CONSTRUCTION ADVISOR

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ARTICLES:

Random Drug & Alcohol Testing: What Does the New TTC Case Tell Us?

Author: Sarah E. Smith, Associate

Since early May, the Toronto Transit Commission ("TTC") has been requiring employees in safety-sensitive jobs, as well as in designated management and executive positions, to undergo random testing for drugs and alcohol. Within the first month of random testing, five employees had tested positive.

But is this testing lawful? Testing began when the Ontario Superior Court of Justice denied the Amalgamated Transit Union, Local 113's (the "Union") challenge regarding the lawfulness of the testing. Therefore the Court held that.testing *is* lawful – at least for the time being.

To understand the temporary nature of the Court's decision, it is important to understand the background to the Union's challenge.

In 2010, the TTC introduced a Fitness for Duty Policy to guard against drug and alcohol use that could endanger safety. The Union took issue with the Policy, grieving it all the way to arbitration, which started in March of 2011.The arbitration proceedings remain ongoing, with no signs of wrapping up anytime soon.

Despite the ongoing arbitration, in March 2016, TTC approved implementation of random drug and alcohol testing. In response, the Union challenged the lawfulness of the testing by bringing an interlocutory injunction to the Court. In other words, the Union asked the Court to stop the random testing until the arbitration decision is issued. As noted, the Court denied the Union's request.

In coming to this decision, the Court considered a number of factors. Most notably:

- The TTC was able to demonstrate that there was a "demonstrated workplace drug and alcohol problem." To do so, the TTC provided substantial evidence, including statistics showing 116 instances where employees either tested positive or refused to be tested between 2010 and 2016 in respect of other types of testing (e.g. post-accident or reasonable suspicion testing).

- The TTC uses state-of-the-art testing procedures and methods that are minimally

intrusive on employees privacy. Specifically, the TTC uses oral fluid and breathalyser testing, and the cut-off levels for what constitutes "impairment" were set much higher than testing levels in the United States. In other words, it takes more drugs or alcohol in your system to fail the TTC test.

- The Fitness for Duty Policy, on the whole, is aimed at protecting health and safety. It is not just about testing, but also includes an addiction treatment component, and rigorous controls to ensure accountability for the information collected and confidentiality of the results. Employees also have the opportunity to challenge the results before they are reported to management.

- TTC employees are required to pass pre-employment testing, so it is reasonable to assume that, if you have to pass a test to *start* working at the TTC, you should pass a test to *keep* working at the TTC.

In light of this (and other considerations), the Court allowed the TTC to engage in random testing while the parties conclude the arbitration proceedings.

Therefore, the testing will remain lawful pending the outcome of the arbitration. If the arbitrator ultimately finds that the random testing is unlawful or contravenes the collective agreement, the arbitrator can award monetary compensation as a remedy.

This case certainly doesn't end the debate on random testing, but it is encouraging. It appears to crack open the door to random drug and alcohol testing in safety-sensitive workplaces – in limited circumstances. While we await guidance from higher levels of court, this case seems to recognize what many employers have been saying for years: drug and alcohol impairment have no place on-the-job.

Ontario: Fairer Workplaces? Better Jobs?

Author: Sydney Kruth, Associate

On June 1, 2017, the Ontario government introduced legislation, the *Fair Workplaces, Better Jobs Act, 2017* ("Fair Workplaces Act"), which, if passed, will amend the *Employment Standards Act, 2000* ("ESA") and the *Labour Relations Act, 1995* ("LRA").

Some of the significant legislative amendments imposed by the Fair Workplaces Act include:

Employment Standards Act:

- Minimum wage increase to $14/hr by Jan 2018, and $15/hr by Jan 2019;

- Casual, part-time, temporary and seasonal employees to be paid same as full time employees; and

- Imposition of penalties for misclassifying employees as independent contractors

Labour Relations Act:

- Making automatic certification easier in the event of an unfair labour practice;

- Improving access to first contract arbitration; and

- The introduction of intensive mediation to the first contract arbitration process.

One of the amendments imposed by the Fair Workplaces Act which could significantly impact the construction industry is the addition of mediation-arbitration to the first agreement provisions of the LRA.

What is Mediation-Arbitration?

Mediation-arbitration is a dispute resolution mechanism available when an impasse has been reached in collective bargaining.

Mediation is a voluntary process based on the consent of the parties, while arbitration is not a voluntary process. Typically, an arbitrator will begin by mediating the dispute, and if mediation does not succeed, the arbitrator will hold a hearing and issue a binding decision.

First Contract Mediation-Arbitration and the Fair Workplaces Act

Currently, first agreement arbitration is only available in limited instances after the parties have failed to reach a first collective agreement. Once the Fair Workplaces Act is passed, first agreement arbitration will be universally available.

Where the appointment of a first agreement mediator is requested, and mediation fails, a party will be able to apply to the Labour Board to direct first agreement mediation-arbitration. The parties will then be able to select their own mediator-arbitrator, or can apply to the Labour Board for settlement via mediation-arbitration. The Labour-Board will then appoint a Chair or Vice-Chair to act as mediator-arbitrator.

It appears that the Labour Board will direct mediation-arbitration in most instances, unless the Board determines that the applicant has previously breached its obligation to bargain in good faith, or has otherwise taken an unreasonable position in bargaining. Therefore, as long as the "good faith" requirement is met, a party will be able to obtain a first collective agreement via mediation-arbitration.

Where mediation-arbitration has been directed, no strikes or lock-outs will be permitted. Additionally, current working conditions will be "frozen" until the collective agreement is settled.

What Will the Implementation of Mediation-Arbitration Look Like in Ontario?

A "mediation intensive" approach to first contract arbitration is currently in use in British Columbia, and may provide guidance with respect to what mediation-arbitration may entail in Ontario. Under the BC model, parties may request that the Labour Board appointment a mediator after first contract negotiations fail. If the mediation process is unsuccessful, the mediator is able to recommend the outstanding terms of the collective agreement, or order further dispute-resolution steps, which could include arbitration or mediation-arbitration. Any recommendations made by the mediator can be used in subsequent proceedings.

As established in *Yarrow Lodge*, a decision of the BC Labour Relations Board outlining the purpose of the BC first agreement model, BC first agreement mediators are bound by the same principles that guide interest arbitrators when imposing a collective agreement – specifically, adherence to the replication principle, and ensuring any terms recommended are fair and reasonable in the circumstances. In other words, mediators are supposed to "replicate" what would have happened if the parties had successfully engaged in collective bargaining. Ontario mediator-arbitrators would likely be held to the same standard.

The availability of mediation-arbitration in Ontario has the potential to seriously alter the ways in which parties bargain in non-accredited sectors of the construction industry. Parties may be incentivized to reach a settlement in first contract bargaining when faced with the knowledge that a binding agreement may be imposed through the mediation-arbitration process. While, as outlined above, arbitrators may be constrained by the principle of replication, the reality is that the results of mediation-arbitration may be unpredictable.

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Additionally, Mathews Dinsdale congratulates a number of its construction lawyers for appearing in the Lexpert Practice Area Rankings that highlights Ontario's leading lawyers in Labour Relations – Construction Sector.

Construction Advisor – Next Edition

Ontario to Extend WSIB Benefits for Work-Related Mental Stress - On May 17, 2017, the Legislature passed Bill 127 – the Stronger, Healthier Ontario Act (Budget Measures), 2017. Through Schedule 33, Bill 127 introduced many amendments to the *Workplace Safety and Insurance Act ("WSIA")*. Perhaps most notably, the Bill amends Section 13 of the *WSIA* to explicitly include Chronic Mental Stress. How the Legislature is defining Chronic Mental Stress, how this change impacts Ontario Construction Employers and when employer's should start worrying about the same will be covered in our next edition of the Construction Advisor.

Update on College of Trades – In December of 2016, the provincial government passed amendments to the Ontario College of Trades and Apprenticeship Act, and these amendments are now being implemented. Our next edition will outline the College's new Compliance and Enforcement Policy, the procedure for bringing applications for review before the OLRB and the regulation concerning administrative penalties under the Act. These changes will be discussed in further detain in our next edition of the Construction Advisor.

About the Authors:

Sarah E. Smith, Associate
Sarah joined the firm as an Associate in 2014 and is a member of the firm's Construction Lawyers group.
Contact details: T 647.777.8287
ssmith@mathewsdinsdale.com

Sydney Kruth, Associate
Sydney joined the firm as an Associate in 2016 and is a member of the firm's Construction Lawyers group.
Contact details: T 647.776.2052
skruth@mathewsdinsdale.com