IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION

Citation: *Hibernia Platform Employers' Organization v. Unifor (Local 2121)*, 2023 NLSC 144
Date: November 6, 2023
Docket: 202201G4076

BETWEEN:

HIBERNIA PLATFORM EMPLOYERS' ORGANIZATION

APPLICANT

AND:

UNIFOR (LOCAL 2121)

RESPONDENT

Before: Justice Peter N. Browne

On Judicial Review From: A Decision of W. John Clarke, K.C., Sole Arbitrator, dated the 25th day of July, 2022.

Place of Hearing: St. John's, Newfoundland and Labrador

Date of Hearing: September 15, 2023

Summary:

The Applicant, Hibernia Platform Employers' Organization, sought judicial review of an Arbitrator's award. The Arbitrator substituted a three-month suspension following the employer's decision to terminate an employee for violation of its Alcohol and Drug Policy because of his undisclosed use of CBD oil.

The Court dismissed the application for judicial review and held that the Arbitrator's reasons met the *Vavilov* threshold of an acceptable decision because he provided a reasonable explanation that was discernable and the outcome was acceptable and defensible.

Appearances:

Stephen F. Penney and Robert Bradley	Appearing on behalf of the Applicant
Michael S. Gillingham	Appearing on behalf of the Respondent

Authorities Cited:

CASES CONSIDERED: *Canada (Minister of Citizenship and Immigration) v. Vavilov,* 2019 SCC 65; *Dunsmuir v. New Brunswick*, 2008 SCC 9; *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34; *Alexion Pharmaceuticals Inc. v. Canada (Attorney General)*, 2021 FCA 157; *Bell Canada v. British Columbia Broadband Association*, 2020 FCA 140; *Girouard v. Canada (Attorney General)*, 2020 FCA 129; *Canada (Attorney General) v. Honey Fashions Ltd.*, 2020 FCA 64; *Unifor, Local 2121 v. Hibernia Platform Employers' Organization*, *(Fitzgerald)* (November 18, 2014), Newfoundland and Labrador (Unreported Labour Arbitration Findings and Award)*; Hibernia Platform Employers' Organization v. Communications, Energy and Paperworkers Union (Unifor, Local 2121) (Hunt)*, 2018 NLCA 45; *Unifor, Local 2121 and Hibernia Platform Employers' Organization (Kean), Re*, 2022 CarswellNfld 142, 2022 C.L.A.S. 785 (N.L. Arb.); *Chandos Construction Ltd. v. Deloitte*, 2020 SCC 25; *Capital Markets Technologies, Inc. v. Prince Edward Island*, 2020 PECA 12; *Long Harbour Employers' Association Inc. v. Resource Development Trades Council of Newfoundland*

and Labrador, 2023 NLCA 24; *Medis Health v. Teamsters Local 424*, 2000 CarswellOnt 5991, [2000] O.L.A.A. No. 753 (Ont. Arb.); *Imperial Oil Ltd. v. C.E.P., Local 900* (2006), 157 L.A.C. (4th) 225, 88 C.L.A.S. 273 (Ont. Arb.); *Council of Construction Trades Inc. v. WWRP Construction Employers' Association*, (February 15, 2021), Newfoundland and Labrador (Unreported Labour Arbitration Findings and Award)

STATUTES CONSIDERED: *Labour Relations Act*, R.S.N.L. 1990, c. L-1

REASONS FOR JUDGMENT

BROWNE, J.:

OVERVIEW

[1] The Applicant, Hibernia Platform Employers' Organization ("HPEO"), applies for judicial review of an arbitration award made under its collective agreement with the trade union, Unifor (Local 2121) ("Unifor").

[2] HPEO is an employers' organization representing the various contractors who operate onboard the Hibernia Platform, including the Hibernia Management Development Corporation (the "HMDC"). Unifor is the certified bargaining agent for all unionized employees employed onboard the Hibernia Platform. Both parties have a collective agreement that governs all aspects of employment offshore.

[3] Scott Pittman ("Mr. Pittman") was an operations technician with HMDC. He worked on Hibernia Platform, in some capacity, for sixteen (16) years. From 2019 until the spring of 2020, Mr. Pittman began experiencing severe stomach problems that at one stage required an emergency helicopter flight to an onshore Emergency Room. He was subsequently diagnosed with colitis.

[4] Following his diagnosis, Mr. Pittman was prescribed several medications which came with various undesirable side effects. He also continued to have flare-

ups from his colitis, the worst being on November 14, 2020, where he once again had to be flown home by helicopter on an emergency basis.

[5] Around this time, Mr. Pittman also had a conversation with his family doctor about a trial of CBD oil and was provided a referral to the local cannabinoid clinic in Churchill Square, St. John's.

[6] Mr. Pittman returned to the Hibernia Platform on November 26, 2020, to finish his interrupted work rotation. He returned home again on November 30, 2020, as part of his scheduled turn around. He was still in pain and had not heard about his referral to a gastroenterologist. As a result, he went to a Dominion store in Mount Pearl and purchased over-the-counter CBD oil that contained 25 mg/ml of CBD, and 0-1 mg/ml of THC (the latter being the psychoactive compound).

[7] Initially, Mr. Pittman did not obtain any great benefit from the CBD oil, but over the course of the following week, he increased the dosage and began consuming it with food. This change caused a corresponding relief in his symptoms. He last consumed the oil on December 20, 2020.

[8] On January 26, 2021, as part of the recertification process, Mr. Pittman underwent a routine alcohol and drug test. He passed the point of collection test, which is set at 20 mg/ml. However, THC metabolites were present on a secondary confirmation test, calibrated to a lower threshold of 15 mg/ml.

[9] On February 2, 2021 Breton MacDonald, the offshore installation manager ("OIM"), called Mr. Pittman to discuss the test results. Mr. MacDonald's meeting notes indicate Mr. Pittman said he had taken CBD oil to help with his "Crohn's [*sic*] and anxiety". The notes also confirm that MacDonald gave Mr. Pittman no indication regarding the employer's position on reinstatement or continued employment on the platform.

[10] The following day, Mr. MacDonald wrote Mr. Pittman a letter stating he was prepared to hold the decision on discipline in abeyance until additional information was available from a medical assessment. Mr. Pittman was advised to contact the platform nurse, Juliann Cormier, to arrange the assessment. MacDonald subsequently testified at the hearing that at this time various forms of discipline were being discussed with Human Resources.

[11] Mr. Pittman followed Mr. MacDonald's instructions and met with a medical assessor, Dr. Weal Shublaq. Dr. Shublaq examined Mr. Pittman's family history (which showed no history of substance abuse) and his clinical history (confirming his ulcerative colitis). He found no evidence of dependency or other explanation for the positive result.

[12] In his report dated March 30, 2021, Dr. Shublaq opined there were no limitations or restrictions that could affect Mr. Pittman's job performance nor were there any safety concerns with him returning to work. In keeping with the employer's zero tolerance policy, Dr. Shublaq suggested random testing every six months for the next two years to ensure compliance with work and safety regulations.

[13] On May 6, 2021, Mr. Pittman was advised by correspondence that he was permanently removed from the HMDC platform and terminated as an employee for cause. He was referred to Articles 5.5, 6.3 and 10 of the Alcohol and Drug Policy ("the Policy") and informed that because of his positive test for cannabinoids during the recertification process he violated Article 38 of the collective agreement.

[14] Mr. Pittman grieved the termination and the matter proceeded to an arbitration hearing on April 6 and 7, 2022. The Arbitrator, W. John Clarke, K.C. ("the Arbitrator") granted an award in Mr. Pittman's favour ("the Award") and substituted a three-month suspension in place of the HPEO's decision to terminate his employment.

[15] In his reasons, the Arbitrator concluded the Policy is a "legitimate part of the collective agreement … subject to renegotiation and update by the parties".

However, Article 10 (Consequences of a Policy Violation) was in conflict with the wording under Article 9 (Disciplinary Action). The latter article required HPEO to conduct an investigation before determining discipline and it did not do so. Because the evidence supported a lesser sanction he substituted a three-month suspension.

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

ISSUES:

1. Did the Arbitrator err in his reasons by failing to account for the factual record and neglecting material evidentiary inconsistencies?

2. Did the Arbitrator depart from the established jurisprudence that mandatory permanent removal is the agreed upon consequence following a breach of Article 10 of the Policy?

3. Did the Arbitrator err by finding a conflict in the wording in Articles 9 and 10 and applying the doctrine of *contra proferentem*?

4. Did the Arbitrator err by requiring HPEO to hold an investigation following a positive test and finding that the employer did not conduct one?

5. Did the Arbitrator err in granting a remedy unavailable under the collective agreement?

6. Does the Arbitrator's award meet the *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 threshold; namely, does it contain the requisite degree of justification, transparency and intelligibility and not any internal inconsistencies or logical shortcomings that materially influenced the final decision?

ANALYSIS

Relevant Legislation, Collective Agreement Provisions and Legal Principles

a) Legislation

[17] Section 88(2) of the *Labour Relations Act*, R.S.N.L. 1990, c. L-1 ("the *Act*") limits an arbitrator's remedial authority where the penalty is prescribed in the collective agreement. The section provides:

> Where an arbitration board determines that an employee has been discharged or disciplined by an employer for cause, it may, except when the penalty is prescribed in the collective agreement that is binding upon the employees and employer, review and modify the penalty imposed by the employer and, in the case of the discharge of the employee, substitute another penalty that to it seems just and reasonable in the circumstances.

b) Collective Agreement and Alcohol and Drug Policy

[18] The applicable collective agreement between the HPEO and the CEPU is effective as of September 26, 2019 and contains the following:

> Article 15.4 -Arbitration
> The decision of the Arbitrator shall be final and binding on all parties. The Arbitrator shall not have the power to change this Collective Agreement or to alter, modify, or amend any of its provisions.
>
> Article 15.9-Arbitration
> The Arbitrator or Arbitration Board has the power to substitute for the discipline or discharge of an employee any other penalty that the Arbitrator or Arbitration Board deems to be just and reasonable.
>
> Article 38-Drug and Alcohol Policy

The HPEO will confirm to the Union and the employees, by August 1, 2006, the Alcohol and Drug policy applicable on the platform.

The applicable sections of the HPEO Alcohol and Drug Policy are:

9.0 Disciplinary action
A violation of this policy may result in disciplinary action up to and including termination of employment. If an employee violates the provisions of this policy, an investigation will be conducted before disciplinary action is taken. The appropriate disciplinary action in a particular case depends on the nature of the policy violation and the circumstances surrounding it.

10.0 Consequences of Policy Violation
HMDC and any of its owners have the right to require the removal from work, or prevent access to work, of any worker subject to this policy whom HMDC or its owner(s) has reasonable cause to suspect is in contravention of this policy. A worker, subject to this policy, will be considered for return to work if the employer is able to demonstrate to HMDC or its owner(s)' satisfaction that the individual was in compliance with the requirements of this policy (for example, by producing a negative test result from an alcohol and drug test as soon as reasonably practical following removal).

If a worker tests positive on any alcohol or drug test required under this policy, refuses to be tested or contravenes 1(a) through 1(f) of the Work Rules for employees of the HPEO employers above, the employer must permanently remove the individual from the HMDC platform or site and from HMDC work.

A worker, who contravenes 1(g) of the Work Rules for employees of the HPEO employers above, may at HMDC's discretion, be considered for return to work on the HMDC platform.

c) Legal Principles - Judicial Review

Conducting a reasonableness review of the arbitrator's decision

[19] "[A] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision-maker to arrive at [the] conclusion"; (*Vavilov*, at para. 84, quoting *Dunsmuir v. New Brunswick*, 2008 SCC 9, at para. 48).

[20] The Court should not embark on a "line-by-line treasure hunt for error" (para. 102, citing *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, at para. 54). Rather, it should search for (i) "sufficiently serious shortcomings"; (ii) things that are "more than merely superficial or peripheral to the merits of the decision"; or (iii) flaws that are "sufficiently central or significant" (para. 100).

The two features of an acceptable decision:

(1) A reasoned explanation for the decision must be discernable.

[21] The decision must be based on an internally coherent and rational chain of analysis (para. 102). The analysis (*i.e.*, the reasons or justification for the decision) can be in written reasons or can be inferred, supplemented or surmised from the record before the decision-maker (see *Vavilov*, at paras. 91 and 97).

(2) The outcome is acceptable and defensible

[22] The outcome should not go beyond the factual and legal constraints placed on the decision-maker (see *Vavilov*, at paras. 85 and 101). These constraints vary according to the context and "dictate the limits and contours of the space in which the decision-maker may act and the types of solutions it may adopt" (see *Vavilov*, at para. 90).

[23] The two (reasoned explanation and reasonable outcome) often interrelate. The absence of one can be a sign the other is absent too (see *Alexion Pharmaceuticals Inc. v. Canada (Attorney General)*, 2021 FCA 157, at paras. 28-33).

A reasoned explanation for the decision must be discernable: The criteria

[24] This phrase speaks to the "critical point[s]" or the central issues and concerns raised by the parties (*Vavilov*, at paras. 127-128) and must contain "sufficiently serious shortcomings" (*Vavilov*, at para. 100). To achieve this threshold there must be the following criteria.

Adequacy

[25] A reviewing court must be able to discern an "internally coherent and rational chain of analysis". If there is (i) a "fundamental gap" in reasoning; (ii) a"fail[ure] to reveal a rational chain of analysis"; or (iii) it is "[im]possible to understand the decision-maker's reasoning on a critical point", then the decision does not meet the reasonableness threshold (see *Vavilov*, at paras. 103-104).

Logic, coherence and rationality

[26] The reasoning given must be "rational and logical without fatal flaws in its overarching logic" (see *Vavilov*, at para. 102). The reasoning falls short when it "fail[s] to reveal a rational chain of analysis", has a "flawed basis", "is based on an unreasonable chain of analysis" or "an irrational chain of analysis", or contains "clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise" (see *Vavilov*, at paras. 96 and 103-104).

[27] The evidentiary record, the submissions made, and the understandings of the decision-maker as seen from previous decisions cited demonstrate that they were aware of the nature of the issue before them (see *Vavilov*, at paras. 94 and 123; and *Bell Canada v. British Columbia Broadband Association*, 2020 FCA 140).

[28] The decision-maker must provide enough reasons to "assur[e] the parties that their concerns have been heard", demonstrate that it "actually listened to the parties" and show it was "actually alert and sensitive to the matter before it" (see *Vavilov*, at paras. 127-128).

The outcome is acceptable and defensible: The criteria

[29] A reviewing court should find that the decision does not go beyond the factual and legal constraints acting on the decision-maker (see *Vavilov,* at paras. 85 and 101).

Interpretations of legislation

[30] Administrators must follow the "text, context and purpose" approach to interpretation that courts follow (*Vavilov*, at para. 118) and must do it authentically, not in a result-oriented way (*Vavilov*, at para. 121). But their reasons don't necessarily have to be formal and follow a certain form.

Relevant common law

[31] The common law can affect the permissible space or constrain the administrator. Where a relationship is governed by private law, it would be unreasonable for a decision-maker to ignore that law in adjudicating parties' rights within that relationship (see *Vavilov,* at para. 111). It is open to an administrator to explain why a different interpretation in its administrative context should be reached (see *Vavilov*, at para. 112).

[32] Equitable and common law principles can be adapted and explained and this can be reasonable (*Vavilov*, at para. 113); similarly, the failure to adapt a principle could render a decision unreasonable (*Vavilov,* at para. 113).

The evidence before the decision-maker

[33] Evidence before the decision-maker can affect the outcome. The fact-finding process is the preserve of the decision-maker. A reviewing court is forbidden from re-weighing the evidence (*Vavilov*, at para. 125). At the same time, a reasonable decision must be justified by the facts (*Vavilov*, at para. 126). Only in "exceptional circumstances" will a reviewing court set aside findings of fact (see *Girouard v. Canada (Attorney General)*, 2020 FCA 129, at para. 48).

The submissions of the parties

[34] The principles of justification and transparency require that an administrative decision-maker's reasons meaningfully account for the central issues and concerns raised by the parties" (*Vavilov*, at para. 127). But an administrator cannot be expected to respond to every argument or "to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion" (see *Vavilov*, at para. 128).

[35] Ultimately, the reviewing court must determine whether the decision-maker's failure to meaningfully grapple with key issues or central arguments raised by the parties calls into question whether the decision-maker was actually alert and sensitive to the matter before it" (*Vavilov*, at para. 128).

Administrative precedents

[36] Whether a particular decision is consistent with the administrative body's past decisions is also a constraint that the reviewing court should consider when determining whether an administrative decision is reasonable. Where a decision-maker departs from longstanding practices or established internal authority, it bears the justificatory burden of explaining that departure in its reasons (see *Vavilov*, para. 131; and *Canada (Attorney General) v. Honey Fashions Ltd.*, 2020 FCA 64, at paras. 39-40).

The potential impact of the decision on the individual to whom it applies

[37] The principle of responsive justification means that if a decision has particularly harsh consequences for the affected individual, the decision-maker must explain why its decision best reflects the legislature's intention (see *Vavilov*, at para. 133).

ISSUE #1

Question: Did the Arbitrator err in his reasons by failing to account for the factual record and neglecting material evidentiary inconsistencies?

Answer: No. The Arbitrator's reasons account for the factual record and provide a reasoned and discernable explanation for the outcome that is acceptable and defensible. The expert evidence supports Mr. Pittman's explanation for the positive test.

Position of HPEO

[38] HPEO argues the evidentiary record is clear and unambiguous; Mr. Pittman testified that he consumed six bottles of CBD oil between December 1, 2020 and December 20, 2020. This would have meant his last dose was 37 days prior to his failed drug test. Prior to the test, Mr. Pittman completed a medical fitness form that asked him to list all medications, supplements or over-the-counter medications used in the last three (3) months. He did not report his CBD oil use on the form.

[39] Mr. Pittman's explanation for the positive test was contradicted by evidence from two qualified medical experts that CBD oil alone would not trigger a positive result for THC metabolites. In their opinion, a positive test meant either very recent use by an occasional cannabis user or very distant use by a chronic cannabis user (see pages 19-20 of the Award).

Position of Unifor

[40] Unifor argues that HPEO presents a skewed portrait of the expert evidence provided to the Arbitrator. It points to the acknowledgment by both experts that a drug test for THC does not provide any information as to whether a particular individual is impaired, unlike testing for alcohol.

[41] The first expert, Dr. Mace Beckson, testified that 15 mg/ml was "a very low concentration but not zero." The second expert, Dr. John Weber, testified 19 mg/ml (Mr. Pittman's concentration) was "on the low end of what is detectable". More importantly, the Arbitrator concluded (based on the entirety of the expert evidence) that Mr. Pittman was in breach of the policy when he failed to pass the drug test and that the breach warranted some form of discipline. It rejects HPEO's argument that based on the wording of the Policy any failed test equates with termination, irrespective of the concentration of THC detected.

Applicable law and findings

[42] In his reasons, the Arbitrator determined the evidence was clear Mr. Pittman failed the drug test on January 26, 2021 (see page 26 of the Award). He rejected Unifor's argument that the Policy was not part of the Collective Agreement, noting that since 2006 the Policy survived several renegotiations including the most recent version in 2019. At no point over this period did Unifor challenge the Policy (see pages 27-28 of the Award).

[43] Instead, the Arbitrator concluded, the permanence of the employee's removal referenced in Article 10 of the Policy was restricted by the requirement that following the removal an investigation was required as contemplated by the wording in Article 9. He noted the wording in Article 10 did not reference the notion of dismissal or discipline as a consequence of a positive drug or alcohol test (see pages 30-31 of the Award).

[44] In Mr. Pittman's circumstances the evidence revealed that the OIM, Mr. MacDonald, testified he wrote Mr. Pittman on February 3, 2021 informing him that a decision on discipline was being held in abeyance pending a medical assessment. This medical assessment occurred in March, 2021 and the assessor, Dr. Wael Shublaq, reported that Mr. Pittman did not meet the criteria for a substance disorder and that there were no safety concerns over him returning to work. Dr. Shublaq recommended testing every six months for two years to ensure work safety compliance.

[45] The Arbitrator found the evidence also disclosed that Mr. MacDonald did not see Dr. Shublaq's report, nor was he aware there were no safety concerns with Mr. Pittman returning to work. He concluded this failure on HPEO's part equated to a lack of a meaningful investigation prior to any disciplinary action being taken as required under Article 9 (see page 31 of the Award).

[46] Concluding that there was a conflict between the wording of Articles 9 and 10 of the Policy, the Arbitrator then held that while there was a technical breach of the alcohol and drug policy, any ambiguity in the wording of an employer-drafted policy should be resolved against the drafter. In this case, the breach did not warrant dismissal but did require consideration around deterrence of future activities. It was on this basis he set aside the dismissal and substituted a three-month suspension (see page 34 of the Award).

[47] As stated in *Vavilov* at paragraphs 125 to 126, the fact-finding process is the preserve of the decision-maker; as such, the reviewing court is forbidden from re-weighing the evidence. Only in "exceptional circumstances" should a reviewing court set aside findings of fact (*Girouard v. Canada (Attorney General)*, 2020 FCA 129, at para. 48).

[48] An important nuance to the expert evidence before the Arbitrator was that at the time Dr. Weber and Dr. Beckson wrote their reports, they did not know the frequency of Mr. Pittman's consumption of CBD oil. Once Dr. Weber was informed that Mr. Pittman consumed the product liberally up until December 20, 2019, he prepared a post-hearing report (at the employer's request). In this report he revised

his opinion that the chances of a positive drug test of 19 mg/ml was certainly much more plausible based on Mr. Pittman's scenario, adding that there were very few research studies that have investigated oral consumption of cannabis products.

Conclusion on Issue #1

[49] Having reviewed the evidence before the Arbitrator and the detailed reasons he provided in reaching his decision, I cannot find that he failed to account for the factual record and neglected material evidentiary inconsistencies. Instead, I find the record supports the Arbitrator's conclusion that Mr. Pittman's explanation for the positive test was a plausible one supported by expert opinion.

[50] Accordingly, I find the Arbitrator's reasons account for the factual record and provide a reasoned and discernable explanation for the outcome that is acceptable and defensible.

ISSUE #2

Question: Did the Arbitrator depart from the established jurisprudence that mandatory permanent removal is the agreed upon consequence following a breach of Article 10 of the Policy?

Answer: No. Mr. Pittman's circumstances provided the appropriate factual matrix for Unifor to advance its position regarding the Policy as outlined in its September 2018 correspondence to HPEO. This approach is in line with Unifor's position in Kean and in its position before the Arbitrator in this case. Accordingly, I find the outcome of the Award to be acceptable and defensible.

Position of HPEO

[51] HPEO argues that the wording contained in Article 10 that "the employer must permanently remove the individual from the HMDC platform or site and from HMDC work" circumscribes the discretion granted to an employer under Article 9.

[52] By not reading in this prohibition, the Arbitrator ignored his own decision in *Unifor, Local 2121 v. Hibernia Platform Employers' Organization*, (*Fitzgerald*) (November 18, 2014), Newfoundland and Labrador (Unreported Labour Arbitration Findings and Award). In this decision, the Arbitrator held that the consequences of a positive test would be permanent removal. In this case, he did not explain his reasons for departing from this precedent (see paras. 25-29 of the Originating Application).

Position of Unifor

[53] Unifor states this issue is the crux of HPEO's argument because it is where the parties fundamentally disagree. The Arbitrator did not depart from established authority. *Fitzgerald* did not concern the proportionality of the discipline, or whether an Arbitrator had jurisdiction under the collective agreement to substitute a lesser penalty. More importantly, there were no arguments advanced regarding the interpretations of Articles 9 and 10 of the Policy.

[54] Rather, the Arbitrator's decision aligns with existing precedents that the HPEO unilaterally continues to treat cannabis products as an illicit substance despite its legalization and it does so without the concurrence or agreement of the union. These precedents confirm that Unifor has consistently reserved the right to grieve the application of a zero-tolerance policy in the right factual circumstances.

[55] Citing *Hibernia Platform Employers' Organization v. Communications, Energy and Paperworkers Union (Unifor, Local 2121) (Carroll),* 2018 NLCA 45, Unifor argues that HPEO is making many of the same arguments from previous

decisions that our Court of Appeal have rejected. Firstly, that the wording of the Policy did not require it to conduct an investigation; secondly, that the arbitration decision amounted to an amendment to the collective agreement; and, finally, that the arbitrator did not have the remedial authority to set aside the dismissal and order reinstatement.

Applicable law and findings

[56] HPEO argues the Arbitrator ignored his own decision in *Fitzgerald* by departing from it without explaining that departure in his reasons, thereby making the outcome unacceptable and indefensible (see *Vavilov,* at para. 131).

[57] I accept Unifor's argument that *Fitzgerald* is distinguishable. The factual matrix in that case involved termination following two non-negative breathalyzer samples for alcohol. The Union's primary argument at arbitration was that there were no reasonable grounds to test Fitzgerald as the policy did not apply to the heliport. The panel noted the drug and alcohol policy purports to be zero tolerance, and the evidence disclosed Mr. Fitzgerald's breathalyzer result would not have permitted him to drive a motor vehicle safely, thus it presented a tangible safety risk on an isolated offshore platform.

[58] In *Fitzgerald,* Unifor did not seek lesser discipline as an option; rather, it sought an unconditional reinstatement on the basis the Policy did not apply to the footprint of the heliport. Consequently, I agree *Fitzgerald* did not preclude it from making the future argument surrounding the unreasonable application of the Policy by HPEO in the appropriate circumstances.

[59] In *Carroll,* HPEO argued Article 10 of the Policy specified the consequences for a violation and that the employer was compelled to terminate the employee's employment. In its reasons, the arbitration panel found the employer did not conduct a proper investigation following the incident on the helipad. It granted the grievance and reinstated the employee, notwithstanding the test result.

[60] On judicial review, McGrath, J. (as she then was) upheld the panel's decision, noting that the Policy did not expressly and clearly define all aspects of how it was to be applied. Consequently, it was not an error for the panel to consider common law principles when interpreting how it should be applied. On appeal, the Court found it was not an error for the arbitrator to have considered factors beyond the four corners of the Policy, particularly as it related to its application to a particular set of facts.

[61] Lastly, Unifor refers this Court to the arbitral award in *Unifor, Local 2121 and Hibernia Platform Employers' Organization (Kean), Re*, 2022 CarswellNfld 142, 2022 C.L.A.S. 785 (N.L. Arb.). In this case, the employee had a verbal altercation with a co-worker. Following the altercation both men submitted to a drug test and Kean tested positive for marijuana. In reasons provided by the Arbitrator, he found Kean to be insubordinate in that he refused to take accountability for his actions, noting his explanation of accidental consumption to be a feeble attempt to explain the test result. The arbitrator went on to find he would have upheld the dismissal for Kean's comments and insubordination alone.

[62] In *Kean*, the HPEO argued Unifor was estopped from arguing cannabis is not captured by the Policy because it had accepted the Employer's position following cannabis legalization. The arbitrator rejected the argument noting that on September 24, 2018, Unifor wrote to the HPEO advising it reserved the right to grieve the zero tolerance for use standard, and all other aspects of the revised Policy when an employer applied it to any worker it represented. Further, the arbitrator found the argument that nothing had changed following the legalization of cannabis unpersuasive. Instead, he held the "status quo" had changed with legalization of cannabis, and that if the HPEO intended to continue to treat cannabis as an "illicit" substance under the Policy, then it did so unilaterally.

Conclusion on Issue #2

[63] I share Unifor's view that the Arbitrator did not depart from established precedents in the area. In fact, his decision demonstrates the opposite. It is clear the Policy has been in existence over successive collective agreements. Over this period,

Unifor has challenged it in a number of cases. To suggest that the Arbitrator departed from established jurisprudence by not concluding that mandatory permanent removal is the agreed upon consequence following a breach of Article 10 is to ignore the evolution of the jurisprudential analysis as outlined in *Fitzgerald*, *Carroll* and *Kean.*

[64] In my view, Mr. Pittman's circumstances provided the appropriate factual matrix for Unifor to advance its position regarding the application of the Policy as outlined in its September 2018 correspondence to HPEO. This approach is in line with Unifor's position in *Kean* and in its position before the Arbitrator in this case. Accordingly, I find the outcome of the Award to be acceptable and defensible.

ISSUE #3

> *Question: Did the Arbitrator err by finding a conflict in the wording in Articles 9 and 10 and then applying the doctrine of contra proferentem?*
>
> *Answer: No. HPEO's suggestion that Unifor agreed to a blanket zero tolerance collective agreement provision is not a tenable or realistic interpretation of the intention of the parties. Accordingly, I find the Arbitrator did not commit a reviewable error by finding a conflict in the wording in Articles 9 and 10 of the Policy and his subsequent application of the doctrine of contra proferentem.*

Position of HPEO

[65] The Arbitrator erred by finding a conflict between Articles 9 and 10 of the Policy. Specifically, that the wording in Article 9, which states, "may result in disciplinary action up to and including termination" conflicted with the wording in Article 10, which states "if a worker tests positive on any alcohol or drug test required under this policy … the employer must permanently remove the individual from the HMDC platform or site and from HMDC work".

[66] Counsel for HPEO suggests this interpretational approach violates the powers of the Arbitrator under Article 15.4 of the Collective Agreement in that he did not have the power to "alter, modify, or amend any of its provisions". The wording in Article 9 is overly broad, whereas the wording in Article 10 is specific to use of alcohol and drugs. Therefore, the conclusion that Article 9 governs amounts to a "substantive modification of the terms of the collective agreement".

[67] Historically, the Policy's wording has survived several versions of collective agreements as well as multiple grievances and arbitrations. This interpretational approach has never been applied; therefore, the doctrine of *contra proferentem* does not apply. Before finding a conflict, adjudicators must attempt to reconcile the terms of a contract by interpreting one term as a qualification of another.

[68] The Arbitrator was required to resolve the apparent conflict by reading in an intention by the parties that the scope of the general terms used in Article 9 did not extend to the subject matter of the specific term used in Article 10 (see *Chandos Construction Ltd. v. Deloitte*, 2020 SCC 25, at para. 130).

[69] The application of *contra proferentem* is only permissible as a matter of last resort when all other rules of construction have failed to resolve an ambiguity. The maxim has been referred to as a "very weak canon of construction" (see *Capital Markets Technologies, Inc. v. Prince Edward Island*, 2020 PECA 12, at para. 165).

[70] Instead of relying on *contra proferentem* as a measure of last resort to resolve the perceived ambiguity, the Arbitrator's first attempt at resolving it was by applying *contra proferentem*, making it a reversible error.

Position of Unifor

[71] Unifor's position is clear. Article 9 of the Policy is eminently reasonable and accords with the principle of just cause and the provisions of the collective

agreement; therefore, the Arbitrator was not only reasonable, but correct, to find a conflict or ambiguity between Articles 9 and 10.

[72] The wording of Article 9 recognizes the employer's legal requirement to conduct a reasonable investigation based on the principles of just cause. The wording in Article 10 expresses the unilateral view of the employer that it will proactively prevent employee behavior that is contrary to its workplace expectations through a zero tolerance approach. Discipline flowing from a failed drug test would ostensibly fit under both articles as an alleged policy violation.

Applicable law and findings

[73] In *Capital Markets Technologies*, the Court held the *contra proferentem* rule should not be used to construe an agreement against its drafter unless it is clear that the non-drafting party had no meaningful opportunity to participate in the negotiation of the instrument. Its use is contingent on an absence of meaningful negotiating ability (see para. 166).

[74] Recently, in *Long Harbour Employers' Association Inc. v. Resource Development Trades Council of Newfoundland and Labrador*, 2023 NLCA 24, our Court of Appeal spoke to the *Vavilov* hallmarks of reasonableness in the context of labour arbitration decisions. It suggested that reviewing courts should be sensitive to the special circumstances that arise in these relationships and ensure that a flexible, not rigid, approach is taken when reviewing decisions made in this context (see para. 49). This would include the use of equitable and common law principles (see paras. 95-100).

[75] Arbitrators have long applied the doctrine of *contra proferentem* to collective agreements, particularly where the draftsperson seeks to rely on an interpretation that would appear to exempt it from other contractual commitments (see *Medis Health v. Teamsters Local 424*, 2000 CarswellOnt 5991, [2000] O.L.A.A. No. 753, (Ont. Arb.), at paras. 23-25).

[76] As observed by the Court in *Long Harbour*, part of the reason labour arbitrators are entitled to deference in the application of equitable and common law doctrines is due to the need to be alert to the long-term interests of both the employee and the employer.

[77] This approach to the discipline imposed in this case is responsive to the interests of the parties as there may be cases where termination for a first offence is appropriate, and cases where a lesser sanction is more just and reasonable. Adherence to the principle of just cause is more compatible with ensuring fair and rational outcomes than a strict application of zero tolerance. The wording used in Article 9 of the Policy is responsive to the balancing of the parties' rights under the collective agreement, including Article 15.09, and the principle of just cause.

[78] Mr. Pittman's grievance was not one which challenged the existence of the Policy or the employer's right to have a comprehensive system of drug and alcohol testing. Rather it was an individual grievance which challenged the application of the Policy to specific facts.

[79] In *Carroll*, the Court found the Policy was not one which was clearly negotiated to govern all aspects of how it was to be applied; therefore, it was permissible for the arbitrator to defer to common law principles to fill in the gaps.

[80] In *Kean*, the Arbitrator commented that continued treatment of cannabis as an illicit product is a unilateral decision by the employer that could invite grievances, noting that in September 2018 Unifor issued a very clear warning to HPEO that it intended to challenge the application of zero tolerance policy to bargaining unit members on a case-by-case basis.

[81] Article 1 of the Policy contains a preamble that states the employer is concerned over the use of illicit drugs and the inappropriate use of legal substances which can have serious adverse effects on safety in the workplace. Article 2 sets out the Policy's objective to minimize the risk of "impaired performance". Article 5 (1) contains various work rules, relevant to Article 10. Work rules (a) through (f)

reference illicit drugs and alcohol or substance abuse. Work rule (g) is specifically applicable to workers who are unfit (i.e. impaired) due to the legitimate use of prescription and over-the-counter medications.

[82] During the arbitration hearing, Mr. MacDonald testified the word "illicit" meant "illegal". Article 5(5) of the Policy states a positive test result constitutes a violation of the Policy. This was the Article relied on in the letter of dismissal sent to Mr. Pittman.

[83] However, Article 5(d) of the Collective Agreement (Management Rights) states that management can make "*rules and regulations to be observed by employees provided the rules and regulations do not conflict with the terms of this agreement".* Subsection (c) of the same Article limits management's right to discipline, suspend, or terminate provided it is "*for just cause*".

[84] Article 15.9 of the Collective Agreement explicitly confers upon an arbitrator the authority to substitute lesser forms of discipline where the facts deem it to be just and reasonable. Article 5.5 of the Policy states a positive drug test is "*a violation of the policy*" whereas Article 9 states *"a violation of the policy may result in disciplinary action".*

Conclusion on Issue #3

[85] I accept Unifor's argument that the Arbitrator was reasonable in determining there was a conflict or an ambiguity between the wording used in Articles 9 and 10 of the Policy.

[86] One (Article 9) is framed in terms that require the employer to conduct a reasonable investigation in accordance with the principle of just cause; whereas, the other (Article 10) is an expression of the employer's zero tolerance towards drug and alcohol use on the work site. Any discipline flowing from a failed drug test would fit under both articles of the Policy as an alleged policy violation.

[87] HPEO's suggestion that Unifor agreed to a blanket zero tolerance collective agreement provision is not a tenable or realistic interpretation of the intention of the parties. Accordingly, I find the Arbitrator did not commit a reviewable error by finding a conflict in the wording in Articles 9 and 10 of the Policy and applying the doctrine of *contra proferentem*.

ISSUE #4

> *Question: Did the Arbitrator err by requiring HPEO to hold an investigation following a positive test and finding that the employer did not conduct one?*
>
> *Answer: No. I conclude that the Arbitrator's interpretation of Article 9 of the Policy and its application to the facts was reasonable and not in error (i.e. the requirement to conduct an investigation as a prerequisite to discipline).*

Position of HPEO

[88] The Arbitrator erred by using the wording in Article 9 to require an investigation under Article 10 where no such requirement exists. Additionally, HPEO argues that there could be no other investigations carried out as Mr. Pittman's positive test was confirmed independently by a medical review officer and he underwent a dependency assessment (see paras. 36-39 of the Originating Application).

Position of Unifor

[89] Unifor argues that discipline must be informed in order to be just, fair, or reasonable. In Mr. Pittman's case the person making the decision on discipline, Mr. MacDonald, disregarded the results of an investigation he had arranged.

[90] The Arbitrator was attuned to this disconnect in finding the employer had a duty not only to conduct an investigation, but to review it as well. This failure on their part rendered the investigation meaningless, because the evidence disclosed it was never brought to the attention of Mr. MacDonald.

Applicable law and findings

[91] HPEO advances the argument that the Arbitrator made a reviewable error in his interpretation of the Policy that amounted to an amendment or modification of the Collective Agreement contrary to the prohibition in Article 15.4.

[92] The Court of Appeal in *Carroll* (see paras. 19-20) has previously rejected this line of argument. Contrary to counsel for HPEO's assertion, I conclude that arbitrators are frequently requested to interpret workplace policies and collective agreements in the context of particular fact circumstances such as Mr. Pittman's.

[93] Here, the OIM, Mr. MacDonald, was the person who told Mr. Pittman he had to attend the assessment, was the person who told Mr. Pittman the decision on discipline would be held in abeyance pending the assessment result, and was the person who made the ultimate decision to terminate Mr. Pittman's employment.

[94] Yet the evidence at the hearing disclosed Mr. MacDonald terminated Mr. Pittman's employment without reviewing Dr. Shublaq's assessment. This report found Mr. Pittman did not have a substance abuse disorder and was safe to return to work. Most importantly, Dr. Shublaq did not foresee any safety issues with Mr. Pittman's return to the platform and noted Mr. Pittman was willing to agree to a trial period of random drug and alcohol testing.

Conclusion on Issue #4

[95] The Arbitrator's interpretation of Article 9 of the Policy and its application to the facts was reasonable and not in error (i.e. the requirement to conduct an investigation as a prerequisite to discipline). In Mr. Pittman's circumstances, the requirement was rendered meaningless because Dr. Shublaq's report was not brought to the attention of Mr. MacDonald before making the decision to terminate Mr. Pittman's employment.

[96] Accordingly, I find the Arbitrator did not err by concluding that HPEO was required to hold a meaningful investigation. This conclusion follows a reasonable chain of analysis.

ISSUE #5

Question: Did the Arbitrator err in granting a remedy unavailable under the collective agreement?

Answer: No. The Arbitrator did not err in relying on Article 15.9 of the Collective Agreement to substitute the employer's decision to terminate Mr. Pittman with the lesser sanction of a three-month suspension

Position of HPEO

[97] The Arbitrator relied on Article 15.9 of the Collective Agreement to vary HPEO's termination of Mr. Pittman with a three-month suspension.

[98] Section 88(2) of the *Act* states that an arbitrator cannot modify a penalty where the penalty is prescribed in the applicable collective agreement. Here, Article 10 of

the Policy states that the employer must permanently remove the employee following a positive drug test (see paras. 40-43 of the Originating Application).

Position of Unifor

[99] Article 15.9 of the Collective Agreement explicitly confers upon an arbitrator or arbitration board the power to substitute the discipline or discharge of an employee with any other penalty that the arbitrator or arbitration board deems to be just and reasonable.

[100] This is consistent with the wording in Article 5 of the Collective Agreement, which permits an employer to only discipline for cause, and Article 9 of the Policy, which references that the appropriate discipline depends on the nature of the policy violation and the circumstances surrounding it.

Applicable law and findings

[101] Section 88(2) of the *Act* contains a statutory limitation on an arbitrator's power to modify employer discipline when the penalty is prescribed in the collective agreement. Article 15.9 of the Collective Agreement presents an arbitrator with the power to substitute the termination of an employee with another penalty that is just and reasonable.

[102] The evidence presented at the hearing established that the OIM Breton MacDonald prepared notes dated February 8, 2021, following a telephone discussion with Mr. Pittman on February 2, 2021. These notes indicate that he made no comment to Mr. Pittman about reinstatement or continued employment on the platform.

[103] I agree with the position advanced by Unifor that, notwithstanding the wording in Article 10 of the Policy, this evidence would support the inference that dismissal was not the only outcome being considered following Mr. Pittman's positive test. This position is also consistent with the requirement that Mr. Pittman undergo an assessment by Dr. Shublaq as contemplated in Article 9 of the Policy.

[104] In *Carroll, supra,* at paragraph 59, the Court noted with approval the following statement from *Imperial Oil Ltd. v. C.E.P., Local 900* (2006), 157 L.A.C. (4th) 225, 88 C.L.A.S. 273 (Ont. Arb.) that an extraordinary incursion into the rights of employees must be expressly and clearly negotiated (see para. 53). Later at paragraph 60, the Court observed the wording of the Policy did not relieve the employer of the obligation to complete a thorough investigation because a positive test may not prove that substance use was the "root cause".

[105] Like the Court in *Carroll,* I conclude the wording contained in Article 9 suggests the exercise of managerial discretion in determining how and when the Policy should be invoked is part of an assessment and investigation. The arbitral award in *Kean* further supports this view, stating that HPEO's continued treatment of cannabis products as illicit is a unilateral imposed policy. When placed in the context of these facts and this jurisprudence Article 15.9 of the collective agreement unambiguously permits arbitral review of all forms of discipline, as there is no stipulated penalty for a failed drug test.

Conclusion on Issue #5

[106] I adopt the position advanced by Unifor that any employee discipline must be reasonable, fair, and proportionate to the gravity of the offense. This principle is rooted in the idea that any discipline must be anchored in the concept of just cause (see *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper Ltd.*).

[107] The importance of safety in the offshore context is one factor in the analysis of just cause, but it is not determinative of the issue. There are various factors which

an arbitrator may consider when assessing the proportionality of discipline under employer drug and alcohol policies.

[108] The Arbitrator's substitution of a three-month suspension is reasonable and is in the range of appropriately substituted penalties in safety arbitral awards (see *Council of Construct[ion Trades Inc. v. WWRP Construction Employers' Association*, (February 15, 2021), Newfoundland and Labrador (Unreported Labour Arbitration Findings and Award).

[109] Accordingly, I find that the Arbitrator did not err in substituting a three-month suspension in place of the employer's decision to terminate.

ISSUE # 6

> *Question: Does the Arbitrator's award meet the Vavilov threshold; namely, does it contain the requisite degree of justification, transparency and intelligibility and not any internal inconsistencies or logical shortcomings that materially influenced the final decision?*
>
> *Answer: Yes. A reasonableness review is meant to ensure courts intervene only where it is truly necessary to safeguard the legality, rationality and fairness of the process.*

Position of HPEO

[110] Counsel for HPEO says the Arbitrator's reasons do not meet the *Vavilov* threshold of "reasonableness" because he found that the employer was required to investigate the failed drug test before imposing discipline and did not.

[111] Despite making this finding, the Arbitrator then went on to make the conclusion that Pittman breached the Policy, and upheld the requirement of discipline following a breach but imposed a lesser sanction.

[112] Finally, the Arbitrator failed to assess Pittman's credibility in the face of expert opinion that his explanation was not scientifically plausible (see paras. 44-47 of the Originating Application).

Position of Unifor

[113] Counsel for Unifor contends the Arbitrator's reasons meet the "reasonableness" threshold because he found the Employer did not conduct a proper investigation as required under Article 9 of the Policy, but instead determined Mr. Pittman engaged in conduct warranting discipline.

[114] Specifically, he found that Mr. Pittman consumed the cannabis oil without proper medical supervision. This demonstrates that the Arbitrator was alive to the concerns of both parties, including safety, making it a nuanced and demonstrably balanced decision.

Applicable law and findings

[115] HPEO's argument relies on the wording of the second paragraph in Article 10 of the Policy, which stipulates mandatory removal for employees who violate Article 5 - Work Rules.

[116] However, Article 10 also contains a third paragraph that makes an exception to the zero tolerance principle for employees who violate Work Rules. Article 5(1)(g) states that a worker who legitimately uses prescription or over-the-counter medications may be considered for return to work on the HMDC platform.

[117] The CBD oil used by Mr. Pittman was an over-the-counter medication that he was required to list on the CAPP form and he did not. I conclude that it was an entirely reasonable interpretation by the Arbitrator to find Article 10 suggests that such situations should be exempt from zero tolerance and subjected to an investigation regarding a return to work (i.e. an investigation under Article 9). While the wording used in Article 10 speaks to a discretionary determination on the part of the employer, that discretion must be exercised reasonably based on the nature of the Policy violation and the circumstances surrounding it as set out in Article 9.

[118] HPEO asserts the Award has a significant impact on its ability to maintain a safe workplace based on the need to promote offshore safety. Unifor agrees with this objective but stipulates that promoting safety is not mutually exclusive with the Arbitrator's jurisdiction to review the proportionality of discipline under Article 15.9. The substitution of a three-month suspension, without pay, is a serious penalty for someone who consumed CBD oil for relief of medical symptoms and failed to report it on the CAPP form.

[119] Dr. Shublaq offered one alternative in his assessment report; namely, periodic drug testing, but unfortunately, this alternative was not explored as the evidence disclosed that the employer did not review the assessment. The Arbitrator found overall, the evidence demonstrated that Mr. Pittman worked for the better part of a year with abdominal cramping and bleeding, and tried several medications before obtaining a cannabis clinic referral from his doctor. All of these events occurred during the pandemic when the availability of conventional medical services was disrupted. Mr. Pittman's circumstances were unlike a case of late-night drinking (*Fitzgerald*) or edibles consumed at a party (*Kean*).

Conclusion on Issue #6

[120] A reasonableness review is meant to ensure courts intervene only where it is truly necessary to safeguard the legality, rationality and fairness of the process (see *Vavilov*, at para. 13). As part of a judicial review of an arbitral award, the Court must look at the potential impact of the decision on the individual(s) to whom it applies (see *Vavilov*, at para. 133). The substitution of a lengthy three-month suspension by

the Arbitrator strikes the appropriate balance between safety and just cause discipline.

[121] Accordingly, I find no error in the Arbitrator's decision to substitute a lesser penalty for Mr. Pittman's breach of Article 10. The decision meets the requisite degree of justification, transparency and intelligibility required under *Vavilov*. I am not able to find any internal inconsistencies or logical shortcomings that materially influenced the award.

DISPOSITION

[122] For the reasons provided above, the application is dismissed. Unifor is entitled to its costs on a Column III basis.

PETER N. BROWNE
Justice