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ARTICLE

Court Dismisses Union's Application For An Injunction Restraining Random Drug/Alcohol Testing

The Ontario Superior Court rendered a decision on April 3, 2017 dismissing the Amalgamated Transit Union, Local 113's (the "Union") application for an interlocutory injunction restraining the implementation of a policy permitting random drug and alcohol testing of its members. The Union requested that the injunction be in place pending the completion of the arbitration of a policy grievance (*Amalgamated Transit Union, Local 113 v. Toronto Transit Commission*, 2017 ONSC 2078).

History and Purpose of the Policy

The employer, the Toronto Transit Commission (the "TTC"), approved the implementation of a "Fitness for Duty Policy" (the "Policy"), with the purpose of ensuring health and safety of its employees, customers and members of the public.

The Policy required that TTC employees be mentally and physically fit to perform their tasks, without any limitations, including from the use of drugs or alcohol. The Policy further required drug and alcohol testing of employees in safety sensitive and other specified positions, in the following circumstances:

1. Where there is reasonable cause to believe alcohol or drug use resulted in the employee being unfit for duty;
2. As part of a full investigation into a significant work-related accident or incident;
3. Where an employee is returning to duty after violating the Policy;
4. Where an employee is returning to duty after treatment for drug or alcohol abuse; and
5. As a final condition of appointment to a safety sensitive position.

While the Policy did not expressly provide for random testing at the time it was introduced, the TTC advised the Union that it was reserving its right to perform such testing, and the Policy was later amended to expressly permit this. Before the Policy came into effect, the Union filed a policy grievance, alleging the entire Policy was contrary to the collective agreement.

The grievance was referred to arbitration, which commenced on March 8, 2011. As of the date of the hearing of the Union's application for an injunction in February and March 2017, the TTC had not even commenced its case.

The Union Failed to Meet the Test for an Injunction

In order to succeed in its application for an injunction, the Union had to demonstrate that the application met the following, well-established, criteria:

- There is a serious issue to be tried;
- The Union or its members would incur irreparable harm if the relief requested was not granted; and
- The balance of convenience, taking into account the public interest, favours granting the interim relief requested.

On the first criterion, the Court agreed with the Union that there was a serious issue to be tried in the arbitration. Specifically, the arbitrator would be tasked with considering how the Supreme Court of Canada's decision in *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp and Paper Limited*, 2013 SCC 34 ("*Irving*") would be applied to the case, and whether the threshold requirements established by *Irving* for implementing such a policy were met. This component of the injunction test was satisfied.

With respect to whether irreparable harm would be suffered unless the injunction was granted, the Union made a number of arguments, including that employees would suffer breaches of privacy, psychological harm, as well as suffering consequences resulting from false positive test results, and damages resulting from unjust discharges. The Court concluded that adequate avenues exist through which employees could seek damages relating to these kinds of consequences, and that monetary damages would provide sufficient compensation for any harm suffered. Accordingly, this component of the test was not satisfied, and the Court dismissed the Union's application, with costs, on this basis.

Notwithstanding that the Union's application was already unsuccessful, the Court proceeded to comment on the third criterion, in case it was wrong on the second. In this regard, the Court reasoned that, if the random drug and alcohol testing is permitted to proceed, the testing will increase the likelihood that an employee prone to drug and/or alcohol use and working in a safety-sensitive position will either be detected through the testing, or that his or her drug and/or alcohol use will be deterred by the possibility of being subjected to random testing, and that this "will increase public safety". The Court concluded that the balance of convenience favoured the TTC's position, and again commented that any damages suffered by employees as a result of any such testing can be adequately remedied with monetary compensation.

The Court awarded $100,000 in costs, to be paid to the TTC as the successful party.

Though the TTC won this battle, it does not mean that the TTC will be permitted to keep the Policy in place or to proceed with random drug and/or alcohol testing in the future. We will have to stay tuned to see what comes of the ongoing arbitration, and whether the TTC can satisfy the arbitrator that it meets the *Irving* requirements for having a random testing policy. This is certainly one to watch.

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