What's New in HR Law

Arbitrator Holds that the Reasonableness of Employee Drug Testing Must be Assessed Separately from the Reasonableness of Alcohol Testing

September 21, 2018

BOTTOM LINE

Arbitrator found that the fact that an employee reported to work smelling of alcohol did not provide the employer with reasonable cause to test that employee for drugs.

Facts: An employee reported to work smelling of alcohol, but did not demonstrate any other signs of possible impairment. The employer responded by requiring the employee to submit to both drug and alcohol testing.

The employee, C.L., was employed as a labourer by Vancouver Drydock Co. Ltd. (the "Employer") in British Columbia. C.L. was a unionized employee.

The Employer operated a safety-sensitive workplace and had a workplace drug and alcohol policy (the "Policy") in place. Under the Policy, the Employer could require an employee to

undergo drug and/or alcohol testing if the Employer "reasonably believed" that the employee's "work performance may be affected by the use of Alcohol or Drugs". The policy set out several examples of "unusual behaviour" that might justify subjecting an employee for testing, including slurred speech, smelling of alcohol, changes in personality, or mood swings.

C.L. reported to work smelling of alcohol but showed no other signs of potential impairment. The Employer required C.L. to submit to a urine test for drugs and a breathalyzer test for alcohol. While C.L. passed the breathalyzer test, his urine test came back positive for having consumed cocaine and MDMA within the previous 24 hours.

The Employer discharged C.L. as a result of his failed drug test. C.L.'s union grieved this decision, arguing that the Employer lacked reasonable cause to test C.L. for drugs.

The Determination: The Employer lacked reasonable cause to subject C.L. to drug testing because he showed no signs or symptoms of potential drug-related impairment

Arbitrator David McPhillips held that the Policy required the Employer to demonstrate that it had "reasonable cause" for subjecting an employee to any drug or alcohol testing. The Arbitrator also held that, because the Employer operated a safety-sensitive work environment, the Employer ought to be given some deference when deciding whether reasonable cause existed for requiring C.L. to undergo the drug and alcohol testing.

Despite showing deference to the Employer's decision, the Arbitrator concluded that the Employer lacked reasonable cause for the drug testing. The Employer's decision to subject C.L. to both drug and alcohol testing was based solely on the fact that C.L. smelled of alcohol; he did not exhibit any signs of impairment that might reasonably suggest that he had been using drugs, nor did the employer have any reason to suspect drug use. Rather, the employer's sole reason for requesting that C.L. undergo testing was the smell of alcohol. The Arbitrator therefore concluded that there had been no reasonable cause for the Employer to require C.L. take a drug test, and the Arbitrator excluded the results of the drug test from the arbitration.

Importantly, the Arbitrator indicated that it may be reasonable for an employer to test an impaired employee for both drugs and alcohol where it is not possible to pre-determine the cause of the employee's impairment. The Arbitrator stated as follows at page 13 of his award:

> …[I]t may be impossible to know in a particular situation what is the cause, be it drugs or alcohol or even personal circumstances, so a testing for both drugs and alcohol would clearly be appropriate. The arbitral and judicial authorities establish that where, for example, there is clear evidence of impairment and it is unclear whether that may be caused by alcohol or drugs, it would be reasonable to test for both.

Check the Box

This decision cautions that reasonable cause for alcohol testing does not necessarily mean there is reasonable cause for drug testing (or vice versa). This decision suggests that requiring an employee to undergo both drug and alcohol testing for reasonable cause may be justified where

there are facts giving rise to suspected impairment, but the employer is unable to determine whether the potential cause of impairment is alcohol, drugs or both, or where the employer has reason to suspect both alcohol and drug use. It remains to be seen whether and how Arbitrator McPhillips' decision will be applied by other arbitrators in Canada.

Forum: British Columbia Labour Arbitration

Date: May 3, 2018

Citation: *Vancouver Drydock Co. Ltd. v. Marine Workers and Boilermakers Industrial Union, Local 1*, 2018 CanLII 55873

Need more information?

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