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CAN SMOKING AT WORK JUSTIFY AN AUTOMATIC DISMISSAL?

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IN A RECENT ARBITRATION AWARD, AN ARBITRATOR ASSESSED A COMPANY'S INTERNAL POLICY WHICH PROVIDED FOR THE DISMISSAL OF ANY EMPLOYEE CAUGHT SMOKING AT THE EMPLOYER'S PLANT OR ON ITS PROPERTY, EVEN IN THE CASE OF A FIRST OFFENCE.[1]

THE DISPUTE

The plaintiff worked at ADM Milling Co.'s flourmill for nine years, a mill where grain is made into flour. On October 11th, 2012, he was dismissed after having been caught smoking in the cloakroom of the facilities. To justify its decision, the employer relied on its policy prohibiting any employee from smoking in the mill or on the employer's property, under penalty of automatic dismissal.

A grievance contesting the plaintiff's dismissal was filed. The union essentially attacked the severity of the penalty.

THE EVIDENCE

The impugned policy came into effect in 2009. In general, it is aimed at preventing the risk of fire, detonation and explosion which may result from flour dust if it comes into contact with sources of ignition such as a lit cigarette. In the fall of 2012, two other employees were dismissed after smoking on the premises.

The evidence showed that the safety rules, particularly as they related to the prohibition on smoking at the mill, had been explained to the employees and were posted at the time they were implemented in 2009. Moreover, the employees had received annual training as well as periodic reminders on the subject. It was also demonstrated that the main risk posed by the company's flour-milling operations is a risk of fire, detonation and explosion which may result from contact between flour dust and a source of ignition. Furthermore, the employer presented evidence of explosions which had occurred at some of its other establishments and at other similar facilities.

At the hearing, the plaintiff admitted that he had indeed smoked in the cloakroom on company's property, a fact that he previously denied when the employer's representatives met with him. He also acknowledged that the cloakroom was adjacent to a flour compressor and transfer room. According to his testimony, he knew about the employer's policy as well as the goal sought by the prohibition on smoking.

THE PARTIES' ARGUMENTS

The union claimed that a number of circumstances undermined the severity of the plaintiff's misconduct and, as a result, the penalty imposed was too severe. The union emphasized the plaintiff's seniority, his unproblematic behaviour, that the "zero tolerance" policy failed to take into consideration the circumstances surrounding the infraction, the gravity of the misconduct in proportion to the risk, and the fact that the employer's notion of danger is "applicable everywhere".

For its part, the employer argued that the policy adopted had been followed and applied in a uniform manner, that there was a risk of danger given the operations which were carried out in the part of the mill adjacent to the cloakroom, the fact that the plaintiff lied when he met with the employer's representatives, and furthermore that he had failed to present any justification for his conduct.

[1] *Travailleuses et travailleurs unis de l'alimentation et du commerce, section locale 501* and *ADM Milling Co.*, (T.A. Mtre Jean Barrette, 2013-04-09), AZ-50958802.

THE DECISION

At the outset, the Tribunal stated that it was not bound by the disciplinary measure set out in the policy but that its legal authority was limited to assessing the mitigating and aggravating factors present in this case.

The facts were admitted and the Tribunal examined the evidence regarding the risk of detonation and explosion which is known to be associated with flourmills. The Tribunal noted that the methods for preventing such risks are limited. It also referred to the applicable legislation and made particular reference to the criminal liability to which employers are vulnerable. The Tribunal felt that the employer's policy was legitimate and reasonable in the circumstances, and added that the plaintiff was well aware of it. Furthermore, the policy was not discriminatory, arbitrary or unfair.

As for the circumstances surrounding the commission of the infraction, the Tribunal stated that copies of the policy had been posted all over the premises, that the plaintiff had attended two annual training sessions on the subject, and that he had admitted to knowing about both the prohibition on smoking as well as the applicable sanction in the event of an infraction. As the Tribunal saw it, the plaintiff's seniority was an aggravating factor and his good disciplinary file was not relevant in light of the seriousness of the misconduct and insofar as the risk of explosion had been proven.

As a result, the arbitrator dismissed the grievance and confirmed the dismissal.

CONCLUSION

A policy providing for the automatic dismissal of an employee for serious misconduct can be valid. In the present case, it was demonstrated that smoking in the workplace posed a serious risk to the health and safety of the employees. The arbitrator must assess the circumstances surrounding the impugned conduct. However, it should be noted that, in two other arbitral decisions involving the same employer, the arbitrators quashed the dismissals imposed on the employees who were caught smoking. Thus, the particular circumstances of each case will determine whether dismissal for a first offence is justified, even in the case of a serious infraction.[2]

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[2] *ADM Milling* and *Syndicat national des employés de Ogilvie Flour Mills (CSN)*, (T.A. Me Jean-Pierre Lussier, 2002-06-19), D.T.E. 02T-734; *ADM Milling* and *Syndicat national des employés de la Minoterie Ogilvie Ltée*, August 15 2008, SOQUIJ AZ-5050977 (Me Nathalie Faucher).

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