

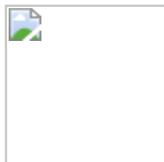


FIELD LAW

Labour and Employment

April 11, 2014

Alberta Arbitration Board Rules Random Drug and Alcohol Testing Unreasonable



By **Joël Michaud** and **Jason Kully**

In the ongoing debate on random drug and alcohol testing of employees, an Alberta Arbitration Board (the “Board”) has found that an employer’s random drug and alcohol testing policy is unreasonable.

The Board’s decision is the result of a grievance filed by Unifor, Local 707A (“Unifor”) against Suncor Energy Inc., Oil Sands (“Suncor”) and follows a Queen’s Bench decision in 2012 that granted Unifor an injunction preventing Suncor from implementing the random testing policy pending the outcome of the grievance. The Court of Appeal upheld the injunction (the Court of Appeal decision having been discussed in a previous *Workwise* found [here](#)).

The issue before the Board was whether Suncor’s unilateral imposition of a random drug and alcohol testing policy for employees in a safety sensitive position was a reasonable exercise of management rights. The random drug and alcohol policy at issue was separate from Suncor’s current drug and alcohol policy, which allows for post-incident, reasonable cause, return to work and follow-up testing.

The starting point for the Board’s analysis is the Supreme Court of Canada’s decision in *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Limited* (“Irving”) delivered in June 2013 that upheld an arbitration board’s decision that random alcohol testing was unreasonable. As set out in Irving, the employer must prove there is a workplace problem sufficient to justify random testing. In determining whether random testing is reasonable, it is necessary to apply a “balance of interests” approach to determine if the benefit gained to the employer by the imposition of the random testing policy in the dangerous workplace is proportional to the harm to employee privacy.

The majority of the Board (one of the three panel members, Suncor’s nominee, had a dissenting view [1]) rejected the random testing policy, finding it was unreasonable because the benefits gained by Suncor in reducing its safety risks were not proportional to the harm that would occur to employees because of the significant infringement of their privacy rights.

The Board noted the distinction that has existed in the case law between random *alcohol* testing and random *drug* testing stemming from the inability of random drug testing by urinalysis to demonstrate impairment of job functions at the time the test is taken.

The Board found that there was not a sufficient basis to justify the imposition of random alcohol testing, as the evidence did not establish an “out-of-control” alcohol culture or a significant problem or legitimate safety risk (there being only 14 positive alcohol tests over 9 years for a large employer and the evidence suggesting that positive tests were decreasing). Further, the Board commented that the evidence failed to demonstrate a particular problem with employees who were Unifor members as the evidence presented by Suncor related to all workers on the site (reference to three fatalities linked to drugs or alcohol were contractor employees and not Unifor members).

The Board also rejected the imposition of random drug testing. It found that Suncor’s testing method of urinalysis, while able to identify employees who recently used drugs, was unable to provide specific information with respect to current impairment. It was a more intrusive means of testing which did not provide the most accurate results or necessary information. As such, the “flagging” of an employee who recently used drugs did not meet the threshold of a legitimate business interest which would justify the intrusion into the employee’s privacy. The Board also identified Suncor’s failure to fully comply with Alberta’s Drug and Alcohol Risk Reduction Pilot Principles (“DARRPP” [2]), which Suncor originally participated in, as another factor for finding the policy was unreasonable. In this regard, the Board noted that Suncor’s position on the use of urine testing is made more confusing in that DARRPP recognized oral fluid (buccal swab) testing, which is able to determine present impairment by drugs.

In summary, the Board held that the policy was unreasonable based on the lack of proof of a drug or alcohol problem among Unifor members, the intrusive nature of the testing methods and the limitations with urinalysis as a testing measure.

The Board's decision does not foreclose random drug testing in the workplace. Random testing could be justified if it was a proportionate response that considered safety concerns and privacy interests. While Suncor and Unifor did not give the Board jurisdiction to determine what would have been a reasonable policy, the Board did state what it would have done if they had done so. Essentially, a "reasonable random alcohol and drug testing policy" would be one that applied DARRPP, including a time-limited trial project subject to review, measurement of effects and results (including false positives), respect for employees' dignity, a dispute solution mechanism, a clear "under the influence of alcohol or drugs" prohibition, consistent training and oral fluid testing.

Suncor has issued a statement that it intends to seek judicial review of the Board's decision.

We will provide further analysis of the decision and what it means for employers in an upcoming edition of *Work wise*.

[1] Suncor's nominee provides an extensive review of the evidence on the basis that the majority of the Board "failed to consider material and relevant facts and was highly selective in its review of the evidence".

[2] DARRPP is a two-year initiative that started in 2012 and is led by a multi-stakeholder group that includes major oil sands industry employers and labour providers. Its purpose is to evaluate and report on the effectiveness of comprehensive workplace alcohol and drugs programs that include random workplace testing. DARRPP is expected to report its findings in 2014.

This email is sent on behalf of Field Law's Labour and Employment Group. For more information on our services and contacts, please see our [webpage](#).



© 2014 Field LLP. All Rights Reserved.

"Field Law" is a registered trademark of Field LLP.