Court of King's Bench of Alberta

Citation: Sobeys Capital Incorporated v United Food and Commercial Workers, Local No 401, 2024 ABKB 614

Date: 20241018
Docket: 2301 16319
Registry: Calgary

Between:

Sobeys Capital Incorporated

Plaintiff

- and -

United Food and Commercial Workers, Local No 401

Defendant

Reasons for Decision
of the
Honourable Justice G.H. Poelman

I. Introduction

[1] Sobeys Capital Incorporated ("Sobeys") seeks judicial review of an arbitration decision determining wage increases for a certain group of employees at its Alberta Safeway stores. The employees are represented through a collective agreement by United Food and Commercial Workers, Local No 401 ("UFCW").

[2] The arbitration was conducted by Mia Norrie. The issue was determination of wage increases for Safeway employees for the last two years of a five-year collective agreement.

[3] Pursuant to the collective agreement, if the negotiations were unsuccessful the wage changes would be determined in a "final offer selection interest arbitration" – requiring the arbitrator to choose either Sobeys's offer or UFCW's offer.

[4] The collective agreement included directions on factors the arbitrator was to take into consideration. Sobeys argues that, in selecting UFCW's final offer, the arbitrator breached principles of procedural fairness and unreasonably failed to consider required factors, favouring instead matters that should not have been taken into consideration. In doing so, Sobeys argues, the arbitrator acted unreasonably.

II. Facts

[5] Sobeys is the second largest Canadian food retailer, with stores across Canada. In 2013, it purchased Safeway's Canadian operations and since then has operated stores under the Safeway banner across Alberta.

[6] UFCW Local 401 is one of Canada's largest private sector locals. It is the certified bargaining agent for most of the employees working in Safeway stores, representing about 6,334 employees in 63 Safeway stores in Alberta. About half of these employees are "top-rated" or "over-scale", both part-time and full-time.

[7] The last collective agreement between Sobeys and UFCW for Safeway employees was concluded in July 2020, following over three years of negotiations, which included mediation by Ms. Norrie. As stated in the decision, in addition to contractual issues between the parties, the bargaining process was further complicated by the Alberta government's declaration of a state of public health emergency in March 2020 due to the COVID-19 pandemic.

[8] The collective agreement covered five years, effective August 20, 2020 to August 9, 2025. For the last two years of the contract (2023-24 and 2024-25), the collective agreement provided a "wage reopener" process for top-rated or over-scale Safeway employees.

[9] The wage reopener process was set out in letters of understanding ("LOUs"). There was first a requirement for notice and negotiations; if negotiations were unsuccessful, "the parties shall resolve their dispute through final offer selection interest arbitration for a binding settlement" (para 2). The parties were to agree to the appointment of an interest arbitrator, formulate their final offers and then, according to paragraph 5:

> The final offer selection arbitrator shall hear submissions from each of the Parties and then select one (1) of the final offers. The final offer selection arbitrator shall take into consideration the economic and competitive climate of the Employer's business, and the interests raised in 2020 bargaining.

[10] On February 22, 2023, UFCW provided notice to begin bargaining under the wage reopener provisions. Negotiations were unsuccessful, leading to the final offer selection process. Sobeys's final offer was for a 1.5% wage increase effective August 6, 2023, plus a $1000 lump sum payment (intended to effect an average 2% increase); and effective August 11, 2024, a 2% wage increase. UFCW's final offer was for 5% increase for each year, effective August 7, 2023 and August 11, 2024.

[11] The arbitration was conducted on July 17, 2023. The hearing involved the submission and exchange of written briefs and materials by each party and oral submissions. Subsequently

(on July 31, August 16, August 31 and September 1, 2023) UFCW made additional written submissions to the arbitrator about wage settlements in other provinces, for which there was bargaining during the period covered by the arbitration although the settlements were concluded shortly thereafter. Sobeys objected to the new submissions, but also made substantive arguments on why they should not be considered relevant or given weight by the arbitrator.

[12] The arbitrator issued her decision on November 19, 2023, selecting UFCW's final offer.

III. Arbitrator's Decision

A. Introduction

[13] The arbitrator's decision began with background on the parties, quoting the LOUs, summarizing the bargaining and negotiations leading to the arbitration and setting out the parties' final offers. Next, the arbitrator set out the legal principles applicable: "the parties generally agree that the basic principles of replication and comparability are applicable" (decision at 4) even though they differed on how they should apply.

B. The Relevant Law

[14] The guiding principle of interest arbitrations, she held, is replication; that is, to replicate the settlement the parties would have made in a free collective bargaining process with the possibility of a lock-out or strike. Replication requires analysis of objective data rather than subjectively speculating on where the parties might have ended up. She quoted with approval arbitral decisions holding that an arbitrator must have regard to market forces and economic realities that would have driven a bargain and, in determining a most fair and reasonable offer, looking at the economic and social climate as well as weighing the merits of each proposal.

[15] Turning to comparators, she observed as follows:

> Replication relies on establishing what others have negotiated in similar circumstances and this concept relies on comparability as providing the objective framework to assess the parties' respective positions. The most relevant comparators are those that are negotiated by similarly placed parties for a similar time frame and in a similar industry and within the same or similar conditions. Depending on the cases, this assessment has also included similar locations, however, that is not universally consistent.
>
> None of these factors are absolute and one must consider the specific circumstances to find appropriate comparators and not merely extract only the ones most favourable to either parties' position. In most cases it is not possible to extract exact comparators as each set of negotiations results in compromises and trade-offs that are not apparent over the history of the agreement, especially when dealing with a limited focus of general wage increases. [Decision at 6.]

[16] She noted that the parties were most at odds on comparability, as UFCW looked to contracts across several industries and provinces while Sobeys argued "that the leading consideration in attempting replication is the selection of comparable collective agreements which serve as a 'normative' baseline from which to consider the proposals" (decision at 7).

[17] As a final topic under legal principles, the arbitrator noted that the parties were engaged in a final offer selection process, which required the selection of one of two competing offers

and, again referring to arbitral authority, this meant that the arbitrator was required to choose the offer that best replicates what most likely would have been negotiated had free collective bargaining run its course.

C. Factors for Consideration

[18] Next, the arbitrator summarized each party's position and evidence on the three factors paragraph 5 of the LOUs required her to "take into consideration"; namely "the economic and competitive climate of the Employer's business, and the interests raised in 2020 bargaining." She referred to these as "the enumerated factors."

[19] She first summarized and commented on "economic climate" from UFCW's perspective. It relied upon an expert report on the economic and competitive climate of the Canadian grocery industry. The arbitrator found it to be of limited assistance because it addressed grocery economics at a high level and nationally with limited applicability to the Alberta market. Another expert report focused on the erosion of real wages during the term covered by collective agreements between the parties. However, the arbitrator agreed with Sobeys that her task did not include making the employees whole with respect to real wages over the entire five year term of the collective agreements. Finally, the arbitrator summarized (without comment) UFCW's argument that prevailing high inflation and interest rates since the collective agreements were bargained in 2020 created a further erosion in real wages.

[20] The employer's position on economic climate, as summarized by the arbitrator, was based on an economist's summary of Alberta's economic performance and prospects. Sobeys argued that "the Alberta economy has not fully recovered from the 2015 recession and the COVID-19 shutdown which has resulted in lower growth and prosperity than pre-2014" (decision at 9); and it submitted that inflation would be lower than the previous three years, employee wage growth would be moderate and nothing indicated grocery profit margins would be abnormally high during the remaining two years of the agreement. UFCW argued, in response, that food price inflation remained an important contributor to overall inflation, employee wages had posted a strong gain over the previous year and there were indications that lower inflation remained far away.

[21] The arbitrator interrupted her review of each party's position on the three enumerated factors with a section entitled "Comparators" (decision at 9-15). It is by far the longest section in her review of the party's positions.

[22] The arbitrator noted that UFCW relied on settlements outside Alberta and outside the grocery retail industry as evidence of what wages were being "freely negotiated with the current economic pressures in play" (decision at 9).

[23] Relying on arbitral authorities, UFCW submitted that in "extraordinary circumstances" it was appropriate to look at settlements from sectors not normally considered as the best evidence of results from free collective bargaining in a high and sustained inflation environment.

[24] The arbitrator noted that UFCW relied primarily on the following:

a) The "Calgary Warehouse" agreement between UFCW and Sobeys (the warehouse being part of Safeway stores' supply chain) implemented a general wage increase of 4% in 2023 and 3% in 2024. UFCW submitted that distinctions between the Calgary Warehouse agreement and Safeway employees should translate into higher wage increases for the latter.

b) The Government of Alberta *Bargaining Update* indicated that private sector unions have achieved general wage increases of 4.09% in 2023 and 2.74% in 2024. Similarly, it argued, data showed private sector unions in Ontario achieved wage increases of 4.0% in 2022 and 3.9% in 2023. There were also settlements at the federal level with increases between 2.5% and 15.5% for the years 2022 to 2024.

c) In a July 2023 agreement, Save-On Foods in British Columbia and UFCW negotiated increases of 5% in 2023 and 3% in 2024, with an additional 2% for each of the following two years.

d) The Ontario Metro grocery chain settlement, after a strike, resulted in wage increases for full-time employees of 6.6% and 4.15% for, respectively, 2023 and 2024; and for part-time employees, of 9% and 5% for those two years.

e) A B.C. Port Workers collective agreement reflected a 19.2% wage increase over four years, plus a signing bonus.

[25] UFCW's submissions on the B.C. Port Workers and Metro settlements were made after the hearing's conclusion, over the objections of Sobeys. Sobeys argued that the information was submitted too late, and further the settlements were distinguishable, were outside the province, and in the one case, in a different industry – and thus were irrelevant. The arbitrator held that it was appropriate to consider UFCW's post-hearing submissions because they were not directed at showing changed economic circumstances but relied upon agreements "bargained during the seem period of evolving economic conditions" as when the reopener negotiations took place (decision at 12).

[26] Finally, as noted by the arbitrator, UFCW took the position that the Real Canadian Superstore ("Superstore") collective agreement of October 16, 2021 (1.5% and 2% increases for the years commencing October 2024 and October 2025) was not a relevant comparator. It argued that there was an "option of binding arbitration" for both years; Safeway and Superstore had very distinct operations; and since October 2021 there had "been a persistent increase to the cost of living and rising interest rates."

[27] Sobeys's position on comparators, the arbitrator noted, was that "the most relevant considerations are the wage settlements that have been negotiated and the wage rates being paid by the Employer's major competitors in Alberta" (decision at 12); and that Sobeys's competitive situation was set by its major competitors having locked in modest wage increases at a time preceding the current high inflation environment.

[28] Sobeys submitted that its primary competitor was Superstore, and relied heavily on its wage increases and wage levels as proper comparators. It also submitted as comparators several other grocery locations in Alberta. The following summarizes the data relied upon:

a) An October 2021, Superstore collective agreement had an increase of 1% lump sum (2023), 1.5% (2024) and 2.0% (2025).

b) A May 2022, Calgary Co-Op wage settlement had increases of 1.0% lump sum (2023) and 1.5% plus 1% lump sum (2024).

c) A November 2021, Forest Lawn IGA (Calgary) agreement provided a 1.0% lump sum for each of the years 2023 and 2024.

d) A June 2022, Banff IGA agreement had 1.5% lump sum awards for each of 2023 and 2024.

[29] Sobeys also presented data on the 2023-24 and 2024-25 top-rated and overscale hourly wage rates to show comparisons between its current wage structure and the wage structure it would have under each final offer, as compared to its competitors. Thus:

a) For the first year: Superstore wages per hour were $21.53, Co-Op was $20.57 and Forest Lawn IGA was $20.93 (subject to wage reopener). These compared to Sobeys then-current wage rate of $21.21; its final offer wage rate of $21.53; and UFCW's final offer rate of $22.27.

b) For the second year: Superstore's wages were $21.96; Co-Op was $20.57; and there was no comparable for Forest Lawn IGA. In comparison, Sobeys then-current wages were $21.21, its final offer would have generated $21.96 and UFCW's final offer would have resulted in $23.38.

[30] Sobeys's submissions emphasized that there was a history of pattern bargaining between Sobeys and Superstore on the one hand and UFCW on the other from which UFCW's final offer would be a radical departure. Sobeys's final offer included, for the 2023 year , both a 1.5% wage increase and a $1000 lump sum payment – the latter intended "to provide something over and above the Superstore increases, while still maintaining the wage rates and as a result its competitiveness" (decision at 15).

[31] The second enumerated factor in the LOUs is "competitive climate of the employer's business." The arbitrator summarized the submissions and evidence of each party on this factor.

[32] UFCW emphasized Sobeys's "high profitability" since the start of the pandemic. It presented data on significant increases in sales, net earnings and dividends per share; and a comparison of staple food items among various Alberta grocers, arguing that Safeway has the highest prices in Alberta and raised its prices to a greater degree than other retailers.

[33] Sobeys argued that while its parent company performed well overall, "in Alberta there has been a consistently tight competitive market and the Alberta grocers have not enjoyed a windfall from the increases through inflation as any benefit was outpaced by grocery costs" (decision at 16). The market share for Safeway stores declined year over year and, "while Sobeys is expanding its discount footprint, it is below the national average in discount sales and tonnage share" (*ibid*.). The arbitrator commented that Sobeys "did not provide economic data to support its position and did not argue an ability to pay" (decision at 16), relying instead upon comparisons of wage settlements and wage rates being paid by its competitors.

[34] The final enumerated factor is "interests raised in 2020 bargaining." The arbitrator stated that UFCW's "consistently stated interests were to improve the wages and compensation for its members" (decision at 17). Sobeys identified its interest and goals in the 2020 bargaining as, among other things, building a foundation for long-term profitable success, offering customers both full service and discount offerings, and "introducing its discount banner to address the opportunity in the Alberta market" (decision at 17). Sobeys's predominant interest was to enter the discount grocery market which required "wages and increased operational flexibility that were on par or close to the Superstore collective agreements" (decision at 18).

D. Analysis

[35] The arbitrator then turned to her findings and decision, under the heading "Analysis." She structured her analysis by considering each of the three enumerated factors separately, beginning with "economic climate."

[36] She found broad agreement in the financial forecasts provided by the parties. In her words, "they confirmed that inflation peaked in 2022, has moderated since then, and is likely to continue in the 3% range for the duration of the Collective Agreement" (decision at 18). Based on Bank of Canada information, interest rates were likely to remain high beyond the term of the agreement. However, she found the economic reports to be less persuasive than the actual impact on wages" (decision at 19). The Government of Alberta *Bargaining Update* that reported private sector wage increases went from an average of 3.73% in 2023 and 3.07% in 2024 to 4.23% and 3.11% in 2024. This indicated that collective agreements negotiated in the current environment to cover 2023 and 2024 showed wage rates increasing.

[37] She spent most of her analysis looking at the "competitive climate of the employer's business," the second factor. She began by assessing the significance of Superstore, the comparator on which Sobeys relied most heavily.

[38] She accepted that "for our purposes in this matter [Superstore] is certainly a competitor" (decision at 19) even though there were differences between it and Safeway. However, she did not "accept that the wage rates in the Superstore agreements should limit the wage rates at Safeway when one has consideration for the economic factors which drive what is an appropriate Final Offer" (*ibid.*). Wages and terms at Safeway and Superstore had been closely tied for years, but "replication relies on objective data as best can be determined at the time, which includes the prevailing market" (*ibid*.). The arbitrator did not accept that the LOUs were intended to hold Safeway employees to Superstore rates regardless of current economic circumstances. It would be inappropriate, she stated, to ignore economic factors because of comparators negotiated in a different economic climate.

[39] She ended her comments on the Superstore comparable with the following:

> I also note that the Union submitted that the negotiated rates in the Superstore settlement for 2024 and 2025 includes the potential for binding arbitration. There was no evidence as to how this would apply, I only mention it to identify that there is an open question as to the 2024 rates at Superstore if there was to be an option to arbitrate based on changing economic conditions. [Decision at 20.]

[40] The arbitrator then looked to other possible Alberta comparators, and dealt with them as follows:

a) The Alberta market comprises few province-wide unionized retailers and of those that exist, only Calgary Co-op, Forest Lawn IGA and Banff IGA had collective agreements settled within the last two years.

b) While Sobeys submitted the Forest Lawn and Banff IGA stores as reliable comparators because their agreements were negotiated in the current economy, they were dismissed by the arbitrator in one sentence: "As Forest Lawn and Banff IGA stores are small stand-alone sites, I am not persuaded they are appropriate comparators" (decision at 20).

c) She noted that Calgary Co-op covered approximately 3000 employees in the province and was an appropriate comparator, but ended her consideration by noting "it is difficult to view the wage rates in isolation in that contract as they are extremely low overall" (*ibid*.).

d) Where collective agreements of comparators "were negotiated in a very different economic reality, I believe it is inappropriate to use those agreements alone to base my decision on" (decision at 21). She stated she did not ignore them as indicative of Alberta industry settlements, "however there was insufficient information on the context of the settlement to draw any firm conclusions or trend" (*ibid*.).

[41] In the result, the arbitrator concluded she needed to look at "grocery settlements in other provinces and settlements within the province beyond the retail grocery industry" (*ibid*.), because comparators within the industry and province (which would normally be considered) did not take into account current economic pressures.

[42] The best evidence of replication, she said, was the use of comparators. She acknowledged that the most persuasive and relevant comparators would be drawn from similar industry, same geography and similar-sized entities – and thus found Ontario healthcare settlements and Vancouver port workers settlements less relevant. "However, grocery settlements, particularly in the Western Provinces are of assistance, as are the settlements between these parties at the Calgary Warehouse which is part of the grocery supply chain" (*ibid*.).

[43] She found the situation before her constituted "extraordinary circumstances" and on that basis considered the B.C. Save-On Foods and Ontario Metro agreements as relevant. Likewise, she found the Warehouse agreement relevant as also involving Sobeys and UFCW and negotiated at the same time.

[44] She noted that Sobeys did not advance an inability to pay argument and had acknowledged the benefit of increases over the last few years while wages remained relatively stable.

[45] The final enumerated factor was "interests raised in 2020 bargaining." She noted that Sobeys had made some progress towards entering the discount markets, although not as much as it had hoped in 2020. However, the UFCW was less successful in achieving its interest of increasing wages and compensation for its members.

[46] The latter was largely attributable to significant uncertainty in 2020 regarding the impact of COVID on the economy. That led to including a wage reopener for the last two years of the contract; it "was intended to allow for the impacts to be better understood and for better or worse to negotiate wage rates when there was a clearer understanding of the economic factors and their impacts" (decision at 24).

[47] The arbitrator's ultimate conclusion was as follows:

> There is no question that the Union's Final Offer of 5% per year for the 2023 and 2024 is aggressive and on its face appears to exceed the private sector settlements in the province, however the impact of these increases must be considered in light of the fact this Award only applies to approximately half of the employee group, a majority of whom are part-time. It is also not inconsistent with the 2023 and 2024

> increases in the Metro and Overwaitea settlements, especially when cost of living factors are considered.
>
> Conversely in the context of the economic circumstances as identified above, I find the Employer's proposal is significantly inferior to the pattern of private sector settlements and those comparators such as the Save-On, Metro and Calgary Warehouse agreements.
>
> Having consideration for the factors outlined above and using a standard of what is fair and reasonable in the circumstances to determine which of the proposals to accept, I believe that the Union's proposal is the offer that most replicates what the parties would have achieved in free collective bargaining and best accords with the current economic and collective bargaining landscape. [Decision at 24-25.]

IV. Standard of Review

[48] In all judicial review of administrative decisions it is presumed that reasonableness will be the applicable standard of review, subject only to occasions where a legislature has directed a different standard or where the rule of law requires correctness to apply: ***Canada (Minister of Citizenship and Immigration) v Vavilov***, 2019 SCC 65 at paras 16-17. Thus, "the reviewing court must consider only whether the decision, including its rationale and the outcome to which it led, was unreasonable": at para 83.

[49] Where written reasons are provided, the reviewing court "must begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion": at para 84.

[50] Two types of flaws may constitute unreasonableness: a failure of rationality internal to the reasoning process, and a decision untenable in light of the relevant factual and legal constraints bearing on it: at paras 15 and 101.

[51] The burden of showing unreasonableness will be met where the court is "satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (at para 100). However, any shortcomings or flaws must be sufficiently central or significant as to make the decision unreasonable: *ibid*.

[52] Questions about procedural fairness are not determined according to any particular standard of review: *Vavilov*, at para 77. Rather, the court must evaluate whether the proceedings met the level of fairness required by common law: ***Case v Edmonton (City)***, 2023 ABKB 232 at paras 21-25.

V. Admissibility of Affidavit

[53] In support of its application for judicial review, Sobeys filed an affidavit by Morgyn Ahrens, its director of labour relations and one of its representatives at the arbitration hearing. UFCW opposes admissibility of the affidavit on this review and has applied for it to be struck.

[54] The general rule on judicial reviews is that the court will consider only the record of the proceedings being challenged; additional affidavits and evidence are permitted only in exceptional circumstances: ***Northern Air Charters (PR) Inc v Alberta Health Services***, 2023 ABCA 114 at paras 3 and 8-10; and rule 3.22(a) of the *Alberta Rules of Court*. New evidence would be irrelevant "as the court is not assessing the merits of the decision, but instead whether the decision of the administrative body is supported by the record before it, and whether that decision aligns with the rules of natural justice": ***Northern Air*** at para 8; citing with approval ***Alberta Liquor Store Association v Alberta (Gaming and Liquor Commission)***, 2006 ABQB 904 at paras 43-44.

[55] Ms. Ahren begins her affidavit by setting out the background of the parties and their negotiations (paras 5-18). She then reviews the wage reopener hearing and award, giving her "understanding" of the process generally and in this case. Then she summarizes and comments on the decision. Finally, she gives a detailed account of the financial and operational impacts of implementing the award.

[56] Much of Ms. Ahrens's affidavit is already part of the record or contained in the decision and therefore adds nothing. Other parts contain summaries of commentaries upon and critiques of the decision and as such have little or no evidentiary value in any type of proceeding. The balance of the affidavit, on which Sobeys would most heavily rely, addresses the impact of the decision on Sobeys.

[57] The impact of the decision on either party has no bearing on whether the decision was reasonable and the proceedings were conducted fairly, in accordance with natural justice and without bias (typical exceptional circumstances for allowing affidavit evidence). Further, to the extent the effect on Sobeys of accepting UFCW's offer was an important consideration, it should have been the subject of evidence and submissions before the arbitrator. Projections of financials and operational impacts could have been prepared. Indeed, Sobeys's counsel indicated that much of what Ms. Ahrens's affidavit states can be derived from the record and the arbitrator's decision.

[58] For these reasons, I allow UFCW's application to strike Ms. Ahrens's affidavit from these proceedings and do not consider it in this decision.

VI. Procedural Fairness

[59] Sobeys argues that the arbitrator breached the principles of procedural fairness in three ways:

a) By accepting evidence after the scheduled one-day hearing;

b) By accepting evidence that was not available to be considered when the parties were engaged in bargaining; and

c) By relying on evidence not within the enumerated factors in paragraph 5 of the LOUs.

[60] As Sobeys acknowledges, an arbitrator has discretion to determine her own procedure and interest arbitrations in particular are flexible. Further, as noted by one arbitration panel, "it is not unusual for the parties to make post-hearing submissions": ***Foyer Richelieu Welland v CUPE, Local 3606***, 2020 CanLII 97972 at 5. It is the failure to give a party an opportunity to

reply to evidence or other submissions that is a breach of procedural fairness and natural justice: ***Westfair Foods Ltd v United Food and Commercial Workers' Union, Local 401***, 2007 ABCA 167 at para 5.

[61] The record shows that Sobeys was able to, and did, fully respond to all of UFCW's post-hearing evidence and submissions, both on procedural and substantive issues. It did not seek a further oral hearing. I find no breach of the duty of procedural fairness on this account.

[62] As to the second argument, nothing in the arbitral agreement restricts the arbitrator to information known to and available to the parties when they were bargaining. In my view, the arbitrator did not act unfairly by taking into account all of the materials submitted by the parties, subject to her obligation to act reasonably in determining its relevance and weight.

[63] Finally, the argument that the arbitrator considered matters outside what was set out in paragraph 5 of the LOUs falls within the question of whether she acted reasonably in arriving at her decision.

[64] Thus, I find no breach of the duty of procedural fairness in the arbitration.

VII. Reasonableness

A. Nature and Scope of the Arbitration

[65] The remaining issue is whether Sobeys has established that the arbitrator's decision was unreasonable. Answering that question first requires determining the legal parameters of her mandate.

[66] The parties referred their dispute to an "interest arbitration." That form of arbitration is "more or less legislative in nature": ***Revera Retirement v Armstrong***, 2010 ONSC 3041 at para 8; and to a significant extent is a continuation of the parties' negotiation, with no right or wrong answer: ***Foyer Richelieu Welland*** at 5. It is thus very different from rights arbitration which is adjudicative in nature and involves right and wrong answers: ***Revera Retirement*** at para 8; ***Foyer Richelieu Welland*** at 4.

[67] Interest arbitrations employ the principle of replication. The arbitrator cited other arbitral decisions for the main features of this principle: using objective data, seeking to simulate what the parties would have reached in free bargaining under threat of a work stoppage, and having regard to market forces and economic realities that would ultimately have driven the parties to a bargain: decision at 4-6. An interest arbitrator is not to impose terms and conditions that seem attractive or fair but design a collective agreement that comes as close as possible to what the parties would likely have made under compulsion of work stoppage**:** ***Labourers' International Union of North America, Local 3000 v Primacare***, 2023 ONSC 1628 at para 40.

[68] Replication involves an examination of comparators (again, as noted by the arbitrator referring to other arbitral decisions) as well as market forces and economic realities. The arbitrator observed that "the most relevant comparators are those that are negotiated by similarly placed parties for a similar timeframe and in a similar industry and within the same or similar conditions": decision at 6.

[69] Most important where an arbitrator is appointed pursuant to an agreement are the terms of reference of that agreement**:** ***Botten v Botten***, 2024 BCSC 39 at paras 117-21, citing and quoting ***Voong v GPUN Broadway Investment Inc***, 2017 BCSC 1521 at paras 44-47. Here, those are

contained in paragraph 5 of the LOUs: “the final offer selection arbitrator shall take into consideration the economic and competitive climate of the Employer’s business, and the interests raised in 2020 bargaining.” General principles of replication and use of comparators developed in arbitral decisions do not override the directions in the arbitral agreement.

[70] In addition to being an interest arbitration, these parties were engaged in a final offer selection arbitration. The arbitrator was required to select one of the two final offers in its entirety without modification or selection of what she might have considered a more fair and reasonable result.

B. The Enumerated Factors

1. Introduction

[71] The parties agreed to defer a dispute over the wage rates for the last two years to “final offer selection interest arbitration.” As the principles in the previous section and the arbitrator’s decision make clear, they did not need to go farther. The nature of interest arbitration is well established in labour arbitration jurisprudence.

[72] However, the parties chose to add specific directions, namely that the arbitrator take into consideration the economic and competitive climate of Sobeys’s business and the interests raised in 2020 bargaining. Neither party suggests that the arbitrator was limited to these factors. Sobeys in particular, however, argues that the arbitrator was required to give them special attention and that they imposed constraints.

2. Economic Climate

[73] The “economic climate . . . of the Employer’s business,” the first enumerated factor, seems to have been understood by the parties and the arbitrator as relating to economic factors affecting the grocery industry, such as costs, pricing, inflation (particularly food prices), interest rates and employees’ “real wages.”

[74] The arbitrator took little from the expert reports addressing these matters. However, she made particular note of the Government of Alberta *Bargaining Update* as demonstrating an upward trend in private sector wage increases in 2023 and 2024.

[75] The arbitrator’s understanding and application of the economic climate factor is not challenged and I do not find it unreasonable.

3. Competitive Climate of the Employer’s Business

[76] The focus of Sobeys’s challenge to the reasonableness of the decision is how the arbitrator dealt with the “competitive climate of the employer’s business," the second enumerated factor. This section of the decision primarily involves a consideration of comparators.

[77] Paragraph 5 of the LOUs expressly required the arbitrator to take into consideration the competitive climate of Sobeys’s business. Sobeys argued that this limited use of comparables to Alberta, which was the extent of the competitive climate of the Safeway stores operated by Sobeys and subject to the collective agreements.

[78] According to Sobeys, its main competitor is Superstore. The arbitrator acknowledged that for her purposes certainly it should be considered as a competitor. However, ultimately she did not give it any discernible weight. Her reasons were that the Superstore agreement was settled in

October 2021, while she was dealing with mid-2023; and she did not accept Sobeys's argument that Superstore wage rates should limit those at Safeway, even though their settlements had been closely tied together for years. The arbitrator then turned to other comparators put forward by Sobeys: Calgary Co-op, Forest Lawn IGA and Banff IGA – all of which she seemed to acknowledge were negotiated in the current economic climate (decision at 20 and 21).

[79] She dismissed Calgary Co-op in one sentence: "I do note the Calgary Co-op agreement covers approximately 3000 employees in the province and is an appropriate comparator, however it is difficult to view the wage rates in isolation in that contract as they are extremely low overall" (decision at 20). It is unclear what that means; and why, if Co-op is a competitor (which certainly it is), its 2022 wage settlement can be ignored simply because the arbitrator considers the wages low. She does not explain why more context would not have allowed her to use Co-op as a comparator; at least she had the percentage increments of Co-op wages for 2023 and 2024 (1% lump sum and 1.0% lump sum plus 1.5% increase, respectively).

[80] Similarly, she quickly dismissed Forest Lawn IGA and Banff IGA because they are small stand-alone sites and thus not valid comparators. There is no explanation why they could provide no insight for her replication model, while operations in different provinces and industries do.

[81] The Alberta grocer comparators that she looked at were of little relevance or weight, she found, because they were negotiated in a different economic climate or were different types of grocers or were outliers in terms of wage levels. These "extraordinary circumstances" justified looking outside of the retail grocery business and outside of the province. The comparators on which she relied, particularly highlighted in the short paragraph at the end of page 24, were one grocer chain in Ontario, one grocer chain in B.C. and a warehouse business in Calgary owned by Sobeys and part of its supply chain. It is not disputed that these three entities are not competitors of Sobeys.

[82] Throughout her decision, the arbitrator expressly pursues the replication theory (a continuation of the bargaining process) and its servant, the application of comparators. In my view, she ignored the modification of that approach required by the LOUs. She made her decision without giving any significant weight to the competitive climate of Sobeys's business.

[83] The three enumerated factors are interrelated. As the arbitrator correctly noted, a key interest of Sobeys in the 2020 bargaining was its desire to enter the discount grocery market in Alberta and bring its collective agreements more in line with those of Superstore. Of course, these objectives conflicted with those of UFCW. Nevertheless, their relevance as the third enumerated factor gives weight to the second enumerated factor of Sobeys's competitive climate.

[84] Regardless of when the last Superstore collective agreement was made, its wage levels were important elements in Sobeys's competitive environment. For example, Superstore's hourly wage rates for the relevant group of employees were $21.53 (2023-24) and $21.96 (2024-25). These compared to Sobeys's final offer of $21.53 (2023-24) and $21.96 (2024-25); and UFCW's final offer of $22.27 (2023-24) and $23.38 (2024-25). Over the thousands of employees and thousands of hours worked, these differences are not insignificant, and thus are relevant to the competitive climate between Superstore and Sobeys. Yet the arbitrator took no notice of them, because her replication theory could only accommodate comparators negotiated contemporaneously with the wage reopener negotiations.

[85] Just as troubling, there is a concern that part of the reason the Superstore contract was not considered was the "open question" about whether the Superstore wages for 2024 and 2025 were final, or subject to wage reopener negotiation. The latter possibility was submitted to the arbitrator by UFCW and seemingly taken at face value by her; the collective agreements forming part of the record do not bear this out, and there is no evidence of reopener provisions in the Superstore contract. UFCW did not dispute this before me. We are left to ponder how significant this "open question" was to the arbitrator's decision not to rely on the Superstore agreement.

[86] I have already intimated that the arbitrator's reasons for taking no account of the other Alberta grocer collective agreements are weak, lack meaningful analysis and not transparent. She was too eager to prefer more contemporaneous negotiations, even though they formed no basis for looking at Sobeys's competitive climate.

4. Interests Raised in 2020 Bargaining

[87] The arbitrator recognized the competing interests driving the 2020 negotiations. Among other things, Sobeys was seeking to enter the discount grocery market in Alberta and to preserve and enhance its market share. To be competitive in this sector of the market, it sought to keep its wages more in line with those at Superstore. In contrast, UFCW primarily sought to improve wages in compensation taking into account, among other things, a recent increase in the minimum wage to fifteen dollars.

[88] Sobeys's interest in particular related directly to the three enumerated factors. As noted before, they give particular weight to consideration of its competitive climate. UFCW's interests were more general in nature, although not to be dismissed on that account. Of course, it also sought significant wage increases in the wage reopener negotiations, consistent with its 2020 bargaining interests.

[89] This part of the arbitrator's decision is not challenged by Sobeys. However, as noted above, the 2020 bargaining interests inform the significance of the competitive environment of Sobeys under the second enumerated factor.

C. Conclusions

[90] The arbitrator had broad discretion in conducting this interest arbitration, to decide which final offer to select. However, her discretion was bound by the arbitral agreement's direction that she consider three enumerated factors – one of which was the competitive climate of Sobeys's business. She acted unreasonably by giving this factor no discernible weight. Rather than using comparators drawn from grocers in Alberta (Sobeys's competitive climate), with whatever adjustments she may have thought necessary, she relied on recent wage settlements from one Ontario grocer, one B.C. grocer and one grocery warehouse business in Calgary. None of these are part of Sobeys's competitive climate.

[91] Further, she cast doubt on the reliability of current wage information for Superstore (a main Sobeys competitor) based on facts not supported by the evidence. What effect this had on her decision cannot be determined with any confidence, a lack of transparency of material significance in light of Superstore's importance in the Alberta grocery business. Lack of transparency on material points constitutes unreasonableness: ***Vavilov*** at para 100.

[92] It bears emphasis that my decision is not about what decision I might have made. As ***Vavilov*** emphasizes, "the focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome"

(at para 83). I "must consider only whether the decision made . . . – including both the rationale for the decision and the outcome to which it led – was unreasonable" (*ibid*.).

[93] I therefore grant an order in the nature of *certiorari* to quash the arbitrator's decision and refer the wage reopener dispute to a new arbitrator for determination.

[94] The parties may arrange a further appearance, if necessary, to address any matters arising from this decision, including costs.

Heard on the 11th day of September, 2024.
Dated at the City of Calgary, Alberta this 18th day of October, 2024.

G.H. Poelman
J.C.K.B.A.

Appearances:

Damon Bailey, K.C. and Rebecca Silverberg
for the Applicant

Kristan McLeod and James Diebert
for the Respondent