Federal Court Cour fédérale

Date: ~~20200214~~ 20221117

Docket: T-449-18

Citation: 2020 FC 255

Ottawa, Ontario, ~~February 14, 2020~~ November 17, 2022

PRESENT: Mr. Justice Pentney

BETWEEN:

MUDJATIK THYSSEN MINING JOINT VENTURE

Applicant

and

DALLAS A. BILLETTE and KELLY F.A. CAMPBELL

Respondents

AMENDED JUDGMENT AND REASONS

I. Introduction

[1] Mudjatik Thyssen Mining Joint Venture (MTM) seeks to overturn an adjudicator's decision that upheld the complaints of unjust dismissal of two employees, Dallas A. Billette (Billette) and Kelly F.A. Campbell (Campbell) under the Canada Labour Code, RSC 1985, c L-2 [the Code].

[2] MTM fired Billette and Campbell because they refused to take a drug test when asked to do so by management. MTM claims it had just cause to dismiss the employees, because of the safety-sensitive nature of their work in underground mining. MTM therefore asks that the adjudicator's ruling that the employees had been unjustly dismissed be set aside. It claims that the decision does not follow the arbitral consensus on what constitutes reasonable cause for drug testing, and that the adjudicator's approach is unreasonable.

[3] In the alternative, MTM seeks to vary the remedy that was awarded, by reducing the amount of lost wages owed to the two employees and by quashing the order to have Cameco Corporation (Cameco), the owner of the mine where the employees worked, restore their camp privileges.

[4] For the reasons that follow, I am dismissing this application for judicial review in relation to the unjust dismissal and lost wages questions, and granting it in respect of the order regarding Cameco camp privileges.

II. Context

[5] Before addressing the specific incidents, which gave rise to the dismissal of Billette and Campbell, I will outline the context for MTM operations at the McArthur River mine, and then describe the work histories of the two employees.

(i) *MTM and McArthur River Mine*

[6] MTM is an underground mining construction company, which has operated since 1997. It is a joint venture between Thyssen Mining and several First Nation and Metis groups. It has

projects in various locations across Northern Saskatchewan, including the McArthur River Mine, which is a uranium mine owned and operated by Cameco. MTM was contracted by Cameco to perform work at McArthur River on July 1, 2014.

[7] The McArthur River Mine is in an isolated location, so MTM's employees were flown in and resided at the mine site for their assigned work schedule. They would then fly out for their off-duty periods. All employees working at the mine site lived in the quarters provided by Cameco.

[8] Underground mining is by definition a dangerous occupation. Work by underground contractors such as MTM involves the use of heavy equipment and explosives in an underground "hard rock" mine. This means that their employees work in tunnels or larger areas drilled and blasted into the rock, usually in total darkness, and generally either alone or in small groups. It is not a typical industrial setting, and it is not possible to observe or supervise all of these employees on a regular basis during their work shift. Rather, the usual practice would be for a shift supervisor to see the employees at the beginning of the shift to give them their assigned work for the day, and then often not to see them again until the end of the shift. Supervisors would monitor the work being done, but would generally not be in a position to observe all of the miners throughout their shift.

[9] As will be discussed in more detail below, Cameco has a strict alcohol and substance abuse policy, and it requires contractors who work at its mine site, such as MTM, to have policies that are at least as stringent as their own in regard to their employees. The Cameco policy forbids any drug use on the mine site, and prohibits employees from being impaired by drugs or alcohol while on duty. The Cameco policy includes drug testing for safety-sensitive

positions “whenever there are reasonable grounds to believe that the actions, appearance or conduct of an individual while on duty are indicative of the use of Alcohol or other Substances”. The policy sets out the procedures to be followed when making the decision to require a drug test. It also makes clear that any violation of the policy will be grounds for discipline up to and including termination for cause.

[10] MTM adopted its own Substance Abuse Policy, which also forbids any possession or use of banned substances while at work, and includes reasonable suspicion testing “(w)hen there are reasonable grounds to suspect an employee has reported to work or is working under the influence of illicit drugs, medication or alcohol…”. The Policy also indicates that “(r)easonable suspicion testing is based upon the employee’s conduct or behaviour as observed by a supervisor who is trained in the detection of probable use of drugs or alcohol” (at article 1.5).

[11] It should be noted that as of January 31, 2018, Cameco had suspended production at the McArthur River Mine, and there were no MTM employees still working at that site.

(ii) *The Respondents’ Work Histories*

[12] The Respondent Campbell worked for MTM between April 2011 and June 2015, and was rehired on November 24, 2015. He had worked in a variety of progressively more skilled jobs throughout this period, and from May 1, 2016, until his dismissal he held the position of Miner I (having previously worked at the lower levels of Miner III and Miner II). He was earning $25.00 per hour plus a $25.00 per hour bonus, and worked 12-hour shifts on a 14 days on and 14 days off schedule.

[13] The Respondent Billette worked for MTM from September 2006 until January 2007, at which time he was dismissed. He was rehired on February 1, 2010, as a Miner I, and in February 2013, he changed positions to a Bolter Operator, which was the position he held until his dismissal. He earned $35.00 per hour plus a $25.00 per hour bonus.

[14] The jobs that the Respondents held are safety sensitive positions that demand skill and experience. A Miner I would regularly use explosives to blast the rock being mined, and a Bolter Operator would use heavy equipment to install bolts into the rock either to stabilize it, or to hold up the metal screen that prevents smaller pieces from shearing off and injuring workers.

(iii) *The Events that resulted in the dismissals*

[15] On a night shift that started at 6:30 pm on February 22, 2017, and ended at 6:30 a.m. the following morning, the Respondents were part of a 10-person crew under the supervision of Mr. Grandmaison. At the end of the shift, Mr. Grandmaison asked one of the crew how the shift had gone, and the co-worker complained about Campbell, saying, “some guys don’t want to work together as a team”. The co-worker said he did not want to continue working with Campbell. Mr. MacPhee, a Project Superintendent and Mr. Grandmaison’s boss overheard part of this conversation. Mr. MacPhee told Mr. Grandmaison that he should find out what was going on between the employees.

[16] Over the next shift that began on the evening of February 23, 2017, Mr. Grandmaison talked to other co-workers about Campbell, and heard a variety of other complaints. One of the co-workers said that “you guys know what is going on and you guys should fix it”. Mr. Grandmaison thought they were talking about drug use, but there were no specific allegations

made in that regard. He thought that he either needed one of the co-workers to make a written statement, or to catch the Respondents in the act of using drugs before he could ask them to take a drug test. He did not think that complaints about their attitude or lack of teamwork were sufficient grounds to take further action.

[17] On February 24, 2017, Mr. MacPhee asked the co-worker who had first complained about Campbell for a written statement. The co-worker wrote that he had worked the night shift on February 22-23, 2017 with both Campbell and Billette. They were working together installing ventilation ducts. He stated that the Respondents "were both smoking drugs all morning it goes on a daily bases [sic]". During his testimony before the adjudicator, the co-worker elaborated on his written statement. He indicated that he had observed both Respondents smoking marijuana in plastic tubes several times during the shift. He said he knew it was marijuana because he recognized the smell. He stated that he decided to give the written statement because the Respondents were smoking drugs openly and he thought it was getting out of control.

[18] Mr. MacPhee consulted with his superiors and some Cameco personnel, and they decided that based on the written statement they had reasonable cause to ask both Respondents to take a drug test and to search their rooms and lockers.

[19] On the morning of February 24, 2017, both Respondents were awoken and their rooms were searched. No drugs or anything relating to drug use were found in either of their rooms. Similarly, searches of their work lockers did not reveal anything related to drug possession or use.

[20] Mr. MacPhee then told both men they would have to provide a sample for a urine drug test. He told them the reasons was “there’s suspicion” but did not provide further details. He indicated to them that refusing the drug test would result in their dismissal.

[21] Both Respondents denied taking drugs before or during the shift. They refused the drug test, because they felt that the employer did not have reasonable cause for testing, and they believed they were being unfairly singled out. The Respondents also stated they were concerned that they would test positive because they had used drugs while they were on leave, before they returned to begin their work assignments on February 20, 2017. Both Respondents were terminated by MTM for refusal to provide a sample for drug testing. Cameco also revoked their camp privileges.

[22] On March 17, 2017, Billette filed a complaint of unjust dismissal with Employment and Social Development Canada. Campbell filed his complaint on March 21, 2017. MTM denied the allegation, and the complaints were referred to adjudication. They were heard together, at the request of all of the parties.

III. The Decision Under Review

[23] The adjudicator began her decision by reviewing the history outlined above, including the nature of the work done by MTM, the Respondents’ employment histories, the incidents that gave rise to the demand for the drug tests, and the corresponding refusal by the Respondents. She then noted the issues were whether each of the Respondents had been unjustly dismissed, and if so, what was the appropriate remedy.

[24] After summarizing the arguments of the parties, the adjudicator turned to an analysis of each claim of unjust dismissal. She noted that the employer claimed just cause for dismissal based on the Respondents' violation of the company's rules, in particular the Substance Abuse Policy. In addition, MTM claimed that the refusal to comply with the demand for a drug test amounted to insubordination.

[25] The adjudicator found that the MTM Substance Abuse Policy regarding drug testing is reasonable, because it applies to a dangerous workplace and only permits testing where there are reasonable grounds to suspect an employee is impaired by drugs or alcohol. This complies with the requirements set out in leading cases such as *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper Ltd.*, 2013 SCC 34 [*Irving Pulp & Paper*], and *Entrop v Imperial Oil Ltd.* (2000), 50 O.R. (3d) 18 (Ont C.A.) [*Entrop*].

[26] The question for the adjudicator in this case was whether there were reasonable grounds for MTM to suspect that the Respondents had reported to work or were working under the influence of illicit drugs.

[27] The adjudicator noted that both case-law and the MTM and Cameco policies required that testing be based on observations of the employee's conduct on the job. The core of the adjudicator's analysis on this point is set out in the following passages:

> What both the case law and the actual MTM Substance Policy emphasize is that reasonable cause is the direct observation of an employee by a supervisor (and in MTM's case, a *trained* supervisor) that lead the supervisor to believe that the employee was working while impaired due to an illicit drug.
>
> …

> Neither the case law nor the MTM Substance Abuse Policy say that an uncorroborated statement by a co-worker made 24 hours after alleged drug use is reasonable cause to suspect drug impairment while on duty.
>
> What is missing is any observation of [the Respondents'] alleged drug impairment by a supervisor, particularly a trained supervisor, made on the Feb. 22-23, 2017 shift. This is despite the fact that [the] supervisor saw [them] at the beginning and end of this shift and was available to make observations of [them] during that shift and the shift the next day.

[28] In addition, the adjudicator noted that the supervisor and other management personnel did not follow the procedure set out in the MTM Substance Abuse Policy when they conducted the drug test. They did not conduct the required interview, or provide the employees with an opportunity to explain the situation before ordering them to take the drug test.

[29] Based on this analysis, the adjudicator concluded that MTM had failed to establish reasonable suspicion and therefore the order to take the drug test was not valid. The employees had been within their rights to refuse to take the test and their refusal did not amount to insubordination. The adjudicator upheld the Respondents' complaints of unjust dismissal.

[30] Turning to the appropriate remedy, the adjudicator found that the Respondents were entitled to any income they would have earned from the date of their dismissal to January 31, 2018 (the date of the closure of the McArthur River Mine), less any income they earned from other sources. The adjudicator found that both Respondents had made reasonable efforts to mitigate their losses by looking for other employment, and taking into account the salary they had earned following their dismissal, she awarded Billette the sum of $22,463.55 (less any deductions required by law). The adjudicator awarded Campbell exactly the same amount but, at

the hearing before me, the Applicant acknowledged that this was an error, and that Campbell should have been awarded $28,947.19 (less any deductions required by law).

[31] In addition, the adjudicator ordered both Respondents be reinstated to the positions they each had been fired from, and that any layoff and privileges they would have had had they been working for MTM when the operation was shut down also be reinstated. Finally, the adjudicator ordered MTM mining to have Cameco camp privileges restored to the Respondents.

[32] MTM seeks judicial review of this decision.

IV. Issues and Standard of Review

[33] There are three issues in this case:

i. Did the adjudicator err in finding unjust dismissal?

ii. Did the adjudicator err in finding that the Respondents made reasonable efforts to mitigate their losses?

iii. Did the adjudicator err in making an order that MTM require Cameco to restore camp privileges to the Respondents?

[34] MTM submitted that the first two issues are to be reviewed on a standard of reasonableness, while the third attracts the standard of correctness because it involves a question of jurisdiction. When this case was argued, the leading authority on standard of review and reasonableness was *Dunsmuir v New Brunswick*, 2008 SCC 9, since then the Supreme Court of Canada has reviewed and updated the framework that applies, in *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]; *Bell Canada v Canada (Attorney General)*, 2019 SCC 66, and *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67

[*Canada Post*]. In view of paragraph 144 of *Vavilov*, I see no reason on the facts of this case to request additional submissions from the parties on either the appropriate standard or the application of that standard. As stated in *Canada Post* at paragraph 24, under both frameworks the result in this case would be the same.

[35] In *Vavilov*, the SCC ruled that there is a presumption that the standard of review is reasonableness, even for most questions of jurisdiction (at paras 23, 63-68). There are three exceptions to this presumption, but none apply here. This is consistent with the recent trend in jurisprudence on this question (see *Canada (Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31).

[36] In *Canada Post*, the SCC applied the *Vavilov* framework to judicial review of a decision of a health and safety officer pursuant to the *Code* and concluded that the reasonableness standard applied. In *Bank of Montreal v Li*, 2020 FCA 22, the Federal Court of Appeal came to a similar conclusion in relation to an appeal from a judicial review of an adjudicator's decision under the *Code*.

[37] Therefore, in this case, the standard of review that applies to all of the issues is reasonableness. In *Canada Post* the Supreme Court of Canada described the attributes of a reasonable decision under the *Vavilov* framework:

> [31] A reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov,* at para. 85). Accordingly, when conducting reasonableness review "[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*, at para. 48).

> The reasons should be read holistically and contextually in order to understand "the basis on which a decision was made" (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).
>
> [32] A reviewing court should consider whether the decision as a whole is reasonable: "what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov*, at para. 90). The reviewing court must ask "whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, at para. 99, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).

V. Analysis

(i) *Did the adjudicator err in finding unjust dismissal?*

(1) MTM's submissions

[38] The crux of the Applicant's argument on this question is that the adjudicator erred by requiring direct observation of drug use by a supervisor:

> The Adjudicator concluded that to have reasonable cause to test, when an employee is directly observed using drugs while on duty, that observance must be by a supervisor. However, there is nothing in the MTM Substance Abuse Policy, the Cameco Drug Policies or the law which supports this holding.

[39] The Applicant advances several arguments. Regarding its own Policy, it first submits that the adjudicator erred by parsing the words of the Policy and adopting an overly literal interpretation, without sufficient regard to the context or operational realities. Second, MTM argues that the wording of the Policy should be interpreted in a more flexible manner.

[40] MTM submits that the Policy should be interpreted in a common sense way. The key sentence in the Policy that the adjudicator relied upon states: “Reasonable suspicion testing is based upon the employee’s conduct or behaviour as observed by a supervisor who is trained in the detection of probable use of drugs or alcohol”. MTM argues that this should be read as though there is a comma after the word “conduct” – so testing would be permitted in two circumstances: based upon the employee’s conduct, or based upon the employee’s behaviour as observed by a trained supervisor.

[41] In support of its argument in favour of a more flexible interpretation, MTM points to next sentence in the same provision, which states: “Circumstances that may lead to reasonable suspicion testing include the following…”. This wording makes clear that what follows are examples of circumstances which may form the basis of reasonable cause to test, rather than a closed list. This is consistent with the purpose of the Policy, which is to give guidance to employees on the types of situations in which drug testing may be demanded, rather than to set out an exhaustive list. In light of this, MTM argues that the adjudicator’s interpretation is not reasonable, because it would render the Policy unworkable in the context of an underground mining operation.

[42] Further, MTM argues that it was bound by the terms of the Master Construction Contract it had with Cameco to enforce the Cameco policy, in addition to adopting its own Policy which had to be “no less stringent than Cameco’s…”. The Cameco policy does not require supervisor observation of drug use or impairment.

[43] MTM also points to an arbitral consensus on what constitutes reasonable cause for drug testing in safety-sensitive positions, and notes that arbitrators have upheld dismissals based on

direct observation of drug use on the job by another employee: *Canadian National Railway Company v United Steel Workers of America, Local 2004*, 2007 CarswellNat 6559 (Can ROA). The Applicant also argues that there is no principled basis to adopt a requirement that direct observation of actual drug use must be by a supervisor.

[44] MTM submits that the adjudicator erred by failing to recognize that it is under a statutory duty to safeguard the health and well-being of its employees, and to take all reasonable steps to prevent an employee from working in a mine if that employee is impaired by alcohol, drugs or other substances. Safety and security are paramount considerations in underground mines, as confirmed by the jurisprudence: *Noranda Minerals Inc. v Canadian Union of Base Metal Workers* (1995), 49 LAC (4^{th}) 46 at para 30.

[45] The Applicant points to leading decisions such as *Entrop* and *Irving Pulp & Paper*, which have established that an employer can require drug or alcohol testing of employees who work in safety-sensitive positions where there is reasonable cause to suspect the employee was impaired while on duty. In this case, the Respondents' actual drug use on the job was observed and reported by a co-worker. This, combined with other accounts of their drug use, established reasonable cause to test. In safety sensitive environments, a degree of deference is owed to the judgment of the employer, if it can demonstrate that it acted in good faith: *Canadian National Railway and CAW, Local* 100, *Re*, (2013) 230 LAC (4^{th}) 148 at para 14.

[46] Based on this, the Applicant submits that the adjudicator erred both in her interpretation of the Policy, and in finding that no reasonable cause for testing existed in the absence of direct supervisor observation of drug use or impairment. Therefore the finding of unjust dismissal should be upheld, both for breach of the Policy and for insubordination.

(2) Respondents' Submissions

[47] The Respondents argue that the adjudicator's decision is grounded in the law and the facts, and should not be overturned, in particular because this is an application for judicial review and not a *de novo* hearing on the merits.

[48] The Respondents do not contest the finding that they had been made aware of the Cameco policy. However, they point out that the form they signed acknowledged that they had read and understood the MTM Policy, and stated that the MTM Policy constituted a term and condition of their employment and that any breach might result in discipline up to and including discharge for cause. This form did not mention Cameco's policy, or indicate that it was also a term and condition of their employment. They submit, therefore, that the only policy that bound them was the MTM Policy.

[49] The Respondents note that the Master Contract between Cameco and MTM required MTM to have an alcohol and drug program that "is no less stringent than Cameco's". This is consistent with Cameco's consistently expressed desire to go beyond the legal minimum requirements in pursuit of a safe workplace. They argue that the MTM Policy was more stringent than the Cameco policy because it required direct observation of an employee by a trained supervisor for the employer to have reasonable cause to demand a drug or alcohol test. This is what the MTM Policy demands, and without actual observation by a trained supervisor, the company cannot have reasonable grounds for drug testing. If this was too restrictive for MTM, it could have amended its Policy.

[50] Noting that the reasonableness of the MTM Policy itself was not directly in issue, and that the adjudicator specifically found that the drug testing Policy met the reasonableness test as set out in the jurisprudence, the Respondents submit that the adjudicator was correct to find that the only question before her was whether MTM had demonstrated it had reasonable grounds to demand a drug test. They argue that the adjudicator's decision is based on the evidence, and that it simply required the employer to follow the specific wording in their own Policy. Having failed to do that, the employer cannot now argue that the adjudicator's decision is unreasonable.

[51] The Respondents argue that the arbitral cases cited by the Applicant on reasonable cause testing can be distinguished on their facts, because these decisions involve testing following incidents on the job, and in this case, there were no alleged incidents relating to the Respondents.

[52] In addition, the Respondents submit that MTM's arguments about insubordination must also fail, because the adjudicator properly considered the safety-sensitive nature of the job and the legislative duties imposed on the employer. The Respondents submit that the adjudicator's decision is consistent with the relevant jurisprudence and the decisions relied on by the Applicant can be distinguished on their facts.

[53] The Respondents contend that the employer's failure to follow their own policy is fatal to their argument that the Respondents wilfully disobeyed a valid order, and therefore the adjudicator's findings on insubordination should not be disturbed.

(3) Discussion

[54] Drug testing in the workplace has been the subject of many decisions, and the parties largely agree with the adjudicator about the leading authorities, including *Irving Pulp & Paper*

and *Entrop*. It is not necessary to trace the general development of this area of the law. In light of the nature of the complaints before the adjudicator, the finding by the adjudicator that the case did not involve a general challenge to the MTM Policy was reasonable. That finding is not challenged here.

[55] The adjudicator found that the issue before her was whether the drug testing rules were reasonable and, if so, whether MTM had reasonable cause for testing the Respondents. Based on the guidance set out in the leading authorities, the adjudicator found that the drug testing rules in the MTM Policy met the reasonableness test, because they only permit testing where there are reasonable grounds to suspect an employee is working while impaired by drugs or alcohol, and the workplace involves safety-sensitive occupations. That finding is also not challenged here.

[56] The core of the argument between the parties relates to the adjudicator's finding that MTM did not have reasonable cause to test the Respondents. This turns on the reasonableness of the adjudicator's interpretation of the requirements of the MTM Policy and its relationship with the Cameco policy, as well as her application of this to the facts.

[57] In considering this, it is important to recall the caution expressed by the Supreme Court of Canada in *Vavilov* regarding how to conduct judicial review under the reasonableness standard:

> [83] It follows that the focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome. The role of courts in these circumstances is to review, and they are, at least as a general rule, to refrain from deciding the issue themselves. Accordingly, a court applying the reasonableness standard does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the "range" of possible conclusions that would have been open to the

> decision maker, conduct a *de novo* analysis or seek to determine the "correct" solution to the problem. The Federal Court of Appeal noted in *Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171, that, "as reviewing judges, we do not make our own yardstick and then use that yardstick to measure what the administrator did": at para. 28; see also *Ryan*, at paras. 50-51. Instead, the reviewing court must consider only whether the decision made by the administrative decision maker — including both the rationale for the decision and the outcome to which it led — was unreasonable.

[58] Applying this to the case at bar, the question is not whether the MTM or Cameco policies are reasonable, within the framework established by the leading authorities on drug testing in the workplace, because there was no challenge to the policies themselves. Rather, the question is whether the adjudicator's decision is reasonable, in the sense that it reflects the legal and factual context for the case, and the reasoning demonstrates justification and logical coherence.

[59] The reasons do not need to be perfect, nor do they need to address each and every factual and legal point. Instead, review on the deferential standard of reasonableness must reflect the choice that Parliament made to confer the fact-finding in these sorts of cases to a specialized adjudicator. This Court, in reviewing the reasons, must determine whether the decision is "justified, intelligible and transparent" to the parties affected by the decision.

[60] One key aspect of this is whether the reasons indicate that the adjudicator engaged with the main arguments of the parties on the key points. Another important consideration is whether it is possible to follow the lines of analysis and to understand how the adjudicator came to the key findings that underpin the decision. Simply put, do the reasons provided by the adjudicator allow this Court to "connect the dots on the page where the lines, and the direction they are

headed, may be readily drawn" (*Komolafe v Canada (Minister of Citizenship and Immigration)*, 2013 FC 431 at para 11, cited with approval in *Vavilov* at para 97).

[61] The main point of contention relates to the adjudicator's interpretation of the MTM Policy, in relation to the facts of this case. At the heart of this is the question of whether it was reasonable for the adjudicator to find that the Policy required observation by a trained supervisor of an employee's drug use or impairment.

[62] The Applicant contends that this is not what the Policy says, and that it would make no sense to adopt such a restrictive policy in an underground mining context, since doing so might mean that the employer would fail to live up to its statutory obligation to provide a safe workplace. It also submits that it was required to enforce the Cameco policy, which does not require supervisor observation as the only basis to demand a drug test. Rather than parsing the words of the Policy so closely, the adjudicator should have adopted a broader interpretation that took into consideration the operational context within which the Policy would be applied.

[63] The Respondents argue that the adjudicator simply followed the clear wording of the only policy that applied to them, the MTM Policy. If the Applicant does not like the result, it should have adopted a different policy. The adjudicator did not err in applying the MTM Policy according to its plain terms.

[64] The adjudicator's decision on this point quotes the specific wording of the MTM Policy on the meaning of reasonable cause to undergo a drug test: "Reasonable suspicion testing is based upon the employee's conduct or behaviour as observed by a supervisor who is trained in the detection of probable use of drugs or alcohol". She finds that this is consistent with the

jurisprudence cited by MTM in argument before her; she also finds it reflects the Cameco policy, which emphasized that "the referral for a test will be based on specific, direct observation". The adjudicator concludes:

> What both the case law and the actual MTM Substance Policy emphasize is that reasonable cause is the direct observations of an employee by a supervisor (and in MTM's case, a *trained* supervisor) that lead the supervisor to believe that the employee was working while impaired due to an illicit drug.

[65] The adjudicator then examines the evidence regarding the basis for MTM's demand that the Respondents submit to a drug test. She finds that "(n)either the case law nor the MTM Substance Abuse Policy say that an uncorroborated statement by a co-worker made 24 hours after the alleged drug use is reasonable cause to suspect drug impairment while on duty". The adjudicator notes that there is no indication that a trained supervisor observed the Respondents during the February 22-23, 2017 shift, despite the fact that the supervisor saw them at the beginning and end of this shift, and so had ample opportunity to make such observations.

[66] The adjudicator also finds that MTM did not follow its policy with respect to the manner in which they conducted the drug test, because they did not interview the Respondents or provide them with an opportunity to explain the situation before demanding that they undergo a drug test.

[67] Based on this analysis, the adjudicator concluded that "this was not a valid order to take a drug test because these prerequisites required by law and the MTM Substance Abuse Policy were not met. No reasonable cause has been proven and [the Respondents] were within [their] rights to refuse to take a drug test that was a violation of [their] right to privacy". In addition, the adjudicator also found that the Respondents were not insubordinate, again because the order to take a drug test was not valid.

[68] While I understand why the Applicant argues that applying the strict wording of the Policy might cause them difficulty, I am not persuaded that the adjudicator's decision on this point is unreasonable. Even if the case law is not unanimous that drug testing can only be based on observation by a supervisor, the adjudicator cannot be faulted for applying the specific wording of the MTM Policy to the facts of this case.

[69] The interpretation adopted by the adjudicator is rooted in the specific wording of the Policy. This is reinforced by other provisions of the Policy, including the reference to Supervisor training in article 2.3:

> Supervisors will receive the same general substance abuse awareness educational and training program that the Company presents to its employees. In addition, supervisors will receive training to enable them to fairly exercise their authority to make "reasonable suspicion" determinations. The supervisory training program is designed to enable the supervisor to recognize the profile of an employee at risk while not over-reacting to unfounded suspicions of substance abuse that will upset an employee's legitimate expectation of privacy and confidentiality.

[70] These are essentially findings of fact that were open to the adjudicator to make based on the record. It is not the role of a reviewing court to interfere with the decision-maker's factual findings, absent exceptional circumstances. As confirmed in *Vavilov* at paragraph 125, the reviewing court "must refrain from 'reweighing and reassessing the evidence considered by the decision maker".

[71] I do not accept MTM's argument that the adjudicator adopted an overly literal interpretation of the Policy. Drug testing in the workplace involves important interests on both sides. Employers want to maintain safe workplaces, and to meet their statutory obligations in that regard. Society has recognized that this is a legitimate interest that deserves protection. On the

other hand, employees want to maintain their privacy and not be forced to submit to intrusive testing without reasonable cause. Society has also recognized that this is a legitimate interest that deserves protection. Indeed, the opening part of the MTM Policy acknowledges the importance of both interests, as does the supervisor testing provision quoted above. In such circumstances, it was reasonable for the adjudicator to give effect to the plain wording of the Policy.

[72] In addition, I am not persuaded that the alternative interpretation offered by the Applicant was the only reasonable way of reading the key sentence. MTM argues that the Policy should be read to allow testing in two separate circumstances – based on employee conduct, or based on supervisor observation. It argues that the key sentence should be read as though there is an implied comma inserted between the reference to employee conduct and observed behaviour. I am not persuaded. Moreover, it is not the task of a reviewing Court to re-interpret the Policy. The interpretation adopted by the adjudicator was reasonable, based on the wording of the Policy and the context within which it operates.

[73] The Applicant's arguments on this issue centre on policy concerns about the impact of requiring drug testing only where the employee has been directly observed by a supervisor. This is a legitimate concern, and it is worth noting that the Cameco policy appears to be worded in a more permissive fashion. It should also be noted that the MTM Policy would appear to allow an employee to be disciplined based on observations by a co-worker, according to the wording of articles 1.1 and 1.3 of the Policy. The adjudicator was not asked to rule on that, because the employer did not argue it had reasonable cause to terminate the Respondents based on drug use or impairment. Rather, it rested its case on their refusal to undergo drug testing.

[74] The adjudicator quoted the specific provision that governs reasonable suspicion testing (article 1.5) and applied its plain wording to the facts of the case. The decision notes that the Respondents signed a form acknowledging that they were aware of the MTM Policy and that it constituted a term and condition of their employment, but there was no evidence that they had signed a similar form regarding the Cameco policy. The evidence showed that they had signed a Cameco form relating to searches of their quarters and belongings while on the mine site, but not policy itself. In addition, there is no evidence that MTM purported to dismiss the Respondents for their failure to follow its Policy as well as the Cameco policy. Finally, MTM acknowledges that at all relevant times, the Respondents were its employees, and they were not employed by Cameco. It was therefore reasonable to find that the Cameco policy was not at play in the employee's dismissal, Overall, I do not accept the Applicant's arguments regarding the aspect of the adjudicator's decision relating to unjust dismissal. The reasons are based on an internally coherent and rational chain of analysis that is justified in relation to the facts and the law that constrained the adjudicator. (*Vavilov*, at para 85; *Canada Post*, at para 31). These are the hallmarks of a reasonable decision, and I can find no basis to disturb the decision on this question.

[75] I agree with the Respondents that if the Applicant finds the application of its policy to be too restrictive, it should amend the Policy. The difficulties it has noted with the interpretation adopted by the adjudicator flow from the wording of the Policy itself, and the contrast with the wording of the Cameco policy does not assist the Applicant because it did not adopt that policy or incorporate it into the terms and conditions of employment for its workers.

[76] Finally, on this issue, I do not agree with the Applicant that the adjudicator's decision establishes a wider precedent that testing for cause can only be based on supervisor observation. To the extent that any of the wording of the decision would appear to support such a conclusion, I find that it must be interpreted in the context of the analysis overall, which is clearly focused on the wording of the MTM Policy. The adjudicator was ruling on specific complaints brought by the Respondents, which were only about the employer's failure to follow its own Policy.

[77] For these reasons, I reject the Applicant's arguments on this issue.

(ii) *Did the adjudicator err in finding that the Respondents made reasonable efforts to mitigate their losses?*

[78] The adjudicator found that each of the Respondents had "used reasonable efforts to mitigate his losses, in light of his education, work experience, the job opportunities available and his family obligations". The Applicant submits that the adjudicator erred by ignoring the evidence and considering statements not tendered as evidence in reaching this conclusion.

[79] The parties agree that an employee who is unjustly dismissed must take reasonable steps to attempt to mitigate the losses which flow from the loss of employment, as confirmed in the leading decision of *Red Deer College v Michaels*, [1976] 2 SCR 324, at 331-32. The dispute concerns the application of this principle to the facts of the case.

[80] The adjudicator noted that Billette is 31 years old, has three children and lives in Dillon, Saskatchewan. Following his dismissal by MTM, he found several different jobs and earned a total of $37,060.35, which was deducted from his lost earnings award. He testified that he needs to leave home to find work because there are so few employment opportunities where he lives,

but that he does not want to be away from his children for lengthy periods. The adjudicator found that he had made reasonable efforts to find other employment following his dismissal.

[81] The Applicant submits that the adjudicator ignored the evidence that Billette turned down a job offer in New Brunswick shortly after his dismissal, and this would have almost entirely mitigated his damages. Furthermore, the adjudicator took into account his explanation regarding his family responsibilities and how they limited his employment possibilities, but this was not given in evidence but rather in final submissions, and so MTM had no opportunity to cross-examine him on this statement.

[82] In regard to the other Respondent, Campbell, the adjudicator noted that he was 30 years old, a single parent of three children, and that he lived on the Buffalo River Dene Nation near Dillon, Saskatchewan. He testified that there were no jobs near his residence and that he could not leave for extended periods because he is a single parent. He had earned $27,329.00 from a temporary job, which was deducted from his lost earnings award. He also testified that his search for mining jobs had been hampered because MTM never gave him an opportunity to train on any machinery. The adjudicator found that he had steadily looked for work and had not refused any work. Therefore, he had made reasonable efforts to mitigate his losses.

[83] The Applicant contends that there was no evidence that Campbell had steadily looked for work; rather, the evidence showed he had obtained one temporary job and had only applied for one other job.

[84] The starting point on this issue is the wide remedial discretion available to the adjudicator following a finding of unjust dismissal, pursuant to subsection 242(4) of the *Code*. The case law

has consistently confirmed that the adjudicator's decision as to the appropriate remedy lies at the heart of their expertise and cannot be lightly set aside: see *Payne v Bank of Montreal*, 2013 FCA 33 at para 43.

[85] In the context of an adjudication where the employees were not represented by counsel nor assisted by a union representative, the adjudicator must be given some latitude in regard to the line between evidence and final submissions. In this case, while I accept that MTM did not have an opportunity to cross-examine the Respondents on some aspects of their case, it made no request to do so during the hearing after this point came up. Further, MTM had an opportunity to address these matters in final submissions, and it could have requested either an opportunity to cross-examine, or to lead other evidence regarding job opportunities or other relevant considerations. On this point, I do not find any basis to disturb the findings of the adjudicator on the facts.

[86] Overall, on this issue, I find the decision of the adjudicator to be clear, and it reflects the application of the appropriate legal principles to the facts before her. It bears repeating that the determination of whether an unjustly dismissed employee has made reasonable efforts to mitigate their losses is an inherently factual exercise, and it is not the role of the Court to lightly interfere with such findings.

[87] I find that the decision on this point is reasonable, and there is no basis to overturn the findings of the adjudicator on this issue.

[88] I note that it has been acknowledged by MTM that the adjudicator erred in making the same award in regard to both Respondents, and that Campbell is in fact owed a larger amount.

The adjudicator expressly retained jurisdiction to correct any errors, and if the parties cannot agree on the precise amount, they may return to the adjudicator so that it can be fixed.

(iii) *Did the adjudicator err in making an order that MTM require Cameco to restore camp privileges to the Respondents?*

[89] At the end of her decision, in addition to the other remedies awarded in favour of the Respondents, the adjudicator ordered: "[MTM] is hereby ordered to have Cameco camp privileges restored to [the Respondents]" (at paras 120, 125). There is no explanation for this order in the reasons, in particular in view of the fact that Cameco had shut down the McArthur River mine.

[90] The Applicant submits that the adjudicator erred by making this order, since Cameco was not a party to the proceeding, and under subsection 242(4) of the *Code* an adjudicator can only make orders against the employer. By ordering MTM to have Cameco camp privileges restored to the Respondents, the adjudicator was attempting to do indirectly what she could not do directly. MTM also has no control over Cameco and no power to require it to restore camp privileges.

[91] The Respondents contend that the loss of camp privileges was a direct consequence of their wrongful dismissal. In light of the broad remedial discretion granted to the adjudicator under subsection 242(4), this aspect of the remedial award should be interpreted as merely requiring MTM to notify Cameco in writing that the Respondents had not violated its Policy and therefore there was no basis to revoke their camp privileges.

[92] While I accept that the adjudicator has a wide discretion to fashion an appropriate remedy under subsection 242(4) of the *Code*, I am unable to accept the Respondent's interpretation of this aspect of the order. In effect, the Respondents ask me to uphold the order of the adjudicator as they have interpreted it, but doing so would involve re-writing the terms of the order contained in the decision. This goes beyond a respectful attention to the reasons in light of the record and with due sensitivity to the administrative setting. As confirmed in *Vavilov* at paragraph 96, "it is not open to a reviewing court to disregard the flawed basis for a decision and substitute its own justification for the outcome".

[93] The interpretation of the order by the Respondents may well have been an entirely reasonable remedial award, but it does not reflect the actual words used by the adjudicator. In the absence of any explanation of the rationale for such an order, I am unable to find it to be reasonable. I note that the Cameco Standard regarding Alcohol and Substance for Contractors and Other Non-Cameco Personnel includes a provision dealing with the revocation and restoration of site access, and makes it clear that this decision is to be made by Cameco, upon verification that all necessary steps have been taken by the contractor. This reinforces the point that the specific terms of the adjudicator's order would impose an obligation on MTM that it simply could not fulfill.

[94] I therefore quash this particular order of the adjudicator, since it is unreasonable. In doing so, the rest of the order can stand, since this is clearly a severable part of the overall remedy. In the circumstances, there is no purpose to be served by sending this aspect of the decision back to the adjudicator for reconsideration, in particular in light of the fact that Cameco has suspended the McArthur River mine operation (see *Vavilov* at para 142).

VI. Conclusion

[95] For these reasons, I dismiss the application for judicial review in relation to the finding by the adjudicator that the Respondents had been unjustly dismissed by MTM, and that they had made reasonable efforts to mitigate their damages. I grant the application for judicial review only in relation to the order by the adjudicator that MTM have Cameco camp privileges restored to the Respondents.

[96] On the question of costs, I have reviewed the submissions filed by the parties. The Applicant did not seek its costs, in recognition that the Respondents had represented themselves before the adjudicator and that they had not launched their own challenge to the decision.

[97] The Applicant submitted that the Court should exercise its discretion under Rule 400 of the *Federal Court Rules*, SOR/98-106 to order each party to bear its own costs of the judicial review, because there is a public interest dimension to its challenge to the decision. The Applicant contends that the decision under review involves issues of significant public importance, which transcend the interests of the parties. They submit that the adjudicator's decision is an "outlier" which may erode the already well-established case law on reasonable cause drug testing. As stated in their written submissions: "the Decision has the potential to set … an untenable precedent which would require a supervisor to directly observe drug use, rather than an observation by any individual to trigger reasonable cause testing…".

[98] In the alternative, the Applicant submits that if costs are awarded against it, they should follow the usual formula set out in Column III of Tariff B. They argue that the request for a lump sum by the Respondents is unjustified since this would not save the parties time and effort, a Bill

of Costs having already been prepared, and they note that the amount requested ($17,000) is far in excess of the sum that would be awarded under the Tariff, without basis. If costs are awarded under the Tariff, they also submit that there is no justification for an award to cover the costs of a second counsel, or for travel expenses, since the Respondents had a wide choice of counsel available who would not have had to travel.

[99] The Respondents submit that a lump sum of $17,000 should be awarded in their favour, because they are both impecunious and an award that followed the usual Tariff would not adequately compensate them for their costs of defending the decision. Further, the Respondents argue that the Applicant has misconstrued the adjudicator's decision; they submit that the decision is entirely factual, and that it does not raise the wider policy concerns stated by MTM. In light of this, the Applicant should have narrowed its application for judicial review, and its failure to do so has resulted in higher costs being incurred by the Respondents to defend the decision. If a lump sum is not awarded, the Respondents claim fees for two counsel as well as travel to attend the hearing and other disbursements, for a total of $6,497.95, in accordance with Column III of Tariff B.

[100] In exercise of my discretion under Rule 400, and in light of the relevant considerations listed in that Rule and set out in the jurisprudence, I award costs in favour of the Respondents in the amount of $5,000, all-inclusive. This was a simple application for judicial review; the record was not extensive and neither party undertook cross-examination on affidavits. On the other hand, the Respondents were largely successful in defending the adjudicator's decision, and the evidence before the Court indicates that they have limited financial resources.

[101] While I acknowledge that the Applicant did not seek its costs, this is not a basis to deny the successful Respondents any recovery. Furthermore, it bears repeating that the adjudicator's decision – and this decision – rest on the specific facts of this case, and in particular the specific wording of the MTM Policy. While the adjudicator's decision mentions the jurisprudence that indicates that supervisor observation is a component of reasonable cause testing, I do not accept the Applicant's characterization of the decision. It did not – and indeed it could not – set a wider precedent in regard to reasonable cause drug testing in safety sensitive employment, because that was not the nature of the complaint that was before the adjudicator. In the future, if MTM or other employers wish to provide for a wider basis for reasonable cause for testing they may do so, subject to the overarching guidance set out in the leading authorities such as *Irving Pulp & Paper* and *Entrop*.

[102] I therefore award costs in favour of the Respondents, in the all-inclusive amount of $5,000.

JUDGMENT in T-449-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed in regard to the decision by the adjudicator that the Respondents were unjustly dismissed, and in regard to the finding that the Respondents made reasonable efforts to mitigate their damages.

2. The application for judicial review is granted in relation to the order of the adjudicator that "Mudjatik Thyssen Mining Joint Venture is hereby ordered to have Cameco camp privileges restored" to the Respondents. That aspect of the decision is quashed and set aside.

3. The Applicant shall pay to the Respondents costs in the all-inclusive amount of $5,000.

"William F. Pentney"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-449-18
STYLE OF CAUSE:	MUDJATIK THYSSEN MINING JOINT VENTURE v DALLAS A. BILLETTE and KELLY F.A. CAMPBELL
PLACE OF HEARING:	SASKATOON, SASKATCHEWAN
DATE OF HEARING:	MARCH 13, 2019
REASONS FOR JUDGMENT AND JUDGMENT:	PENTNEY, J
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APPEARANCES:

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