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Random alcohol testing fails Supreme Court's test

Top court gives final word on debate over the right to test employees in safety sensitive positions

BY ADRIAN JAKIBCHUK AND GERALD GRIFFITHS

IN A 6-3 decision released in June of this year, the Supreme Court of Canada ruled as unreasonable the mandatory alcohol testing policy adopted by Irving Pulp and Paper for employees in safety sensitive positions.

According to Canada's top court, a dangerous workplace is not automatic justification for random testing. Additional factors must be present, including, for example:

- Reasonable grounds to believe an employee is impaired while on duty.
- A workplace accident or near miss justifying post-incident testing.
- An employee returning to work after treatment for substance abuse so that the testing protocol is part of a "return-to-work" program.
- Evidence of a workplace problem of alcohol abuse.

The decision has broad implications for employers in all industries and sectors, but particularly for those with safety sensitive positions.

ALCOHOL TESTING

A controversial alcohol testing policy

Irving Pulp and Paper operated a unionized paper mill in New Brunswick. In 2006, purportedly in response to alcohol issues in the workplace, the company unilaterally adopted a drug and alcohol policy. Under this policy, 10 per cent of employees classified as working in "safety sensitive" positions were to be randomly selected for unannounced breathalyzer testing. A positive test would lead to disciplinary action, up to and including dismissal.

The union challenged the random testing as an unjustifiable breach of employee privacy rights. The union argued that a breathalyzer test — being an involuntary submission of bodily fluids — required a high level of personal intrusion which should only be permitted when there is reasonable cause such as slurred speech, the smell of alcohol or an actual accident or near miss.

In its defense, Irving argued its policy was justified given the unique circumstances and history of the mill as well at its legal duty to protect the health and safety of its workers. The mill contained hazardous chemicals, flammable substances, heavy rotating equipment, a 13,000-volt electrical system and a $350-million high-pressure boiler. It had also experienced at least eight documented alcohol-related incidents between 1991 and 2006. In all of the circumstances, Irving maintained it was not reasonable to require its random testing policy to be tied or causally linked to an actual accident or near miss in the workplace. Given its duty to protect its workers, Irving argued it should not have to wait for a serious incident before taking action.

Legal battle goes back and forth

At arbitration, the random testing policy was struck down as being a signif-

8 incidents over 15 years was insufficient to show a problem

icant encroachment into employee privacy that was "out of proportion to any benefit." In reaching this decision, the New Brunswick Arbitration Board chose to follow a line of decisions in which random testing was upheld only where there was a demonstrable drug or alcohol problem in the workplace. According to the board, Irving's eight alcohol-related incidents over 15 years were insufficient to demonstrate a "problem in the workplace".

The arbitration decision was overturned, and ultimately appealed to the Supreme Court of Canada, which found the random testing policy to be unreasonable:

"In this case, the expected safety gains to the employer were found by the board to range from uncertain to minimal, while the impact on employee privacy was severe," said the Supreme Court. "(Irving) exceeded the scope of its management rights under a collective agreement by imposing random alcohol testing in the absence of evidence of a workplace problem with alcohol use."

Broad implications for employers

The decision from the Supreme Court could have broad implications, as it is considered a national test case for how far an employer can go when it comes to a worker's right to privacy. The case attracted numerous interveners, including the Canadian Civil Liberties Association, Canadian National Railway Company, Via Rail Canada, the Canadian Mining Association, and the Canadian Manufacturers and Exporters.

Ultimately, whether random alcohol testing is justified will depend on whether an employer can demonstrate a workplace problem with alcohol use. What constitutes a significant enough problem remains unclear. What is clear is that random testing without evidence of an identifiable issue in the workplace will be considered an unreasonable infringement on employee privacy, even in safety sensitive positions.

For more information see:

■*Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper Ltd.*, 2013 SCC 34 (S.C.C.).

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