



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](#).

In *Office and Professional Employees International Union v Cougar Helicopters*, the arbitrator has temporarily suspended random testing under Cougar Helicopters' drug and alcohol policy pending final arbitration of the union's grievance.

The employer, Cougar Helicopters, operates offshore air transport services for the oil and gas industry in Newfoundland and Labrador, and performs deep water search-and-rescue and medevac flights. Cougar's unionized workforce consists of pilots, weather observers, radio operators, and search-and-rescue cabin crew. Most of Cougar's employees occupy safety-sensitive positions.

Cougar's comprehensive drug and alcohol policy contained several provisions regarding drug and alcohol testing, including random testing. The union grieved the random drug and alcohol testing portion of the policy, although it agreed that Cougar could test employees pre-employment, post-incident, and in follow-up to certain situations. The policy when initially implemented in 2010 included random testing and applied to only pilots. In 2016, the union complained that random testing of pilots targeted certain pilots, and the policy was put on hold pending review.

Cougar reviewed the policy again in 2018, in consultation with the union, but the parties could not agree on its terms. Cougar expanded the random testing provisions to capture all employees in safety-sensitive positions. In light of the nature of the workplace, this effectively captured nearly all employees.

The union grieved.

As is often the case in random drug and alcohol testing grievances, the union requested, and was awarded, a preliminary injunction prohibiting the employer from conducting random testing until the final determination of the grievance. In assessing the union's request for a temporary injunction, the arbitrator applied the established three-part test:



1. Is there a serious issue to be tried?
2. Will irreparable harm result if the relief requested is not granted?
3. Does the balance of convenience favour granting the motion?

In concluding that the union had met the three-part test, the arbitrator focused on the second and third criteria: irreparable harm and the balance of convenience.

The union argued that employees' rights to privacy and dignity would be irreparably harmed by being forced to submit to mandatory medical tests, while the employer argued that the safety of all employees required random testing to dissuade and detect workplace intoxication. The employer argued that workplace safety and the safety of the public outweighed employees' privacy rights.

The arbitrator concluded that further evidence regarding the safety risks of not permitting random testing was required before permitting the employer to breach employees' privacy rights.

In our view

Employers that wish to impose random drug and alcohol testing policies on unionized employees must be prepared to defend these against challenges. Unions will often request preliminary injunctions to preserve employees' privacy rights pending the outcome of a grievance. To stay ahead of unions' arguments, employers must consider whether workplace safety and the public interest can justify violating employees' privacy rights.