

The Court of Appeal Rules on the Validity of an Alcohol and Drug Detection Policy in Light of the Charter of Human Rights and Freedoms

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On December 6, 2007, the Quebec Court of Appeal declared that part of Goodyear's alcohol and drug detection policy implemented in its Valleyfield plant in the summer of 2004 was valid.

The Court of Appeal's judgement maintained in part a decision rendered on April 21, 2006 by the Superior Court that upheld grievance arbitrator Mtre Denis Tremblay's April 12, 2005 ruling.

Pursuant to an arbitration agreement between the parties, they mandated Mtre Tremblay to decide on the validity of the alcohol and drug detection policy implemented by the employer, and to amend that policy to the extent that any of its provisions infringed rights guaranteed by the *Charter of human rights and freedoms*. As a result, the arbitrator drafted an amended policy that formed an integral part of his decision.



The policy, as revised by the arbitrator, provided for alcohol and drug testing in the following circumstances:

- For job applicants and new employees;
- Where there are reasonable and probable grounds to believe that a person's faculties are impaired by alcohol consumption or drug use;
- Following an accident;
- Randomly and without notice for "high-risk jobs"; and
- Following an absence related to alcohol consumption or drug use.

Except for testing where there are reasonable and probable grounds for believing that a person's faculties are impaired by alcohol consumption or drug use, the union contested the entire policy as formulated by the arbitrator.

Infringement of employees' fundamental rights

The fact that alcohol and drug testing *a priori* infringes the rights to personal security, dignity and privacy set forth in sections 1, 4 and 5 of the *Charter of human rights and freedoms* and the rights enunciated in articles 3, 10, 11 and 35 of the *Civil Code of Québec* was not contested by either of the parties.



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The Court of Appeal's decision confirms that compulsory blood, urine or breathalyzer tests are a significant invasion of an employee's private life. The results of such tests may reveal substance consumed in several weeks before the date on which the sample was taken and thus intrude in an employee's private life when not at work. Such tests could also reveal confidential information concerning an employee, specifically information on an employee's state of health.

It has, however, been recognized in Canadian and Quebec case law that the rights to personal security, dignity and privacy are not absolute. Infringements are permitted provided that they occur in the pursuit of a legitimate and important purpose and is proportional to it, i.e. is minimal and logically related to the purpose.

Conflicts between employers' and employees' rights

The Court of Appeal reasoned that, in this case, the employer was not using the policy to protect other employees in the plant but rather to organize production and the management of staff in compliance with occupational health and safety protection standards. Consequently, in the opinion of the Court of Appeal, the alcohol and drug detection policy implemented by the employer was not to be treated as a conflict between employers' and employees' rights.

Testing following an accident or an absence related to alcohol consumption or drug use

The Court of Appeal noted that such measures constitute reasonable restrictions generally recognized in Quebec and Canadian case law. Moreover, it held that they constitute [translation] "a fair reconciliation of rights by balancing employee rights to personal dignity and privacy and management's rights to protect the company's legitimate interests and organize its work".

Without a doubt, the most innovative aspect of the decision is its recognition that detection testing following an accident constitutes a reasonable restriction on employees' rights. Previously, Quebec case law had never automatically allowed such tests, which leads to the conclusion that the Court of Appeal is of the view that an "accident" is in and of itself a sufficiently important event to warrant detection testing.

Random testing without notice of employees in “high-risk jobs”

In its consideration of arbitrator Tremblay’s decision, the Court of Appeal concluded that the activities in the plant were not of a dangerous nature that would warrant special protection measures for the employees or the general public.

The Court also noted the fact that there was no evidence in the record that would indicate that the plant employees had a particular alcohol or drug use problem. Furthermore, there was no evidence that would establish a connection between accidents occurring in the plant and drug or alcohol use. Nor was there any statistical data on the employee group in high-risk jobs. It should be noted that, in fact adducing such evidence could prove to be arduous, depending on the specific circumstances and situations encountered in any given company.

Thus, the Court of Appeal decided that, given that this was the first detection policy implemented by the employer, it was best that the detection measures apply initially where the employer has reasonable and probable grounds to believe that an employee’s faculties are impaired by alcohol consumption or drug use, following an accident or an absence related to alcohol consumption or drug use.

The provisions of the policy respecting random testing without notice for “high-risk jobs” were therefore struck down by the Court of Appeal.

Testing of job applicants and new employees

According to the Court of Appeal, it was not necessary to rule on the validity of such testing because the parties had not really advanced arguments regarding persons not already employed by Goodyear. Without actually addressing the issue, the Court of Appeal indicated that there was some uncertainty regarding the union’s legal interest in representing such persons. The Court of Appeal thus refrained from considering such testing.

Conclusion

To summarize, the Court of Appeal ruled on the validity of detection testing where an employer has reasonable and probable grounds to believe that an employee’s faculties are impaired, or where there has been an accident or an absence related to alcohol or drug consumption.

The Court did not definitively rule on the validity of the provisions of the policy under consideration regarding job applicants and new employees.

Only the provisions on random testing without notice of employees in high-risk jobs were struck from the policy by the Court of Appeal. However, it did not entirely rule out the possibility that such tests could be part of a detection policy where the employer can show that its business is of a dangerous nature that necessitates special protection measures, or if there are problems related to drug or alcohol use that affect the incidence of accidents in the workplace.

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