Supreme Court Rules on Random Alcohol Testing

Date: June 18, 2013
Lawyers You Should Know: Maria Kotsopoulos

Original Newsletter(s) this article was published in: Employment Update: June 2013

Last week, the Supreme Court of Canada released its decision in *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Limited* dealing with random alcohol testing in a safety sensitive workplace.

The Policy

The employer's random alcohol testing policy was part of a larger policy on alcohol and drug use adopted under the management rights clause of the collective agreement. Drug and alcohol testing under this policy was limited to employees holding safety sensitive positions. The random alcohol testing policy component provided for 10% of employees to be randomly selected for unannounced breathalyzer tests in each year. A positive test led to disciplinary action, up to and including dismissal, while an employee's failure to submit to a test constituted grounds for immediate dismissal.

The Underlying Decisions

The union grieved the random alcohol testing policy and was successful before a board of arbitration. The board of arbitration was not satisfied that the evidence regarding the degree of the safety risk outweighed employee privacy rights. On judicial review, the board's award was set aside as unreasonable because of the safety risks associated with this particular workplace. Before the New Brunswick Court of Appeal, the appeal was dismissed.

The SCC Decision

In a split decision, the majority of the Supreme Court affirmed the board of arbitration's decision to strike down Irving Pulp and Paper Ltd.'s random alcohol testing policy. The majority concluded that the unilaterally imposed random alcohol testing policy was unjustified because the employer had not established that there was an existing problem with alcohol use in its workplace.

The majority reviewed the well-established tests developed in arbitration cases with respect to random testing of employees, noting that at least one of the following must be present to justify this type of incursion into employees' right to privacy, even in dangerous or safety sensitive workplaces:

- a history of a problem with substance abuse at the workplace;
- reasonable cause to believe an employee was impaired while on duty;
- a workplace accident or incident; or
- as part of a return to work program following treatment.

In this case, the employer led evidence of eight alcohol-related incidents at its mill over a 15 year period to justify its policy. However, in concluding that the board of arbitration's decision to strike down the policy was reasonable, the majority agreed that the expected safety gains to the employer were uncertain, if not minimal, while the impact on employee privacy was severe. As a result, the majority agreed that the employer had exceeded its scope under the management rights clause.

In Dissent

Three judges dissented. In their view, the board of arbitration's decision to strike down the policy was unreasonable because it departed from the established test. In essence, the dissent concluded that the board of arbitration elevated the test by requiring evidence of a "significant" or "serious" problem at the workplace, whereas the arbitral jurisprudence only required evidence of "a" problem.

Status of Random Alcohol Testing

For now, it appears that random alcohol drug testing will continue to be impermissible, unless there is a serious risk of harm or problem of alcohol use impacting the company. Employers will have to continue to weigh and balance employee privacy rights with workplace safety concerns and will be required to show evidence of a significant problem before being permitting to use random alcohol testing.