

Legal update

Suncor takes another step towards random drug testing for employees in safety-sensitive positions

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Employment and labour

The Alberta Court of Appeal recently released a decision upholding the quashing of a ruling that restricted Suncor's legal right to implement random drug and alcohol testing for union employees in safety-sensitive positions. The main issue was whether Suncor had to demonstrate that there was a substance abuse problem within the bargaining unit specifically, or whether evidence of a general problem within the workplace was sufficient.

In upholding the decision of the court below, the court highlighted the importance of a safe work environment in favour of privacy concerns of union employees.

Background

Suncor introduced random drug and alcohol testing for employees in safety-sensitive positions at some of its sites in the Fort McMurray area in 2012.¹ The union representing many of those employees grieved the alleged infringement of unionized workers' privacy rights.²

The majority of an arbitration tribunal ruled in favour of the union in 2014, concluding that Suncor had not demonstrated sufficient safety concerns within the bargaining unit to justify random testing.³ This decision was quashed by Justice Nixon on the Alberta Court of Queen's Bench last year.

The question before the Court of Appeal was whether Justice Nixon selected the appropriate standard of review and applied it properly.⁴

Courts will look at substance abuse within the workplace, not just within a bargaining unit

The legal basis for justifying a random drug and alcohol test was revisited in *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper Ltd*, 2013 SCC 34, [2013] 2 SCR 458 [*Irving*]. In *Irving*, the Supreme Court of Canada explained how a dangerous worksite is not, in itself, enough to justify imposing random drug or alcohol testing on its unionized employees. What is additionally required is evidence of enhanced safety risks, such as evidence of a general problem with substance abuse in the workplace.⁵

Suncor established that the Fort McMurray-area worksites are dangerous by submitting evidence on the type of work done by employees in safety-sensitive roles. The worksites are situated near environmentally sensitive areas and populated communities.⁶ The employees typically work 12-hour shifts and operate some of the largest and most complex mining and industrial equipment in the world.⁷

Suncor established that there is a general problem with substance abuse in the workplace by presenting evidence of more than 2,200 incidents that involved drugs or alcohol. However, Suncor did not break down how many of these incidents involved unionized employees versus non-union members and contractors.⁸

It was the “unparticularized” evidence that led the tribunal to rule in favour of the union.⁹ The panel suggested it should only consider evidence demonstrating a drug or alcohol problem *within the bargaining unit*.¹⁰ Justice Nixon found that this unreasonably heightened the threshold for demonstrating a workplace problem with drugs and alcohol. The correct question, mandated by *Irving*, is whether there was evidence of a general problem of substance abuse *within the workplace*.¹¹

In agreeing with Justice Nixon, the Alberta Court of Appeal found that “[b]y unreasonably narrowing the evidence that it considered when deciding this issue, the tribunal majority effectively asked the wrong question, and therefore applied the wrong legal test.”¹²

The Court of Appeal explained that unionized employees, non-unionized employees and contractor employees all work side by side, in integrated workforces at integrated jobsites.¹³ There was no reasonable justification for distinguishing between the evidence of substance abuse problems in the workplace as a whole and evidence of substance abuse problems specific to unionized employees.¹⁴ As a result, the matter was remitted for a new arbitration, to be heard by a fresh panel.¹⁵

Footnotes

¹ *Suncor Energy Inc v Unifor Local 707A*, 2017 ABCA 313 at para 2 [*Suncor*].

² *Ibid*, at para 2, 13.

³ *Ibid*, at para 16.

⁴ *Ibid*, at para 4.

⁵ *Ibid*, at para 39.

⁶ *Ibid*, at para 6.

⁷ *Ibid*, at para 7.

⁸ *Ibid*, at para 40.

⁹ *Ibid*, at para 19.

¹⁰ *Ibid*, at para 38.

¹¹ *Ibid*, at para 39.

¹² *Ibid*, at para 49.

¹³ *Ibid*, at para 48.

¹⁴ *Ibid*.

¹⁵ *Ibid*, at para 52.

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