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Docket: CI 20-01-29439
CI 21-01-30389
(Winnipeg Centre)
Indexed as: DHRW Electrical Projects GP v. The International Brotherhood of Electrical Workers, Local Union 2085 et al.
Cited as: 2022 MBQB 168

# COURT OF QUEEN'S BENCH OF MANITOBA

**B E T W E E N:**

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|---|---|---|
| | ) | Appearances: |
| DHRW ELECTRICAL PROJECTS GP, | ) | |
| | ) | Rod C. Roy and |
| applicant, | ) | Peter A. Mueller |
| | ) | for the applicant |
| - and - | ) | |
| | ) | Fred Thiessen and |
| THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 2085 AND CONSTRUCTION LABOUR RELATIONS ASSOCIATION OF MANITOBA, | ) | Tamara D. Reimer |
| | ) | for The International |
| | ) | Brotherhood of Electrical |
| | ) | Workers, Local Union 2085 |
| | ) | |
| respondents. | ) | Keith D. LaBossiere and |
| | ) | Miranda D. Grayson |
| | ) | for Construction Labour |
| | ) | Relations Association |
| | ) | of Manitoba |
| | ) | |
| | ) | JUDGMENT DELIVERED: |
| | ) | August 18, 2022 |

## BOCK J.

[1] The applicant, DHRW Electrical Projects GP ("DHRW"), applies for judicial review of two decisions by a labour arbitrator arising out of a motion by the respondent union at a labour arbitration hearing. It attacks those decisions on two bases: first, that it was

denied procedural fairness in respect of that motion; second, that the decisions are unreasonable.

[2] For the reasons that follow, the application is dismissed.

## The Facts

[3] The parties are as follows:

(a) DHRW is an electrical contractor based in British Columbia;

(b) The International Brotherhood of Electrical Workers, Local Union 2085 (the "Union") operates a hiring hall of electrical workers in Manitoba;

(c) The Construction Labour Relations Association of Manitoba ("CLRAM") is an employers' organization under s. 1 of ***The Labour Relations Act***, C.C.S.M c. L10. It represents its member employers within Manitoba's construction industry in the negotiation of collective agreements.

[4] In 2013, DHRW was the successful bidder for certain electrical work at the Health Sciences Centre Women's Hospital (the "Project"). Since DHRW had no workforce in Manitoba, it hired members of the Union to perform that work under a collective agreement (the "2013 CBA").

[5] In November 2013, DHRW became a member of CLRAM. As a member, DHRW agreed to have CLRAM negotiate, and enter into, a renewed collective agreement with the Union on its behalf. To that end, the Union and CLRAM concluded a renewed agreement on April 26, 2016 (the "2016 CBA").

[6] DHRW contends that the Union's members performed the electrical work negligently, resulting in 65,000 deficiencies on the Project. The responsibility for the cost to repair these deficiencies lies at the heart of this dispute.

[7] DHRW claims the journeypersons who performed the electrical work and the Union are either responsible to rectify the deficiencies at no cost to DHRW, or to compensate DHRW for any costs incurred by it to repair the deficiencies. It has advanced that claim by a grievance (the "grievance") dated November 17, 2016.

[8] The grievance states:

> Grievance under Article 17.01 of Collective Agreement
>
> . . .
>
> Nature of violation: Union and its members have not performed the work on the HSC Women's Hospital project in a workmanlike manner and in accordance with applicable code and contract specifications. The owner and the Union have identified thousands of deficiencies where code and contract specifications have not been satisfied as a result of workmanship not meeting the required standards, and the owner has demanded that these deficiencies be rectified.
>
> Remedy requested: Full redress, including compliant rework of the deficient work, and reimbursement to the Grievor for all costs associated with the rework, including the work and materials, business interruption, legal costs and any other costs related to the remedial work on this project.

[9] The grievance proceeded before the Manitoba Labour Board, but in 2019, DHRW and the Union terminated those proceedings and referred the grievance to the arbitrator for final and binding arbitration by an arbitration agreement (the "Arbitration Agreement"). They subsequently entered into a second agreement, the "Arbitration Procedural Agreement", which governs the process of the arbitration.

[10] DHRW and the Union then filed pre-hearing statements setting out the substance of their position on the grievance. (CLRAM was not involved in this part of the process.)

[11] In its pre-hearing statement, DHRW advanced a three-pronged position. First, it alleged Article 17.01 of the 2016 CBA, properly interpreted, obliged the Union to indemnify it for the cost of repairing deficiencies on the Project. For ease of reference, Article 17.01 is set forth here:

> 17:01 Journeypersons shall install all electrical work in a safe and workmanlike manner and in accordance with applicable code and contract specifications. Whenever corrections have to be made to bring the work up to code requirements because of faulty or careless workmanship, the Journeyperson shall make such corrections on their own time unless the errors were made by order of the Employer or the Employer's representative. The employee shall not be charged for wasted material.

[12] Second, DHRW alleged the Union had improperly interfered with the Project, which in turn led to the deficiencies, and it should therefore be held liable to compensate DHRW for them.

[13] Third, DHRW alleged the Union ought to be held vicariously liable for any negligently performed work of its members.

[14] Article 4 of the Arbitration Agreement expressly provided that the arbitration would be bifurcated. The initial hearing would address, among other things, "any motions with respect to the Grievance". A further hearing would proceed in the event that the initial hearing was not wholly dispositive of the grievance. The process for such motions was set out in Article 5 of the Arbitration Procedural Agreement.

[15] On February 4, 2020, the Union filed a preliminary motion to have the grievance dismissed. It was this motion that led to the decisions in respect of which DHRW seeks judicial review.

[16] The Union's motion states the grievance should be dismissed on these three grounds (a fourth ground was withdrawn):

(a) "Certain provisions of Article 17:01 are unlawful and so unenforceable";

(b) "the Employer's [i.e., DHRW's] position violates the principle of vicarious liability"; and

(c) "The Union is not the employer of its members and is not liable for the actions of its members."

[17] The Union's position can be fairly summarized as follows. First, the requirement in Article 17:01 that faulty or careless workmanship be corrected by journeypersons "on their own time" was tantamount to a "free labour" provision. As such, it was illegal, violated ***The Employment Standards Code***, C.C.S.M. c. E110 (the "***Code***") and was therefore unenforceable. DHRW's remedy against any particular journeyperson who had negligently performed work was to discipline that person. Second, Article 17:01, properly interpreted, did not impose any obligation on the Union to indemnify or otherwise compensate DHRW for the cost for correcting faulty or careless workmanship. Finally, the Union did not employ and was not responsible for the actions of its members.

[18] CLRAM had status to participate in the motion, and made submissions to assist the arbitrator in his interpretation of Article 17:01. It supported the Union's position in that regard, but took no position with respect to DHRW's allegation that the Union had improperly interfered with the Project.

[19] The motion was heard on August 12 and 13, 2020. Before the hearing, each party filed its brief. Affidavits were filed, as were transcripts of cross-examinations on affidavits.

At the hearing, DHRW, relying on a narrow interpretation of the Union's motion, disputed the arbitrator's jurisdiction to render a decision on the interpretation of Article 17:01 as a whole, rather than on the meaning of the words "on their own time."

[20] The arbitrator called for and received supplementary written and oral submissions with respect to the scope of his jurisdiction. These were received on September 15, 2020. Each party provided a brief oral submission on that same issue by teleconference on October 2, 2020. Further written submissions were then submitted by the parties on October 9 (by the Union), 13 (by CLRAM), and 29 (by DHRW), 2020.

[21] On November 22, 2020, the arbitrator issued the "November Decision", his 76-page ruling on the Union's motion. The Union was substantially successful. The arbitrator concluded the Union's motion did properly raise the question whether "either directly, vicariously or on any other basis pursuant to Article 17:01, the IBEW could be liable to indemnify DHRW for the deficiencies", and answered that question in favour of the Union, so disposing of that part of the grievance based on Article 17:01. However, he ruled DHRW's claim for damages alleged to have been caused by the Union's wrongful interference could advance to the second stage of the arbitration.

[22] The arbitrator's conclusion and order (para. 160) are reproduced here for ease of reference:

> 160. For the reasons above, I find that the Union's motion succeeds to the following extent, and I order accordingly:
>
> > 1. The second sentence of Article 17:01 in the 2016 CBA is unlawful and is removed from the Article and pursuant to Article 24 of the 2016 CBA is replaced with the following (or such other language as is mutually acceptable to DHRW and the Union):

> Whenever corrections have to be made to bring the work up to Code requirements because of faulty or careless workmanship, the Journeyperson shall make such corrections and be compensated in accordance with the provisions of the Employment Standards Code and regulations thereunder.
>
> 2. Neither the first sentence of Article 17:01, nor the revised Article 17:01 considered in its entirety, is a basis pursuant to which, whether on the principle of vicarious liability, or because of a direct obligation of the Union, or on any other ground, the Union could be held liable to indemnify DHRW or provide redress to it for the cost of alleged work deficiencies by workers on the Project, and the grievance of DHRW is accordingly dismissed to that extent;
>
> 3. The claim by DHRW for full redress as set out in the "Remedy requested" portion of the grievance, to the extent that it is based on damages suffered because of alleged wrongful interference by the Union and alleged direct involvement by the Union in breaches by workers of required standards of work, may advance to the second hearing on the merits as contemplated by the 2019 Agreement. The grievance asserts violations commencing in early September 2013, and the breaches were alleged to have continued up to the date of the grievance. The right to claim redress for those violations, whether arising when the 2013 CBA was in force or the 2016 CBA was in force, is a vested right and within the scope of the second hearing, based on the agreement of DHRW and the Union set out in para. 7 of the 2019 Agreement. Rights that have accrued under an expired collective agreement remain enforceable: *Dayco (Canada) Ltd. v. C.A.W.* [1993] 2 S.C.R. 230 at para. 47.

[23] On December 22, 2020, DHRW applied for judicial review of the November Decision. At about the same time, DHRW sought clarification and direction from the arbitrator with respect to certain aspects of the November Decision. In particular, DHRW questioned whether the wording proposed to replace the unlawful second sentence of Article 17:01 meant that compensation paid to journeypersons who corrected deficiencies was to be at the statutory minimum wage rate provided in the ***Code***, even though that rate is lower than the wage rates provided under the 2016 CBA.

[24] The arbitrator requested further written submissions on this issue, which the parties submitted on December 30, 2020 (DHRW), January 11, 2021 (the Union) and January 29, 2021 (CLRAM).

[25] On February 18, 2021, the arbitrator released the "February Decision". He rejected DHRW's submission that minimum wage rates could apply to remedial work performed by journeypersons, and found them entitled to the wage rates stipulated in the 2016 CBA.

[26] On March 8, 2021, DHRW applied for judicial review of the February Decision. The two applications for judicial review were subsequently consolidated.

## The issues and standard of review

[27] DHRW's application raises three issues:

(a) was DHRW afforded procedural fairness?;

(b) was the November Decision reasonable?; and

(c) was the February Decision reasonable?

[28] There is no dispute on the standard of review to be applied to these issues.

[29] With respect to procedural fairness, the respondents acknowledge that DHRW was entitled to a fair and meaningful opportunity to participate in the hearing. If DHRW did not receive the high level of procedural fairness to which it was entitled, the matter should be returned to the arbitrator for further hearing (***Baker v. Canada (Minister of Citizenship & Immigration)***, 1999 CanLII 699 SCC, [1999] 2 S.C.R. 817 (S.C.C.), paras. 21 – 27).

[30] With respect to the November and February Decisions, the parties agree that they are to be reviewed on a standard of reasonableness, in accordance with the methodology

prescribed by the Supreme Court of Canada in ***Canada (Minister of Citizenship) v. Vavilov***, 2019 SCC 65, 441 D.L.R. (4th) 1 (QL). A brief discussion of that methodology follows.

[31] To begin, a review for reasonableness is concerned with both the decision-maker's reasoning process and its outcomes (***Vavilov*** at para. 85). A reviewing court must "carefully assess not only the decision, but also the path that led to the decision." (***Grafton Developments Inc. v. Labourers International Union of North America, Local 615***, 2022 NSSC 208, [2022] N.S.J. No. 217 (QL), at para. 30).

[32] When assessing a decision maker's reasoning process, the reviewing court should read the reasons in light of the record and with due sensitivity to the administrative setting in which they were given (***Vavilov*** at paras. 91 - 98). Reasonable reasons, read in that context, will reflect an internally coherent and rational reasoning process evidenced by justification, transparency, and intelligibility (***Vavilov*** at paras. 85, 86, 99 and 102 - 104).

[33] As regards the outcome of that reasoning process, it must be justified in light of the factual and legal constraints that bear on the matter. These constraints include the evidence, the submissions of the parties, the governing statutory scheme, other relevant statutory or common law, principles of statutory and contractual interpretation, and precedent (***Vavilov*** at paras. 105 – 107).

[34] Finally, reasonableness review involves an attitude of judicial restraint and deference. The reviewing judge must respect the distinct role of administrative decision-makers and their specialized expertise (***Vavilov*** at para. 75). As Grammond J. has aptly

noted in ***Brandon (City) v. Brandon Professional Firefighters'/Paramedics' Assn.***, 2020 MBQB 73, [2020] M.J. No. 105 (QL), reasons should not be assessed against a standard of perfection, and the court should only intervene where "truly necessary" to preserve the legality, rationality and fairness of the administrative process (para. 9).

## Analysis and disposition

### (a) Was DHRW afforded procedural fairness?

[35] DHRW submits it was "blindsided" by the November Decision, because the arbitrator permitted the Union to expand the "narrow scope" of its motion "into an all-encompassing summary judgment like review".

[36] I disagree. The arbitrator neatly summarized his conclusion with respect to DHRW's argument concerning procedural fairness at para. 126 of his reasons, and I endorse it:

> While the precise framing of the Union's motion may lack certain specificity, the motion, which includes the remedy sought by the Union, should be construed against the backdrop of the pleadings and the grievance itself. The essence of the motion, which involves the interpretation and applicability of Article 17:01, would come as no surprise to DHRW. I am satisfied that the motion raises the question of whether, on any basis related to Article 17:01, either directly, vicariously or on any other basis pursuant to the Article, the Union could be held responsible for the deficient workmanship of its members.

[37] The record amply justifies the arbitrator's conclusion. DHRW framed its grievance as a "Grievance under Article 17:01 of the Collective Agreement", so putting in issue the meaning and effect of that provision. In its pre-hearing statement, it asserted that Article 17:01 either imposed a direct obligation on the Union to guarantee the workmanship of its members, or constituted an indemnity in favour of DHRW. DHRW also alleged the

Union was vicariously liable for the deficiencies alleged to have been caused by the workers.

[38] The Union joined issue with DHRW. In particular, it alleged Article 17:01 was illegal, and in any event that it did not have the effect alleged by DHRW. As regards the issue of vicarious liability, the Union alleged that as a matter of law it was not the employer of its members, and was not responsible for the actions of its members. Matters of discipline and employee management, it said, fell on the employer, DHRW, and not the Union.

[39] On February 4, 2020, the Union moved to dismiss the grievance on the grounds noted earlier: the legality of Article 17:01, whether the Union could be vicariously liable for its members, and whether the Union was the employer of its members. The Arbitration Agreement and the Arbitration Procedural Agreement explicitly authorized either party to proceed with such a preliminary motion, and explicitly conferred on the arbitrator the authority to hear and decide it.

[40] As the arbitrator noted, the Union's motion "may lack certain specificity", but in my opinion any lack of specificity was remedied by the Union's initial 27-page submission, in which it argued in some detail why Article 17:01 could not "sustain the remedies sought" by DHRW, why the Union should not be regarded as the employer of the journeypersons who worked on the Project, and why the Union could not be held vicariously liable for the poor workmanship of those journeypersons. DHRW's responsive motion brief reveals that it was fully alive to these issues. Indeed, paragraphs 102 to 106 of its motion brief expressly contemplated the possibility that the Union's motion

might succeed on these issues without being wholly dispositive of the grievance, which is in fact what happened.

[41] All three parties filed affidavit evidence, and deponents were cross-examined on their affidavits.

[42] The hearing of the motion proceeded on August 12 and 13, 2020, but, as noted above, the arbitrator provided the parties with the opportunity to make supplementary submissions concerning the scope of his jurisdiction, which they each did on September 15. Each party also made a further oral submission, by teleconference, on October 2, 2020, and each party filed a further written submission in October 2020.

[43] In his reasons the arbitrator provided an "extensive recapitulation" of the evidence filed by the parties (paras. 18 to 45), their written and oral submissions (paras. 46 to 89), and the subsequent submissions made in September and October 2020 (paras. 90 to 109). His recapitulation accurately confirms what the record reveals, namely, that DHRW was not only provided with, but exercised, all of the participatory rights to which it was entitled on the motion. In particular, DHRW was provided with notice that the viability of Article 17:01 as the basis for its grievance was at issue on the motion, it was given a meaningful opportunity to respond to that issue fully and fairly, and it did so. Its complaint that it was "blindsided" and denied procedural fairness is without substance.

**(b) Was the November Decision reasonable?**

[44] DHRW focuses on three elements of the November Decision: whether the arbitrator exceeded the jurisdiction conferred on him by the parties, his interpretation of Article 17:01, and his treatment of DHRW's vicarious liability argument.

### (i) Jurisdiction

[45] Dealing first with the issue of jurisdiction, DHRW argues the arbitrator "clearly exceeded the jurisdiction conferred on him by express agreement of the parties" by expanding the scope of what it characterizes as a narrow preliminary motion concerning the meaning and legality of the words "on their own time" in Article 17:01, into a summary judgment-style hearing about whether the Union could be liable to DHRW under Article 17:01. The main thrust of DHRW's argument on this point is that the arbitrator's reasons are unreasonable because they contain "no train of thought or reasoning" to support the conclusion he reached about his jurisdiction, and lack "the requisite degree of justification, intelligibility and transparency."

[46] I disagree. I find the arbitrator's reasons with respect to his jurisdiction on the Union's motion meet the criteria for reasonableness articulated in ***Vavilov***. As I will discuss, the arbitrator's process – his analysis and chain of reasoning with respect to the limits of his jurisdiction – is easily discernable and set forth coherently and rationally in paras. 110 to 126 of his decision. The outcome of that process – the arbitrator's conclusion that he has the jurisdiction to determine whether the Union can be liable to DHRW under Article 17:01 – is clearly articulated in para. 127.

[47] The arbitrator's analysis begins with the grievance filed by DHRW, a "foundational document" (para. 111). He goes on to identify precisely the sources of his jurisdiction derived from the parties' various agreements, so meeting the demands of justification and transparency: Article 5 of the 2013 and 2016 CBA's, Articles 3 and 4 of the Arbitration Agreement, and Article 5 of the Arbitration Procedural Agreement (paras. 111 to 115 and 117 to 118). He identifies, too, the statutory source of his jurisdiction in s. 121(1) of ***The***

***Labour Relations Act***, which directs him to "have regard to the real substance of the matter in dispute …" (para. 116).

[48] The arbitrator conducts his analysis in the context of labour arbitration proceedings, noting that the parties had "agreed on a bifurcated process", and that bifurcation is "not unusual in labour arbitration proceedings" because it can save the parties time and money (para. 119). He adverts to the grievance itself, which puts in issue Article 17:01, the parties' submissions with respect to Article 17:01 in their pre-hearing statements, and DHRW's contention that Article 17:01 provides a mechanism to compensate it for the cost to remedy the deficiencies which it attributes to poor workmanship (paras. 120 to 125).

[49] He concludes that neither the grievance nor the motion ought to be interpreted "in a narrow, overly technical manner" (para. 124), and cites three Manitoba authorities in support of that proposition: ***Brandon (City) and ATU, Local 1505 (Policy), Re*** 2013 CarswellMan 439, ***Vale Inco Ltd. Manitoba Operation v. United Steelworkers, Local 6166 (Gerus Grievance)***, [2012] M.G.A.D. No. 18 (QL), and ***Manitoba v. Manitoba Government Employees' Assn. (MGEA)***, [1990] 68 Man.R. (2d) 189, [1990] M.J. No. 446 (Man. Q.B.).

[50] This reasoning process leads the arbitrator to conclude in para. 127 that he has the jurisdiction to determine not only the meaning and legality of the words "on their own time", but whether Article 17:01 provides DHRW with any right or remedy against the Union. Paragraph 127 is reproduced in full, because in that paragraph the arbitrator succinctly articulates the justification for his conclusion:

> Having considered all the submissions on jurisdiction, I am in no doubt that I have jurisdiction to determine the matters raised by the Union in its motion. Not only does the 2016 CBA confer jurisdiction, the parties expressly conferred such jurisdiction on me and the *Act* confers it as well, since the "real substance of the matter in dispute" at this stage is whether, having regard to the grounds advanced by the Union in its motion, the grievance is viable. The Union's motion is about Article 17:01. If the grievance, insofar as it relates the Article, is not viable, that would be dispositive of the grievance to that extent, and by agreement of the parties no further steps (i.e., arbitral steps) will be taken in relation to the Article. If it is not so dispositive, there will be a hearing on the merits of the grievance as it relates to the Article. Whether or not the grievance fails regarding the Article, there would still be the claim of wrongful interference by the Union causing damage, which although not expressly raised in the grievance is a claim advanced by DHRW and acknowledged to arise by virtue of the CBAs. It is not disputed that the Union could be liable for damages caused by such interference if proven. I will discuss this below. As stated, I conclude that I have jurisdiction to deal now with the issue of whether the Union can be liable under Article 17:01.

[51] The majority in ***Vavilov*** offers examples of defects that will call into question a decision-maker's reasonableness: logical fallacies, false dilemmas, unfounded generalizations, absurd premises, or an outcome that ignores relevant law and facts (paras. 104 to 105). The arbitrator's reasons are free from such defects. His decision contains a careful train of thought which explicitly identifies and discusses the sources of his arbitral jurisdiction. The arbitrator's decision to address the "real substance of the matter", namely the viability of Article 17:01 as a basis for DHRW's grievance, is justified in relation to the relevant facts and law – the evidence with respect to the scope of DHRW's grievance, the agreements of the parties, their submissions, s. 121(1) of ***The Labour Relations Act***, usual practice in labour arbitration proceedings, and relevant legal authorities.

[52] DHRW has failed to establish any basis for judicial intervention with respect to the arbitrator's decision concerning his jurisdiction.

### (ii) The interpretation of Article 17:01

[53] DHRW's second line of attack concerns the arbitrator's interpretation of Article 17:01.

[54] I cannot find any fault with the arbitrator's approach to the interpretation of Article 17:01, which cites and follows the well known modern Canadian approach to interpreting agreements by reading their language in their entire context, in their grammatical and ordinary sense, harmoniously with the scheme of the agreement, its object and the intention of the parties (paras. 129 – 130 and references there to ***Sattva Capital Corp. v. Creston Moly***, 2014 SCC 53, [2014] 2 S.C.R. 633, Adam Beatty, David Beatty & Donald Brown, *Canadian Labour Arbitration*, 5th ed. (Toronto: Thomson Reuters, 2019)(Loose-leaf), at 4:2100, and ***Brick and Allied Craft Union of Canada and Brick and Allied Craft Union of Canadan Local 31 v. Moscone Tile Ltd.***, 2015 CanLII 44678 (On LRB), at para. 26). As he writes (para. 131):

> The general principles of contractual interpretation are applicable, and should be applied in a manner reasonably consistent with the purposes of the governing legislation, the principles of labour relations, the applicable law, the nature of the collective bargaining process (to the extent relevant) and the facts in evidence.

[55] Having correctly instructed himself on the legal principles that apply to the interpretation of a collective agreement, the arbitrator proceeded to undertake a sentence-by-sentence interpretive analysis of Article 17:01 in accordance with those principles. Article 17:01 is again reproduced here for easy reference:

> 17:01 Journeypersons shall install all electrical work in a safe and workmanlike manner and in accordance with applicable code and contract specifications. Whenever corrections have to be made to bring the work up to code requirements because of faulty or careless workmanship, the Journeyperson shall make such corrections on their own time unless the errors were made by order of the

> Employer or the Employer's representative. The employee shall not be charged for wasted material.

[56] The arbitrator's analysis led him to conclude that the first sentence of Article 17:01 sets a standard of work to be achieved by journeypersons, enforceable by the employer through its right to manage and control its workforce and, if necessary, to discipline employees (para. 143). The next sentence, he concluded, was illegal, because it called on journeypersons to correct any deficient work "on their own time", without pay, in violation of the ***Code***. He found the third sentence was unaffected by the illegality of the second.

[57] DHRW complains the arbitrator's interpretation of Article 17:01 is unreasonable because it reduces the first sentence to "mere context", thereby depriving it of any meaning and rendering it a redundancy. That is plainly not so. While the arbitrator does use the first sentence of Article 17:01 to put the next two sentences in their "immediate context" (para. 134), he does so in order to interpret those next two sentences. When he turns to interpret the first sentence, however, he applies the same principles of contractual interpretation set out earlier (para. 140). On the basis of that analysis, he finds the words used in the first sentence of Article 17:01 are intended to set a " 'standard of work' which the workers are expected to achieve" (para. 141), which can be enforced by DHRW through its right to manage, control and discipline employees (para. 143). On the arbitrator's interpretation of Article 17:01, the first sentence is neither meaningless nor redundant.

[58] DHRW also argues the arbitrator unreasonably failed to consider whether the first sentence of Article 17:01 imposes a direct legal obligation on the Union to ensure that

the work achieves the stated standard, enforceable in an action for damages, or constitutes an indemnity by the Union in favour of DHRW for the cost to remedy poor workmanship by journeypersons. But, that too, is plainly not so. The arbitrator devotes paras. 141 to 144 of his decision to this very argument. He concludes, quite reasonably and with ample reference to the words used in Article 17:01, that the "sentence does not state what DHRW argued it means" (para. 142).

[59] DHRW makes several other arguments against the reasonableness of the arbitrator's interpretation of Article 17:01; I have only addressed what I consider to be the two strongest arguments, in order to explain why they are without merit. I have considered DHRW's other arguments on this issue, but I find that in each instance the same analysis applies, and to the same result. Those other arguments to which I refer include the reasonableness of the arbitrator's determinations with respect to the illegality of the second sentence of Article 17:01; the individual liability of journeypersons under Article 17:01; the Union's liability to indemnify DHRW under Article 17:01; and the Union's vicarious liability for journeypersons under Article 17:01. In every case, I find the analytical path taken by the arbitrator, and the decision at which he arrived, to have been reasonable.

[60] In short, the arbitrator's approach to the interpretation of Article 17:01 conforms to well-known principles of contractual interpretation, and his interpretation is properly grounded in the ordinary and plain meaning of the words used. I bear in mind Grammond's J.'s admonition in ***Brandon Professional Firefighters'/Paramedics' Association***. If judicial intervention is only justified where it is "truly necessary" to

preserve the legality, rationality and fairness of the administrative process, on this issue I find intervention to be truly unnecessary.

### (iii) The arbitrator's treatment of DHRW's vicarious liability argument

[61] DHRW also argues the arbitrator was unreasonable in the "summary dismissal" of its argument that the Union could be liable for the negligent work of journeypersons other than by operation of Article 17:01 on the basis of the Supreme Court's approach to vicarious liability in ***Fullowka v. Pinkerton's of Canada Ltd.***, 2010 SCC 5, [2010] 1 S.C.R. 132. This argument is without merit.

[62] I find that if the arbitrator's admittedly brief reasons on the issue of the Union's vicarious liability are read "in light of the record and with due sensitivity to the administrative setting in which they were given" as ***Vavilov*** requires (paras. 91 – 98), they satisfy the demands of reasonableness.

[63] To begin, the arbitrator's decision on the viability of DHRW's claim of vicarious liability other than by operation of Article 17:01 is contained in para. 154:

> In its Pre-Hearing Statement, as noted above, DHRW advanced the claim that the Union should be held liable for a breach of the applicable CBA. It said that the Union was liable for the remedy sought in the grievance, that is, full redress for the cost of deficient work, on several grounds. One of those was Article 17:01, which I have dealt with above. Another was that the Union was vicariously or otherwise by operation of law responsible for the deficiencies committed by the workers. The Union was not the employer of the workers. There is no basis on which to find that the Union could be vicariously liable for the deficient work performed by the workers.
>
> [emphasis added]

[64] The following six factors should be considered in order to place the arbitrator's comments in this paragraph in their proper context.

[65] First, the grievance itself fails to allege that the Union is vicariously liable for journeypersons by any means other than by operation of Article 17:01.

[66] Second, as the Union notes in its brief, on the motion before the arbitrator DHRW's vicarious liability argument was argued "in the alternative and at best peripherally." In my opinion, the amount of attention given by the arbitrator to DHRW's argument on this issue corresponds to the amount of attention it was given by DHRW in its submissions.

[67] Third, it was only before me that DHRW advanced an argument in support of the Union's vicarious liability on the basis of the Supreme Court's approach in ***Fullowka***. The arbitrator can hardly be faulted for not considering an authority which was not put before him at the hearing.

[68] Fourth, despite these shortcomings, the arbitrator nevertheless considered whether DHRW's claim based on vicarious liability should advance past this initial hearing to a second hearing on the merits. In doing so, he took the same broad perspective in determining "the real substance of the matter in dispute" on the grievance that he had applied in determining the issues on the Union's motion (para. 156).

[69] Fifth, the Union argues, and I accept, that nothing in the arbitrator's reasons runs afoul of the Supreme Court's analysis in ***Fullowka***, which calls for a three-step approach to determine the question of whether vicarious liability should be imposed on a party. The first step is to determine whether the issue is unambiguously determined by precedent. If it is not, the party advancing the claim of vicarious liability must show "that the relationship between the tortfeasor and the person against whom liability is sought is

sufficiently close and that the wrongful act is sufficiently connected to the conduct authorized by the party against whom liability is sought …" (at para. 142).

[70] In this case, the arbitrator did not dismiss the issue of the Union's vicarious liability as having been "unambiguously determined by precedent." Nor did he conclude, as DHRW asserts, that a union can never be liable for deficient work performed by its members, or that a union can only be vicariously liable where it plays the role of employer. Rather, he concluded that there was "no basis" on which to find the Union vicariously liable. That conclusion must be read in light of his extensive recapitulation and discussion of the substantial evidentiary record before him, including evidence relevant to the second and third steps of the ***Fullowka*** analysis, such as: the relationship between DHRW and the Union; responsibility for the supervision, management and control of the work alleged to have been deficiently performed; and responsibility for the hiring, discipline and discharge of workers.

[71] Sixth, and finally, the arbitrator's decision with respect to the issue of the Union's vicarious liability other than by operation of Article 17:01 in para. 154 must be read in light of his more detailed discussion and disposition of DHRW's position with respect to the Union's potential liability under Article 17:01, "based on principles of either direct liability or vicarious liability" (para. 153), in paras. 126 – 153 of his reasons.

[72] To conclude, DHRW's argument on this point depends on reading the arbitrator's conclusions in para. 154 in isolation, but it fails once that paragraph is put in its proper context.

### (c) Was the February Decision reasonable?

[73] On December 16, 2020, counsel for DHRW requested clarification and direction with respect to para. 160 of the November Decision, and specifically with respect to the effect of the replacement of the unlawful second sentence of Article 17:01 with the following:

> Whenever corrections have to be made to bring the work up to Code requirements because of faulty or careless workmanship, the Journeyperson shall make such corrections and be compensated in accordance with the provisions of the Employment Standards Code and regulations thereunder.

[74] DHRW submitted that the words replacing the second sentence mean that compensation paid to a journeyperson who undertakes remedial work is to be at the minimum wage rate provided in the ***Code***, and not at the wage rates provided by the 2016 CBA.

[75] The arbitrator rejected that argument. In doing so, he relied on Article 24 of the 2016 CBA, which provides:

> In the event that any of the provisions of this Agreement are found to be in conflict with any Federal or Provincial Law, now existing, or hereinafter enacted, it is agreed that such Law to the extent that it conflicts with the terms of the Collective Agreement nullify and replace the conflicting provisions of the Collective Agreement without in any way affecting the remainder of the Agreement.

[76] The arbitrator found the original second sentence of Article 17:01 conflicted with the ***Code***, because it contemplated journeypersons would provide unpaid labour to correct deficiencies in workmanship. As such, Article 24 required that sentence be nullified and replaced with the relevant provisions contained in the ***Code***.

[77] Section 3(2) of the ***Code*** provides: "If under an agreement an employee is to receive greater wages than are provided for under this Code, the employer must give the greater wages." Because the 2016 CBA provides wage rates greater than the minimum provided under the ***Code***, the arbitrator reasoned, it follows that journeypersons performing remedial work would be paid for that work at the higher rate.

[78] The coherence and rationality of the arbitrator's decision on this point are best illustrated by his own explanation for it (at pp. 2 – 3 of the February Decision):

> The application of Article 24 and the required replacement of the "on their own time" words with words referring to the *ESC* does not mean that journeypersons who do remedial work are to be paid only the minimum wage for that work. The *ESC* provides in s. 3(2):
>
> > If under an agreement an employee is to receive greater wages than are provided for under this Code, the employer must give the greater wages.
>
> To be compensated in accordance with the provisions of the *ESC,* as required by Article 24 and the Ruling [i.e., the November Decision], means that journeypersons who do remedial work which, as indicated, is work of the same kind and character as original work, are by virtue of s. 3(2) entitled to the greater wages stipulated in the 2016 CBA, and are not obliged to do electrical work at the minimum wage. For DHRW's argument to be sustained, the 2016 CBA would have to state clearly that for doing remedial work journeypersons are to be paid only the minimum wage and are not to be paid the greater wage stipulated in the 2016 CBA to be payable for electrical work. The 2016 CBA, as revised by the Ruling, does not so state or provide and it cannot reasonably be construed to have that meaning. The Ruling does not so state or provide, nor was it intended to so provide. The wording that was suggested to conform to the mandate of Article 24 did not, and was not intended to, create a new wage rate of the minimum wage for remedial work.

[79] On this application, DHRW's essentially repeats the argument it made to the arbitrator. In effect, it takes the position that the arbitrator was unreasonable by not accepting its argument.

[80] As the reviewing judge, my role is not to rehear the arguments that were put before the arbitrator and decide what I would have done in his place. Rather, I must "consider only whether the decision made by the administrative decision maker -- including both the rationale for the decision and the outcome to which it led -- was unreasonable" (***Vavilov*** at para. 83).

[81] The rationale for the February Decision – the explanation provided by the arbitrator in support of his conclusion – is guided and supported by the text of Article 24 of the 2016 CBA and s. 3(2) of the ***Code***. As will be evident to any reasonable reader of the February Decision, it is coherent and logical. It is not unreasonable.

[82] The outcome of the February Decision – that journeypersons performing remedial work are to be paid at the rates set by the 2016 CBA – is not unreasonable, either, and I expect conforms to ordinary practice in the construction industry.

[83] To conclude this section of my reasons, I find there is no basis to intervene in respect of the February Decision.

## Conclusion

[84] I end on a point often made by courts on judicial review: the reviewing judge must respect the distinct role of administrative decision-makers and their specialized expertise (***Vavilov*** at para. 83), and should approach the decision under review with restraint and deference. That is particularly so here, where the parties chose their decision-maker, presumably on the basis of his long experience, expertise and skill as a labour relations arbitrator, and his extensive knowledge of arbitral law and procedure.

[85] Having considered the arbitrator's November and February Decisions by the ***Vavilov*** rubric, I find them to be eminently reasonable, both in process and outcome. They are carefully reasoned, easily understood, and consistent with the relevant facts and law. Put another way, the arbitrator's reasons leave the reader with no doubt as to how and why he came to his decisions, and the outcome of those decisions makes sense in the context of the law and the evidence.

[86] Furthermore, the record of the proceedings before the arbitrator satisfies me that DHRW was provided with the high level of procedural fairness demanded by the circumstances, and participated fully and meaningfully at every stage of the proceedings.

[87] DHRW's application is therefore dismissed with costs in favour of the respondents. The parties may make arrangements for further submissions with respect to costs if they are unable to come to agreement.

_____ J.