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Court finds arbitrator's decision on Safeway collective agreement unreasonable

By **Anosha Khan**

Law360 Canada (October 22, 2024, 4:45 PM EDT) -- The Alberta Court of King's Bench has found an arbitrator's decision regarding grocery employees' wages under a collective bargaining agreement (CBA) unreasonable because direct industry competitors in the province were not considered in comparison.

In *Sobeys Capital Incorporated v. United Food and Commercial Workers*, Local No 401, 2024 ABKB 614, released Oct. 18, Sobeys sought judicial review of an arbitration decision for wage increases for certain employees at Safeway stores.

The employees were represented through a collective agreement by the respondent, a local of the United Food and Commercial Workers (UFCW) union, and the determination was for the last two years of a five-year agreement.

On unsuccessful negotiations, wage changes under the CBA were to be determined on a "final offer selection interest arbitration" in which the arbitrator was required to choose either Sobeys's offer or UFCW's offer. They engaged in over three years of negotiations.

The last two years of the agreement (2023 to 2025) provided a "wage reopener" process for top-rated or over-scale Safeway employees, who make up half of Safeway's part-time and full-time employees.

"Sobeys's final offer was for a 1.5 per cent wage increase effective Aug. 6, 2023, plus a $1000 lump sum payment (intended to effect an average two per cent increase); and effective Aug. 11, 2024, a two per cent wage increase. UFCW's final offer was for five per cent increase for each year, effective Aug. 7, 2023. and Aug. 11, 2024." The arbitrator selected UFCW's offer.

Per the parties' specific directions, the arbitrator was required to consider the economic and competitive climate of Sobeys's business and the interests raised in 2020 bargaining. The arbitrator acknowledged that she was required to "choose the offer that best replicates what most likely would have been negotiated had free collective bargaining run its course."

Sobeys argued that the arbitrator's decision was unreasonable as she did not consider required factors. It argued that there was 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."

According to facts detailed in the decision, Safeway's main competitor was said to be Real Canadian Superstore, but the arbitrator did not give the Superstore agreement any discernible weight because it was settled in October 2021, and she was dealing with the agreement at hand in 2023. 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."

Other comparisons that Sobeys put forward were Calgary Co-op and the Forest Lawn and Banff IGA's, which the arbitrator said "were negotiated in the current economic climate." However, these were not considered as Co-op's wages were deemed too low without further explanation. The court noted she still had information on Co-op's wages for 2024 (one per cent lump sum plus 1.5 per cent increase).

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

The arbitrator found that Alberta grocer comparisons were negotiated in a different economic climate and were different types of grocers or outliers in wage levels. She, therefore, looked to an Ontario grocery chain, a B.C. grocery chain and a warehouse business in Calgary that was part of Sobeys' supply chain. These were not competitors of Sobeys.

The arbitrator made her decision without giving significant weight to the competitive climate of Sobeys's business, Justice Poelman said. It was noted that Sobeys's interest in the 2020 bargaining was to enter the discount grocery market in Alberta and to bring its collective agreements more in line with Superstore.

"Regardless of when the last Superstore collective agreement was made, its wage levels were important elements in Sobeys's competitive environment," wrote Justice Poelman.

"For example," he added, "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," the court noted. "Yet the arbitrator took no notice of them because her replication theory could only accommodate comparators negotiated contemporaneously with the wage reopener negotiations."

He found that the arbitrator's reasons for not accounting for other Alberta collective agreements were weak, lacked meaningful analysis and were not transparent. She preferred more contemporaneous negotiations, even though they formed no basis for looking at Sobeys's competitive climate.

"Further, she cast doubt on the reliability of current wage information for Superstore 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."

The arbitrator's decision was quashed, and a new arbitrator ordered to determine the wage reopener dispute.

Counsel for the applicant Damon Bailey and Rebecca Silverberg of McLennan Ross LLP.

Counsel for the respondent were Kristan McLeod and James Diebert of Chivers Carpenter Lawyers.

They were not immediately available for comment.

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