A Look at One of the First Drug/Alcohol Testing Cases Decided Since Irving Pulp



Testing workers for drugs and/or alcohol is a controversial practice and routinely challenged by workers and unions. Despite the fact that workers who are under the influence pose safety hazards to themselves and their co-workers, such testing is seen as intrusive and an invasion of privacy.

And the Supreme Court of Canada's decision in *Irving Pulp* on the legality of a random alcohol testing program provided support for those objections. (To learn more about this key decision, watch this recorded webinar.)

In one of the first cases decided since *Irving Pulp*, a federal arbitrator recently issued a decision on a rail company's drug and alcohol use and testing policy [*Bombardier Transportation v. Teamsters Canada Rail Conference'Division 660*, [2014] CanLII 5318 (CA LA), Feb. 10, 2014]. The union challenged various aspects of the policy as unreasonable, and violating workers' rights and the collective agreement. The arbitrator specifically cited *Irving Pulp* and struck parts of the policy while upholding others

Sections Struck Down

The arbitrator struck down several parts of the policy, including:

- A ban on workers from reporting for duty with blood alcohol concentration levels (BACs) greater than '0.' The arbitrator noted that a prior case had established that concern for impairment for a 'risk-sensitive' position was legitimate at a BAC of .04, which was a reasonable cut-off level. Thus a cut-off of '0' was unreasonable.
- The imposition of post-accident drug/alcohol testing without limitation for every accident whether there was injury or property damage as a result. The arbitrator agreed that this section was overly broad and exceeded the standards set for post-incident testing in prior cases. (See, model post-incident drug and/or alcohol testing procedures)
- A ban on workers consuming alcohol for eight hours after an accident for which they're required to take a post-accident alcohol test. Without any rationale for this prohibition, it's unreasonable, said the arbitrator.
- The testing procedures and types. This section of the policy was too broad. For example, it permits the collection of blood samples, which is highly intrusive, unnecessary and unreasonable, concluded the arbitrator. But she did uphold part of this section that permitted observation of workers giving a urine sample provided there was reasonable cause to suspect that they might alter or substitute a urine specimen.
- Classification of any worker with a positive test as unqualified to perform his duties. To deem a worker unqualified is akin to an automatic disciplinary response, which is unreasonable, said the arbitrator.

Sections Upheld

However the arbitrator upheld other sections of the policy as reasonable, including:

- The statement that workers who violate the policy may be disciplined up to and including termination. The policy

didn’t require discipline for every violation, explained the arbitrator, but is couched in terms of *possible* discipline.

- A requirement that workers being certified for safety critical and safety sensitive positions submit to drug/alcohol tests as part of the certification process.
- Accommodation of workers whose drug/alcohol tests are positive. The union claimed the policy didn’t properly address the company’s duty to accommodate such workers or provide for a comprehensive employee assistance program (EAP). But the arbitrator noted that the policy did, in fact, provide for and reference its EAP, which was sufficient.
- Sections relating to privacy concerns. The policy provided that all test results were to be considered private and confidential information and only released with the employee’s consent or when permitted by law, explained the arbitrator.
- The requirement that workers who need valid drivers’ licences for their jobs and who lose their driving privileges due to impaired driving charges must report the loss of such privileges. The arbitrator found that this requirement was reasonable for workers in safety sensitive positions.