April 24, 2019

ADR Case Update 2019 - 8

Federal Circuit Courts

- **ARBITRATOR DID NOT EXCEED AUTHORITY**

  Centerpoint Energy Resources Corp., v. Gas Workers Union, Local No. 340
  2019 WL 1547951
  United States Court of Appeals, Eighth Circuit
  April 10, 2019

  Ness, an appliance repair technician for Centerpoint, was part of the Gas Workers Union (Union). When Ness was terminated by Centerpoint for falsifying timesheets and neglect of duties, the Union protested. Centerpoint denied the grievance and the Union appealed to arbitration in accordance with its collective bargaining agreement (CBA) with Centerpoint. Article 26 of the CBA provided that employees may be terminated for cause, and outlined four offenses constituting absolute cause: drug use; dishonesty; neglect of duty; and abuse of sick leave. The arbitrator reinstated Ness, finding that while he was dishonest and neglected his duty, his discharge was arbitrary and discriminatory. The court granted Centerpoint's motion to vacate the award on the grounds that the arbitrator had exceeded his authority. The Union appealed.

  The United States Court of Appeals for the Eighth Circuit reversed and remanded. Interpretation of a CBA is a matter for the arbitrator; so long as the arbitrator arguably construed or applied the contract and acted within the scope of his authority, the decision must stand. To justify vacating the award, Centerpoint needed to establish that the arbitrator based his decision on some body of thought, feeling, policy or law that was outside the contract. The arbitrator relied heavily on the breadth of the terms "neglect of duty" and "dishonesty", determining that accepting the company's position on absolute cause would negate the just cause standard in the first sentence of Article 26. Right or wrong, that was an interpretation of the contract.

- **AWARD DREW ITS ESSENCE FROM CBA**

  National Elevator Bargaining Association; Kone, Inc. v. International Union of Elevator Constructors (IUEC)
  2019 WL 1716235
  United States Court of Appeals, Eighth Circuit

April 18, 2019

The International Union of Elevator Constructors (IUEC) and the National Elevator Bargaining Association (NEBA) are parties to a nationwide multi-employer collective bargaining agreement (CBA). Kone, an elevator company that belongs to the NEBA, hired Alex Thompson, who traveled from South Dakota to the job site in Iowa. Kone denied Thompson's claim for overtime travel and mileage and the parties proceeded to arbitration. The arbitrator found in favor of Thompson, per the CBA language that says when "elevator constructors are sent outside the primary jurisdiction…travel time and travel expense shall be paid." Kone asserted that because Thompson was not a Kone employee, he did not fall within the scope of an elevator constructor, defined in the CBA as "in the employ of the Employers" and thus was not entitled to travel expenses. Kone appealed and the court vacated the award, finding that the arbitrator failed to consider the key contractual language "in the employ of Employers". The union appealed.

The United States Court of Appeals for the Eighth Circuit reversed and remanded. An arbitrator's award may only be set aside when the decision does not "draw its essence from the CBA". This award did. The arbitrator considered and compared two CBA clauses. The first was the clause with the language "in the employ of the employers," which the arbitrator found to represent the parties' intent to define the bargaining unit and exclude those employed by other entities. The second was the clause concerning travel expenses, which applied to all Elevator Constructors, not just employees. CBAs often provide benefits for individuals who are not currently in the bargaining unit. Thompson was not a member of the bargaining unit when Kone told him to travel; however, he was entitled to travel pay, per the CBA clause covering Elevator Constructors.

- **ARBITRATOR'S AWARD CONFIRMED; FINAL JUDGMENT ENTERED ON FEWER THAN ALL CLAIMS**

Paisley Park Enterprises v. Boxill; Rogue Music Alliance, LLC et al.
United States District Court, D. Minnesota
2019 WL 1513456
April 8, 2019

Paisley Park, the personal representative of the Estate of Prince, sued Boxill et al., for breach of contract, conversion, and copyright infringements, alleging that defendants unlawfully possessed and attempted to exploit commercially several sound release recordings of Prince. Paisley filed a demand for arbitration for the breach of contract and conversion claims and Boxill moved to enjoin the arbitration, contending that copyright law preempted arbitration of those claims. Determining that the copyright claims did not preempt the matter, the arbitrator issued an interim award in favor of Paisley on the breach of contract and conversation claims, finding that the Prince Estate was entitled to damages and the return of the disputed recordings. The final award also included attorneys' fees and costs. The parties cross-moved to vacate and to confirm the award and Paisley sought the entry of a final judgment.

The United States District Court, D. Minnesota granted Paisley's motion and denied Boxill's motion. The exclusive bases on which a court may vacate an award are: corruption, fraud, or undue means; evident partiality or corruption in the arbitrators; arbitrator misconduct; or a showing that arbitrators exceeded their powers. Boxill argued that the arbitrator manifestly disregarded copyright law when she decided Paisley's claims; however, the Eighth Circuit no longer recognizes the judicially created manifest disregard for the law basis to vacate an award. Boxill asserted that the arbitrator engaged in misconduct and/or exceeded powers, yet offered no case law to provide that a party's mere disagreement with an arbitrator's decision was proof of either. A district court may enter final judgment on fewer than all of a party's claims only if the court expressly determined that there was no just reason for delay. The first step was to determine whether that judgment was final. The parties here had already agreed to that in their confidentiality agreement. The second step was determining if there was any just reason for delay. Here, Boxill could appeal the award regardless of entry of final judgment – thus a delay in judgment would have no impact on an appeal. The copyright and trademark claims and a counterclaim for tortious interference with economic advantage were also sufficiently distinct from the contract and conversion claims that were the subject of the award. Though the counterclaim could result in a setoff against the award, it need not delay entry of a final judgment on another claim when a party was expected to be able to satisfy future judgments on surviving claims. The

monetary damages awarded to Paisley also weighed in favor of entering final judgment since the remaining litigation was likely to last for additional months or years. The Court granted Paisley's request for post-award, pre-judgment interest and attorneys' fees and costs.

California

- **CONTINUED EMPLOYMENT CONSTITUTED ACCEPTANCE OF ADR POLICY**

  Diaz v. Sohnen Enterprises
  2019 WL 1552361
  Court of Appeal, Second District, Division 7, California
  April 10, 2019

  Diaz, an employee of Sohnen, received notice that the company was adopting a new dispute resolution policy regarding arbitration of all claims. At that time, she was informed that continued employment by an employee who refused to sign the agreement would constitute acceptance of the agreement. When Diaz indicated to the company that she did not want to sign the agreement, the company reminded Diaz that her continued employment constituted acceptance. Diaz and her lawyer presented the company with a letter saying that she would not sign but would continue to work. That same day, Diaz filed a complaint alleging workplace discrimination. The company filed a motion to compel arbitration and Diaz filed her opposition. The Court denied the motion, finding that the arbitration agreement was a "take it or leave it contract" of adhesion and there was no meeting of the minds.

  The Court of Appeal, Second District, Division 7, California, reversed and remanded. The first question was whether an agreement had been formed. California law is settled in this area: when an employee continues his or her employment after notification that an agreement to arbitrate is a condition of continued employment, that employee has impliedly consented to the arbitration agreement. Given that the employment agreement between Diaz and Sohnen was at will, Sohnen could unilaterally change the terms of the employment agreement so long as it provided notice of the change. Diaz asserted that even if a binding agreement was formed, it should not be enforced because it was unconscionable. There are both procedural and substantive components of unconscionability, with the former "focusing on oppression or surprise due to unequal bargaining power, the latter on overly harsh or one-sided results." The court found that the contract was adhesive, but this was not enough. The record contained "no evidence of surprise, nor of sharp practices demonstrating substantive unconscionability."

New York

- **EMPLOYEE WAIVED RIGHT TO ARBITRATION**

  In the Matter of Village of Bronxville v. Bronxville Police Taylor Act Committee
  2019 WL 1549385
  Supreme Court, Appellate Division, Second Department, New York
  April 10, 2019

  The Village of Bronxville (the Village) terminated Thomas Kempkes' employment as a police officer and notified him by letter that his health insurance coverage would be terminated. The Bronxville Police Committee (Committee) filed a grievance with the Village Chief of Police on behalf of Kempkes, alleging that he was entitled to retiree health insurance benefits pursuant to the CBA. The grievance was not resolved, so the Committee presented it to the Village Administrator, who denied the grievance. The Committee advanced the grievance to the Village Board of Trustees, which also denied. The Committee then served a demand to arbitrate and the Village moved to permanently stay the arbitration, contending that Kempkes waived the right to arbitration. The court found that arbitration should be permanently stayed by the doctrine of laches.

The Supreme Court, Appellate Division, Second Department, New York affirmed on a different ground. When Kempkes commenced the proceeding to challenge the Village's decision to terminate his health insurance benefits, he sought the benefit of litigation in a manner "inconsistent with its later claim that the parties were obligated to settle their differences by arbitration." By doing so, he waived his right to arbitration.

- **PETITIONER PROPERLY SERVED WITH NOTICE OF ARBITRATION**

  Dinapoli v. UBS Financial Services Inc.
  2019 WL 1601336
  Supreme Court, Appellate Division, First Department, New York
  April 16, 2019

  Petitioner filed to vacate a FINRA arbitration award on the grounds that he was not properly served with the notice of the arbitration. The court granted the motion to vacate the award and UBS Financial Services appealed.

  The Supreme Court, Appellate Division, First Department, New York reversed and confirmed the award. The arbitrator correctly concluded that the petitioner was properly served with notice. In accordance with the rules, FINRA sent petitioner notice by regular mail at one of the three residential addresses he provided in a filing to FINRA six weeks earlier. It was up to the petitioner to keep his address current via supplemental amendments. He submitted nothing. The Statement of Claim was not returned to FINRA as undeliverable.

Case research and summaries by Deirdre McCarthy Gallagher and Richard Birke.

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