent to do so. In my respectful opinion, we cannot say the arbitrator's conclusion was unfounded, as Justice Griffin has, because he did not "grapple with the inconsistency" that might have existed in the evidence.

[54] With due respect for the views of Justice Griffin, I do not consider Justice Voith to have "recast" the arbitrator's findings. The central finding, to which we must defer, was that the layoff was initiated by the appellant and if he had requested work it would have been provided. As Justice Griffin notes there was evidence that if the appellant had been willing to work with the respondent he would have remained fully employed.

[55] For those reasons I agree with Justice Voith that the appeal should be dismissed.

"The Honourable Mr. Justice Willcock"

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Reasons for Judgment of the Honourable Justice Griffin:

i) Introduction

[56] I have had the privilege of reading the reasons of my colleagues in draft form, and while I agree that the arbitrator made an error of law, with respect, I do not agree with the disposition of this appeal. In my view, the proper disposition is to allow the appeal and remit the matter to arbitration.

ii) Background

[57] The appellant, Mr. Morrison, is in his 60s and worked for the respondent for 29 years. Prior to his employment with the respondent ending in October 2020, he had worked for approximately 15 years as a project manager on renewed Total Chance Planning ("TCP") contracts for BC Timber Sales ("BCTS"), a client of the respondent. This work involved road planning and layout, covering a large geographic territory. There was a field season of work, from May to December. The months in-between, known as the off-season, allowed time for completion of office work in relation to the past field season and planning for the upcoming field season. The client, BCTS, controlled the amount of work the appellant had to do.

[58] BCTS cancelled the TCP contract work in October 2020, before the regular end of the field season, to the knowledge of both the respondent and appellant. That is when the appellant's employment with the respondent ended. The respondent on its own evidence had no further field assignments for him that season. The appellant requested his record of employment ("ROE") form from the respondent and it was issued.

[59] BCTS confirmed that it did not need the appellant to do office work that winter, and was not going to be proceeding with the TCP work in the future.

[60] The respondent did not reach out to inquire with the appellant whether he was interested in other work until May 2021. This was approximately six months later. Likewise, the appellant did not reach out to ask his employer to provide him with alternative work during that period.

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[61] The question before the arbitrator, Mark Tweedy, and before this Court on appeal, is what to make of these undisputed facts insofar as it relates to the appellant's request for statutory entitlements under the *Employment Standards Act*, R.S.B.C. 1996, c. 113 [*ESA*], and to common law damages for termination of employment without proper notice, and the interplay between the two.

[62] Justice Horsman granted leave to appeal the award, limited to the issue of the arbitrator's interpretation of the *ESA,* in oral reasons for judgment: *Morrison v. 0812652 BC Ltd. dba Timberland Consultants* (27 September 2023), Vancouver CA49253 (B.C.C.A. Chambers).

[63] My colleagues acknowledge that an error of law was made by the arbitrator in interpreting the *ESA*, by finding that because the layoff was employee "initiated" the provisions of the *ESA* regarding layoffs and termination did not apply. However, in my view my colleagues then take a novel approach to the standard of review of an arbitrator's decision. Rather than remit the matter to arbitration in light of this Court's opinion on statutory interpretation, my colleagues recast the arbitrator's findings and conclude that the error was immaterial.

[64] Respectfully, it is my view that the arbitrator's findings, interpreted in context of the whole of his reasons and the evidence, do not support my colleagues' conclusion that the error of law was immaterial. It was the central reason for the arbitrator's conclusion that the appellant was not entitled to *ESA* benefits despite being laid off for over six months, and the central basis for his finding that the appellant's employment was not terminated.

[65] In my view, the proper approach is to remit the matter to arbitration so that the necessary findings of fact can be made, in light of this Court's conclusion on statutory interpretation.

iii) The Evidence

[66] I will briefly review the evidence and the arbitrator's reasons to explain why I am of the view the arbitrator's conclusion that the *ESA* did not apply to an employee-

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initiated layoff was material to his decision in dismissing the whole of the appellant's claim, and why it is my view my colleagues have recast the arbitrator's findings in concluding that the arbitrator's error was immaterial.

[67] The affidavit evidence filed by both sides, as part of the appellant's case and the respondent's defence, was uncontroverted in respect of the following facts:

a) The respondent's field season runs from May to December each year.

b) The appellant had managed the TCP contract for the respondent's client, BCTS, for the previous 15 years.

c) The layoff occurred before the typical end of the field season, because the field season contract work that the appellant was doing, namely the TCP contract for BCTS, was cancelled by BCTS and ended in mid-October 2020.

d) The appellant was notified by BCTS of his TCP contract work being cancelled by email on October 14, 2020, and forwarded the email to the respondent. The respondent acknowledged by reply email that it was "an abrupt end!".

e) When the TCP contract ended, the respondent's witnesses' affidavit evidence was that the respondent did not have suitable replacement field work for the appellant. Further, according to the respondent's affidavit evidence, "other than … the minor office work to present information on assignments to BCTS, there was no work done on the TCP that [the appellant] was qualified to do or requested to do by BCTS". In addition, it was BCTS, that "managed the budget and funding for the TCP contract", with the respondent asserting that it had "no control over how BCTS decides to allocate its budget".

f) The appellant referred to the cancellation of his TCP contract and the fact he had received no other assignments, in his October 27, 2020 email to

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the company requesting his ROE, as quoted by the arbitrator at para. 5 of the reasons.

g) The employer issued a ROE on which it wrote, in its own words, that the layoff was because of a "[s]hortage of work/[e]nd of contract or season".

h) What occurred following the appellant's October 2020 ROE request was not a resignation. The respondent's affidavit evidence was that "[t]hroughout 2021, [the respondent] operated on the assumption that [the appellant] had not resigned". This was confirmed in one of the respondent's emails to the appellant on June 18, 2021, "[y]ou stated that you have not resigned and we have been operating as such throughout 2021." The respondent filed evidence to support its belief that the appellant had not resigned in October 2020, stating that it paid his medical premiums, kept him in the staff email loop, allowed him to use his Timberland email address, and allowed him access to the office and database. On appeal, the respondent's factum confirms this evidence and its position that the appellant was on a layoff.

i) In the past, the appellant regularly did some office work during the off-season that included planning for the next field season's work. However, he also often had some length of temporary layoff during the off-season. The respondent's evidence indicated that the appellant was on a temporary layoff during periods of six of the 15 years he managed the TCP contract, however, there is no evidence as to how long each layoff was or whether there was a typical pattern. According to the respondent's witnesses, it was BCTS "who dictated how busy [the appellant] was over the winter months for the 15 years he managed the TCP".

j) The respondent advised the appellant during the off-season in 2020–2021 that BCTS did not want the appellant doing any continuing work for it. As rather obliquely stated in the affidavit evidence of the respondent's witness, "[d]uring the winter season of 2020–2021, BCTS prioritized

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assignments that did not require [the appellant]". The only office work that the appellant had in the winter of 2020–2021 was, in the respondent's witnesses' words, "loose ends" and "minor office work". Consistent with this, in the appellant's uncontradicted evidence, he was able to complete his off-season office work over an additional 3.6 days, after receiving additional materials that he requested from the respondent.

k) As of October 2020 and throughout the winter of 2020–2021, the respondent did not notify the appellant of any projects that it had for him in the upcoming field season, which typically started in May. There was no evidence that the respondent contacted the appellant at all between October 2020 and May 2021 to offer him any alternative work.

l) It was not until May 19, 2021, that the respondent first reached out to the appellant to, in the respondent's witness's own words, "start a conversation about the upcoming season" (emphasis added). The respondent confirmed with the appellant in July 2021 that the TCP contract was not being retendered by BCTS and inquired about his thoughts on continuing on with the respondent in a "different capacity".

[68] The evidence reviewed by the arbitrator in his award, regarding what happened in the fall of 2020 to the spring of 2021 between the parties, is consistent with the above undisputed evidence.

[69] I pause to note that this Court does not have available transcripts of the oral testimony of the witnesses. If there was oral testimony inconsistent with the parties' affidavit evidence on the above points, I would have expected the arbitrator to grapple with the inconsistency, especially given that there was no controversy between the parties' affidavit evidence on the above points.

iv) The Arbitrator's Reasons

[70] The arbitrator throughout his reasons accepted that what occurred in October 2020 was a layoff. His review of the facts was consistent with the evidence that the

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respondent did not reach out to the appellant to inquire about alternative employment until May 2021.

[71] The arbitrator held:

> **Mr. Morrison's employment history and previous layoffs**
>
> 2. Mr. Morrison commenced employment as a forestry technologist with Timberland in 2021, which was when it bought the subject business. Mr. Morrison had been employed in the same capacity by the prior owner of the business since 1992. There is no written contract of employment.
>
> 3. From 1992 to 2020, Mr. Morrison's duties were to manage Total Chance Planning ("TCP") contracts in the Kootenay Lake, Rocky Mountain, Boundary and Arrow regions (the "TCP Contracts"). The TCP Contracts were administered by BC Timber Sales ("BCTS"), and insofar as Timberland was concerned, largely self directed by Mr. Morrison. While Mr. Morrison says that he did some work for Timberland in addition to the TCP Contracts, Timberland says that this work was very limited.
>
> 4. Mr. Morrison says that his work was split into two roles: field season and off-season. Mr. Morrison says that he was not consistently subject to seasonal layoffs, and that he typically maintained year-round employment. Timberland says that this was not the case, and that its records indicate that Mr. Morrison did not work in the off-season in 2012, 2013, 2016, 2017, 2018 and 2020, and further, that he had requested a layoff in each of those years. Consistent with Timberland's position, and in evidence before me were Records of Employment ("ROE"s) dated December 16, 2014, December 17, 2016, November 29, 2017, December 18, 2018 and March 9, 2020, all of which referred to "Shortage of Work / End of contract or season" as a reason for their issuance.
>
> **The October 15, 2020 layoff**
>
> 5. On October 27, 2020 Mr. Morrison sent an email to Timberland which stated, *inter alia*:
>
> > Good morning Deb and Suzanne.
> >
> > Could you please prepare an ROE for me, with my last day of work being 15th October 2020. The last TCP project that was awaiting funding has been cancelled, and haven't had [sic] any new assignments. Will be doing a nominal amount of work when GIS gets caught up, and will used my banked time up whenever that work gets done.
>
> 6. A ROE was issued by Timberland on October 28, 2020. It stated that "Shortage of work / End of contract or season" was the reason for its issuance.

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Events subsequent to October 2020

7. On May 19, 2021, Mr. Scott MacDonald of Timberland phoned and left Mr. Morrison a voicemail asking him to call regarding the upcoming season. This was followed up on the same day with an email. Mr. Morrison did not respond. Mr. MacDonald followed up with another email dated May 26, 2021.

8. Mr. Morrison responded by email on May 27, 2021 and stated *inter alia* that:

> **"To be clear, I have not resigned.** In light of the current circumstances, however, I have no alternative but to conclude that Timberland is not interested in keeping the terms of my employment.
>
> (Emphasis in the original.)

9. On June 18, 2021 Mr. MacDonald emailed Mr. Morrison advising that the TCP contract was not being retendered. He asked Mr. Morrison "What are your thoughts on continuing with Timberland in a different capacity? Are you pursuing options through your own company? We need to set up a meeting to discuss options". A follow up email was sent on July 2, 2021.

10. On July 6, 2021 Mr. Morrison replied to the June 18, 2021 email as follows:

> Hi Scotty,
>
> My apologies for my tardy response to your email of 18th June 2021. I have been experiencing some internet and computer problems, among other issues.
>
> In regards to my "future at Timberland", that would be, for the most part, dependent on what Timberland is offering by way of employment "…in a different capacity. Can you please email me the terms of the position(s) Timberland is considering as employment "options" for me in lieu of the TCP contracts that I have been managing for the past 15 years? I will review the options and respond accordingly.
>
> Thanks.

11. On July 5, 2021 Mr. MacDonald emailed Mr. Morrison and said:

> Hi Corey. I left you a voicemail today. To follow up on the voicemail, Suzanne has sent you an email about your benefits balance and we would like to have our equipment back. As for a position at Timberland, we were hoping to sit down with you and discuss options, but that might be unnecessary as we here [sic] that you have accepted a position with Atlas Information Systems. Could you please give us an update. Thanks.

12. In March through April, Mr. Morrison assisted Atlas Information Systems ("Atlas") in preparing a bid on the Kootenay Lake Multiplex contract, a project administered by BTS, and one that Timberland also bid on.

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> 13. Mr. Morrison commenced employment with Atlas on July 16, 2021.
>
> …
>
> 18. Timberland says that the layoff was requested by Mr. Morrison, so that he could collect Employment Insurance, and enjoy some "downtime". It says that this was consistent with what had occurred in the past.
>
> 19. Timberland does not take the position that the "deemed termination" provisions of the *Act* were waived, or that the parties contracted out of them. It stresses that the layoff was initiated by Mr. Morrison.
>
> 20. Counsel referred me to, *inter alia*, *Nicolas Jr. v. Ocean Pacific Hotels Ltd.*, 2022 BCSC 1052, and *Blomme v. Princeton Standard Pellet Corporation*, 2023 BCSC 652, and *Collins v. Jim Pattison Industries*, 1995 BCSC 919.
>
> 21. Based on the foregoing authorities, I do not agree with Mr. Morrison's submission that the deemed termination provisions of the *Act* apply to his wrongful dismissal claim.
>
> 22. On the evidence, it is clear to me that the layoff was initiated by Mr. Morrison. This was consistent with what had occurred in December 2014, December 2016, November 2017, December 2018, and March 2020. It is also clear to me that if Mr. Morrison had requested work from Timberland outside of the TCP Contracts, it would have been provided. However, no work was requested. These facts do not support an application of the deemed termination provisions set out in the *Act*, which contemplate a layoff initiated by the employer.
>
> [Emphasis added.]

[72] As noted above, at para. 22 the arbitrator decided that because the layoff was "initiated" by the appellant, the "deemed termination" provisions of the *ESA* did not apply because those provisions contemplate a layoff initiated by the employer.

[73] The first event subsequent to "the October 15, 2020 layoff" that the arbitrator referred to in his review of the facts was the respondent contacting the appellant in May 2021, asking the appellant to call regarding the upcoming field season.

[74] The arbitrator then referred to the exchange of emails between the parties in May, June and July 2021 about the possibility of work in the upcoming field season, the appellant's assistance of another entity's project in March–April, and the appellant's acceptance of employment from that other entity on July 16, 2021.

[75] The arbitrator did not refer to any evidence that the respondent had work available to the appellant when the TCP contract was cancelled early in October

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2020, and before the respondent reached out to the appellant in May 2021, or that the respondent reached out to the appellant to give him other work before May 2021, and there was no such affidavit evidence.

[76] Thus, when the arbitrator said, at para. 22, that had the appellant requested work from the respondent "outside of the TCP Contracts, it would have been provided", "[h]owever no work was requested", the arbitrator had to be referring to the only specific evidence on this topic, the same evidence he had just reviewed in the prior paragraphs at paras. 5–7 of the award and following, namely, that the respondent reached out to the appellant in May 2021 and subsequently to discuss the potential for the appellant doing other field work, but the appellant did not pursue it. A reading of this conclusion in context of the arbitrator's reasons as a whole and the evidence, can only mean that had the appellant requested other field work from the respondent at that time, in May 2021, it would have been provided. Otherwise the evidence was consistent that the respondent did not have available work for him in the off-season, because it was BCTS that controlled the appellant's work and it was not continuing with the TCP contract.

v) Analysis

[77] I will first review the statutory interpretation issues and legal framework with respect to temporary layoffs. Second, I will describe how, in my view, my colleagues have recast the arbitrator's findings to conclude that the statutory interpretation error had no impact on the award. Finally, I will address the approach to the standard of review of an arbitrator's decision.

Statutory Interpretation Error

[78] I agree with my colleagues that the arbitrator erred in finding that the *ESA* does not draw any distinction between a layoff initiated by an employer and a layoff initiated by an employee. However, respectfully it cannot be said that this error played "no role" in the arbitration.

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[79] The arbitrator's decision was brief, only 24 paragraphs before the conclusion, dismissing the claim. On the question of *ESA* benefits, the arbitrator's decision was based on his conclusion that the appellant had "initiated" or "requested" his temporary layoff by requesting his ROE form from the respondent in an October 2020 email, and therefore the appellant was not entitled to rely on the provisions of the *ESA* by which a temporary layoff automatically becomes a termination after 13 weeks, pursuant to s. 1(1) and s. 63(5).

[80] For ease of reference, these sections provide:

> s. 1(1)
>
> "temporary layoff" means… a layoff of up to 13 weeks in any period of 20 consecutive weeks;
>
> "termination of employment" includes a layoff other than temporary layoff;
>
> …
>
> s. 63(5)
>
> For the purpose of determining the termination date under this section, the employment of an employee who is laid off for more than a temporary layoff is deemed to have been terminated at the beginning of the layoff.

[81] Also relevant is s. 4 of the *ESA* which provides:

> 4 The requirements of this *Act* and the regulations are minimum requirements and an agreement to waive any of those requirements, not being an agreement referred to in section 3 (2), has no effect.

[82] I agree with Justice Voith's careful analysis of the *ESA*. A layoff is a layoff under the *ESA*. It means no work is available. The fact that an employee writes to the employer to obtain his ROE form, a form he is entitled to because the project-based work he was hired to do has ended, is neither here nor there.

[83] However, contrary to Justice Voith's reasoning, it is clear that the arbitrator found as a fact that a layoff occurred, and that the arbitrator's error, in finding it significant that it was employee "initiated", played a material role in his finding that the appellant was not terminated.

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[84] The arbitrator framed the entire logic of his brief reasons around the fact this was a layoff, and that it was "employee initiated", from paras. 4–22.

[85] In determining the impact of the arbitrator's error, it is helpful to review the legal principles regarding temporary layoffs. The lower court decisions indicate that generally, a temporary layoff constitutes a termination of the employment contract in the absence of a contractual term that allows for temporary layoffs: *Collins v. Jim Pattison Industries Ltd.* (1995), 7 B.C.L.R. (3d) 13, 1995 CanLII 919 (S.C.). This, to state the obvious, is because "there is nothing more fundamental to a contract of employment than that the employee be employed and that he be paid for his services": *Archibald v. Doman-Marpole Transport Ltd. et al.*, [1983] B.C.J. No. 1284, 1983 CarswellBC 2088 (S.C.), cited in *Collins* at para. 17; see also *See Thru Window Cleaners Inc. v. Mahood*, 2016 BCSC 2134 at paras. 37–43; *Andrews v. Allnorth Consultants Limited*, 2021 BCSC 1246 at paras. 37–38.

[86] The statutory employment standards scheme is designed to "prevent employers from avoiding the liabilities that flow from terminating the employment of employees under the guise of placing them on indefinite layoff", as noted by the Ontario Court of Appeal in commenting on similar Ontario legislation in *Elsegood v. Cambridge Spring Service (2001) Ltd.*, 2011 ONCA 831 at para. 9.

[87] Here, the issue about past layoffs that emerged from the evidence was whether occasional temporary layoffs were an implied term of the employee-employer contract that both parties accepted; and even if so, how long could such a temporary layoff continue before it would become a termination? Employers cannot contract out of the *ESA*, and there was no affidavit evidence that the parties had ever expressly discussed the matter. Accordingly, the appellant had a viable claim that the *ESA* applied and that if the layoff exceeded 13 weeks, it automatically became a termination entitling him at a minimum to benefits under the *ESA*.

[88] Because the arbitrator concluded that the *ESA* provisions did not apply to an employee-initiated layoff, he avoided the need to address multiple issues, including: whether a termination of employment that arises after the passage of 13 weeks on

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layoff occurred, pursuant to the *ESA*; the resultant *ESA* entitlements that arise on termination of employment (the appellant submits these were valued at approximately $12,000); whether this also meant termination of employment at common law and if so as of which date, and because it was without notice, was the appellant entitled to damages for common law wrongful dismissal; whether the appellant failed to mitigate his losses by seeking other work from the respondent; and whether the appellant resigned or repudiated his employment in the spring of 2021 when he did some work with a competitor.

[89] There was no question that the more difficult questions in this case concerned the larger common law claim for damages for wrongful dismissal. Had the arbitrator properly interpreted the *ESA* and concluded that the layoff became a termination after 13 weeks, entitling the appellant to statutory benefits, the arbitrator would then need to consider the impact of this on the common law claim. Perhaps the arbitrator could have followed the approach of the Ontario Court of Appeal in *Elsegood* and concluded that such a statutory termination of employment would also amount to a concurrent termination at common law, entitling the appellant to damages for wrongful dismissal. Or, perhaps the arbitrator could have followed the approach in *Blomme v. Princeton Standard Pellet Corporation*, 2023 BCSC 652, and concluded that the appellant failed to mitigate the common law claim by not considering the respondent's offer of a return to work (in the present case, it was a possibility not explored until May 2021). Or perhaps the arbitrator would have reached another result had he interpreted the *ESA* correctly.

[90] The remainder of the arbitrator's brief reasons dealt with the respondent's actions in May 2021 in reaching out to the appellant about possible employment in the upcoming season (paras. 7–11), and the appellant assisting a competitor in March through April 2021 and then accepting work from that competitor in July 2021 (paras. 12, 13, 24). Clearly when he accepted full-time work from another employer in July 2021, the appellant's employment with the respondent had come to an end, whether that was by resignation as argued by the respondent, or repudiation. However, these actions occurred subsequent to the deemed termination that occurs

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under the *ESA* when a temporary layoff is longer than 13 weeks. As these other events occurred outside of the 13-week period, these facts were irrelevant insofar as determining whether the *ESA* provisions applied.

[91] The arbitrator's error in interpreting the *ESA* was the foundation for the dismissal of the claim of benefits under the *ESA* and the decision that despite the approximate six-month length of the layoff there was no termination of employment under the *ESA* and correspondingly at common law. It resulted in the appellant receiving not even relatively modest statutory benefits he might otherwise be entitled to, despite being an employee for 29 years.

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Context of Arbitrator's Findings

[92] My colleagues rely on the arbitrator's finding that the appellant could have requested work and it would have been provided, although the arbitrator did not put a date on when this could have happened in relation to the layoff. My colleagues infer that the arbitrator must have meant that during the whole of the layoff, there was work available to the appellant if he had just asked the respondent for it, and therefore the arbitrator's erroneous interpretation of the *ESA* was meaningless. In my view, this is not a contextual reading of the arbitrator's award. Instead, it recasts the arbitrator's findings in a manner that is inconsistent with the known context: the arbitrator's own analysis of the record as supported by what we know about the respondent's witnesses' evidence.

[93] I have already addressed the context of the whole of the arbitrator's reasons, above. It is clear that the arbitrator refers to the October 2020 end of the appellant's work as a layoff, and that the next event of significance he refers to subsequent to the layoff is the respondent reaching out to the appellant in May 2021 to inquire about the possibility of the appellant doing other work. The arbitrator makes no reference to any evidence that work was available to the appellant between October 2020 and May 2021, or to any reaching out by the respondent before May 2021.

[94] If we turn to the context of the known evidence, there was a statement at the end of an affidavit provided by Mr. Anderson, one of the respondent's witnesses,

that “[i]f [the appellant] had been willing to work with us he would have remained fully employed”. That was a general statement without any support or reference as to when that work might have begun. It does not suggest that the respondent reached out to offer employment to the appellant.

[95] Leaving aside that Mr. Anderson’s general statement is devoid of detail and self-serving, the only way to interpret that evidence, which contains no date reference, was to read it in context and consistently with the rest of the body of the affidavit that preceded it, and that leads to the conclusion that it was referring to May 2021 when the upcoming field season was beginning. To read it otherwise would be inconsistent with the more specific evidence given by Mr. Anderson within the body of the same affidavit, that confirmed: the TCP contract with BCTS that the appellant had worked on for the last 15 years ended in October 2020; there was some other field work in October 2020 “for which [the appellant] had no qualification or previous experience” and it was completed by others who had been working on that project since the beginning; and the only office work that the appellant had to do after that was “loose ends” for BCTS.

[96] The other witness for the respondent, Mr. MacDonald, gave evidence to the same effect: that during his 15 years of managing the TCP contract, the appellant had very limited contact with other clients, and after BCTS cancelled the TCP contract, other than “the minor office work to present information on assignments to BCTS, there was no work done on the TCP that [the appellant] was qualified to do or requested to do by BCTS”. Again, Mr. MacDonald’s affidavit evidence suggests he was the first person from the respondent who called and emailed the appellant on May 19, 2021 “to start a conversation” about the possibility of alternative work in the upcoming season.

[97] Neither witness for the respondent gave affidavit evidence that before May 2021 they had reached out to the appellant after BCTS cancelled the TCP contract in October 2020; indeed Mr. MacDonald’s evidence was that other opportunities outside of managing the TCP were not offered to the appellant.

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[98] If we turn to the context of the submissions made by the respondent's counsel before the arbitrator, we only have in the record submissions provided before the hearing of the arbitration. Counsel for the respondent did make submissions to the effect that there was work available if the appellant wanted to work, but he was uninterested. This is counsel's rhetoric, not evidence. The only evidence at the time of this submission was the affidavit evidence. The only specific examples and emails given by the respondent's witnesses in their affidavits in support of the respondent's position and this proposition are those referred to by the arbitrator in his reasons, namely, that the respondent reached out to the appellant in May 2021, at the start of the upcoming field season, to discuss the possibility of other work.

[99] The arbitrator referred to submissions by the respondent that the appellant had requested layoffs in the past and enjoyed them. However, again, that was not evidence. The fact an employee may have enjoyed their time during past layoffs and not objected to them, does not answer the question of whether the employee has been terminated at law because a particular temporary layoff has gone on too long. An employee is not required to suffer during a layoff.

[100] While the arbitrator referred to the fact that the appellant had initiated layoffs at times in the past he made no finding that because of past history, there was an implied term in the employment contract that it was the appellant's responsibility to be asked to be recalled to work once he was on temporary layoff; or that had he done so he could have worked throughout the winter from October 2020 to May 2021. It would not be correct to imply a term that overrides the operation of the *ESA*.

[101] I add that I would have difficulty understanding any basis for implying such a term to govern the situation in October 2020. On all accounts the situation in October 2020 was new: the appellant had worked for BCTS on the TCP contract for the preceding 15 years, and this work was at an end.

[102] There was also some affidavit evidence directed to the constructive dismissal claim. However, this evidence was based on the appellant's belief that the nature of his employment, as project manager of the TCP contract, changed during the course

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of 2020 because in his view his responsibilities were diminished prior to that contract ending. That evidence regarding the constructive dismissal claim was not directed to what happened after October 2020 and before May 2021.

[103] Therefore there is no “context” from which this court can interpret the arbitrator’s statement about work being available, as meaning the respondent had available work for the appellant between the layoff, October 2020, and the first time the respondent reached out to the appellant to discuss the possibility of alternative work, which was in May 2021.

[104] There is also no contextual basis for recharacterizing what occurred on October 15, 2020 when the appellant requested his ROE, as the appellant simply requesting the entire winter off, similar to a holiday or sabbatical or perhaps even a resignation.

[105] Nowhere did the arbitrator find, nor did the evidence we are aware of support, any conclusion that the respondent simply asked for time off for the entire off-season beginning in October 2020. Nor did the arbitrator find that office work would otherwise generally continue throughout the winter. Nor are these facts supported by the award or the record before us.

[106] Simply put, the record and the arbitrator’s findings are all consistent with the fact that what occurred in October 2020 was a layoff. Again, a layoff means no work was available.

[107] My colleagues suggest that since leave to appeal was not granted on the appellant’s attempt to challenge the arbitrator’s finding that there was work available to the appellant, this finding is conclusive and the arbitrator’s award must be upheld. Respectfully, this reasoning avoids the point that the layoff and application of the *ESA* is a separate issue from the availability of work, and fails to recognize that contextually, the arbitrator could only have been referring to May 2021.

[108] Regardless, the arbitrator’s finding that the appellant could have asked for work stems from the arbitrator’s erroneous interpretation of the *ESA* as not applying

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to an employee initiated layoff. The arbitrator concluded that the appellant's request for his ROE form was an action that initiated the layoff and then equated this to displacing the normal obligation on the employer to provide work to the employee.

[109] It cannot be correct to find, as a general proposition, that an employee who "initiates" the layoff displaces the employer's obligation to provide work, and that therefore the *ESA* provisions do not apply where the employee fails to initiate his own work recall. The *ESA* does not require an employee to recall himself to work when he is on layoff.

[110] In my view, we should presume the arbitrator knows the difference between a request for time off for personal enjoyment, a resignation and a layoff. The arbitrator was clearly aware of the undisputed affidavit evidence of the respondent's witnesses that the appellant's work on the TCP contract for BCTS was terminated by BCTS in October 2020 and the respondent did not then have other assignments for the appellant. Presuming the arbitrator does not know the difference between a layoff and a request for personal time off is inconsistent with the limited right to appeal findings of fact by arbitrators.

[111] If the arbitrator did not find that what occurred in October 2020 was a layoff but implicitly found that in October 2020 the appellant simply took a holiday, sabbatical, resigned, or refused available work, then his repeated description of what occurred as a "layoff" and his discussion of the layoff provisions of the *ESA* was unnecessary and inexplicable.

[112] For the above reasons, I am of the view that the arbitrator's finding that the *ESA* did not apply to the appellant's situation because he "initiated" it was central to his conclusion that the appellant was not terminated pursuant to the *ESA* after more than six months on layoff.

Standard of Review

[113] Respectfully, I am of the view my colleagues' approach to this appeal is not aligned with the applicable standard of review for arbitral decisions.

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[114] It is well-established that the *Arbitration Act*, S.B.C. 2020, c. 2 creates a right of appeal from arbitration awards on questions of law: *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32 at para. 42. For this Court's statutory jurisdiction on appeal to have any meaning, this Court is not permitted to recast an arbitrator's factual findings in order to support the outcome of the award. Where, as here, the arbitrator is shown to have erred in law, and it appears to have had an impact on the reasoning leading to the award, the appeal should be allowed, and, where appropriate, the case should be remitted to the arbitrator as permitted by s. 59(6)(b) of the *Arbitration Act*. Such a remedy is consistent with the limited right of appeal and the policy of respect for the arbitration process that underlies it.

[115] My colleagues have interpreted the arbitrator's general statement about there being work available if the appellant had requested it and attributed meaning to it that is in my view inconsistent with the context of the whole of the award, the issues between the parties, and the known evidence. However, even if there was any basis for their interpretation of the evidence, it is only one interpretation, not an interpretation reached by the arbitrator, and the weight of the evidence leans towards quite a different interpretation. My colleagues' analysis fails to address the incoherence between the arbitrator's acceptance of the undisputed evidence that it was indeed a layoff in October 2020, his erroneous analysis of the *ESA* as not applying to employee-initiated layoffs and the inexplicability of a conclusion that it is the obligation of such a laid-off employee to ask to be recalled to work.

vi) Conclusion

[116] The arbitrator made an error of law in his interpretation of the *ESA*. The interpretation and application of the evidence in the proper legal framework, had the arbitrator not made the error of law, is a matter for arbitration. For these reasons, I would allow the appeal, and remit the matter to the arbitrator together with this Court's opinion on the question of statutory interpretation.

"The Honourable Justice Griffin"

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