In the Court of Appeal of Alberta

Citation: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 488 v. Bantrel Constructors Co., 2009 ABCA 84

Date: 20090309
Docket: 0803-0033-AC
Registry: Edmonton

Between:

The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 488; The International Association of Bridge, Structural, Ornamental and Reinforcing Ironworkers, Local 720; and The Construction and General Workers' Union, Local 92

Appellants (Applicants)

\- and -

Bantrel Constructors Co.

Respondent (Respondent)

\- and -

Construction Owners Association of Alberta

(Intervenor)

The Court:

The Honourable Madam Justice Constance Hunt
The Honourable Mr. Justice Ronald Berger
The Honourable Mr. Justice Jack Watson

Memorandum of Judgment

Appeal from the Order by
The Honourable Mr. Justice J.J. Gill
Heard the 4th day of October, 2007
Filed the 4th day of February, 2008
(2007 ABQB 721, Docket: 0703-04774)

Memorandum of Judgment

The Court:

[1] The appellants appeal a judicial review decision upholding the decision of the majority of an arbitration panel ("Panel"). The Panel held that collective agreements incorporating industry-wide policies about employee drug and alcohol testing did not prevent the employer from imposing more stringent testing requirements on existing employees.

[2] The appeal is allowed and the Panel's decision is quashed.

Background

Facts

[3] The appellants, the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 488, the International Association of Bridge, Structural, Ornamental and Reinforcing Ironworkers, Local 720, and the Construction and General Workers' Union, Local 92 ("Unions"), represent workers with slightly different collective agreements ("CAs"). The respondent employer, Bantrel Constructors Co. ("Respondent"), contracted with Petro-Canada to construct a diesel desulphurisation unit at Petro-Canada's existing hydrocarbon refinery, a hazardous work site. The contract required the Respondent to comply with Petro-Canada's alcohol and drug use policy.

[4] The Respondent's site work began in the spring of 2004. Shortly thereafter, Petro-Canada raised the possibility of drug and alcohol testing of employees working on the site. The Respondent unsuccessfully attempted to exempt existing employees (numbering about 200) from the requirement. Petro-Canada adopted a pre-site access testing policy for most (but not all) workers at the site effective November 15, 2004. It advised the Respondent that its failure to adhere to the policy could result in termination of its contract. The Respondent incorporated Petro-Canada's requirements into its policy ("Policy") without negotiating the new requirements with the Unions.

[5] The Respondent's employees were informed of the Policy in October 2004. Employees who failed to comply could not work on the site after January 3, 2005. Some accepted the Respondent's offer of layoff.

[6] The Unions filed grievances on December 24, 2004 alleging that the Respondent had violated the CAs by requiring union members already working on the site to comply with the Policy.

[7] Each CA incorporates the "2001 Canadian Model for Providing a Safe Workplace, Alcohol and Drug Guideline and Work Rules", a publication of the Construction Owners

Association of Alberta ("2001 Model"). The CAs, provide that "[t]he Parties agree that the Canadian Model for Providing a Safe Workplace – Alcohol and Drug Guidelines and Work Rule will apply on all work sites.". The relevant ironworkers' article added "[t]he Parties will cooperate with clients who institute pre-access drug and alcohol testing": art. 30.02 (emphasis added).

[8] The 2001 Model permits testing for cause. Under its heading "4. Implementation of the alcohol and drug work rule", it lists the following circumstances under which a test may or must be imposed on an employee:

- 4.2.1 - once the employee has been informed of a concern about their compliance with the alcohol and drug policy and encouraged to seek assistance, the employer may insist the employee submit to alcohol and drug testing;
- 4.4 - if the employee is observed as unable or potentially unable to work in a safe manner because of the use of alcohol or drugs, a test must be requested; and
- 4.5 - reasonable grounds about an employee's involvement in an accident, near miss or dangerous incidents require the employer to request the employee to take a test unless alcohol or drugs are reasonably believed not to be the cause.

The 2001 Model does not require any pre-employment or general pre-site access testing.

[9] Two paragraphs from the introductory *Guidelines* section of the 2001 Model ("Guideline") are reproduced in full with emphasis added:

> This model is part of an overall approach to safety and is intended to be an integral part of a safety or loss management policy. It can also be used as a tool for dealing with safety through performance management and education. The model strives to establish a minimum industry standard for a safe workplace and recognizes that some companies may require even higher or alternate standards based on the specific nature of their operations or with technological breakthroughs in testing.
>
> It should be noted that testing as a condition of employment is not addressed in this model. Although it was considered initially, pre-employment testing as part of an industry-wide standard was not practical primarily because the standard applies to a rotational workforce. During any period of time, workers may be assigned to a number of different workplaces. However, although pre-employment testing cannot be addressed here, it should not be overlooked for those companies that may require it based on the specific nature of their operations.

[10] Each CA contains a management rights clause (with emphasis added):

> **Plumbers and Pipefitters**: 5.01 Subject only to the limits which are set forth in this Agreement, the Union recognizes the rights of the Employer to the

> management of its plant and direction of the working forces ... The Union further recognizes the rights of the Employer to operate and manage its business in accordance with its commitments and responsibilities ...
>
> **Ironworkers**: 8.01 Management of Company and the direction of the working forces are vested solely and exclusively in the Company, and shall not be abridged except by specific restrictions as set forth in this Agreement ...
>
> The Employer retains the sole and exclusive control over all matters concerning the operation and management and administration of his/her business ... the right to make and enforce rules, including safety matters and to perform other functions inherent in the administration and control of the business.
>
> **Construction and General Workers**: 7.01 Subject only to the terms of this Agreement, the Union recognizes the right of the Employer to the management of its plant and the direction of the working forces ... and further recognizes the right of the Employer to operate and manage its business in accordance with its commitments and responsibilities ...

In other words, the management rights clause is, in each case, subject to the terms of the CA.

Arbitration Decision

[11] The issue before a three-member labour arbitration panel was whether the Respondent breached the CAs by requiring employees already working on the Petro-Canada site to be tested before they could return to work after the Christmas shutdown.

[12] In addition to the Policy, the CAs and the parties' submissions, the Panel's 38-page decision considers pre-site access testing generally; the incidence of drug and alcohol use in both safety-sensitive workplaces in general and on this job site in particular; the 2001 Model; and the updated 2005 Canadian Model for Providing a Safe Workplace. The latter specifically deals with pre-site access testing but has not been incorporated into the CAs.

[13] The Unions submitted that the implementation of the Policy was flawed, there was no evidence to justify it and its application was inconsistent as not all refinery employees were required to submit to testing. They asserted that the CAs only permitted testing in accordance with the 2001 Model, which does not provide for such testing. Moreover, they said that since the management rights provisions in the CAs are expressly subject to its other terms, management rights could not justify the imposition of the Policy. Alternatively, they submitted that the Policy failed a test of reasonableness (*Re Lumber & Sawmill Workers' Union, Local 2537 v. KVP Co. Ltd.* (1965), 16 L.A.C. 73 (OLA)). Additionally, they contended that third-party demands (here, Petro-Canada's) could not justify the Respondent's breach of the CAs.

[14] The Unions also relied on a case since overruled by this Court for the proposition that pre-employment testing is a human rights violation, *Alberta (Human Rights and Citizenship Commission) v. Kellogg Brown & Root (Canada) Co.*, 2006 ABQB 302, 399 A.R. 85, rev'd 2007 ABCA 426, 425 A.R. 35; leave to appeal to S.C.C. refused, [2008] S.C.C.A. No. 96.

[15] The Respondent's position was that since the site was safety-sensitive, it was unnecessary to prove drug or alcohol problems to justify the Policy. Nevertheless, evidence showed that, prior to implementation of the Policy, four of six post-incident tests were positive: A.B. F31. Moreover, the Policy was consistent with industry practices and supported by studies showing that such testing improves site safety. The Respondent also asserted that the 2001 Model did not preclude the Policy because the 2001 Model contemplates employer-specific requirements. The Respondent also relied on its management rights.

[16] Two of the three panel members concluded that the 2001 Model was not a complete code because its introductory Guideline contemplated employer-specific needs and testing as a condition of employment in some circumstances. Thus, the Policy did not violate the CAs. Additionally, they found it justifiable in the context of the work site and its history. They said testing was not random but mandatory, and applicable to each Respondent employee coming onto the site.

[17] The Panel agreed with the Unions' submissions that the Respondent was required to act reasonably in requiring its employees to submit to the Policy and could not justify the Policy by Petro-Canada's demands. The Panel applied the two-part test from *International Union of Operating Engineers, Local 793 v. Sarnia Cranes Limited*, [1999] O.L.R.D. No. 1282 (OLRB) to conclude that the Policy was not unreasonable.

[18] The dissenting panel member saw the 2001 Model as a complete code. He concluded the Policy's requirements exceeded those of the 2001 Model because the latter's only reference to employer-specific requirements concerned pre-employment testing, which did not apply here. In his view, the Respondent's unilateral adoption of the Policy undermined the bargaining process. Thus, the Policy violated the CAs. He also determined that the Policy was unreasonable for two reasons. First, the 2001 Model already incorporated risk management concerns and balanced these against employees' rights to be free from intrusion into their conduct when not on duty. Second, the inconsistency between the Respondent's employees and a selected group of exempted Petro-Canada employees was unreasonable.

Queen's Bench Decision

[19] The chambers judge concluded that all grounds of appeal (the Panel erred in finding that the 2001 Model did not occupy the field; the Policy was reasonable; it did not violate human rights law; and the Panel lacked jurisdiction to award a remedy) were reviewable on the reasonableness *simpliciter* standard: *United Association of Journeymen and Apprentices of the*

Plumbing and Pipefitting Industry of the United States and Canada, Local 488 v. Bantrel Constructors Co., 2007 ABQB 721, 431 A.R. 314.

[20] Not having the benefit of the Supreme Court's decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, to determine the applicable standard of review he applied the now-overtaken four-step pragmatic and functional analysis from *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92,* 2004 SCC 23, [2004] 1 S.C.R. 609.

[21] He held that the Panel's conclusion about the 2001 Model was based on its wording and "the evidence that was presented relating to the safety issues surrounding the industry and the site. As such I find the decision to be reasonable.": para. 79. He also interpreted art. 30.02 of the ironworkers' CA to contemplate pre-access testing expressly. This negated the ironworkers' arguments.

[22] He concluded that the Panel understood the Unions' submissions about why they believed the Policy to be unreasonable, and provided "a clear line of analysis from the law and the evidence to its conclusions.". It stood up to a somewhat probing examination and was reasonable.: para. 106.

[23] Ground three (whether the Policy violated human rights legislation) is not in issue in this appeal. As regards the Panel's jurisdiction to award a remedy, the chambers judge noted that the Panel's discussion on this point was *obiter dicta* since, having found no violation of the CAs, it granted no remedy.

[24] He dismissed the judicial review application.

Issues

[25] The Unions submit the chambers judge erred in concluding that the Panel: (i) did not amend the CAs; (ii) was reasonable in determining that the 2001 Model was not a complete code; and (iii) was reasonable in its interpretation of the 2001 Model as permitting the Policy.

Standard of Review

[26] When an arbitration decision has been reviewed by a judge of the Court of Queen's Bench, appeals from the reviewing judge's decision to this Court are governed by *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. This Court must determine whether the reviewing judge chose and applied the correct standard of review and, if not, assess a tribunal's decision in light of the correct standard: *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226 at para. 43; *U.N.A., Local 115 v. Calgary Health Authority*, 2004 ABCA 7, 339 A.R. 265 at para. 9; *Health Sciences Assn. of Alberta v. David Thompson Health Region*, 2004 ABCA 185, 348 A.R. 361 at para. 7.

[27] Since the reviewing judge did not have the benefit of the Supreme Court's decision in *Dunsmuir*, a fresh standard of review analysis is necessary.

[28] *Dunsmuir* clarifies that previous determinations of the applicable standard of review may be used: paras. 57 and 62. Courts are deferential to labour adjudication panels' decisions because of their expertise and familiarity with the applicable legislation. In their factum, the Unions asserted that the appeal concerned a jurisdictional matter to which the correctness standard applies. In oral argument, acknowledging this Court's decision in *Alberta v. Alberta Union of Provincial Employees*, 2008 ABCA 258, 433 A.R. 159, the Unions did not vigorously assert a standard of review other than reasonableness. See also *United Food and Commercial Workers Union, Local 401 v. Westfair Foods Ltd. (The Real Canadian Superstore)*, 2008 ABCA 335 at para. 4, 440 A.R. 249.

[29] We agree that reasonableness applies. Although the Unions' factum characterized the question as an excess of jurisdiction by the Panel (on the argument that the Panel amended the CAs), in our view the case turns on the Panel's conclusion that the 2001 Model, adopted by the parties in the CAs, did not provide a complete code for drug testing. The Respondent argues that because the 2001 Model left open the possibility of other types of testing, it did not occupy the field. Thus there was nothing to prevent the Respondent from relying on its management rights to impose testing outside the 2001 Model. On the other hand, if the 2001 Model permitted only limited types of testing, the management rights clauses could not justify additional testing because that would fly in the face of the CAs (to which the management rights clauses are subject).

[30] Since this question of whether the 2001 Model was a complete code required the Panel to interpret both the CAs and the 2001 Model, its decision is subject to review on the reasonableness standard. That was the standard employed by the reviewing judge. Whether he properly applied it is a question of law subject to the correctness standard on appeal: *Alberta (Minister of Municipal Affairs) v. Municipal Government Board*, 2002 ABCA 199 at para. 2, 312 A.R. 40; *C.U.P.E., Local 784 v. Edmonton School District No. 7*, 2005 ABCA 74, 363 A.R. 123.

> Reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process and with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law. It is a deferential standard which requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system.

Dunsmuir headnote, see also paras. 47-50.

Analysis

[31] As a preliminary matter, we need say no more about the importance to all concerned of efforts to improve safety in the workplace, especially in hazardous work sites such as the one involved here. The intervener appropriately emphasized these matters, as did both of the decisions below.

[32] But this case is not about the desirability of combatting substance abuse in the workplace. Rather, it is about how, in light of the applicable CAs, to determine procedures for drug and alcohol testing of existing employees.

[33] Part of the difficulty in this case may result from unclear definitions of different types of testing. As will become apparent, there is a lack of uniformity and precision in certain terms describing "testing". Given the relatively recent arrival of drug and alcohol testing in the workplace, this may not be surprising. Hopefully the intent of future arrangements will be more clear. Whatever the shortcomings, however, we are limited to interpreting the language of existing documents.

[34] To apply the reasonableness standard, it is necessary to examine carefully the reasoning of both the Panel and the reviewing judge.

[35] To reach its conclusion that the 2001 Model did not provide a complete code, the Panel determined what the 2001 Model contemplates. It observed (italicized text in original, underlined text added) at pp. 25-26:

> ... it is apparent ... it is not a complete code. It expressly provides in its introduction (page G-1) that testing as a <u>condition of employment</u> is not addressed in the model, but that "*it should not be overlooked for those companies that may require it based on the specific nature of their operations*". The entire 2001 Model is included in the Collective Agreements including the fact that <u>pre-employment testing</u> may be considered where necessary. <u>If testing as a condition of employment was contemplated if required in the 2001 Model</u>, the *expressio unius* doctrine does not operate so as to exclude the application of Petro-Can's policy on this work site. <u>In order to reach the conclusion that such doctrine does exclude this particular safety based work rule imposed by the employer, we would have to find that the Canadian Model was a complete and restricted code respecting drug and alcohol testing</u>. We decline to do so given that the guidelines contained in the Code.

[36] This passage makes it apparent that in interpreting the Guideline (set out in full at para. 9, above), the Panel gave the words "condition of employment" a broader meaning than the term "pre-employment testing", the term used twice in the balance of the Guideline. The Panel's approach is evident two paragraphs later:

> ... when the Model specifically contemplates that testing as a condition of employment may apply on some worksites, ... the integrity of the Model is not harmed when a worksite does require testing as a condition of employment. Therefore we are of the opinion that the Collective Agreements, by expressly providing that the 2001 Model was the drug and alcohol testing policy in place on the worksite, did not exclude testing as a condition of employment and requiring such testing did not violate [the CAs].
>
> (emphasis added)

In contrast, the Panel noted several times that the 2001 Model "did not deal with pre-access testing": A.B. F4 and F5.

[37] In our view, the Panel incorrectly interpreted the Guideline. This may be due, in part, to its view (expressed at p. 28 in the section dealing with the reasonableness of the Policy) that "it is not possible to separate the issue of pre-employment testing from the issue of applying such testing to current employees.". However, in context, "condition of employment" in the Guideline refers to a pre-employment condition, rather than (as here) a condition applied to existing employees that would govern access to a job site. Thus interpreted in the Guideline, the paragraph might mean that the 2001 Model did not occupy the field as to pre-employment testing (as a condition of employment) because it contemplated the possibility of some companies adopting higher standards, and specifically pre-employment testing. But that is not the issue in this case. Rather, it is whether the 2001 Model, adopted by the CAs, contemplated the possibility of pre-site access testing of existing employees.

[38] The question that arises from the Panel's incorrect interpretation of the Guideline is whether there is any line of analysis within the decision that could reasonably lead the Panel from the evidence to its conclusion. That is, are its reasons justifiable, transparent and intelligible, and defensible in respect of the facts and the law? If so, the Panel's decision will withstand appellate scrutiny even if it is not one that the reviewing court finds compelling.

[39] In our view, no such line of analysis exists in the Panel's reasons. At page 25 it relied on the *expressio unius* rule to ground its decision about the effect of the 2001 Model. But the Panel's application of the rule was based on its mistaken view that pre-site access testing was included as a 'condition of employment' in the Guideline. *Expressio unius*, or the 'implied exclusion rule', is a rule of construction holding that to express or include one thing implies the exclusion of another. Properly applied, the *expressio unius* rule would exclude pre-site access testing from the 2001 Model because the only type of testing contemplated by the Guideline (over and above that permitted by the 2001 Model) is pre-employment testing as a condition of employment.

[40] The Panel said it recognized "that the testing in dispute ... involves testing of employees already on site": p. 26. Its answer to this was "the testing is part of the implementation of a pre-access ... policy which in our view is justifiable within the context of the worksite and its

history.": *ibid*. But the history of the work site could not override the language of the CAs and the 2001 Model.

[41] The balance of the Panel's reasons on this point concern the fact that the disputed testing was not random (random testing having been clearly disallowed in the 2001 Model). Again, this did not deal with the basic question before the Panel about the interaction of the 2001 Model and the CAs, and whether the 2001 Model was essentially a code that did not contemplate or authorize pre-site access testing of existing employees.

[42] In assessing the reasonableness of the Panel's decision, the reviewing judge did not consider the possible distinction in the Guidelines between pre-employment and pre-site access testing of existing employees, and what implications that would have for the Panel's interpretation of the Guidelines and the application of the *expressio unius* rule. He simply said that it was not unreasonable for the Panel to rely on "the wording in the Introduction to support its conclusion that the Canadian Model is not a complete code and that testing as a condition of employment is not addressed in the Canadian Model.": at para. 74. At para. 76 he said he was satisfied that the Panel understood and addressed the concepts of pre-employment testing, pre-access testing and random testing. In summary, he decided that the Panel's decision was supported by a thorough analysis of the 2001 Model, the CAs and the evidence.

[43] He did not address his mind to whether the Panel misinterpreted the Guideline. Because this was a critical part of assessing the reasonableness of the Panel's decision, he misapplied the reasonableness standard of review. In effect, he found that it was reasonable for the Panel to conclude that the new Policy was reasonable for this worksite. That may have been so, but it is not what the parties agreed to under the CAs and was accordingly not the crucial question before the reviewing judge.

[44] The Respondent points to clause 30.02 in the ironworkers' CA which provides that the "parties will cooperate with clients who institute pre-access drug and alcohol testing". Although this clause does not appear to have been relied on by the Panel, in the reviewing judge's opinion (at paras. 80-81), it undermined any merit of that union's argument.

[45] We do not agree. Although this clause shows that the parties to that CA contemplated that the Respondent's clients might wish to implement "pre-access" testing, it is not clear whether "pre-access" referred to general pre-site testing of existing employees (as here) or to the pre-employment testing as a condition of employment mentioned by the Guideline. Moreover, use of the word "cooperate" is not sufficiently clear to overcome the adoption of the 2001 Model in the previous sentence of the CA. It may suggest that the union is prepared to consider the implementation of such testing when requested by a client. But that does not detract from its right to negotiate the terms and conditions of such testing. We leave for another day the interpretation of this provision if the parties to the CA negotiated in good faith on this point but were unable to reach an agreement.

[46] Given this conclusion, it is unnecessary to consider the other grounds of appeal. The appeal is allowed and the Panel's decision is quashed. The appellants are entitled to one set of costs for the appeal under Column 2.

Appeal heard on February 4, 2009

Memorandum filed at Edmonton, Alberta
this 9th day of March, 2009

Hunt J.A.

Berger J.A.

Watson J.A.

Appearances:

M.J. Field
for the Appellant

H.J.D. McPhail, Q.C.
for the Respondent

B.B. Johnston
for the Intervenor