

FITNESS FOR DUTY IN THE NUCLEAR INDUSTRY : ONTARIO COURT DENIES INJUNCTION RESTRAINING RANDOM DRUG AND ALCOHOL TESTING

By Stanley D. Berger

On April 3, 2017 (ONSC 2078) Ontario Superior Court Judge Frank Marrocco denied the Amalgamated Transit Union Local 113 an interlocutory injunction restraining implementation of random drug and alcohol testing of members of the Local until the completion of an arbitration hearing into the validity of the Toronto Transit Commission (TTC) drug and alcohol testing Policy. The Transit Union argued that the TTC Policy was contrary to the Collective Agreement and the *Ontario Human Rights Code*, R.S.O. 1990, c.H.19.

SIGNIFICANCE OF DECISION

The reasons for decision should provide helpful guidance to other industries where fitness for duty poses safety concerns not only to workers but members of the public. For example, in November 2015 the Canadian Nuclear Safety Commission released *Draft Regulatory Document 2-2-4 on Fitness for Duty*. The Draft provides at par. 4.6.2 that:

"...workers in safety-sensitive positions shall be required to submit to for-cause testing when there is reasonable cause to believe, through observed behaviour, physical condition or after receiving credible information, that the individual is unfit to perform his or her duties, due to the adverse effects of alcohol or drug use. The grounds for for-cause testing shall be independently verified by at least two people (one of whom is the supervisor)...Observed behaviours and physical conditions that may establish for-cause reasonable grounds testing include: breath odour, observed use or possession of alcohol, illicit drugs, or drug paraphernalia, speech patterns, physical appearance and behaviour or an episode or events that suggest irrational or reckless behaviour."

THE TTC POLICY AND IMPLEMENTATION

As with the CNSC Draft Regulatory Document, the TTC Policy provides for drug and alcohol testing where there is reasonable cause to believe alcohol or drug use resulted in an employee being unfit for duty. Failure to submit to a random test is a violation of the Policy. The Judge was satisfied that "it is impossible to effectively enforce the Policy if an employee could simply refuse the test. In my view there is no other sensible way to view a refusal to submit to a random test." (61) Under the Policy, alcohol testing involves breathalyzer tests and drug tests involve oral fluid tests rubbing something like a Q-tip against the inside of a person's cheek. For drug tests, two samples are taken



[Stanley D. Berger](#)
Partner

t: 416.864.7626

sberger@foglers.com



[Tom Brett](#)
Partner

t: 416.941.8861

tbrett@foglers.com



[Jack D. Coop](#)
Partner

t: 416.864.7610

jcoop@foglers.com



[Albert M. Engel](#)
Partner

t: 416.864.7602

aengel@foglers.com



[Yadira Flores](#)
Associate

t: 416.365.3744

yflores@foglers.com

concurrently. One is used for testing and the other is kept in case the employee wants to have the oral fluid sample retested. Evidence was led that the oral fluid sample provided a better indicator of recent use and was a more accurate measure of likely impairment at the appropriate cut-off levels. The advantage of the fluid sample over the uranalysis, was that it did not compromise privacy by having to directly observe specimen collection to prevent adulteration of the sample. Other measures to minimize the intrusion of privacy were that those selected for random testing would be contacted confidentially, testing would occur in a private room or area at the assigned work location and the results of drug tests would be reviewed by a Medical Officer who would discuss the results with the employee before determining whether to report them as a positive or negative. The evidence was that employees were given 3 days to discuss the lab results with a Union representative before discussing it with the Medical Officer. A positive alcohol test meant a blood alcohol concentration above .04 mg. per litre while the oral fluid drug test cut off for marijuana, cocaine, opiates acetylmorphine, phencyclidine and amphetamines was set higher than the draft guidelines for workplace drug testing set by the *U.S. Substance Abuse and Mental Health Services Administration*. The evidence introduced led Judge Marrocco to conclude that the substances covered "can impair psychomotor and cognitive abilities of persons under the influence of those drugs." (at par.22) The TTC employed Integrated Workplace Solutions to provide substance abuse professional services to support their Policy. Disclosure of any recommendations made to the employee by the substance abuse professional could only occur with the employee's consent.

JUDGE'S FINDINGS

The Judge found from the above mentioned elements of the Policy that the Policy had a remedial as well as disciplinary component, that employees had some control over the information collected and there was accountability for the information collected. The Judge dismissed the Union's argument that the random testing exposed employees to reputational damage. Each year the Policy would indiscriminately test 20% of safety sensitive employees, specified management and designated executives meaning that the entire population subject to random testing, would have a chance of being tested within 5 years. Any stigma attached to compelling an employee to attend for testing would be quickly eliminated. In denying the application for injunctive relief Marrocco J. had made two other significant findings. First, he had been persuaded that there was a workplace drug and alcohol problem at the TTC which currently was hard to detect and verify (139). Secondly, drug or alcohol misuse at the TTC could have tragic consequences for many people, not all of whom were TTC employees. Unlike other Ontario workplaces, the Judge noted that the workplace "is literally the City of Toronto." (151)

CONCLUSIONS

Weighing the balance of convenience as he was required to do on such an application, Judge Marrocco concluded that if random testing proceeded it was likely that an employee in a safety critical position, prone to using alcohol or drugs close in time to coming to work, would either be ultimately detected when the test result became known or deterred by the prospect of being randomly tested. On the other hand, if the Union succeeded in challenging the Policy in the arbitration, employees whose reasonable expectation of privacy had been invaded could be compensated with damages. The scales weighed in favour of public safety and denial of the injunction.