



# What's New in HR Law

## Ontario Superior Court of Justice Dismisses Union's Application for Injunction Restraining Random Drug and Alcohol Testing at the TTC

April 18, 2017

### **BOTTOM LINE**

The Superior Court of Justice dismissed the Amalgamated Transit Union, Local 113's ("the Union's") application for an interlocutory injunction restraining random drug and alcohol testing, primarily because the Union failed to convince the Court that bargaining unit members would suffer "irreparable harm" in respect of their privacy interests if the injunction was not granted.

**Facts: Union filed an application for an injunction restraining the implementation of random drug and alcohol testing pending the resolution of an arbitration hearing**

In September 2008, the Toronto Transit Commission ("TTC") approved the implementation of a "Fitness for Duty Policy" (the "Policy"). The Policy provided for drug and alcohol testing of employees in safety-sensitive positions, specified management and designated executive

positions. The Policy did not provide for random testing, although it reserved the TTC's right to do so.

Prior to the Policy taking effect in 2010, the Union filed a grievance alleging that the Policy violated the Collective Agreement and the Ontario *Human Rights Code*. The Union also alleged violations of the *Canadian Charter of Rights and Freedoms*. This grievance was referred to arbitration.

In 2011, the TTC approved the amendment of the Policy to provide for random drug and alcohol testing. In 2016, approval was obtained to implement random testing. When the TTC notified the Union of its intention to implement random testing, the Union filed an application with the Court for an interlocutory injunction seeking to prohibit the TTC from implementing random testing pending the resolution of the arbitration hearing. At the time, the arbitration was in its sixth year of hearing, with no end in sight.

### **Issue #1: No irreparable harm to employees' privacy interests**

The Court found that the Union had failed to demonstrate that bargaining unit members would suffer "irreparable harm" in respect of their privacy interests if the injunction was not granted. In support of this finding, the Court concluded that:

- (1) bargaining unit members' expectation of privacy concerning their drug and alcohol consumption was reasonably diminished by the fact that both TTC management and TTC employees expect that steps will be taken to ensure those in safety-sensitive positions are fit for duty;
- (2) the procedures and methods that the TTC had chosen to randomly test for drugs and alcohol were minimally invasive and superior to other available methods of testing;
- (3) the Policy was reasonably tailored to achieve its stated health and safety purpose; and
- (4) any contravention of the Collective Agreement or the *Human Rights Code* could be remedied by the payment of monetary damages to employees, if any, whose privacy had been "wrongfully" infringed.

The Court also considered the Union's submissions that:

- (1) members selected for random testing would suffer reputational damage in the absence of an injunction;
- (2) random testing would permanently damage the relationship between employees and management;
- (3) random drug and alcohol testing was "among the most intrusive forms of personal surveillance"; and
- (4) random drug and alcohol testing created the likelihood of psychological harm to TTC employees.

The Court, however, was not convinced that the evidence supported the above propositions submitted by the Union.

## **Issue #2: The balance of convenience favoured refusing the injunction**

Further, and in any event, the Court found that the “balance of convenience” favoured refusing the injunction. In assessing the “balance of convenience,” a court must determine which of the two parties will suffer the greater harm from the granting or refusal of the injunction.

The Court reviewed the evidence, including extensive expert evidence, regarding the efficacy of the alcohol and drug testing methods, processes and procedures to be used in the TTC’s random testing program. The TTC’s method of alcohol testing would be by breathalyzer and the method of drug testing would be oral fluid testing. Urinalysis drug testing would not be used for random testing. The Court was satisfied on the evidence that the TTC’s oral fluid method of drug testing was capable of detecting likely impairment due to recent drug usage.

Overall, the Court found that the TTC’s random testing program would enhance public safety by increasing the likelihood that employees in safety-sensitive positions who are prone to drug or alcohol use would either be detected or deterred by the prospect of being randomly tested. Weighing this benefit against the potential invasion of employees’ reasonable expectation of privacy, the Court concluded that the balance of convenience favoured the TTC.

## **Result: Motion dismissed, \$100,000 in costs awarded**

For all of the above reasons, the Court dismissed the Union’s motion. The Court agreed with the parties that an award of costs in the amount of \$100,000 would be reasonable, and awarded the same to the TTC.

## **Check the Box**

The Union’s challenge to the TTC’s Policy, including the random and non-random testing components, continues to proceed at arbitration.

The Court’s decision suggests that random drug and alcohol testing in safety-sensitive workplaces does not necessarily cause irreparable harm to employees if the testing method, processes and procedures are carefully designed to achieve the employer’s health and safety goals while safeguarding employees’ privacy, confidentiality and dignity.

**Forum:** Ontario Superior Court of Justice

**Date:** April 3, 2017

**Citation:** *Amalgamated Transit Union, Local 113 v Toronto Transit Commission*, 2017 ONSC 2078

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