

Drug and alcohol testing in the workplace:

Who, what, when, where, why and how

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November 24, 2017

Common reasons employers want to test for drug and alcohol use

- Following incident at work involving drugs or alcohol
- Suspicion of impairment at work
- Pre-employment or pre-access
- Fulfil obligation to protect employees in the workplace

Types of drug and alcohol tests

- Pre-employment and pre-access
- Reasonable cause
- Post-incident
- Return to work
- Unannounced follow-up (post-treatment)
- Certification
- Random

Random testing: *Communications, Energy & Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper Ltd.*, 2013 SCC 34

- Court held employers in safety-sensitive work environments may be justified in implementing random alcohol testing when there is a safety risk in the workplace due to alcohol, such as evidence of a general problem with substance abuse in the workplace.
- But: must be a balancing exercise in light of legitimate safety concerns and privacy interests
- “[T]he dangerousness of a workplace — whether described as dangerous, inherently dangerous, or highly safety sensitive — is, while clearly and highly relevant, only the beginning of the inquiry. It has never been found to be an automatic justification for the unilateral imposition of unfettered random testing with disciplinary consequences. What has been additionally required is evidence of enhanced safety risks, such as evidence of a general problem with substance abuse in the workplace..”

Random testing: *Amalgamated Transit Union, Local 113 v. Toronto Transit Commission, 2017 ONSC 2078*

- In October 2011, TTC amended its “Fitness for Duty Policy” to permit random drug and alcohol testing of 20% of the TTC’s workforce per year, including senior management and designated executive positions.
- The policy requires drug and alcohol testing in the following situations:
 - where there is a reasonable cause to believe alcohol or drug use resulted in the employee being unfit for duty;
 - as part of a full investigation into a significant work-related accident or incident;
 - where an employee is returning to duty after violating the Fitness for Duty Policy;
 - where an employee is returning to duty after treatment for drug or alcohol abuse; and
 - as a final condition of appointment to a safety sensitive position.

Random testing: *TTC* (cont'd)

- Testing is by way of an alcohol breathalyzer test and an oral fluid drug test
- Testing conducted by a third party.
- Union sought injunction to stop the *TTC* from conducting random testing

- Court went through the 3-step test for an injunction:
- 1. Is there a serious issue to be tried?
 - Court was satisfied there was a serious issue to be tried, including the determination of whether the threshold requirement of a demonstrated workplace problem with alcohol and drugs had been met (*Irving*)

Random testing: *TTC* (cont'd)

- 2. Will the party seeking interim relief incur irreparable harm if relief denied?
- Court was satisfied the applicants would not suffer irreparable harm because, among other things:
 - External candidates interested in a safety sensitive or designated management or executive position are already required to pass a pre-employment test for drug use
 - TTC employees expect that those in safety sensitive positions are fit for duty
 - No evidence of psychological harm from random testing in jurisdictions where random testing is commonplace, and the potential for embarrassment does not constitute irreparable harm
 - Procedures for testing are minimally invasive, and the policy has a treatment component
 - Monetary damages could be awarded for privacy infringement

Random testing: *TTC* (cont'd)

- 3. Does the balance of convenience favour granting the interim relief?
 - Must take public interest into account on this step
 - Court held: *“if random testing proceeds, [it] will increase the likelihood that an employee in a safety critical position, who is prone to using drugs or alcohol too close in time to coming to work, will either be ultimately detected when the test result is known or deterred by the prospect of being randomly tested.”*
 - Court found random testing will increase public safety, and therefore the balance of convenience favours *TTC*
- Union’s request for injunction dismissed.

Random testing: *Suncor Energy Inc. v Unifor Local 707A*, 2017 ABCA 313

- Application of the *Irving* test
- In 2012, Suncor implemented random drug and alcohol testing for workers in safety-sensitive positions at some of its sites in the Fort McMurray area.
- Union grieved the alleged infringement of unionized workers' privacy rights.
- In 2014, the arbitration board released its decision, with the majority finding in favour of the union and holding that Suncor had not demonstrated sufficient safety concerns within the bargaining unit to justify random testing.
- Both the majority and dissent agreed that the Suncor sites were dangerous and the safety was important. And that random testing was not automatically justified in dangerous workplaces, but had to be a proportional response to safety concerns at the specific site.
- However, the majority and dissent differed regarding whether the balance tipped in favour of privacy or safety.

Random testing: *Suncor Energy Inc. v Unifor Local 707A*, 2017 ABCA 313

- Suncor applied for judicial review
- The reviewing justice held that the majority decision was unreasonable and sent the matter back for reconsideration by a new panel.
- Unifor appealed the decision on judicial review to the Alberta Court of Appeal.
- On judicial review, the Court quashed the arbitration decision and ordered that the matter be sent back for a fresh hearing by a new panel (2016 ABQB 269).

Random testing: *Suncor Energy Inc. v Unifor Local 707A*, 2017 ABCA 313

- The Court found that the majority decision was unreasonable for 3 main reasons:
 - The majority misapplied the balancing exercise from *Irving* by imposing more stringent requirements than those contemplated by the Supreme Court of Canada.
 - The majority erred by only considering the evidence that demonstrated substance abuse problems within the bargaining unit and ignoring the evidence of substance problems within the broader workplace.
 - The majority had failed to consider all of the relevant evidence.
- The Court of Appeal dismissed the appeal and affirmed the reviewing justice's decision to remit the matter for a new arbitration, to be heard by a fresh panel.

Random testing: *Suncor Energy Inc. v Unifor Local 707A*, 2017 ABCA 313

- The Court of Appeal considered it necessary to address only the second issue identified by the reviewing justice – whether the evidence had to be limited to the bargaining unit.
- *Irving* defined the balancing process in terms of workplace safety and workplace substance abuse problems – not bargaining unit safety and bargaining unit substance abuse problems.
- In addition, *Irving* calls for a more holistic inquiry into drug and alcohol problems within the workplace generally, instead of demanding evidence unique to the workers who will be directly affected by the arbitration decision.
- The Court of Appeal dismissed the appeal and affirmed the reviewing justice's decision to remit the matter for a new arbitration, to be heard by a fresh panel.

Accommodation case: *Stewart v. Elk Valley Coal Corporation*, 2017 SCC 30

- Stewart worked in a safety-sensitive mine operated by Elk Valley as a loader driver.
- Employer implemented alcohol and drug policy:
 - Required employees to disclose addiction issues before any alcohol- or drug-related incident occurred
 - Employees who self-disclosed would be offered treatment
 - Employees who did not self-disclose in advance of an incident and subsequently tested positive for alcohol or drugs, would be terminated.
- Policy dubbed “no free accident” rule.
- Aim of the Policy was to ensure safety by encouraging employees with substance abuse problems to come forward and obtain treatment before their problems compromised safety.

Accommodation case: *Stewart v. Elk Valley Coal Corporation*, 2017 SCC 30

- Stewart was involved in a workplace accident and tested positive for cocaine.
- During an investigation meeting with his employer following the positive test, he stated that he thought he was addicted to cocaine.
- Stewart had not disclosed his addiction prior to the incident.
- Pursuant to the Policy, Elk Valley terminated Stewart's employment.
- Stewart argued that he was terminated for his addiction, which constituted discrimination under section 7 of the *Alberta Human Rights Act*, RSA 2000, c A-25.5.

Accommodation case: *Stewart v. Elk Valley Coal Corporation*, 2017 SCC 30

- The Alberta Human Rights Tribunal held that while Stewart suffered from a disability – addiction, he was terminated for breaching the policy, not his addiction.
- The Court of Queen’s Bench and Court of Appeal dismissed the appeal of the Tribunal’s decision
- The Supreme Court of Canada held there was evidence capable of supporting the Tribunal’s conclusion that the reason for the termination was not addiction, but breach of the policy.
- Decision affirms employers’ right to take proactive measures to prevent workplace incidents by implementing and enforcing alcohol and drug policies.

Thank you

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