

***Good News on Drug and Alcohol Testing
in the Workplace***

Labour & Employment Group

Eric Durnford, Q.C. - Partner
Nancy F. Barteaux - Partner
Amy Bradbury - Associate
Krista Smith - Associate
Isabelle French - Associate
Hanaa Al Sharief - Associate

INTRODUCTION

The limits of the employer's ability to conduct drug and alcohol testing in the workplace continue to be questioned. The New Brunswick Court of Queen's Bench recently quashed an arbitration award wherein the employer's drug and alcohol testing policy (the "Policy") was challenged.¹ The Policy allowed for random testing for alcohol of employees employed in safety sensitive positions:

Random Testing: Employees employed in Safety Sensitive Positions will be subjected to unannounced random tests for alcohol. In addition, applicants to a Safety Sensitive Position must pass an alcohol and/or drug test before entry to the position or re-entry to the position where they have participated in a treatment program.

The grievor was randomly selected and tested for alcohol during work. He passed the test and successfully grieved the Policy on the basis that there were no reasonable grounds to test or a significant accident or incident which would justify such a measure.

THE BOARD'S DECISION

The Majority of the Board (the "Board") held that the employer must show that the benefits of the policy are proportional to the harm to the employees' privacy rights. The Board also noted that drug and alcohol testing policies do not directly address the risks in the workplace as they do increments to risk and that employers engaged in "ultra hazardous" operations bear a lighter

burden of proving risks in the workplace.

The Board then reviewed the evidence of incremental risk of alcohol-related impaired performance in the employer's plant (the "Plant") and found that over a period of fifteen years ending in 2006, there were only five incidents where employees had attended work under the influence of alcohol. Based on this, the Board concluded that there was not a significant problem with alcohol-related impaired performance at the Plant. In balancing the benefits of the Policy against the damages to the employees' privacy, the Board found there was a limited advantage to the employer from the Policy. As such, the Board held that the Policy was not reasonable and that random alcohol testing is a "significant inroad against those rights and that all in all "... the scheme effects a loss of liberty and personal autonomy"."

Therefore, the Board upheld the grievance.

APPLICATION FOR JUDICIAL REVIEW

The employer brought an application for judicial review to quash the decision on the basis that the decision of the Board was unreasonable in that it:

- A) contradicted the decision of the Ontario Court of Appeal in *Entrop v. Imperial Oil Ltd.*, [2000] O.J. No. 2689 (Ont. C.A.) in ruling that random alcohol testing for employees occupying safety-sensitive positions in a safety-sensitive

¹ *Irving Pulp & Paper Ltd. v. C.E.P., Local 30, 2010 NBQB 294*

work environment is not a reasonable and permissible employer policy;

- B) created a new employer category of “ultra-dangerous operations;”
- C) relied upon the absence of near incidents or positive results since the Policy had been implemented in the workplace as a justification for setting aside the Policy despite citing with approval authorities that hold otherwise;
- D) relied upon the 10% sample size chosen by the employer to implement the Policy as evidence that alcohol in the workplace is not high among workers in safety-sensitive positions; and
- E) contradicted its findings that the breathalyzer testing is minimally intrusive by concluding that the intrusions were significant and out of proportion to any benefit from implementing the Policy.

The employer argued that since the workplace was a dangerous place to work, it was reasonable for it to have the Policy. As well, the employer argued that the Board’s Chair misconducted himself and breached the duty of procedural fairness and rules of natural justice in the decision making process by engaging in consultations with the union’s nominee to the exclusion of the employer’s nominee on the arbitration board.

The union, on the other hand, argued that the reasonableness of the Policy did not depend on whether the Plant was dangerous or whether the work is safety- sensitive but rather on the history of safety in the workplace.

DECISION

The Court allowed the employer’s application for judicial review finding that the Board’s decision was unreasonable. However, the Court dismissed the employer’s argument that the Board’s Chair misconducted himself by engaging in discussions and decision drafting with the union nominee in the absence and to the exclusion of the employer’s nominee and therefore did not breach the duty of procedural fairness.

The Court noted that the Board’s distinction between a dangerous and an ultra-dangerous workplace is unwarranted (at para. 61):

In my view that distinction is not a reasonable basis on which to reject this policy. Dangerous is dangerous and while there are degrees of danger such that the potential for catastrophic loss is easily recognized in a nuclear plant or an airline, the fact still remains that, as the Majority concluded, the Irving mill “in normal operation is a dangerous work environment”.

The Court further ruled that it is not reasonable to require a history of accidents in a dangerous workplace prior to implementing policies on alcohol and drug testing whereas the same requirement is waived for the “ultra dangerous” workplaces. The Court concluded that once the Board found that the workplace was dangerous, the only issue to decide was whether or not the Policy was proportional to its potential harm.

The Court concluded that since the Board ruled that the method of testing used by the employer was minimally intrusive and that the Policy is only applied to employees in safety-sensitive positions, its conclusion that the Policy’s benefits are not proportional to any potential harm was unrea-

This article is produced by Ritch Durnford to keep our clients and friends informed of current legal issues. It is intended for general information purposes only. If you have any questions or comments on the above, or if you would like to be added to our mailing list, please feel free to contact any member of our labour group at (902) 429-3400 or by email:

Eric Durnford -eric.durnford@ritchdurnford.com, Nancy F. Barteaux -nancy.barteaux@ritchdurnford.com, Amy Bradbury -amy.bradbury@ritchdurnford.com, Isabelle French - isabelle.french@ritchdurnford.com, Krista Smith - krista.smith@ritchdurnford.com, Hanaa Al Sharief - hanaa.alsharief@ritchdurnford.com

-sonable (at para. 70):

In summary, I find the decision of the Majority to be unreasonable in that it is not an outcome which is defensible in the context of their earlier findings regarding the dangerous nature of the workplace and the minimally intrusive nature of the testing. I agree with the comments cited by the Majority from the [*Canadian National Railway*](#) case *supra* ., that,

...Boards of arbitration should be cautious before requiring documented near disasters as a pre-condition to a vigilant and balanced policy of drug and alcohol detection in an enterprise whose normal operations pose substantial risk for the safety of employees and the public.

Conclusion

This decision is good news for employers. It confirms that it is unnecessary for employers with dangerous workplaces to have a history of accidents prior to implementing policies on alcohol and drug testing.

However, the union has appealed the Court's decision to the New Brunswick Court of Appeal.

This article is produced by Ritch Durnford to keep our clients and friends informed of current legal issues. It is intended for general information purposes only. If you have any questions or comments on the above, or if you would like to be added to our mailing list, please feel free to contact any member of our labour group at (902) 429-3400 or by email:

Eric Durnford - eric.durnford@ritchdurnford.com, Nancy F. Barteaux - nancy.barteaux@ritchdurnford.com, Amy Bradbury - amy.bradbury@ritchdurnford.com, Isabelle French - isabelle.french@ritchdurnford.com, Krista Smith - krista.smith@ritchdurnford.com, Hanaa Al Sharief - hanaa.alsharief@ritchdurnford.com