Random Drug and Alcohol Testing
Post-legalization of Cannabis

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In June 2013, a 6-3 majority of the Supreme Court of Canada struck down as unreasonable a program of random breathalyzer alcohol testing for safety-sensitive positions at Irving Pulp and Paper Ltd. (CEP, Local 30 v Irving Pulp and Paper, 2013 SCC 34 ["Irving"]). In summary, the Supreme Court held that a dangerous workplace was not automatic justification for random testing. Instead, testing might only be justified if an employer could show there was a "general problem with substance abuse in the workplace". The question left unanswered was: What constitutes a general problem sufficient to justify random testing?

In 2017, the Court of Appeal of Alberta tackled that question in the context of a random drug and alcohol testing program adopted by Suncor Energy Inc. (Suncor Energy Inc v Unifor Local 707A, 2017 ABCA 313 ["Suncor"]). Clarifying and restating the test in Irving, the court confirmed two requirements:

1. the workplace must be dangerous; and
2. there must be a general problem with drug or alcohol use in that workplace. On June 14, 2018 the Supreme Court of Canada dismissed an application for leave to appeal this decision (Unifor Local 707A v. Suncor Energy Inc, 2018 CanLII 53457).

The issue of random testing for safety sensitive positions has never been more pressing as employers navigate recent challenges presented by legalized cannabis and the upcoming availability of commercial edibles.

What Happened in Suncor?

Suncor's Alberta oil sands operations are, by their nature, dangerous. Heavy equipment, high voltage power lines, chemicals, radiation sources, explosives, and flammable liquids and gases are all prominent characteristics of the work environment.

For years, Suncor had concerns about the safety hazards posed by alcohol and drug use at its operations. It adopted a comprehensive strategy including employee and supervisor training, post-incident and reasonable cause testing, treatment for employees with dependencies and an alcohol-free lodging policy.

In June 2012, Suncor announced Canada-wide random drug and alcohol testing (breathalyzer and urinalysis) for employees in safety-sensitive positions, as well as members of the Suncor management team on site – the same testing procedures that had been used by Suncor since 2003 whenever there was a workplace incident or near miss.

Shortly after Suncor announced random testing, Unifor (the union representing some of Suncor's employees) filed a policy grievance, alleging random testing unreasonably interfered with the privacy interests of its member-employees.

The Arbitration Decision

In a 2-1 decision, an arbitration panel found in favour of Unifor and ordered that Suncor's random testing program not be implemented. In summary, the panel held that breathalyzer testing "effects a significant inroad" on employee privacy, and also that Suncor did not demonstrate a "significant" or "serious" alcohol problem within the bargaining unit, nor a causal connection between alcohol use and the bargaining unit's accident, injury or near miss history. The panel also criticized the inability of urinalysis to demonstrate current impairment (it may include a trace amount from several days or weeks prior).

Suncor asked the Alberta Court of Queen's Bench to judicially review the panel's decision.

Review by the Alberta Court of Queen's Bench

The Alberta Court of Queen's Bench overturned the arbitration decision, finding the panel had incorrectly applied the legal test set out in Irving, and failed to consider relevant evidence.

First, the court found the panel misapplied the Irving test by making it more difficult to meet. The Supreme Court had said random testing might be justifiable if there was evidence of a "general problem with substance abuse in the workplace". However, the arbitration panel elevated this standard by requiring evidence of a "significant" or "serious" problem, and erred when it narrowly focused on evidence tied directly and exclusively to Unifor's bargaining unit members, and not the workplace generally. By doing so, the panel minimized the significance of more than 2000 workplace drug and alcohol incidents which had been documented at Suncor generally (the panel was unclear how many of those incidents involved bargaining unit employees).

The matter was sent back to a new arbitration panel for a fresh decision. The union appealed.

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Decision of the Court of Appeal of Alberta

In September 2017, the Court of Appeal of Alberta upheld the decision of the Court of Queen's Bench to send the case back to a new arbitration panel. The Court of Appeal based its decision on the second factor addressed above – that the arbitration panel incorrectly focused on the Unifor bargaining unit when the Irving test required there to be a general workplace problem of drug or alcohol abuse. According to the Court of Appeal, this was an unjustifiable "arbitrary distinction" between substance abuse problems at the workplace generally and those specific to unionized employees, particularly in this case where unionized employees, non-unionized employees and contractors work side-by-side in "integrated workforces at integrated job sites".

The union sought leave to appeal to the Supreme Court of Canada. Meanwhile, in December 2017, Unifor sought and was granted an interim injunction preventing Suncor from implementing random testing until the matter was decided by the court (or another arbitration panel). This injunction was upheld by the Court of Appeal of Alberta in February of 2018.

Decision of the Supreme Court of Canada

On June 14, 2018, the Supreme Court of Canada dismissed Unifor's application for leave to appeal.

Impact on Employers

By dismissing Unifor's leave application, the Supreme Court of Canada signaled to employers the test it established in Irving Paper remains good law, as does the decision of the Court of Appeal of Alberta. A "general problem" with substance abuse in the workplace can be demonstrated by examining the workplace as a whole, and not a specific bargaining unit.

In a somewhat surprising turn of events, in the Fall of 2018 Unifor and Suncor reached a settlement regarding alcohol and drug testing for workers in safety-sensitive positions – a settlement that included Suncor applying random testing for workers at its Fort McMurray operations.

Of course, reaching a settlement regarding the use of random testing does not mean the union has given up the fight. The union may still object to the application of random testing by grieving the appropriateness of testing methods used, the validity of test results, whether accommodation is required, and the appropriateness of any resulting disciplinary. As any employer that has a robust drug and alcohol testing protocol will confirm, establishing (or defending) the appropriateness of a testing protocol is only the first hurdle. As with most policies, an employer utilizing random drug or alcohol testing must approach each situation in an individualized way and consider the circumstances in light of workplace safety obligations, while balancing human rights and privacy factors.

This has never been more true as employers navigate recent challenges presented by legalized cannabis and the upcoming availability of commercial edibles.

Sherrard Kuzz LLP will follow these, and related decisions, and report back to readers. Meanwhile, for assistance addressing drug and alcohol issues in your workplace, contact a member of the Sherrard Kuzz LLP team.

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