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IN THE MATTER OF AN ARBITRATION

BETWEEN

MILO FAIS (FORMERLY 1033984 ALBERTA LTD., OPERATING AS WHEATLEY COLD STORAGE)

(THE COMPANY)

AND

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 459

(THE UNION)

AND IN THE MATTER OF THE GRIEVANCE OF CHRISTOPHER AVELAR

ARBITRATOR: K. A. HINNEGAN

APPEARANCES:

FOR the COMPANY:
JOHN-EDWARD C. HYDE & DAN BAILEY

FOR the UNION:
KELVIN KUCEY & ROLANDO CABRAL

HEARING HELD AT LONDON, ONTARIO, ON JANUARY 15 & FEBRUARY 9, 2015

AWARD

This grievance was filed on August 20, 2014, alleging " Wrongful Termination" of Mr. Avelar on August 19, 2014. However, the Company has raised a preliminary objection that this grievance is not arbitrable in that there was no collective agreement in effect at the time of this termination and grievance.

The collective agreement between these parties expired on March 31, 2014, and negotiations for a new agreement have been ongoing since. On May 16, 2014, the Ministry of Labour issued to the parties a " no board " notice under section 21(b) of the Labour Relations Act. Accordingly, the statutory " freeze " period provided for in section 86 (1) of the Act had ended well before this termination on August 19, 2014. My appointment as arbitrator under section 49 was made on October 9, 2014. That statutory appointment, of course, has been deemed to include the authority of an arbitrator to decide his/her own jurisdiction to deal with the grievance referred to arbitration.

While it is somewhat trite to observe at this point that arbitrators derive their jurisdiction from the collective agreement under which they are appointed, that is the underlying basis of the Company's jurisdictional argument here. In short, it is asked that, if there is no collective agreement in effect at the time of a particular Company action, where does an arbitrator find his/her authority to deal with a grievance protesting that action ? In that regard, arbitrators have repeatedly referenced the observation of arbitrator Harry Arthurs in Toronto (City) and Civic Employees Union, Local 43 (1967), 18 L.A.C. 273 , that "we must ultimately trace all enforceable claims back to the collective agreement".

An arbitrator's statutory mandate under a section 49(1) referral by the Minister of Labour is expressly stated to be to arbitrate " any difference between the parties to a collective agreement arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable ". In that there was, in fact, no collective agreement in effect at the time of Mr. Avelar's termination and the freeze period had ended, there can be no real question that his objection to his termination cannot possibly be an arbitrable grievance alleging a violation of a term of a collective agreement. In short, in order for there to be a violation of a term of a collective agreement, there must obviously be a collective agreement in place in the first place. Accordingly, I am clearly without jurisdiction to deal with the merits of this termination of employment.

At the hearing, the Union raised an issue of timeliness with respect to the referral to arbitration and made reference to section 49(1) of the Act and article 8.01(a) of the expired collective agreement. While I confess to having some difficulty in following the thrust of that submission, the simple answer is that, if there was no collective agreement in effect at the relevant time, there are no time limits under a collective agreement to interpret, apply or administer. Accordingly, I am similarly without jurisdiction to apply and enforce time limits here, there being none to apply and enforce.

Finally, further in the alternative, the Union submitted that the Employer is estopped from taking the position of no collective agreement at the time of this termination. In that regard, it was submitted that, by continuing to discuss a couple of other grievances with a

Employer impliedly agreed to the continuation of the terms of the expired agreement while the parties negotiate the terms of a new agreement. But surely, given the labour relations significance of such an agreement for any company and union, there must be more than that to establish one. In my view, there must be clear and unequivocal evidence of a mutual agreement between a company and a union to extend the terms of an expired collective agreement while negotiating the terms of a new one. There was no such clear and unequivocal evidence of that here. On the contrary, John Fernandes, the former chief steward of the Union candidly acknowledged at the hearing that Dan Bailey, the on-site general manager of the Company, did not provide a written response to this grievance and told him that he was not entertaining it because there was no collective agreement in effect at the time of the termination. That hardly indicates an agreement by Mr. Bailey to extend and apply the terms of the expired collective agreement while negotiating the new one on a "business as usual basis", as suggested by the Union. In the result, I am satisfied that the essential elements of an estoppel have not been established here on the evidence and that there was no agreement, express or implied, between the Company and the Union to extend the terms of the agreement beyond its expiry.

Having carefully considered all of the evidence, the extensive case law provided, and the very complete submissions of counsel, I have concluded that I am without jurisdiction to deal any further with this matter beyond deciding the jurisdictional issue itself.

Dated: March 27, 2015

K. A. Hinnegan

K. A. Hinnegan - Arbitrator