

Random Alcohol Testing in the Workplace

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The Supreme Court Speaks

This morning the Supreme Court of Canada issued its much anticipated decision in the *CEP, Local 30 v. Irving Paper* case, in which the union had challenged Irving's random alcohol testing policy. The S.C.C. overturned a decision of the New Brunswick Court of Appeal and restored an arbitration board's decision striking down the policy.

The case turned on only one provision in the Irving/CEP collective agreement, being the management rights clause, which stated as follows:

4.01. The Union recognizes and acknowledges that it is the right of the Company to operate and manage its business subject to the terms and provisions of this agreement.

There was nothing else in the agreement which addressed the issue, since Irving had not bargained with the union with respect to any aspect of testing. Ultimately, the Court found that "random alcohol testing was ... held to be an unreasonable exercise of management rights under the collective agreement".

The points which can be taken from the Supreme Court's decision include the following:

1. The dangerousness of a workplace, while relevant, is not alone an "automatic justification for the unilateral imposition of unfettered random testing with disciplinary consequences." According to the Court, that factor:

has never, to my knowledge, been held to justify random testing, even in the case of "highly safety sensitive" or "inherently dangerous" workplaces like railways (Canadian National) and chemical plants (DuPont Canada Inc.), or even in workplaces that pose a risk of explosion (ADM Agri-Industries), in the absence of a demonstrated problem with alcohol use in that workplace.
2. A finding that a workplace is dangerous is, according to the Court, only the beginning of a "balancing test", assessing the benefit to the employer versus the impact on an employee's privacy. In short, the employer must demonstrate that "the need for the rule outweighs the harmful impact on employees' privacy rights".
3. Universal drug or alcohol testing will not be allowed when the expected safety gains are minimal and

infringement on employees' privacy rights are severe.

4. "Deterrence" as a reason to implement a universal drug testing policy is unlikely to be upheld.
5. An employer can impose random drug or alcohol testing if it represents a "proportionate response in light of both legitimate safety concerns and privacy interests." Evidence of a safety risk must be present, such as a general problem with substance abuse in the workplace. In Irving, eight incidents over a fifteen year period were found not to reflect a significant problem with workplace alcohol use.
6. The Court accepted that certain situations do permit testing, stating as follows:

In a workplace that is dangerous, employers are generally entitled to test individual employees who occupy safety sensitive positions without having to show that alternative measures have been exhausted if there is "reasonable cause" to believe that the employee is impaired while on duty, where the employee has been directly involved in a workplace accident or significant incident, or where the employee is returning to work after treatment for substance abuse.

All employers in unionized workplaces in Canada with drug and alcohol testing policies should re-examine such policies in light of this decision. TDS would be pleased to assist you.

This article was written by former TDS lawyer Robin Kersey.

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