



Talking Union is a bi-monthly newsletter highlighting matters of interest to the labour relations community. We welcome your questions and comments.

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OCA CRITICIZES RANDOM DRUG TESTS

The Ontario Court of Appeal has released an important decision, *Entrop v. Imperial Oil Ltd.* [2000] O.J.No. 2689, in which it strikes down random drug testing as discriminatory (although in non-binding comments), finds random breathalyzers can be justified, and sets a new approach to determining cases under the Human Rights Code.

Martin Entrop, an alcoholic and a 20 year employee of Imperial Oil, worked in a safety sensitive position ("ssp"). In 1991, Imperial Oil introduced a new drug and alcohol policy. Although Entrop had been abstinent for 7 years, he was required to reveal his alcoholism. Imperial Oil immediately reassigned him to a different position. Much later, Entrop applied for reinstatement to his ssp, which Imperial Oil allowed but on intrusive conditions, including random drug and alcohol tests. Entrop complained to the Human Rights Commission that he was being discriminated against on the basis of "handicap". The Board of Inquiry ("B of I") hearing his complaint expanded the inquiry to include a review of all aspects of the Policy, found for Entrop, and struck down the Policy. The Divisional Court upheld the B of I and Imperial Oil appealed to the OCA.

No Jurisdiction to Consider Drug Testing:

The OCA held that the B of I had to be correct in its review of questions of law, including the Code, but that its findings of fact and the application of the law could be reviewed only on a standard of reasonableness. It found that the B of I was not correct to expand its jurisdiction to include an inquiry into drug testing, as Entrop's complaint was based on alcoholism. The OCA considered, and rejected, each of the B of I's justifications for the extensions of its jurisdiction. The OCA concluded that, at its highest, the B of I could extend its jurisdiction to include all aspects of alcohol testing under the Policy since Imperial Oil had imposed special conditions on Entrop based on his admission of a past alcohol abuse problem. The OCA was concerned that the expansion of jurisdiction to include drug testing went beyond the facts affecting the complainant, unnecessarily expanded the hearing before the B of I, and could not be justified on the basis of the broad remedial jurisdiction normally granted to boards under the Code. Having decided that the B of I was

without jurisdiction, that part of the appeal was allowed. However, the OCA decided to provide its comments on random drug testing, since the parties had made submissions and both the B of I and Div. Court had made findings on such tests.

Legal Principles: The substantive issue was whether the Policy's provisions on alcohol and/or drug testing violated the Code. The appropriate legal principles required that the complainant first show that the workplace rule was prima facie discriminatory on a prohibited ground, then the burden shifted to the employer to justify the rule.

The OCA noted that, historically, different tests have applied to determine whether the alleged discrimination was "direct" or "constructive" discrimination. It then held that that type of inquiry is no longer valid. Rather, parties should now consider the unified approach established by the Supreme Court of Canada in two previous decisions, "Meiorin", (1999), 176 DLR (4th)1 and "Grismer" (1999), 181 DLR (4th)385. Once a prima facie case of discrimination has been proved, the employer can justify that discriminatory rule as a bona fide occupational requirement ("BFOR") by meeting three requirements:

- (i) that the purpose of the standard is rationally connected to the performance of the job;
- (ii) that the employer acted honestly and in the good faith belief that the standard was necessary to fulfil the work-related purpose; and
- (iii) that the standard is reasonably necessary to accomplish the purpose, ie, that it is impossible to accommodate the affected individual without undue hardship on the employer.

Basically, the rule itself must accommodate individual differences to the point of undue hardship. This approach means that an employer has available defences under both s. 11 (the "BFOR" defence) and s. 17 (the "undue hardship" defence) when it seeks to justify a rule with a discriminatory impact, although either defence must meet the threefold test to succeed.

Applying the Three-fold Test: In applying these principles to the facts, the OCA determined that random drug testing offends the Code while random alcohol testing of employees in ssp's can be justified. The crucial difference is that a positive drug test result does not demonstrate impairment whereas a positive alcohol test does.

Substance abusers, or perceived substance abusers, have a "handicap" under the Code. The Policy treated all positive test results the same, without distinction for casual versus problem use of substances, and sanctions followed. Accordingly, the Policy discriminated against all employees on the basis of a perception of a substance abuse handicap.

Since the Policy was prima facie discriminatory, the OCA applied Meiorin's threefold test, with the following results:

(i) the alcohol and drug tests for employees in ssp's were rationally connected to the performance of the work at Imperial Oil's refineries, where an accident could have catastrophic results;

(ii) Imperial Oil acted honestly and in good faith to accomplish this purpose, based on the evidence of the care with which the company developed the Policy; and

(iii) Imperial Oil's drug testing was not reasonably necessary to accomplish the purpose and could not be justified. Its random alcohol testing could be justified as reasonably necessary, but only if Imperial Oil changed the "automatic termination" consequence under its Policy to a consequence which considered individual circumstances and the need to accommodate individuals to the point of undue hardship.

Random Drug Testing Arbitrary: The OCA struck down the random drug tests for two reasons. First, no medical test currently exists which measures impairment from drugs, as opposed to the mere presence of drugs in the body. Secondly, the Policy provided an automatic discharge consequence for a positive finding, a consequence which was not sensitive to individual capabilities. Automatic discharge was also arbitrary; it was not connected to the purpose of providing a safe workplace, given there is no connection between the presence of a drug and impairment.

Random Breathalyzers a BFOR: On the other hand, the OCA found that there is a direct connection between the results of a random alcohol test, a breathalyzer, and actual impairment at the time of testing. Imperial Oil's standard was reasonably connected to safety. Other alternatives, such as closer supervision of employees or the offer of counselling, were not practical. Accordingly, alcohol testing under the Policy was justified as a BFOR. Having determined that breathalyzers could be justified, the OCA found that the Policy's automatic termination penalty for a positive test did not pass the third step of the Meiorin test. To maintain a workplace rule, Imperial Oil must accommodate individual differences to the point of undue hardship. Less severe sanctions and the offer of treatment to employees must be incorporated into the Policy in order to comply with the Code.

The OCA held, as the B of I and the Div. Court had held before it, that the testing for drugs and alcohol after a significant work accident and with reasonable cause was sufficiently connected to job performance to be justified under the Code.

Other Policy Provisions: The OCA then asked whether other provisions of the Policy violated the Code, particularly its provisions for mandatory disclosure of substance abuse problems, mandatory

reassignment from ssp's where a problem is disclosed, reinstatement to an ssp only on intrusive terms, and mandatory testing in order to be certified, or re-certified, for an ssp. The OCA first determined that these provisions were all discriminatory in their impact. It then applied Meiorin and found that the disclosure and reassignment components were not reasonably necessary to accomplish the valid purpose, although certification and re-certification for ssp's could be justified as BFOR's. The OCA also found that Imperial Oil's circulation of the Policy did not infringe the Code, and overturned the B of I on that issue. Finally, it determined that the B of I reasonably concluded that Imperial Oil had committed acts of reprisal against Entrop and had otherwise acted "wilfully and recklessly" toward him, justifying the B of I's award of damages.

In the final analysis, the OCA allowed Imperial Oil's appeal claiming that the B of I did not have the jurisdiction to consider the drug testing components of the Policy. It set aside the B of I's conclusion that random drug testing for ssp's violated the Code, but, in doing so, gave its clear opinion that such tests are discriminatory and, in the proper case, will not be capable of justification as a BFOR. While upholding the validity of random alcohol tests for employees in ssp's, the OCA also struck down the automatic termination sanction imposed by the Policy for a positive test result and required Imperial Oil to consider individual circumstances. It agreed with the B of I and the Div. Court that the mandatory disclosure, reassignment, and reinstatement provisions of the Policy were discriminatory and could not be justified. The Entrop decision will be most relied upon in future for its comments on random drug testing and for its establishment of a new, three step approach to analyzing discrimination complaints.

The Supreme Court of Canada recently expanded the definition of "handicap" under Quebec's Charter of Human Rights and Freedoms in Quebec (*Commission des droits de la personne et des droits de la jeunesse*) v. *Montreal (City), et al*, [2000]SCJ No. 24. The Court considered two fact situations. Two employers refused to hire two job applicants, one as a police officer and one as a gardener, because their pre-employment medical examinations had shown spinal anomalies. The employers feared later back problems and preferred healthier employees. The applicants could perform the work required and medical evidence indicated they had no functional limitations. They complained of discrimination under the Charter. The Tribunal appointed dismissed the complaints, finding the applicants did not suffer from a "handicap" from an objective perspective.

The issue at the SCC was whether persons with no bio-medical condition or functional impairment suffer a "handicap" so as to trigger protection from discrimination. The SCC held that human rights legislation must be given a broad and liberal interpretation, one which emphasizes dignity, respect, and equality, and which considers the socio-political dimension of "handicap". A complainant must establish the existence of a distinction, that difference is based on an enumerated ground, and that that distinction impaired the complainant's human rights; the onus then shifts to the employer to justify the measure. "Handicap" under the Charter must recognize a subjective component and a handicap may be real or perceived. A

person may have no limitations other than those created by the prejudice and stereotypes of others. The emphasis is on the **effect** of the distinction, not the cause of the handicap. The SCC concluded that the employers had discriminated against the job applicants on the basis of "handicap" and referred them back to the Commission to allow the employer the opportunity to justify that discrimination.

This decision may have little direct application in Ontario as the Human Rights Code, s. 10, already includes the subjective element approved by the SCC. In Ontario, persons suffer from a "handicap" if they have or are "believed to have or have had" any disability or impairing condition. However, the SCC's broad and purposive approach to human rights legislation and its willingness to read a subjective element into the legislated protection from discrimination will be widely quoted.

OCA AFFIRMS 4 BROWN & BEATTY CATEGORIES

TALKING UNION, March 1999, noted that the Divisional Court had narrowed the implications of the Pilon decision in *London Life Insurance Co. v. Dubreuil Brothers Employees Assn.*, a Division of IWA Canada, Local 2693 (1998), 98 C.L.L.C. 220-075. On July 13, 2000, that decision was upheld by the Ontario Court of Appeal, [2000] O.J. No. 2609, hopefully ending the debate over the proper interpretation of Pilon.

Pilon v. International Mineral and Chemical Corporation (1996), 31 O.R. (3d) 210 (C.A.) caused considerable confusion regarding an arbitrator's jurisdiction to hear grievances grieving an insurer's denial of insurance benefits. Prior to this decision, Brown & Beatty had identified four categories of claims, which essentially determined arbitrability depending upon whether the dispute was one covered by the collective agreement, either expressly or inferentially. In Pilon, the OCA did not refer to these categories and some arbitrators took that to mean all employee insurance claims were arbitrable.

In its recent decision, however, the OCA clarified that the four categories still apply. In *Dubreuil*, the collective agreement required the employer to maintain an insurance plan. In light of Pilon, an employee who was denied disability benefits brought a grievance. At arbitration, relying on Pilon, the arbitrator assumed jurisdiction and added the insurer as a party. The insurer successfully applied to Div. Court to overturn the arbitrator's decision and the Union appealed to the OCA. The OCA, in a unanimous decision, noted that Div. Court had properly applied the traditional four categories and that Pilon had not changed the law. It found that the arbitrator was not correct in assuming jurisdiction, nor could he add a third party to a grievance proceeding. In every case, the decision-maker must determine whether, having regard to the facts, the essential character of the dispute concerns subject-matter covered by the collective agreement, either explicitly or implicitly. Here, the CA required only payment for a plan; the essential character of the subsequent dispute was entitlement under that plan, a matter between the employee and the insurer, and a matter over which the arbitrator had no jurisdiction.

BILL 74: MANDATING EXTRA-CURRICULAR ACTIVITIES

On June 23, 2000, the Legislature passed the Education Accountability Act, 2000, ("Bill 74") an Act which seriously impacts on teachers and their unions.

Bill 74 introduces the term "co-instructional activities", defined as activities that:

- (a) support the operation of schools,
- (b) enrich pupils' school-related experience, whether within or beyond the instructional program, or
- (c) advance pupils' education and education-related goals." (s.1)

Co-instructional activities are now part of a classroom teacher's "duties" under the Education Act. Curtailing, or interfering with, co-instructional activities, if done pursuant to a common understanding, is a "strike" (s. 20). A teachers' strike also specifically includes the withdrawal of services, working to rule, and the giving of notice to terminate contracts of employment (s. 20). Although not yet proclaimed into law, part of Bill 74 mandates that, if proclaimed, school boards will have an unfettered right to develop "a plan to provide for co-instructions activities for pupils", which plan is subject to review and correction by the Ministry, but is outside the scope of collective bargaining and the jurisdiction of arbitrators (s. 3).

Bill 74 also mandates that, in secondary schools, "eligible courses", not teaching contact hours, will determine workloads, with an average of 6.67 such courses taught per teacher per day (s. 6). The school board will allocate a share of its course obligations to each school for allocation by the principal among the classroom teachers. These allocations are to be made **"despite any applicable conditions or restrictions in a collective agreement"** (ss. 6(6)).

Beginning with the 2000-2001 school year, Bill 74 establishes a comprehensive compliance procedure for workload distribution. On a complaint from a school council or any "supporter of the Board", the Ministry can appoint an investigator with broad powers, who prepares a report. The Minister can then direct the school board to comply and, should the board refuse, can complain directly to the Cabinet. The Cabinet may then order that the Ministry assume control of the non-compliant board (s. 6, Part VIII). The Minister may punish further non-compliance by laying charges personally against board members and employees, or by dismissing non-complying employees.

Bill 74 is the government's response to the teachers' recent job actions. It empowers school boards to override collective agreement provisions regarding workload, makes unpaid, non-teaching activities compulsory, redefines "strikes" for teachers, and gives new, broad powers to the Minister of Education to enforce compliance on school boards and their employees. Teachers' unions, and others, objected

to Bill 74 prior to its passage. It is unlikely that those objections have been overcome merely by delaying the implementation of some of its more intrusive measures.

WHAT'S NEW?

In Legislation:

Employment Standards Act: The government has proposed amendments to the ESA. A consultation paper is available from the Ministry of Labour at 416-326-6643, or on the Ministry's website: <http://www.gov.on.ca/LAB/main.htm> A Bulletin summarizing the major changes is enclosed with this issue.

Bill 69: TALKING UNION - Special Edition, May 2000, described the Labour Relations Amendment Act (Construction Industry), 2000. Subsequent to that edition, several amendments were made to Bill 69 and the negotiations between the Minister of Labour and the construction industry trade unions broke down. The government may re-introduce a version of Bill 69 in the fall session.

TALKING UNION

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