



CANADA - UNITED KINGDOM Chamber of Commerce Over 92 YEARS OF NETWORKING

38 Grosvenor Street
London W1K 4DP
Tel: +44 (0) 20 7258 6578
Fax: +44 (0) 20 7258 6594
Email: info@canada-uk.org
www.canada-uk.org

Sept - Oct 2013

MINKEN
EMPLOYMENT LAWYERS

'In light of the *Irving* decision [from the Supreme Court of Canada], employers should have their existing drug and alcohol policies reviewed to ensure that these policies are in compliance with current law.'

Minken Employment
Lawyers

Contact & Author:

Ron S. Minken

Senior Lawyer & Mediator
Minken Employment Lawyers
190 Main Street, Suite 200
Unionville, L3R 2G9
Canada
T: +1 (905) 477 7011

rminken@minken.com
www.MinkenEmploymentLawyers.ca

Ron Minken gratefully acknowledges Sara Kauder and Kyle Burgis for their assistance in preparation of this article.

Death Knell for Random Alcohol Testing in the Workplace? Not Quite

On June 14, 2013, the Supreme Court of Canada weighed in on the issue of random alcohol testing in the workplace, ultimately deciding in *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.* ("Irving") that the decision to strike down the employer's random alcohol testing policy was reasonable.

In *Irving*, the employer, who operated a paper mill, unilaterally implemented an alcohol and drug use policy for unionized employees which included mandatory random alcohol testing of 10% of employees in safety sensitive positions annually by way of breathalyser. A positive test for alcohol would result in disciplinary action, including dismissal. The union grieved the matter to the arbitration board, who determined that the random testing policy was not justified as there was no evidence of an existing problem with alcohol in the workplace. In rendering its decision, the arbitration board weighed the employer's interest in random alcohol testing as a workplace safety measure against the harm to employees due to the violation of their privacy. In this situation, the board determined that the harm to employees due to the loss of privacy outweighed the minimal safety benefits afforded by the random testing. The employer sought judicial review of the decision, which was the beginning of a lengthy journey for this matter before ending up at the Supreme Court, with the arbitration board's decision being either set aside or upheld through various levels of Court.

In rendering its decision, the Supreme Court discussed the established principles that in the unionized environment, a rule or policy that is unilaterally imposed by an employer and is not agreed to by the union must ultimately be consistent with the

collective agreement and be reasonable. A careful balancing of interests must be undertaken to determine whether an employer can unilaterally impose a rule or policy that carries with it disciplinary consequences to ensure that the need for the rule or policy really does outweigh the infringement of the employees' rights to privacy. The Court noted prior decisions permitting alcohol testing of an individual employee in a dangerous workplace where there was reasonable cause to believe that either the employee was impaired while on duty, had been involved in a workplace accident or was returning to work following treatment for substance abuse. The Court similarly noted prior decisions in which arbitrators have strongly rejected mandatory random testing of employees, even in dangerous workplaces, due to the violation of employees' rights to privacy, unless there was evidence pointing to an existing substance abuse problem in the workplace. Accordingly, the Court acknowledged that while a dangerous workplace is a relevant factor in the overall analysis, it is not the determinative factor.

The Court determined that the arbitration board's findings that the impact on employee privacy of the mandatory alcohol testing policy grossly outweighed the potential safety benefits along with the fact that the employer was unable to demonstrate the required safety concerns to justify the random alcohol testing, were reasonable. Accordingly, the arbitration board's decision striking the mandatory alcohol testing policy was upheld. The Court's decision was made within the context of a unionized environment, though the ramifications of this decision are equally relevant to non-unionized workplaces.

Impact of Decision on Employers

In light of the *Irving* decision, employers should have their existing drug and alcohol policies reviewed to ensure that these policies are in compliance with current law. While random alcohol and drug testing may still be permitted, the scope has been drastically reduced.

Employers will need to establish that a substantial problem with substance abuse exists in the workplace to justify a random testing policy, including establishing that the safety benefits will outweigh the damage caused by the infringement of employees' privacy rights. The level of danger in the workplace is one factor to be considered, but will not be enough on its own for employers to demonstrate the reasonability of the random testing policy. Testing of individual employees is still permitted for employees occupying safety sensitive positions where one of the following scenarios exists: there is reasonable cause to believe the employee is impaired while on duty; the employee has been directly involved in a workplace accident or incident; or if the employee is returning to work following treatment for substance abuse.

Impact of Decision on Employees

The *Irving* decision strengthens employees' rights to privacy in the workplace and limits the situations in which random alcohol and drug testing can be performed and required by employers. Employees should not feel pressured to submit to random testing and should not fear disciplinary action from their employers as a result. Employees may still be required to participate in testing in specific circumstances as outlined above.