

# Court Refuses Injunction Against TTC's Random Drug/Alcohol Testing Program



Drug and alcohol testing of workers is very complex. In general, some form of testing is most likely to be allowed if the workplace and/or positions to be tested are safety-sensitive. And so-called post-incident testing and reasonable cause testing—that is, testing a worker when there's reasonable suspicion that he's intoxicated, such as if he smells of alcohol and is stumbling—are usually upheld. But random testing is the most controversial and, under the *Irving Pulp* decision, must meet a high threshold for establishing a justified need for it. However, the Supreme Court in *Irving Pulp* did say, 'If [random testing] represents a proportionate response in light of both legitimate safety concerns and privacy interests, it may well be justified.' (For more on the *Irving Pulp* decision, watch this recorded webinar of the decision's impact on employers.) An Ontario court recently ruled that a transit authority could conduct random drug and alcohol testing of designated workers. Here's a look at its reasoning.

## THE CASE

**What Happened:** The Toronto Transit Commission (TTC) amended its Fitness for Duty Policy to include random drug and alcohol testing for employees in safety-sensitive jobs and in specified management, senior management and designated executive positions. Employees randomly selected for testing will take an alcohol breathalyzer test and an oral fluid drug test. Failing to submit to a random test violates the policy. And an employee who tests positive in a random test will be considered unfit for duty and thus in violation of the policy. The union challenged the random testing program and asked a court for an injunction, barring the TTC from implementing the program until a hearing on its validity has been completed.

**What the Court Decided:** The Ontario Superior Court of Justice refused to issue the injunction.

**The Court's Reasoning:** Although the court acknowledged that random testing potentially infringed on employees' expectations of privacy, candidates interested in working for the TTC in a safety-sensitive or designated management or executive position must pass a pre-employment drug test. So a reasonable person would assume that if he had to test negatively to get a job with the TTC, then he'd be required to continue to test negatively to keep that job. Also, TTC

management and its employees'who clearly work in a safety-sensitive industry'expect that steps will be taken to make sure that those in safety critical positions are fit for duty. This safety concern reasonably diminishes their expectation of privacy concerning their drug and alcohol consumption, concluded the court.

The court also found that the procedures and methods that the TTC chose to use to randomly test for drugs and alcohol are minimally invasive and superior to other available methods of testing. Moreover, the procedures for collection, laboratory analysis and reporting of the drug tests provided for in the policy give employees a chance to challenge and explain their test results before the results are reported to the TTC.

The court noted that the fact that a refusal to submit to a random test is considered a policy violation adds a coercive element to the policy. But it concluded that it's impossible to effectively enforce the policy if an employee can simply refuse a test. That is, there's no other sensible way to view a refusal to submit to a random test. So the court found that the policy was 'reasonably tailored to its stated health and safety purpose.'

The union also didn't show that the balance of convenience, taking into account the public interest, favours granting the injunction. According to the court, one of the aspects of the public interest here is the interest of the safety of millions of subway, bus and streetcar passengers. The court accepted that the acute effects of marijuana and the other drugs referred to in the policy can negatively affect performance. And the evidence showed that there's 'a demonstrated workplace drug and alcohol problem at the TTC, which is currently hard to detect and verify,' said the court. The question isn't the extent of impairment of a TTC employee in a safety-sensitive position, but whether he poses a greater safety risk due to recent consumption of any of the drugs referred to in the policy. So the court concluded that the balance of convenience favoured the TTC [*Amalgamated Transit Union, Local 113 v. Toronto Transit Commission*, [2017] ONSC 2078 (CanLII), April 3, 2017].

## ANALYSIS

This decision isn't the last word on whether the TTC's random testing program will ultimately be upheld as justified under *Irving Pulp*; it simply allows the program to be implemented until an ultimate decision on its validity is reached. But the decision certainly suggests that such testing will eventually be approved. The OHS Insider will keep you posted on any developments in the case.

It's interesting to note that the union raised mental health arguments in opposing random testing. For example, it claimed that instituting random testing creates the likelihood of psychological harm to employees. But the court found that, despite random testing being common in the US, Australia and other countries, there was no evidence that employees subjected to random testing in those countries suffer any emotional or psychological harm. The court also rejected the claim that employees who aren't impaired at work may be embarrassed or humiliated by testing positive due to consumption outside of work.

**Insider Says:** For more on drug and alcohol testing, see:

- An analysis of the *Irving Pulp* decision
- 11 Elements of a Drug & Alcohol Testing Policy that Doesn't Violate Human

#### Rights

- A checklist for reasonable cause testing for drugs and/or alcohol
- Model Post-Incident Drug &/Or Alcohol Testing Procedures.

[box]

**Want access to all the Canadian safety compliance articles, tools and other resources that the OHS Insider has to offer, such as the articles and tools mentioned above? Sign up for a free trial membership now! [/box]**