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SUPREME COURT OF CANADA RULES ON RANDOM ALCOHOL TESTING

By Valérie Belle-Isle

The Supreme Court of Canada recently rendered a divided decision in which it concluded that an employer's policy imposing mandatory random alcohol testing was not justified.[1] This decision is of interest to employers in Quebec since it confirms arbitral case law on the subject.

Background

In 2006, Irving Pulp & Paper, Ltd. ("Irving" or the "employer") unilaterally adopted a policy on the consumption of alcohol and other drugs (the "policy"). One aspect of this policy provided that over the course of a year, ten percent (10%) of employees occupying safety-sensitive positions were to be selected at random to undergo unannounced breathalyser tests. A positive test (i.e., blood alcohol concentration greater than 0.04%) would lead to severe disciplinary action, possibly including dismissal. Moreover, refusal to submit to the test would result in immediate dismissal.

The policy also provided for mandatory testing 1) if there was reasonable cause to suspect that an employee was consuming alcohol or drugs in the workplace, 2) following a workplace accident or incident in which an employee was directly involved, and 3) as part of a monitoring program for employees returning to work after voluntary treatment for substance abuse.

The grievance sought to challenge only the random alcohol testing aspect of the policy as it pertained to employees occupying safety-sensitive positions.

The decisions rendered by the courts below

In first instance, the arbitration board of New Brunswick (the "Board"), weighed the employer's interest in implementing random alcohol testing as a workplace safety measure against the violation of the employees' right to privacy which resulted from the policy. Following its analysis, the Board allowed the grievance and concluded that random testing was not justified.

The Court of Queen's Bench set aside the Board's decision, and the Court of Appeal dismissed the appeal. The latter therefore recognized the employer's right to unilaterally impose this policy, given the dangerous nature of the workplace.

The Supreme Court decision

The Supreme Court restored the Board's decision. The issue at the heart of this case is whether unilaterally implementing a mandatory random alcohol testing policy constituted a valid exercise of the employer's management rights under the collective agreement. With regards to the exercise of the employers' management rights, the Court pointed out that, in unionized workplaces, a policy imposed unilaterally by the employer must be reasonable and must fall within the scope of the management rights clause contained in the collective agreement. The Court added that when assessing the reasonableness of a policy that affects the employees' privacy, courts generally adopt a "balancing of interests" approach.

This test requires one to answer the following question: "Was the benefit to the employer from the random alcohol testing policy in this dangerous workplace proportional to the harm to employee privacy?"[2]

On the one hand, it is necessary to evaluate the risks that the employer sought to address through random alcohol testing. Such risks included both the risk associated with the particular grievor's position as a millwright as well as the risk associated with the particular workplace.

This review led the Board to conclude that the millwright's functions presented risks and dangers in the operations performed both to the person occupying the position, to third parties, as well as to the environment and to property. As for the workplace, it was "one in which great care must be taken with safe work practices," and, according to the Board, "the mill in normal operation is a dangerous work environment."[3]

That being said, the Supreme Court recalled that this conclusion is not sufficient to justify mandatory random testing:

> "[45] *But, as previously noted, the fact that a workplace is found to be dangerous does not automatically give the employer the right to impose random testing unilaterally. The dangerousness of the workplace has only justified the testing of particular employees in certain circumstances: where there are reasonable grounds to believe that the employee was impaired while on duty, where the employee was directly involved in a workplace accident or significant incident, or where the employee returns to work after treatment for substance abuse. It 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. and C.E.P., Loc. 28-0 (Re)(2002), 105 L.A.C. (4th) 399), or even in workplaces that pose a risk of explosion (ADM AgriIndustries), in the absence of a demonstrated problem with alcohol use in that workplace. That is not to say that it is beyond the realm of possibility in extreme circumstances, but we need not decide that in this case.*"[4]

As for evidence of an alcohol-related problem in the workplace, the Supreme Court agreed with the Board, when it noted that there had only been eight alcohol-related incidents over a 15-year period and that it had only a small impact on the safety risks in the workplace.[5] Moreover, the Board was not convinced by the employer's argument that deterrence was a major benefit of random alcohol testing.[6]

On the other hand, the employees' right to privacy must be taken into account. The Supreme Court held that the Board's position on this point was unassailable and that breathalyser testing "effects a significant inroad" on an employee's right to privacy.[7]

Comments

The Supreme Court therefore upheld the Board's ruling that the employer's policy constituted an unreasonable exercise of its management rights.

However, the Court added that this decision does not mean an employer can never unilaterally impose random alcohol and drug testing on all its employees in a dangerous workplace. Such a policy may well be justified if it represents a proportionate response in light of legitimate safety concerns, which could be the case if the employer were able to demonstrate increased safety concerns, such as a generalized problem of alcoholism or drug abuse in the workplace.

Moreover, the Supreme Court confirms a consistent line of arbitral case law whereby arbitrators have found that when a workplace is dangerous, an employer can test an individual employee if there exists reasonable cause to believe that the employee was impaired while on duty was involved in a workplace accident or incident, or in the event an employee is returning to work after treatment for substance abuse.

These principles must of course be applied on a case-by-case basis.

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[1] *Communications, Energy and Paperworkers Union of Canada, Local 30* v. *Irving Pulp & Paper, Ltd.*, 2013 SCC 34.
[2] *Id.*, para. 43.
[3] *Id.*, para. 44.
[4] *Id.*, para. 45.
[5] *Id.*, paras. 46 and 47.
[6] *Id.*, para. 48.
[7] *Id.*, paras. 49 and 50.