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Preliminary injunctions against random drug and alcohol testing

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***Office and Professional Employees International Union v Cougar Helicopters*, 2019 CanLII 66726 (NL LA)**

This Echo Hotel Aviation HR Briefing follows-up on the decision that Emond Harnden recently reported on in its Echo Hotel Aviation Law Briefing.

An arbitrator in Office and Professional Employees International Union v Cougar Helicopters has decided to temporarily strike down Cougar Helicopters' drug and alcohol policy pending final arbitration of the union's grievance. As cannabis is becoming even more accessible and more citizens are using the drug, aviation employers must be aware of each step in a union grievance against random alcohol and drug testing.

The union represents helicopter pilots; search and rescue personnel; and weather, radio and dispatch personnel. All of these positions are considered safety-sensitive because they relate to flight operations.

The union disputes the random drug and alcohol testing component of Cougar's policy. It agrees that employees can be screen before employment, post-incident, and as follow-up in appropriate situations. Pilots have, moreover, been subject to random testing since the policy was put in place in 2010. In 2016, the union complained that pilot testing targeted certain pilots above others; the policy was placed in abeyance pending review.

The policy was revived by Cougar in 2018. The Union was consulted, but the parties could not agree on terms. Random testing was expanded to include all employees in safety-sensitive positions. This change captures virtually all employees.

The Union grieved.

As is often the case in random drug and alcohol testing grievances, the Union requested and won a preliminary injunction that forbade implementing random testing. The arbitrator applied a three-part test:

1. There is a serious issue to be tried;
2. That irreparable harm will result if the relief requested is not granted; and

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3. That the balance of convenience favours granting the motion.

The arbitrator in this case granted the injunction. She focused on the second and third criteria, irreparable harm and a balance of convenience.

Employees and unions argue that employees' privacy rights and their right to dignity are irreparably harmed if the employer breaches them while the union is contesting the policy. Mandatory medical tests violate these rights.

Employers, on the other hand, argue that the safety of all employees requires random testing to dissuade and to catch intoxication in the workplace. This argument suggests that workplace safety outweighs employees' privacy rights – the balance of convenience is on the employer's side.

In the transportation sector, employers submit a further argument: they are responsible for the safety of passengers. This public responsibility requires heightened safety measures.

The arbitrator in Cougar's case examined the Ontario Superior Court's decision in *Amalgamated Transit Union Local 113 v Toronto Transit Commission*. The union in that case challenged the Transit Commission's drug and alcohol policy. The Court denied a temporary injunction and said:

> The public interest presents itself in two ways,
>
> First the reasonable expectation of privacy of the employees of the TTC must be protected by the court. The right to privacy is protected by the *Charter of Rights and Freedoms* and recognized as common law …
>
> Second, the workplace is literally the City of Toronto and as a result all the people who move about in the City, whether or not they are passengers on the TTC, have an interest in the TTC safely taking its passengers from one place to another.
>
> The best way to take the second aspect of the public interest into account is to have reference to it, as I have, when deciding what is reasonable when defining a TTC employee's reasonable expectation of privacy.

The Court found that employees' expectation of privacy gave way to the public's interest in safe transportation.

In *Cougar Helicopters*, however, the arbitrator did not award a preliminary injunction because the public's interest was not engaged in the same way. The arbitrator required further evidence before allowing the employer to breach employees' privacy rights.

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Though the arbitrator did not explain how she arrived at this conclusion, the context gives some clues. Aviation flying over Newfoundland and Labrador does not fly over cities and towns that are as populated as Toronto. The public remains interested in preserving citizens' lives, but only Cougar Helicopter's passengers are truly affected by pilot intoxication. The number of citizens affected do not support the same protection. Balancing convenience, then, requires the arbitrator to determine how much of the public is affected.

In our view

Employers that wish to impose random drug and alcohol testing policies have to be ready for union challenges. Unions will often ask for preliminary injunctions to preserve employees' privacy rights pending the outcome of a grievance. In order to stay ahead of unions' arguments, employers can determine whether flight operations affect the public interest enough to justify violating employees' rights to privacy. If a large cross-section of the public is affected by safety concerns, the employer is better able to justify imposing its policy straightaway.

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