COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Sarao v. Fraser Health Authority,* 2025 BCCA 267

Date: 20250729
Docket: CA48680

Between:

Kamal Sarao

Appellant
(Plaintiff)

And

Fraser Health Authority operating as Surrey Memorial Hospital

Respondent
(Defendant)

Before: The Honourable Mr. Justice Willcock
The Honourable Justice Donegan
The Honourable Justice Warren

On appeal from: An order of the Supreme Court of British Columbia, dated October 18, 2022 (*Sarao v. Fraser Health Authority*, 2022 BCSC 1820, New Westminster Docket S200097).

Counsel for the Appellant:	C.J. Bolan
Counsel for the Respondent:	A. Mizrahi W. Kunimoto
Place and Date of Hearing:	Vancouver, British Columbia May 16, 2025
Place and Date of Judgment:	Vancouver, British Columbia July 29, 2025

Written Reasons by:
The Honourable Justice Warren

Concurred in by:
The Honourable Mr. Justice Willcock
The Honourable Justice Donegan

Summary:

The appellant, a unionized employee of the respondent, was injured, went on long-term disability leave, and was ultimately unable to return to work. The respondent notified her and her union of their intention to terminate her employment. The union filed a grievance and ultimately initiated an arbitration with the employer as contemplated by the collective agreement governing the appellant's employment relationship with the respondent. The arbitration resulted in a settlement agreement, which the appellant signed. Soon after, the appellant filed a notice of civil claim seeking a declaration that the settlement agreement was unenforceable on grounds of unconscionability, undue influence, and unfairness. The respondent employer filed an application to strike the appellant's claim for lack of jurisdiction, arguing the enforceability of the settlement agreement was in the exclusive jurisdiction of an arbitrator. The chambers judge granted the respondent's application and struck the claim. This is an appeal of that order.

HELD: Appeal dismissed. Applying the Weber framework, the essential character of the appellant's claim arises from the operation of the dispute resolution process mandated by the collective agreement, and the dispute therefore falls within an arbitrator's jurisdiction. This holding does not deprive the appellant of an effective remedy. An arbitrator has jurisdiction to determine the enforceability of the settlement agreement. If the appellant has a basis to say she was unfairly represented by her union, that complaint should be addressed to the British Columbia Labour Relations Board.

Reasons for Judgment of the Honourable Justice Warren:

Introduction

[1] This appeal concerns the jurisdiction of the court over a claim by a former unionized employee against her employer, challenging the enforceability of a settlement agreement resolving a grievance arbitration.

[2] After signing the settlement agreement, the appellant employee commenced an action seeking a declaration that the settlement agreement was null and void and of no force or effect on grounds of unconscionability, undue influence, and unfairness. On an application of the respondent employer, the chambers judge dismissed the appellant's claim for lack of jurisdiction, with reasons to follow. The chambers judge then retired without issuing reasons.

[3] Former Chief Justice Hinkson appointed Justice B. Brown to provide the reasons for judgment. After reviewing the materials filed by the parties and the

audio recording of the chambers hearing, Justice B. Brown concluded that the chambers judge agreed with the respondent's submissions: *Sarao v. Fraser Health Authority*, 2022 BCSC 1820. On application of the analytical framework set out by the Supreme Court of Canada in *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, 1995 CanLII 108 [*Weber*], the appellant's claim was dismissed for lack of jurisdiction because the dispute arose from the interpretation, application, administration or violation of a collective agreement and the appellant had recourse to arbitration under the collective agreement.

[4] The appellant submits it was an error for the chambers judge to dismiss her claim for lack of jurisdiction. In her factum, she characterized the issue as whether the Court below erred in finding that "the essential character of the within dispute relates to the interpretation, application, administration, or violation of a collective agreement". She also argued that she would be denied an effective remedy if she was precluded from pursuing her claim in court.

[5] For the following reasons, it is my view that the action was correctly dismissed for lack of jurisdiction. I would dismiss the appeal.

Background

[6] The appellant was previously employed by the respondent, the Fraser Health Authority ("FHA"). By virtue of her employment, the appellant was also a member of the Hospital Employees' Union ("HEU"). The relationship between the appellant and FHA was governed by a collective agreement between FHA and HEU (the "Collective Agreement").

[7] The appellant was injured at work and went on long-term disability leave. Following an unsuccessful attempt to return to work, FHA advised the appellant and HEU of its intention to terminate the appellant's employment. HEU initiated a grievance on the appellant's behalf, alleging a failure to accommodate and/or retrain her.

[8] The grievance proceeded to arbitration. Before the formal arbitration process began, the parties engaged in settlement discussions facilitated by the arbitrator (Arbitrator Young). The settlement negotiations ultimately resulted in the signing of a settlement agreement by the appellant, FHA, and HEU (the

"Settlement Agreement"). Among other things, the Settlement Agreement provided that:

- the appellant would resign;
- FHA would provide the appellant with a reference letter;
- FHA would pay the appellant $30,000;
- HEU would withdraw all outstanding grievances; and
- the appellant would release FHA from all claims.

[9] The Settlement Agreement also expressly provided that Arbitrator Young would "retain jurisdiction and remain seized to resolve any issues which may arise regarding the interpretation, application or implementation of this Agreement".

[10] The appellant regretted signing the Settlement Agreement almost immediately. About a week later, her lawyer wrote to Arbitrator Young asking her to advise FHA and HEU that the appellant was challenging the enforceability of the Settlement Agreement. FHA took the position that the Settlement Agreement was enforceable.

[11] The appellant did not ask HEU to take any step on her behalf. Instead, she filed a notice of civil claim against FHA commencing the present action. In her notice of civil claim, she alleges that when presented with the Settlement Agreement, she asked for time to think about it, but her union representative told her that she needed to sign it that same day. She also asserts that the arbitrator's involvement in the settlement negotiations was unfair. She claims that the arbitrator encouraged her to accept the settlement, which caused her to worry that if she declined to do so this would be held against her in the formal arbitration. She also claims that no one advised her of the consequences of involving the arbitrator in the settlement negotiations and she did not give informed consent to the arbitrator's participation.

[12] FHA filed a jurisdictional response to the notice of civil claim and an application seeking to strike the claim on the basis that the Court lacked

jurisdiction. As noted, the application was successful, and the appellant's claim was dismissed.

Legal Framework

[13] Labour relations statutes in Canada generally require that collective agreements include a method for the final settlement of disputes concerning the interpretation, application, operation, or alleged violation of the agreement. These provisions have been interpreted as requiring certain types of disputes to be dealt with through the processes provided for in the collective agreement and established by the legislation and not by litigation in the courts.

[14] *Weber* is the foundational authority on the jurisdictional boundaries between the courts and arbitrators in this context. It established an exclusive jurisdiction model for determining the appropriate forum for resolving a dispute that arises in the context of an employment relationship governed by a collective agreement. Generally speaking, "if a difference between the parties arises from the interpretation, application, administration or violation of their collective agreement, the claimant must proceed by arbitration" and "[n]o other forum has the power to entertain an action in respect of that dispute": *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners,* 2000 SCC 14 at para. 22 [*Regina Police Assn.*], citing *Weber* at paras. 50–54.

[15] The approach for determining jurisdictional questions in this context was more recently restated by the Supreme Court in *Northern Regional Health Authority v. Horrocks,* 2021 SCC 42 [*Horrocks*].

[16] The first step in the analysis requires examination of the relevant legislation to determine whether it grants an arbitrator exclusive jurisdiction, and if so, over what matters. If the legislation "includes a mandatory dispute resolution clause, an arbitrator empowered under that clause has the exclusive jurisdiction to decide all disputes arising from the collective agreement, subject to clearly expressed legislative intent to the contrary": *Horrocks* at para. 39; *R.R. v. Vancouver Aboriginal Child and Family Services Society*, 2025 BCCA 151 at para. 63 [*R.R.*].

[17] If the legislation grants the arbitrator exclusive jurisdiction, "the next step is to determine whether the dispute falls within the scope of that jurisdiction": *Horrocks* at para. 40; *R.R.* at para. 64. This requires an analysis of the ambit of the

collective agreement and the legislative scheme surrounding it, as well as the factual circumstances underpinning the dispute.

[18] While the determination of whether the dispute falls within the scope of the arbitrator's exclusive jurisdiction depends on the specific wording of the collective agreement and legislation, "in general, [the exclusive jurisdiction of the arbitrator] will extend to all disputes that arise, in their essential character, from the interpretation, application, or alleged violation of the collective agreement": *Horrocks* at para. 40; *Weber* at para. 52.

[19] The "essential character" question is essentially whether the dispute "had to do with the collective agreement or it did not": *Weber* at para. 52. This flows from the factual context in which the dispute arose, not its legal characterization: *Horrocks* at paras. 20–21, 40; *Weber* at para. 43; *Regina Police Assn.* at para. 25.

[20] Finally, despite a determination that a dispute falls within the exclusive jurisdiction of an arbitrator, the court retains a residual jurisdiction where required to provide the plaintiff with an effective remedy: *Weber* at para. 57.

[21] In British Columbia, the *Labour Relations Code*, R.S.B.C. 1996, c. 244 [*Code*] requires that collective agreements include a method for the final settlement of disputes. Section 84(2) provides that "[e]very collective agreement must contain a provision for final and conclusive settlement … of all disputes between the persons bound by the agreement respecting its interpretation, application, operation or alleged violation, including a question as to whether a matter is arbitrable". Section 84(3) provides that if a collective agreement does not contain such a provision, then it is deemed to contain a provision requiring that such disputes be submitted to arbitration by an arbitrator whose decision is final and binding. Section 89 provides that arbitration boards are authorized to "provide a final and conclusive settlement of a dispute arising under a collective agreement".

[22] Sections 136–139 of the *Code* deal with the jurisdiction of the British Columbia Labour Relations Board ("Labour Relations Board") and courts of law. Section 136(1) provides that "[e]xcept as provided in this Code, the board has and must exercise exclusive jurisdiction to hear and determine an application or complaint under this Code and to make an order permitted to be made". Section

137(1) provides that "[e]xcept as provided in this section, a court does not have and must not exercise any jurisdiction in respect of a matter that is, or may be, the subject of a complaint under section 133 [regarding contravention of *Code* or collective agreement] or a matter referred to in section 136". Section 138 provides that a "decision or order of the board under this Code or a collective agreement on a matter in respect of which the board has jurisdiction is final and conclusive and is not open to question or review in a court on any grounds". Section 139 provides that "[t]he board has exclusive jurisdiction to decide a question arising under this Code".

[23] As observed by Justice Newbury in *Bruce v. Cohon*, 2017 BCCA 186 at para. 32 [*Bruce*], leave to appeal to SCC ref'd, 37696 (15 March 2018), "[g]iven the wording of ss. 84 and 136 and their resemblance to the Ontario legislation considered in *Weber*, there is little doubt that the *Code* demonstrates a 'strong preference' for the resolution of disputes arising under collective agreements by arbitration".

The Court Below

[24] As mentioned, Justice B. Brown concluded that the chambers judge agreed with the respondent's submissions. On application of the *Weber* framework, the appellant's claim was dismissed for lack of jurisdiction because the dispute arose from the interpretation, application, administration or violation of the Collective Agreement and the appellant had recourse to arbitration under the Collective Agreement.

[25] At paras. 16–18 of the reasons for judgment, Justice B. Brown wrote:

- "regardless of how the dispute may be characterized legally, if it arises under the collective agreement then the jurisdiction to resolve it lies exclusively with the Labour Relations Board and the related labour structure established in the *Code*, and not with the courts";
- the question of jurisdiction is not altered by the fact that the parties entered a settlement agreement, citing *Sadler v. Surrey (City of),* 2001 BCSC 936 at para. 33;

- the arbitration board has the jurisdiction to determine the terms of settlement and make orders to remedy a breach, citing *Geo Tech Industries v. International Association of Machinists & Aerospace Workers, Lodge 456* (1999), 83 L.A.C. (4th) 411, 1999 CanLII 20291 (B.C.L.A.) at 12; and

- "the question of whether the [Settlement] Agreement is illegal, including in the sense of unfairness or unconscionability, is for the arbitrator to determine", citing *McGregor v. Holyrood Manor*, 2014 BCSC 679 at para. 150, aff'd *McGregor v. Holyrood Manor*, 2015 BCCA 157 (Chambers).

Positions of the Parties

The appellant

[26] The appellant acknowledges that if the essential character of a dispute arises from the interpretation, application, operation or alleged violation of the Collective Agreement, it must be dealt with through the processes established by the *Code* and the Collective Agreement. Her position is that the essential character of this dispute does not arise from the Collective Agreement, but rather from the manner in which she came to sign the Settlement Agreement.

[27] The appellant argues that *Weber* and the other cases referred to by Justice B. Brown are distinguishable because those cases did not involve a challenge to the binding effect of a settlement agreement on grounds of undue influence, unconscionability, and unfairness.

[28] The appellant also says an arbitrator does not have the authority to determine whether the Settlement Agreement is void or unenforceable due to unconscionability, undue influence, or unfairness. As a result, she submits that if she is precluded from pursuing her claim in court then she will be denied a remedy.

The respondent

[29] The respondent's position is that the appellant's claim is essentially a labour relations dispute arising from and falling squarely within the ambit of the Collective Agreement such that the court lacks jurisdiction to hear it. The respondent says

that characterizing the claim as a challenge to the enforceability of the Settlement Agreement does not change the fact that the appellant's claim emerges out of the dispute resolution process mandated by the Collective Agreement.

[30] The respondent submits that the Collective Agreement and the *Code* provide avenues of recourse for the appellant which she has not—but could have—pursued. In these circumstances, the respondent submits that it is not necessary for the court to exercise its residual jurisdiction to provide the appellant with an effective remedy.

Standard of Review

[31] Interpreting a collective agreement or determining its ambit is a matter of mixed fact and law that is owed deference and should not be interfered with absent palpable and overriding error. However, the question of a dispute's "essential character" or "substance" is a matter of law to be reviewed on a standard of correctness: *Masjoody v. Trotignon*, 2022 BCCA 135 at para. 26; *Bruce* at paras. 76–80.

Analysis

[32] There is no controversy about the first step of the *Weber* framework. The *Code* requires every collective agreement to contain a provision for final and conclusive settlement of all disputes. Again, s. 84(2) provides that "[e]very collective agreement must contain a provision for final and conclusive settlement … by arbitration or another method agreed to by the parties, of all disputes … respecting its interpretation, application, operation or alleged violation, including a question as to whether a matter is arbitrable", and s. 84(3) deems such a provision to exist in every collective agreement.

[33] The focus of the arguments on the appeal was at the second step of the *Weber* framework: determining whether the dispute, in its essential character, falls within the scope of that jurisdiction. I agree with Justice B. Brown's conclusion that it does.

[34] The appellant emphasizes that none of the cases referred to by Justice B. Brown held, specifically, that the court lacked jurisdiction to adjudicate a challenge to the enforceability of an agreement to settle a grievance on

grounds of undue influence, unconscionability, and unfairness. That is true but inconsequential. As discussed, the second step of the *Weber* framework requires an analysis of the ambit of the Collective Agreement and the legislative scheme surrounding it, and a determination of the essential character of the dispute, which flows from the factual context in which it arose, not its legal characterization.

[35] The essential character of this dispute arose from the operation of the dispute resolution process mandated by the Collective Agreement.

[36] Underpinning the appellant's claim are assertions of both procedural and substantive unfairness in relation to the Settlement Agreement. Reading the notice of civil claim as a whole, the unfairness is alleged to have arisen from: 1) the HEU's failure to act in the appellant's best interests during the grievance arbitration process by pressuring her to sign the Settlement Agreement which overlooked what she says was her right to have employee contributions to a pension plan returned to her and contained a broad release extending beyond the grievance itself, and 2) the arbitrator's involvement in the settlement negotiations which caused her to believe that her failure to sign the Settlement Agreement would be held against her in the arbitration. Relatedly, she claims that "no one" advised her of the consequences of involving the arbitrator in the settlement negotiations and she did not give informed consent to the arbitrator's participation.

[37] Article 9 of the Collective Agreement establishes the grievance procedure. It applies, among other things, to the dismissal of an employee (Article 9.04.01(b)). The grievance procedure was invoked by HEU on the appellant's behalf. Article 9.04.04 provides that if a grievance is not settled then it may be referred to arbitration. This is what occurred. HEU had conduct of the appellant's grievance arbitration process. As explained in *Horrocks,* an employee's access to labour arbitration is controlled by their union: at para. 36. (See also the discussion in *Steele v. Corporation of the City of Port Coquitlam*, 2019 CanLII 68594 (B.C.L.R.B.) at paras. 27, 30–31; Palmer and Snyder, *Collective Agreement Arbitration in Canada,* 6th Ed. (LexisNexis Canada Inc., 2017) at 5.13, 5.17). The arbitrator was expressly authorized by s. 89(h) of the *Code* to "encourage settlement of the dispute and, with the agreement of the parties, … [to] use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement".

[38] In its essential character, the dispute over the enforceability of the Settlement Agreement concerns the manner in which HEU, FHA, and the arbitrator conducted themselves during the Collective Agreement-mandated process. This is the factual context in which the dispute arose. In essence, this is a dispute over the operation of the Collective Agreement. In the words of Justice McLachlin in *Weber,* the dispute "ha[s] to do with the collective agreement": at para. 52.

[39] The next question, at the second step of the analysis, is whether a dispute of this character falls within the scope of an arbitrator's jurisdiction. It clearly does.

[40] The Collective Agreement confers upon an arbitrator a broad jurisdiction. As discussed, the *Code* deems that jurisdiction to include all disputes respecting the interpretation, application, operation, or alleged violation of the Collective Agreement, including a question as to whether a matter is arbitrable.

[41] The Collective Agreement itself may cast an even broader net. Article 11.01 of the Collective Agreement provides that "any difference, grievance, or dispute whatsoever arising between the Employer and the Union, or the employees concerned, … including any question as to whether any matter is arbitrable, but excluding re-negotiation of the Agreement shall, … be referred to the arbitration, determination and award" of either a single arbitrator or a board of three members (emphasis added). This extends an arbitrator's jurisdiction beyond disputes respecting the interpretation, application, operation, or alleged violation of the Collective Agreement to include any dispute at all between FHA and an employee subject to the Collective Agreement. However, it is not necessary to go so far in this case because the dispute in question arises from the operation of the Collective Agreement.

[42] The final step in the analysis is to determine whether it is necessary for the court to take jurisdiction to avoid a "real deprivation of ultimate remedy": *Weber* at para. 57, citing Justice Estey in *St. Anne Nackawic Pulp & Paper v. C.P.U.*, [1986] 1 SCR 704 at 723, 1986 CanLII 71.

[43] Justice B. Brown concluded that the appellant had recourse to arbitration. In her factum, the appellant says there is "no legal authority to support that an arbitrator has the power to grant the remedy sought here, being to find that the

employee was unduly influenced to enter into a settlement agreement that was unfair and unconscionable". I take that to be a submission that Justice B. Brown was incorrect.

[44] Neither party specifically identified the standard of review applicable to the question of whether it is necessary for the court to take jurisdiction to avoid a deprivation of ultimate remedy. To the extent that this depends on the interpretation of the Collective Agreement, a matter of mixed fact and law, it attracts the palpable and overriding error standard of review: *Bruce* at para. 76. In any event, on any standard, no error has been identified.

[45] In her response to FHA's application to dismiss for lack of jurisdiction, the appellant acknowledged that, ultimately, what she seeks is "to have her grievance properly arbitrated". The Settlement Agreement is an impediment to that end.

[46] To remove that impediment, the appellant could ask HEU to engage the dispute resolution process mandated by the Collective Agreement in relation to the dispute over the enforceability of the Settlement Agreement and seek a determination by an arbitrator that the Settlement Agreement is unenforceable. She argues that given her allegations concerning Arbitrator Young's involvement in the settlement negotiations, it would be inappropriate to re-engage Arbitrator Young. However, she could take that position with HEU and demand that the dispute over the enforceability of the Settlement Agreement be referred to another arbitrator.

[47] The appellant argues that an arbitrator acting pursuant to the Collective Agreement does not have the power to grant the remedy sought here—to conclude that the Settlement Agreement is unenforceable on grounds of unconscionability, undue influence, and unfairness. However, she cited no authority for this proposition and the language of the Collective Agreement and the *Code* suggest otherwise. Again, the Collective Agreement confers a very broad jurisdiction to an arbitrator, extending to any dispute "whatsoever" between the FHA and an employee subject to the Collective Agreement. The scope of an arbitrator's authority is expressed broadly, in s. 89 of the *Code*, as "the authority necessary to provide a final and conclusive settlement of [the] dispute". In resolving disputes, labour arbitrators have the power and duty to "apply the law of the land": *Weber* para. 56. If the dispute is referred to arbitration, the arbitrator will

have the power and duty to apply the doctrine of unconscionability in determining whether the Settlement Agreement is enforceable.

[48] Whether or not HEU accedes to a request to engage the dispute resolution process in relation to the dispute over the enforceability of the Settlement Agreement, the appellant could initiate a complaint against HEU under s. 12 of the *Code* in relation to HEU's conduct during the negotiations that led to it. Section 12 of the *Code* creates a duty of fair representation of employees by union representatives. Section 13 stipulates the procedure for unfair representation complaints, which ultimately involves a determination of the complaint by the Labour Relations Board.

[49] An employee who takes issue with the conduct of their union representative in reaching an improvident settlement may pursue a s. 12 complaint seeking monetary compensation: see, for example: *United Steelworkers, Paper and Forestry, Rubber, Manufacturing, Energy (Allied Industrial and Service Workers International Union, Local 2009) v. Auyeung*, 2011 BCSC 220 (Chambers). The Board's own jurisprudence demonstrates that it will also entertain an application by an employee to set aside a settlement agreement entered into during a grievance arbitration as a remedy for an alleged breach of the duty of fair representation during the negotiations that resulted in the agreement being signed: *K.T. v. Fraser Health Authority*, 2021 BCLRB 9 (leave for reconsideration denied, 2021 BCLRB 65; petition for judicial review dismissed, *Ferguson v. British Columbia (Labour Relations Board)*, 2023 BCSC 2164); *C.B. v. B.C. Government and Service Employees' Union*, 2013 CanLII 26951 (B.C.L.R.B.) (leave for reconsideration denied, 2013 CanLII 32123 (B.C.L.R.B.)).

[50] In summary, the *Code* requires every collective agreement to contain a provision for final and conclusive settlement of all disputes respecting its interpretation, application, operation, or alleged violation, including a question as to whether a matter is arbitrable. The Collective Agreement contains such a provision. The factual context in which this dispute arose was settlement negotiations that occurred during the process mandated by the Collective Agreement for the resolution of the appellant's grievance; in other words, it arose from the operation of the Collective Agreement. As a result, this dispute falls within the exclusive jurisdiction of an arbitrator acting under the Collective

Agreement. Finally, it is not necessary for the court to take jurisdiction to avoid a real deprivation of ultimate remedy.

Disposition

[51] For these reasons, I would dismiss the appeal.

"The Honourable Justice Warren"

I AGREE:

"The Honourable Mr. Justice Willcock"

I AGREE:

"The Honourable Justice Donegan"