



Human Rights Implications for Employment Drug Testing

The law with respect to employment drug testing continues to evolve.

In *Alberta (Human Rights and Citizenship Commission) v. Kellogg Brown & Root (Canada) Company*, 2006 ABQB 302 (Alt. Q.B.) it was recently found that an employer's pre-employment drug testing policy violated the *Human Rights, Citizenship and Multiculturalism Act* R.S.A. 2000 c. H-14 ("The Alberta Human Rights Act"). The employee had been hired subject to this pre-employment drug test and was discharged after the results of the pre-employment test evidenced cannabis use. The Alberta Queen's Bench held that an addiction to drugs is a "disability" under *The Alberta Human Rights Act* and that denying employment due to drug addiction is *prima facie* discriminatory conduct.

The Court also determined that the employer's drug policy could not be considered a *bona fide* occupational requirement as the employer failed to establish a rational connection between pre-employment urine tests and workplace impairment. Further, the Court held that this zero tolerance policy did not address the duty placed on employers to accommodate a disabled person to the point of undue hardship.

It is important to note that a drug and alcohol testing policy for existing employees may also have human rights law implications. For instance, the Alberta Human Rights Panel in *Jacknife and Collins v. Elizabeth Metis Settlement*, 2006 CLLC ¶230-021 expressed the opinion that a drug and alcohol policy that required all current employees to undergo

drug or alcohol tests and that contained a consequence of dismissal for employees who fail such tests is, *prima facie*, in violation of the *Alberta Human Rights Act*.

While these two recent cases are from Alberta, similar human rights legislation exists throughout Canada. Employers in every jurisdiction should therefore be aware that policies requiring pre-employment or post-employment drug or alcohol testing can be the subject of a human rights complaint. It will depend on the circumstances of each case as to whether or not such a policy will survive a human rights complaint. It may be advisable to seek legal advice regarding a proposed or existing drug or alcohol policy prior to its implementation or enforcement.

Labour, Employment and Administrative Law Group

Lawyers in the McKercher McKercher & Whitmore LLP Labour, Employment and Administrative Law practice group actively advise and represent clients on labour related matters and in appearances before the Labour Relations Board and various Arbitration Tribunals.

- John R. Beckman, Q.C.
- Richard W. Elson
- Catherine A. Sloan
- Collin K. Hirschfeld
- David M.A. Stack
- Marie K. Stack

Recent Pension Plan Litigation

There have been a number of recent decisions that underline the risks involved in pension plan administration. In the spring of this year, the Saskatchewan Court of Queen's Bench certified a class action involving members of the Public Service Superannuation Plan. The plaintiffs claim that the defendant breached terms of the pension plan by failing to make matching contributions to the Plan. The plaintiffs also allege that smaller pensions are being drawn by members since the downsizing of the public sector through early retirement has increased pensions payable from the Plan and reduced contributions. The decision to certify the action as a class proceeding is under appeal.

The Supreme Court of Canada, in a case involving Rogers Communications pension plan, rendered a decision impacting upon pension plan surplus, contribution holidays, and termination of pension plans. In that case, the employer was resisting an effort by employees to terminate the plan. The employees sought to terminate the plan in order to access a surplus in the plan. The employer had been using the opportunity of the surplus to take a contribution holiday. The Court confirmed that the termination of pension plans must proceed through the pension regulatory system and not the courts. However, the Court also stated that a contribution holiday may not be permissible where it is improperly done to thwart the plan beneficiaries' right to terminate the plan.

In June, the Financial Services Commission of Ontario charged a number of union and employer executives for alleged mismanagement of the funds of the Canadian Commercial Workers Industry Pension Plan. The President and the immediate Past President of the United Food and Commercial Workers Canada were among the trustees charged. The charges alleged that the trustees invested more than 10 per cent of the plan's assets with one or two associated or affiliated companies. The trustees dispute the charges. They face a maximum penalty of \$100,000 fine for each charge if convicted.

These cases illustrate the importance of obtaining sound legal, accounting, and actuarial advice when administering pension plan assets.

Labour Relations Board Reinstates Union Organizer

The Saskatchewan Labour Relations Board has reinstated an employee of a Starbucks store who had been dismissed by Starbucks for cause. According to the employer, the employee had received numerous written admonishments for such things as failing to show up for work, showing up late for work, exceeding the limit of free product policy, and violating the food policy. The termination occurred when the employee was reported to have taken a 30 minute authorized break.

The dismissal resulted in an application to the Board by the Retail, Wholesale and Department Store Union. The Union alleged that the employer committed an unfair labour practice since the Union was in the midst of an organizing campaign and the terminated employee was a key union organizer. On an interim application of the union, the Board ordered that the employee be reinstated until the application was heard by the Board.

In the decision of the Board, Chair Seibel commented that nascent bargaining units are fragile and worthy of protection until a first collective bargaining agreement is reached. In particular, he described a new unionized environment as "vulnerable to activities by the employer that may be designed to make it look weak, ineffectual and unable to effectively represent the employees or protect them from allegedly unlawful employer activity." Seibel found that the timing of this key union organizer's dismissal would have a chilling effect on the organizing drive of the union, and therefore the employee should be reinstated. Chairman Seibel, however, noted that union affiliation does not immunize employees, and that "employees will be held accountable for their behaviour in the ordinary course."

Interestingly, the Newfoundland Court of Appeal recently overturned a decision of the Newfoundland Labour Relations Board to reinstate 25 employees who had been laid off during a union certification application. The court concluded that the Board's decision to reinstate was patently unreasonable and punitive in nature since the dismissals were for *bona fide* business reasons (*Hibernia Management and Development Co. v. Communication, Energy and Paperworkers Union of Canada*, 2006 NLCA 19).

These cases illustrate the potential difficulties in managing the work place during a union organizing campaign. The prudent course is likely to seek legal advice prior to terminating an employee during a union drive or certification application.

Courts Weigh In On Arbitration Damage Awards

In cases where it is found that an employee has been unjustly dismissed, grievance arbitrators will typically order that the employee be reinstated. There are, however, circumstances where arbitrators will award damages in lieu of, or even in addition to, reinstatement. The issue of arbitral damage awards has recently drawn the attention of the courts, who exercise a supervisory responsibility over arbitration boards.

In *Alberta Union of Provincial Employees v. Lethbridge Community College*, [2004] 1 S.C.R. 727, the Supreme Court of Canada confirmed that reinstatement will generally be the preferred remedy, but that damages in lieu of reinstatement can be awarded by arbitrators in exceptional circumstances, such as where the work environment has become poisoned or inhospitable.

In a more recent decision, the Ontario Court of Appeal addressed the ability of arbitrators to award punitive damages in addition to ordering reinstatement (*Ontario Public Service Employees Union v. Seneca College of Applied Arts & Technology*, [2006] O.J. No. 1756 [QL] (C.A.)) The Court stated that it was the responsibility of the arbitration board to review the collective agreement to determine if the parties intended to empower the ar-

“... it is possible for arbitrators to be given the power by the parties to make punitive awards...”

bitration board to award aggravated and punitive damages. The striking aspect of this case is the conclusion that it is possible for arbitrators to be given the power by the parties to make punitive awards. The decision may not be followed in

every jurisdiction. In Saskatchewan, for instance, there is case law suggesting that arbitrators do not have the power to penalize the employer (see *SPI Marketing Group v. Saskatchewan Government Employees Union* (1997), 155 Sask.R. 241 (Q.B.) and *U.F.C.W., Local 1400 v. Saskatchewan (Labour Relations Board)* (1992), 95 D.L.R. (4th) 541 (C.A.)).

Finally, in *Westfair Foods Ltd. v. United Food and Commercial Workers, Local 1400*, 2006 SKQB 37, the Saskatchewan Court of Queen’s Bench’s judgment reaffirmed that an arbitrator does not have an inherent and unfettered right to award compensation. The Court stated that an arbitrator cannot award compensation simply because it appears to be the most practical remedy. The Court ruled that arbitration boards can only award damages in accordance with the terms of the collective agreement. The collective agreement must, therefore, be assessed to determine the circumstances in which damages may be awarded. The arbitrator’s damage award in that case was overturned as this analysis was not done.

The one recurring theme in all of these cases is the message that labour arbitrators do not enjoy unfettered discretion in awarding damages. Such awards are subject to the terms of the collective agreement and the supervision of the courts.

Workers’ Compensation Act Committee of Review (COR)

A website has been established for the Workers’ Compensation Act Committee of Review (COR): www.labour.gov.sk.ca/cor. The dates for public hearings can be found on this website.

The public is also encouraged to provide written submissions by email at wca-cor@lab.gov.sk.ca or by mail, addressed to:

The Workers’ Compensation Act Committee of Review
400 – 1870 Albert Street
Regina, SK S4P 4W1

The Purposes and Limits of Non-Competition Covenants

In some circumstances, an employer's business can suffer dearly when a former employee joins a competitor or sets up a competing business, particularly where the former employee had close access to the customers. While the common law does not strive to limit legitimate competition, it does provide some limited protection against the unscrupulous defector. In an effort to strengthen this protection, many employers insert express non-competition covenants into employment contracts for added protection.

It is important to realize that since non-competition covenants operate as a restraint of trade, the courts regard them as void unless the employer can justify the reasonableness of the restraint. There are two policy concerns behind this rule: i) a concern to avoid unduly limiting competition in a free market; and ii) a concern that the former employee should not be unduly restrained from making a living with another employer.

Despite these policy concerns, the law nevertheless recognizes the unfairness to employers where former employees use information and client contacts from the employment to gain a competitive jump on the employer. A non-competition covenant may be enforced where it reasonably restricts the employee from such unfair competitive activities. The courts have often taken into account the following three factors in deciding whether or not a restraint of trade is reasonable.

First, the court may question whether the covenant is reasonable in the kind of work it purports to restrict. A covenant restricting the employee from providing any form of services to a competitor would likely be too broad.

“... the law recognizes the unfairness to employers where former employees use information and client contacts from the employment to gain a competitive jump on the employer...”

Second, the courts will tend to consider whether the covenant is reasonable in regard to the duration of the prohibition on competition. For example, a judge is likely to question whether a ten year restraint on competition is needed to prevent the former employee from exploiting an unfair competitive jump.

Third, the courts will likely examine whether or not the covenant is reasonable in terms of the area or territory restricted. Thus, a local business will have difficulty justifying a covenant that prevents the employee from carrying out his or her skills throughout Canada. However, a wider restriction may very well be reasonable in an industry where sales agents deal with clients across Canada.

In considering the use of a non-competition covenant in a specific employment relationship, it is therefore important to closely examine the particular circumstances, and seek advice, to i) determine if there is a risk that the employment could provide the employee with an unfair competitive jump, and ii) what reasonable restrictions can be placed on the employee to sufficiently mitigate this risk.

Work injuries falling

The Department of Labour announced in its 2005-2006 Annual Report that work injuries have fallen by 14 per cent in Saskatchewan over the last 3 years, one of the highest rates of reduction in all of Canada. The Report states that the number of lost-time injuries in 2005 was down almost three percent from the previous year.



Saskatoon Office
374 Third Avenue South
Saskatoon SK S7K 1M5

Regina Office
1100- 1801 Hamilton St.
Regina SK S4P 4B4

www.mckercher.ca

This newsletter is for information purposes only and should not be taken as legal opinions on any specific facts or circumstances. Counsel should be consulted concerning your own situation and any specific legal questions you may have.