Alcohol Testing in Inherently Dangerous Workplaces

Suncor Energy's ongoing battle, in Alberta, to implement a workplace drug and alcohol testing program has gained a following as it works its way through adjudicative processes. A similar case arising in New Brunswick, however, promises to be the first to receive the opinion of Canada's top justices.

Irving Pulp & Paper Limited, operates a kraft paper mill along the banks of the St. John River in the city of Saint John, New Brunswick near the Bay of Fundy. In 2006, Irving unilaterally adopted a workplace policy for mandatory and random alcohol testing, by breathalyser, for employees holding safety sensitive positions.

Randomness was achieved by having the names of the prospective testees selected by an off-site computer. In any 12-month period, the computer would select 10% of the names on the list for testing.

An Irving employee, and member of the Communications, Energy and Paperworkers Union, who occupied a so-called "safety sensitive" position, was tested under the authority of Irving's policy. The test result for that employee was negative but, nonetheless, a policy grievance was filed by the union challenging the legitimacy of the policy.

It was not in dispute that the employer possesses the right to adopt policies dealing with workplace safety (provided they do not conflict with the collective agreement). Nor was it disputed that the union has a right to challenge those policies on the ground that they are unreasonable.

At arbitration, the policy was struck down on a "balancing of interests approach", when the arbitration board determined that Irving "failed to establish a need for the policy in terms of demonstrating the mill operations posed a sufficient risk of harm that outweighs an employee's right to privacy". More particularly, the panel concluded "Irving had not adduced sufficient

evidence of prior incidents of alcohol related impaired work performance to justify the policy's adoption."

But, the panel left the door open a crack by commenting that a "lighter burden of justification" was appropriate for employers engaged in the operation of "ultra-hazardous" or "ultra-dangerous" endeavours.

The arbitration decision was appealed to New Brunswick's Court of Queen's Bench, which quashed the earlier result. The Court held that it was unreasonable to require evidence of a history of alcohol incidents in the workplace once it had been concluded the kraft mill represented a dangerous workplace where the "potential for catastrophe exists".

On appeal to New Brunswick's Court of Appeal, the union took another shot at striking down Irving's testing policy but was unsuccessful.

The Court of Appeal concluded, "it is not difficult to support the contention that Irving's kraft paper mill qualifies as an inherently dangerous workplace as would a chemical plant. This is why evidence of an existing alcohol problem in the workplace was not required to support its policy of random alcohol testing. This is why the arbitration board's decision cannot stand and the application judge was correct in determining that its decision should be set aside and the grievance dismissed."

In arriving at that decision, the Court of Appeal considered the circumstances of Irving's kraft mill. It commented, "The facts of the present case also reveal a kraft mill with a $350 million pressure boiler which has a "high potential" for explosion. The potential impact on the environment of a major catastrophe, such as a chemical spill, has never been challenged. The intra-city location of the kraft mill and its proximity to the St. John River and Bay of Fundy would cause concern for any environmentalist. Indeed, … incorrect configuration of plant control systems by certain employees is noted as having a potential for "catastrophic failures"."

In sum, the New Brunswick Court of Appeal's judgment seems to stand for the principle that, once an employer has demonstrated it operates an "inherently dangerous" operation, a policy calling for mandatory testing of employees is acceptable. Most importantly, in those circumstances, the employer need not demonstrate any past history of workplace incidents of impairment, etc.

That sounds like a logical approach to me and is as much for the benefit of employees as management and the public. As the union was granted leave to appeal to the Supreme Court of Canada in early 2012, we should soon find out whether our top justices agree with this logic.

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