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Employment and Labour Law Update

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Random Alcohol Testing Fails Test at Supreme Court of Canada

In a 6-3 decision released in June of this year, the Supreme Court of Canada ruled as *unreasonable* the mandatory alcohol testing policy adopted by Irving Pulp and Paper Ltd. for employees in safety sensitive positions *(CEP, Local 30 v. Irving Pulp & Paper)*.

According to the Supreme Court, a dangerous workplace is not automatic justification for random testing. Additional factors must be present, including for example:

- Reasonable grounds to believe an employee is impaired while on duty.
- A workplace accident or near miss justifying post-incident testing.
- An employee returning to work after treatment for substance abuse so that the testing protocol is part of a "return-to-work" program.
- Evidence of a workplace problem of alcohol abuse.

The decision has broad implications for employers in all industries and sectors, but particularly for those with safety sensitive positions.

What Happened in Irving Pulp and Paper?

Irving Pulp and Paper operated a unionized paper mill in New Brunswick. In 2006, purportedly in response to alcohol issues in the workplace, the company unilaterally adopted a drug and alcohol policy. Under this policy, 10% of employees classified as working in "safety sensitive" positions were to be randomly selected for unannounced breathalyzer testing. A positive test would lead to disciplinary action, up to and including dismissal.

The union challenged the random testing as an unjustifiable breach of employee privacy rights. The union argued that a breathalyzer test - being an involuntary submission of bodily fluids – required a high level of personal intrusion which should only be permitted when there is reasonable cause such as slurred speech, the smell of alcohol or an actual accident or near miss.

In its defense, Irving argued its policy was justified given the unique circumstances and history of the mill and Irving's legal duty to protect the health and safety of its workers. The mill contained hazardous chemicals, flammable substances, heavy rotating equipment, a 13,000-volt electrical system and a $350-million high-pressure boiler. It had also experienced at least eight documented alcohol-related incidents between 1991 and 2006. In all of the circumstances, Irving maintained it was not reasonable to require its random testing policy

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to be tied or causally linked to an actual accident or near miss in the workplace. Given its duty to protect its workers, Irving argued it should not have to wait for a serious incident before taking action.

The Decisions

At arbitration, the random testing policy was struck down as being a significant encroachment into employee privacy that was "out of proportion to any benefit". In reaching this decision, the Arbitration Board chose to follow a line of decisions in which random testing was upheld only where there was a demonstrable drug or alcohol problem in the workplace. According to the Board, Irving's eight alcohol-related incidents over 15 years were insufficient to demonstrate a 'problem in the workplace'.

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The arbitration decision was overturned, and ultimately appealed to the Supreme Court of Canada which found the random testing policy to be unreasonable:

> In this case, the expected safety gains to the employer were found by the board to range from uncertain to minimal, while the impact on employee privacy was severe… [Irving] exceeded the scope of its management rights under a collective agreement by imposing random alcohol testing in the absence of evidence of a workplace problem with alcohol use.

Broad Implications for Employers

The decision from the Supreme Court could have broad implications, as it is considered a national test case for how far an employer can go when it comes to a worker's right to privacy. The case attracted numerous interveners, including the Canadian Civil Liberties Association, Canadian National Railway Company, Via Rail Canada, the Canadian Mining Association, and the Canadian Manufacturers and Exporters.

Ultimately, whether random alcohol testing is justified will depend on whether an employer can demonstrate a workplace problem with alcohol use. What constitutes a significant enough problem remains unclear. What is clear is that random testing without evidence of an identifiable issue in the workplace will be considered an unreasonable infringement on employee privacy, even in safety sensitive positions.

For more information about drug and alcohol testing or for assistance developing a drug and alcohol protocol in your workplace, please contact a member of Sherrard Kuzz LLP.

No (Reinstatement) Means No (Reinstatement) –

Court Reverses Arbitrator's "Dangerous Step Backwards" and Upholds Termination of Sexual Harasser

It has been three years since Bill 168, the *Occupational Health and Safety Amendment Act (Violence and Harassment in the Workplace) 2009*, took effect, extending the reach of the *Act* into the realm of workplace violence and harassment.

Since its enactment, Bill 168 has increasingly been relied upon by employers, courts and arbitrators in support of a "zero tolerance" approach to violence and harassment in the workplace. Which is not to say courts and arbitrators will now *always* give deference to an employer's discipline of a workplace harasser. However, it is becoming increasingly clear that Bill 168 has empowered adjudicators to take a harder line when it comes to ensuring a workplace free from violence and harassment.

A Recent Decision in the Sexual Harassment Context

In *Professional Institute of the Public Service of Canada v. CEP, Local 3011*, Mr. Haniff, a unionized mail room clerk with six years of service and no prior discipline, was dismissed for cause after a woman employed as a cleaner in the same building complained about a disturbing incident that had taken place in the elevator. According to the complainant, as she was getting into the elevator, Mr. Haniff raced to get on with her and then tried to kiss her, but she pushed him away. Then, as she exited the elevator, Mr. Haniff is alleged to have grabbed her buttocks.

[i]t is becoming increasingly clear that Bill 168 has empowered adjudicators to take a harder line when it comes to ensuring a workplace free from violence and harassment.

In the course of its investigation, the employer learned this was not the first incident of sexual harassment allegedly involving Mr. Haniff. Throughout the previous five years, Mr. Haniff had engaged in a course of inappropriate conduct including: frequently speaking and gesturing in sexually suggestive ways, performing his "sexy dance" during breaks and, if he encountered the complainant or another cleaner alone, blowing her a kiss or occasionally grabbing her buttocks.

DID YOU KNOW?

An Ontario judge has ruled a woman must remove her face-covering veil to testify against the men she's accused of sexual assault. The case pitted an accused's right to a fair trial against a complainant's freedom of religion. In a ground-breaking decision, the judge held the woman's niqab *"masks her demeanour and blocks both effective cross-examination by counsel for the accused and assessment of her credibility by the trier of fact."*

Mr. Haniff did not deny the incident on the elevator, nor his previous inappropriate behaviour. Instead, he alleged the women had consented to and enjoyed his advances. The employer - not satisfied with his explanations - terminated Mr. Haniff's employment for cause. Mr. Haniff's union grieved the termination.

Arbitrator's Reinstatement of Mr. Haniff

At arbitration, Arbitrator Weatherill found that, while the offence was serious and not denied, Mr. Haniff's discharge "went beyond the range of reasonable disciplinary responses to the situation". He reinstated Mr. Haniff and, in *lieu* of termination, substituted an unpaid suspension of roughly six months.

In a legal atmosphere where employers can bear responsibility for the actions of their employees, an arbitrator's decision that an admitted harasser should be returned to the workplace is, frankly, a chilling one.

According to Arbitrator Weatherill, two factors supported an order of reinstatement:

- Another cleaner testified that, when harassed by Mr. Haniff one too many times, she showed him her fist and made it clear he had gone too far. This had dissuaded him from bothering her again; and
- The complainant, who was described as a "strong woman [who] knows how to stand up for herself", did not want Mr. Haniff to be discharged.

Divisional Court's Reversal of the Arbitrator's Award

At a judicial review hearing before the Divisional Court for Ontario, the employer argued the substitution of a suspension in *lieu* of termination could not be justified for several reasons. The most significant reason being that reinstatement could potentially put the employer in breach of its obligations under Bill 168 to provide a workplace free from violence and harassment. The additional, factual, reasons included:

1. Mr. Haniff's record of past misconduct persisted for most of his employment.
2. Mr. Haniff refused to accept that "no means no".
3. Mr. Haniff's actions were grave and constituted sexual assault.
4. Mr. Haniff showed no remorse, acknowledgment of wrongdoing or contrition.

5. The Arbitrator relied on inappropriate factors (noted in the bullets above) in determining that Mr. Haniff should be reinstated.

A unanimous Divisional Court agreed with the employer, reversing the Arbitrator's decision and upholding the termination. Rejecting both bases on which Arbitrator Weatherill had ordered reinstatement, the Divisional Court held:

1. It is "not the responsibility of employees to protect themselves from being sexually harassed or assaulted by being strong or threatening violence". Whether an individual is "strong and able to stand up for him/herself" is therefore "irrelevant and represent[s] a dangerous step backwards in the law surrounding the treatment of sexual misconduct in the workplace".
2. In determining the suitable penalty, it is not appropriate to consider the wishes of the assaulted individual. Whether that individual can cope with the offending employee's return to the workplace says nothing about the risk he/she poses to other workers who may be exposed to his/her misconduct in the future.

What the Decision Means for Employers

In a legal atmosphere where employers can bear responsibility for the actions of their employees, an arbitrator's decision that an admitted harasser should be returned to the workplace is, frankly, a chilling one. The Divisional Court's decision is therefore a welcomed message that employers will increasingly have the court's support when taking steps necessary to ensure the protection of their workers from violence and harassment in the workplace.

To learn more and/or for assistance developing a workplace violence and harassment policy tailored to your organization, contact a member of Sherrard Kuzz LLP.

DID YOU KNOW?

The Ministry of Labour recently released its "Supervisor Health and Safety Awareness in 5 Steps" Workbook and Employer Guide. Copies can be obtained at http://www.labour.gov.on.ca/english/hs/pubs/sup_awareness.php or by contacting a member of Sherrard Kuzz LLP.

MANAGEMENT COUNSEL

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Seminar Series

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Discipline in the Workplace - An overview of best practices and pitfalls

What procedures should be followed prior to imposing discipline?

- Best practices for an investigation.
- What if an employee won't co-operate.
- Record keeping and collection of evidence.

What is the appropriate discipline?

- Factors to consider, including the impact of remorse.
- Consequences of imposing excessive or disproportionate discipline.
- When to use a "last chance agreement."

How does discipline in a unionized workplace differ from a non-union workplace?

- Timeliness of an investigation and resulting discipline.
- Role of a union representative.
- What is a "sunset clause" and how does it work?

DATE: **Tuesday September 17, 2013; 7:30 – 9:30 a.m.** (breakfast at 7:30 a.m.; program at 8:00 a.m.)

VENUE: **Mississauga Convention Centre,** 75 Derry Rd West, Mississauga ON L5W1G3

COST: Please be our guest

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