

Ontario court dismisses injunction to restrain random drug and alcohol testing

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The Ontario Superior Court of Justice recently denied a union's injunction to restrain an employer's universal random drug and alcohol testing policy in *Amalgamated Transit Union, Local 113 v Toronto Transit Commission, 2017 ONSC 2078 (TTC)*. *TTC* has major implications for employers who are considering or who have already implemented random drug and alcohol testing in both unionized and non-unionized workplaces, post *Irving (Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd., 2013 SCC 34)*.

The respondent Toronto Transit Commission (TTC) implemented a "Fitness for Duty Policy" in October 2010 (the Policy). The Policy provided for limited drug and alcohol testing, although the TTC advised the Amalgamated Transit Union, Local 113 (ATU) that it reserved the right to implement larger scale random testing at a later date. The ATU filed a policy grievance under its collective agreement with the TTC shortly thereafter, and initiated arbitration proceedings.

In October 2011, the Policy was amended to permit random drug and alcohol testing of 20% of the TTC's workforce per year, including senior management. ATU responded by moving for an injunction to prevent the TTC from implementing random testing, pending the outcome of its grievance at arbitration. Actual random testing was not implemented by the TTC until March 2016.

Associate Chief Justice Marrocco dismissed ATU's injunction application and refused to enjoin the TTC from conducting random testing under the Policy. In considering the balance of convenience component of the test for interlocutory injunctions set out by the Supreme Court of Canada in *RJR-MacDonald Inc v Canada (Attorney General), [1995] 3 SCR 199*, the Associate Chief Justice cited the comprehensive evidence led by the TTC of substance abuse issues in its workplace, and in Ontario more generally, including that

- there existed a "culture of drug and alcohol use" in the TTC's workplace (based on affidavit evidence);
- several TTC employees advised management that they did not want to work with individuals that they believed were impaired;
- there were 116 positive or refused alcohol or drug tests for employees in violation of the Policy between October 2010 and December 2016;
- despite being advised of mandatory pre-employment drug testing, 2.4% of external applicants failed such tests;
- approximately 10% of Ontarians have substance abuse disorders; and
- random testing effectively reduced the risk of impaired persons causing an accident.

Regarding the public interest component to the test for injunctions, the Court remarked that

“drug or alcohol misuse at the TTC carries the complication that any accident can have tragic consequences for many people.” Finding that random testing would increase public safety, and that any breach of privacy was compensable by damages, Associate Chief Justice Marrocco dismissed ATU’s motion for an injunction pending outcome of the arbitration. As previously indicated by the Supreme Court of Canada in *Irving* and the Court of Queen’s Bench of Alberta’s later decision in *Suncor Energy Inc v Unifor Local 707A*, 2016 ABQB 269, employers seeking to implement universal random testing are first required to demonstrate that they (i) have a dangerous workplace and (ii) have a general problem with drug or alcohol abuse. The decision in *TTC* provides valuable guidance to employers and counsel on the evidence required to justify random drug and alcohol testing. Unions frequently seek interlocutory injunctions to suspend contested policies while awaiting the outcome of an arbitration. While the TTC has successfully defended its Policy against ATU’s injunction, it remains to be seen whether the TTC and its Policy will prevail in the coming arbitration.

Our appreciation goes out to Nathan White for his outstanding contributions to this Update.