

**IN THE COURT OF APPEAL OF NEWFOUNDLAND AND
LABRADOR**

Welsh J.A.:

[1] The Communications, Energy and Paperworkers Union brought a grievance on behalf of one of its members whose employment was terminated for cause by the employer, represented by the Terra Nova Employers' Organization. The grievance was dismissed by the arbitrator. That decision was reversed by the applications judge on judicial review.

[2] At issue is the reasonableness of the arbitrator's application of strict liability to the employer's policy regarding possession of illegal drugs while performing company business.

BACKGROUND

[3] The grievor, an employee of Magna Services Limited (the "employer"), was employed as a millwright on a "call in" or casual basis on the Terra Nova offshore petroleum production platform. His employment was terminated for non-compliance with the employer's Drug and Alcohol Policy (the "Policy") when a small amount of marihuana was found in his jeans pocket during screening prior to boarding a helicopter that would transport the employees to the offshore platform. The Policy provides, in relevant parts:

5.0 The ... possession ... of an illegal drug [which specifically includes marihuana], ... by an employee while on company facility or while performing company business is strictly prohibited. ...

8.0 Disciplinary action will apply to the following:

...

Employees who are found to be in possession of ... illegal drugs ... if the circumstances, after an investigation, confirms that the employee was in violation of the policy.

[4] There is no dispute that a small piece of tinfoil containing a small amount of marihuana was found in the grievor's jeans pocket while he was preparing to be transported to the worksite and, therefore, on company business. The grievor said that he had checked his pockets before going to the airport and was "in disbelief that it was there" and that "he did not know how it got in his pocket" (arbitrator's decision, at pages 7 and 8). The

grievor admitted to occasional use of marihuana and, in fact, urine tests conducted at the time yielded positive results.

[5] By letter dated March 26, 2014, the employer advised the grievor that an investigation into the January 26, 2014 incident had been completed and that, based on his non-compliance with the Policy, he had been removed from the recall lists and would not be recalled for future employment opportunities.

[6] Following a review of the evidence, the positions of the parties, and judicial authority the arbitrator concluded, at page 21:

In the case at hand, there is no doubt that the illegal substance was found in the pocket of the grievor. He offered no alternative theory as to how the substance may have gotten into his pocket. The impression that comes from the evidence is that he had used the substance previously, possibly on a hunting expedition a short time ago and had simply forgotten to take it out of his pocket. That he had used marijuana in the fairly recent past was corroborated by the presence of marijuana in his urine sample. No evidence was tendered as to how recent the usage must have been in order to show a positive result at that time. This evidence, in my view is not a sufficient meeting of the onus on the grievor as described by arbitrator Buffett [in another arbitration] once the employer established that there was in fact possession. In fact, if anything, this evidence supports the theory of the grievor having knowledge of the possession. As pointed out by the employer in argument, if the substance was not at all known to the grievor one would have thought his protests would have been loud and long that the substance was not his or at least that he had no knowledge of his having possessed it. Instead, there was virtually no protest other than a simple denial of ownership and a lack of knowledge as to how it may have arrived in his pocket notwithstanding that he had admitted to recent use.

...

It should also be borne in mind, as pointed out by the employer, that the facility to which the grievor was headed is one which is located in a very dangerous part of the world to which access is strictly controlled and is in itself very hazardous. A person must have their wits about them for the safety of themselves and others around them. While the amount of marijuana involved in this case appears to be relatively small, the deterrence of others from attempting to bring illicit substances onto the rig must be considered as a critical factor. ...

[7] In denying the grievance, the arbitrator accepted the employer's disciplinary action to remove the grievor from call-back lists and further employment.

[8] On judicial review, the applications judge concluded that the standard of review of reasonableness applied. However, he went on to determine that the arbitrator's decision was unreasonable and must be set aside. He explained (2016 NLTD(G) 194):

[51] While I am required to give deference to the determination of the arbitrator, I am unable to conclude that the arbitrator's decision that [the employee] was "in possession" in violation of the Policy meets the standard of reasonableness. The arbitrator's conclusion that [the employee] did not know the marijuana was in his pocket (and thus did not have the requisite *mens rea* for possession in violation of the Policy) could only have led to one result, namely that the Policy had not been violated. Therefore, the arbitrator's conclusion that [the employee] was nevertheless in violation of the Policy does not fall within the range of reasonable outcomes available.

ISSUES

[9] At issue in the appeal is the standard of review and its application to the arbitrator's decision. In particular, is the arbitrator's interpretation of the Policy using the concept of strict liability reasonable, or is the interpretation unreasonable by virtue of the exclusion of an element of intention or *mens rea*?

ANALYSIS

Standard of Review

[10] The analysis begins with a consideration of whether the applications judge erred in concluding that the arbitrator's decision is reviewable on a standard of reasonableness. The judge explained:

[23] In the present case the arbitrator was called upon to determine if the grievor was in possession of marijuana in violation of the Policy. This question involved the application of the facts to the legal requirements necessary for such possession. Therefore, the question to be decided was one of mixed fact and law. It was not a question of general law of central importance to the legal system, nor a question falling outside the arbitrator's expertise.

[11] Relevant principles on which the applications judge relied are discussed in *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59, [2011] 3 S.C.R. 616. Fish J., for the Court, explained:

[31] Prevailing case law clearly establishes that arbitral awards under a collective agreement are subject, as a general rule, to the reasonableness standard of review.

...

[34] In this light, I think it best to adhere, in substance if not in form, to the analytical template set out in *Dunsmuir* [2008 SCC 9, [2008] 1 S.C.R. 190] and adopted in *Smith* [2011 SCC 7, [2011] 1 S.C.R. 160]. This will serve to explain why reasonableness – not correctness – is the appropriate standard in cases such as this. ...

[35] An administrative tribunal's decision will be reviewable for correctness if it raises a constitutional issue, a question of "general law 'that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise'", or a "true question of jurisdiction or *vires*". It will be reviewable for correctness as well if it involves the drawing of jurisdictional lines between two or more competing specialized tribunals

[36] The standard of reasonableness, on the other hand, normally prevails where the tribunal's decision raises issues of fact, discretion or policy; involves inextricably intertwined legal and factual issues; or relates to the interpretation of the tribunal's enabling (or "home") statute or "statutes closely connected to its function, with which it will have particular familiarity" (*Dunsmuir*, at paras. 51 and 53-54; *Smith*, at para. 26).

[12] In this case, the general rule that a reasonableness standard of review applies to arbitral awards under a collective agreement would apply. The question of what constitutes possession of an illegal drug, leading to discipline, within the meaning of the Policy requires an interpretation of the Policy, which falls within the scope of an arbitrator's mandate. The fact that the meaning of possession of an illegal drug may be analyzed and interpreted using different legal concepts in other contexts does not lead to the conclusion that the interpretation of the language in the Policy amounts to a matter of general law as described in *Nor-Man*, at paragraph 35.

[13] It follows that the applications judge did not err in determining that the appropriate standard of review of the arbitrator's decision is reasonableness.

Applying Principles of Strict Liability

[14] The Policy, while addressing the possession of illegal drugs, does not create an offence. It does, nonetheless, provide a basis for disciplinary

action against an employee, which could include dismissal. These factors inform the legal concepts and analytical approach relevant to interpretation of the Policy.

[15] For this purpose, the arbitrator adopted an approach incorporating the concept of strict liability. That is, the doing of the prohibited act is sufficient to establish non-compliance with the Policy. The employee then has the burden of demonstrating that he took all reasonable care to ensure that he did not breach the Policy. The employee's conduct is measured against that of a reasonable person in similar circumstances. The concept of *mens rea* is not engaged. That is, it is not necessary to establish that the employee intended to possess, in this case, marihuana, while on company business. The fact that the employee had marihuana in that circumstance is sufficient to establish a breach of the Policy unless the employee can demonstrate that he took all reasonable care to ensure he did not have possession of marihuana in those circumstances. These concepts are discussed in the context of regulatory offences in *Lévis (City) v. Tétreault*, 2006 SCC 12, [2006] 1 S.C.R. 420, at paragraphs 15 and 16; *La Souveraine, Compagnie d'assurance générale v. Autorité des marchés financiers*, 2013 SCC 63, [2013] 3 S.C.R. 756, at paragraphs 31 to 33.

[16] It is also relevant that strict liability in the context of regulatory offences applies where there is a public interest objective of safeguarding the welfare of society or protecting the public (*La Souveraine*, at paragraph 32). As applied in this case, the arbitrator accepted that the work, in a dangerous location, is "itself very hazardous". He concluded that the employees must "have their wits about them for the safety of themselves and others around them." He considered that deterring others from bringing drugs such as marihuana onto the platform "must be considered as a critical factor." (Arbitrator's decision at page 21, paragraph 6, above.) In essence, the arbitrator interpreted the Policy as regulatory in nature, intended to safeguard the welfare of all the employees.

[17] On review, the applications judge did not assess the reasonableness of the arbitrator's approach as discussed above as he was required to do. Rather, he substituted his view that an element of *mens rea*, or intention, must be incorporated into the interpretation of the Policy. This amounted to error. The above discussion leads to the conclusion that the arbitrator's interpretation of the Policy using the concept of strict liability was reasonable.

[18] Applying that interpretation to the facts in this case, the grievor was found to have possession of a small amount of marihuana in his jeans pocket as he participated in required screening prior to boarding transportation to the worksite. This constituted a breach of the prohibited act of having possession of an illegal drug, marihuana, while performing company business.

[19] To avoid disciplinary action, the employee was required to establish that he had taken all reasonable care to ensure that he did not breach the Policy by having possession of marihuana. The arbitrator reviewed the circumstances and the explanation provided by the grievor and concluded that he had not satisfied this onus. Rather, the arbitrator found that the grievor more probably than not knew about the marihuana in his pocket, but had forgotten it was there and had not carefully checked his pockets before entering the screening area (paragraph 6, above). The employee's actions did not establish that he had taken all reasonable care to ensure that he did not breach the Policy. He did not meet the standard of the reasonable person in similar circumstances.

[20] In summary, a review of the arbitrator's decision leads to the conclusion that his interpretation and application of the Policy "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law", and is, accordingly, reasonable (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paragraph 47). The applications judge, having correctly concluded that the arbitrator's decision is reviewable on a standard of reasonableness, erred in the application of that standard and in concluding that the arbitrator's decision was unreasonable.

[21] At the hearing, counsel for the Union raised a question as to the validity of the Policy. I agree with counsel for the employer that that issue, raised suddenly at the conclusion of the hearing, was not properly part of the appeal before this Court.

SUMMARY AND DISPOSITION

[22] The applications judge correctly concluded that the arbitrator's decision was reviewable on a standard of reasonableness. However, he erred in the application of that standard when, without regard to the strict liability approach adopted by the arbitrator, he substituted his view that an element of *mens rea* or intention must be incorporated into the interpretation of the Policy.

[23] Accordingly, I would allow the appeal and restore the decision of the arbitrator, with costs to the Terra Nova Employers' Organization in this Court and in the Court appealed from on column 3 of the scale of costs.

B. G. Welsh J.A.

I Concur: _____

M. F. Harrington J.A.

I Concur: _____

L. R. Hoegg J.A.