CITATION: Ottawa Airport Professional Aviation Fire Fighters Association, v. Ottawa Macdonald-Cartier International Airport Authority, 2022 ONSC 3298
DIVISIONAL COURT FILE NO.: DC-21-2656
DATE: 20220817

ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

Swinton, J.A. Ramsay and Kurke JJ.

BETWEEN:	
The Ottawa Airport Professional Aviation Fire Fighters Association Local 3659 International Association of Fire Fighters Applicant	*Sean McGee and Alison McEwen*, for the Applicant
– **and** –	
The Ottawa Macdonald-Cartier International Airport Authority Respondent	*Steven Williams*, for the Respondent
	HEARD at Ottawa (by videoconference): May 31, 2022

Swinton J.

Overview

[1] The Ottawa Airport Professional Aviation Fire Fighters Association (the "Association") has brought an application for judicial review of an arbitration award of arbitrator Tom Hodges dated May 18, 2021. The arbitrator dismissed a policy grievance brought by the Association to challenge the Alcohol and Drug Policy adopted by the respondent Ottawa Macdonald-Cartier

International Airport Authority (the "Authority") insofar as the Policy permits unannounced random drug testing of workers in safety-sensitive positions.

[2] For the reasons that follow, I would grant the application for judicial review and set aside the arbitration award, as the Association has demonstrated that the decision was unreasonable.

Background Facts

[3] The Association represents two bargaining units at the Ottawa airport, one with 17 fire fighters and one with four captains.

[4] In 2016, the Authority began developing a workplace alcohol and drug policy for the airport. Following discussions with the Association and employee information sessions, it issued the Policy in December 2018. The Policy applies to the Association's bargaining units, to employees represented by the Public Service Alliance of Canada ("PSAC") and to non-unionized employees.

[5] Article 10 of the Policy provides for drug and alcohol testing in a number of circumstances: pre-employment/assignment situations, where there is reasonable cause to believe an employee is impaired at the workplace, after an accident or incident, in follow-up post-treatment monitoring for a drug or alcohol-related problem, and unannounced random testing of workers in safety-sensitive positions.

[6] The Association objected to unannounced random testing during discussions with the Authority prior to the adoption of the Policy. Nevertheless, Article 10.6 of the Policy provides:

> **Unannounced Random Testing:**
>
> Unannounced random testing, for the safety sensitive positions, will be carried out at a fifty percent (50%) selection rate for drugs and ten percent (10%) selection rate for alcohol, per year. Selection will be conducted, at arm's length, by the Authority's qualified service provider, using a federally approved computerized process.
>
> Compliance with the Policy including acceptance of testing, is a condition of continued employment with the Authority. Refusal to be tested will be viewed as a failure to comply with the Policy. Such a refusal will result in the employee being referred to an DSAP for assessment and, depending on the facts of each case (including the nature of the breach, the existence of prior violations, the seriousness of the breach, and the employee's own efforts to correct the situation), could lead to a treatment recommendation, a requirement to attend educational sessions, or to a variety of disciplinary measures by the Authority up to and including dismissal for cause and/or serious reason.

Examples of refusal include:

i. failing to provide an adequate urine specimen for a drug test without a valid medical explanation;
ii. failing to provide adequate saliva, breath or urine for an alcohol test without a valid medical explanation;
iii. failing to submit to a test when requested to do so; or
iv. engaging in any conduct which obstructs the testing process.

[7] In March 2019, the Authority demanded that an individual fire fighter submit to a random drug test by urinalysis. He filed an individual grievance about the testing, and the Association filed a policy grievance about random drug testing. The policy grievance proceeded to arbitration.

The Arbitration Award

[8] The arbitrator heard the grievance pursuant to an arbitration agreement between the parties that appointed him to determine an interest arbitration as well as outstanding grievances. With respect to the present dispute, the parties agreed that it would be determined in an expedited manner, with no *viva voce* evidence. The parties proceeded on the basis of written and oral submissions.

[9] The arbitrator dismissed the grievance, finding that the Authority's Policy on random drug testing was reasonable and warranted because of safety concerns for workers and the travelling public due to the nature of airport operations. He concluded that urinalysis was not an appropriate testing method, given that a saliva test was more accurate and less invasive of privacy. However, he did not issue any explicit remedy limiting the use of urinalysis and held that the Policy was in full force and effect.

The Issues in this Application for Judicial Review

[10] The Association argues that the arbitration decision was unreasonable because it failed to interpret the parties' collective agreement in a manner consistent with long-established arbitral jurisprudence on random drug and alcohol testing. According to the Association, the arbitrator unreasonably upheld the Policy without any evidence of a drug abuse problem at the Ottawa airport.

[11] The Authority argues that the decision was reasonable, given the legalization of marijuana and the need to protect public and worker safety in a highly dangerous workplace.

The Standard of Review

[12] The standard of review of the arbitrator's decision is reasonableness.

[13] In determining whether a decision of an administrative tribunal is reasonable, the reviewing court must start with the reasons provided. A decision is reasonable if there is a coherent and

rational line of analysis, and the result is justified in light of the law and the evidence (*Vavilov v. Canada (Minister of Citizenship and Immigration)*, 2019 SCC 65 at paras. 85, 86 and 99-100).

[14] An arbitrator is not bound by *stare decisis*. However, the Supreme Court of Canada stated in *Vavilov* that a decision may be unreasonable if it is inconsistent with prior decisions of the administrative tribunal, and that inconsistency is not explained and justified by the decision-maker. As the Court stated (at para. 131):

> … a decision that departs from longstanding practices or established internal decisions will be reasonable if that departure is justified, thereby reducing the risk of arbitrariness, which would undermine public confidence in administrative decision makers and in the justice system as a whole.

The arbitral jurisprudence on random drug and alcohol testing

[15] The Authority's adoption of the Policy was an exercise of its management rights under the collective agreement. However, an employer may unilaterally impose a rule on employees, if they face disciplinary consequences as a result of non-compliance, only if the rule is reasonable in the circumstances (*Re Lumber & Sawmill Workers' Union, Local 2537, and KVP Co.* (1965), 1965 CanLII 1009 (ON LA), 16 L.A.C. 73 (Robinson)).

[16] There is a well-established arbitral consensus in Canada concerning an employer's authority to impose a drug or alcohol testing policy where employees face disciplinary consequences for non-compliance. That consensus was described in detail by the Supreme Court of Canada in *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, [2013] 2 SCR 458 at paras. 5-6:

> [5] This approach has resulted in a consistent arbitral jurisprudence whereby arbitrators have found that when a workplace is dangerous, an employer can test an individual employee if there is reasonable cause to believe that the employee was impaired while on duty, was involved in a workplace accident or incident, or was returning to work after treatment for substance abuse. In the latter circumstance, the employee may be subject to a random drug or alcohol testing regime on terms negotiated with the union.
>
> [6] But a unilaterally imposed policy of mandatory, random and unannounced testing for *all* employees in a dangerous workplace has been overwhelmingly rejected by arbitrators as an unjustified affront to the dignity and privacy of employees unless there is reasonable cause, such as a general problem of substance abuse in the workplace.

[17] The arbitral jurisprudence on random drug and alcohol testing has required proportionality - that is, a balancing of the interests of the employer in having such a policy and the privacy interests of employees (at paras. 3 and 52). As the majority noted in *Irving* (at para. 31), the dangerous nature of the workplace is not an overriding consideration:

> But the dangerousness of a workplace — whether described as dangerous, inherently dangerous, or highly safety sensitive — is, while clearly and highly relevant, only the beginning of the inquiry. It has never been found to be an automatic justification for the unilateral imposition of unfettered random testing with disciplinary consequences. What has been additionally required is evidence of enhanced safety risks, such as evidence of a general problem with substance abuse in the workplace.

[18] Abella J., writing for the majority, quoted an award of Arbitrator Michel Picher respecting "extreme circumstances" (at para. 34):

> It may well be that the balancing of interests approach . . . would allow for general random, unannounced drug testing in some extreme circumstances. If, for example, an employer could marshal evidence which compellingly demonstrates an out-of-control drug culture taking hold in a safety sensitive workplace, such a measure might well be shown to be necessary for a time to ensure workplace safety. That might well constitute a form of "for cause" justification.

[19] I note that the three dissenting judges also considered the arbitral jurisprudence. They too agreed that there was an arbitral consensus with respect to random alcohol testing. They described the consensus as requiring evidence of an alcohol problem in the workplace in order to justify random testing (at paras. 97, 104).

[20] In sum, when considering whether a random drug or alcohol testing policy is permitted, the arbitral jurisprudence requires an arbitrator to consider the nature of the workplace, the justification for random testing to address a problem related to alcohol or drug consumption, and the degree of intrusion of the testing on employees' inherent right to privacy (*Irving* at para. 50). As the majority stated (at para. 52):

> This is not to say that an employer can never impose random testing in a dangerous workplace. If it represents a proportionate response in light of both legitimate safety concerns and privacy interests, it may well be justified.

Analysis

The arbitrator failed to properly apply the test established in the arbitral jurisprudence

[21] In my view, the arbitrator's decision is unreasonable on a number of grounds. First, the arbitrator has not satisfactorily explained his departure from the arbitral jurisprudence, as described in *Irving*. There was no evidence before him of an elevated safety risk because of a problem of employee drug use at the Ottawa airport, nor was there any real analysis of the significant privacy interests of employees recognized by the Supreme Court in *Irving* (see para. 50).

[22] The arbitrator's reasons are not easy to follow. He does not begin, for example, with a discussion of the established principles respecting random drug and alcohol testing policies. Late in the award, he purports to apply the required balancing test, concluding at para. 88 that the Policy

is a proportionate response in light of "legitimate safety concerns" and privacy interests. He states that "the Authority has demonstrated the obvious safety risks not just to the airport and its employees, but also to the public." However, there is no systematic discussion of "legitimate safety concerns" related to drug use at the airport, nor is there any careful consideration of employees' privacy interests from testing, whether by urinalysis or some other method.

[23] In his reasons, the arbitrator emphasizes the dangerous nature of the airport's operations and the public interest in airport safety. The Authority argues that this is consistent with the jurisprudence.

[24] However, the dangerous nature of the workplace has not alone justified the imposition of random alcohol and drug testing, as stated in *Irving* above. Arbitrators have required evidence of an elevated safety risk arising from alcohol or drug use in the workplace (*Irving* at para. 31). For example, in an earlier case involving the Toronto Airport, the arbitrator had evidence of a problem of alcohol abuse among employees at the airport that led her to uphold the employer's random testing policy (*Greater Toronto Airports Authority v. Public Service Alliance of Canada, Local 0004*, [2007] C.L.A.D. No. 243 (Devlin)).

[25] It is notable that the Authority has not provided any arbitral decision since *Irving* that upholds random drug testing or suggests a departure from the established jurisprudence. I note that the Alberta Court of Appeal in *Suncor Energy Inc. v. UNIFOR, Local 707A*, 2017 ABCA 313 applied the reasoning from *Irving* in review of an arbitration award finding that a random testing policy was contrary to a collective agreement. The Alberta Court of Appeal concluded that the arbitrator must determine whether there was evidence of a problem of substance abuse in the workplace that justified random testing (at paras. 48-49). However, it found that the arbitrator had unreasonably looked only to evidence of a problem in the particular bargaining unit, rather than considering evidence respecting the workplace as a whole, in deciding whether the random testing was a reasonable exercise of management rights.

[26] The Authority in this case provided no evidence of a problem of drug use among employees at the Ottawa airport. Indeed, it refused the Association's request for information about the prevalence of drug or alcohol use in the workplace. The Authority justified the non-disclosure because of concerns about protecting the confidentiality of employees' health information. However, the arbitrator rejected this justification and concluded that there would be ways to protect confidentiality and still provide disclosure (at para. 49). Nevertheless, he proceeded to uphold the Policy despite the lack of any evidence concerning a problem at the airport. In my view, his approach is inconsistent with existing jurisprudence and his departure from the jurisprudence is not explained.

The arbitrator unreasonably relied on the* Toronto Transit Commission *decision

[27] Despite the lack of evidence from the Authority about drug use and abuse at the airport, the arbitrator concluded that the Authority had legitimate safety concerns that justified the random drug testing Policy. In coming to that conclusion, he placed great reliance on the decision of the

Ontario Superior Court of Justice in *Amalgamated Transit Workers Union v. Toronto Transit Commission*, 2017 ONSC 2078, which he describes as "the leading case" (at para. 87 of the award).

[28] *TTC* was a case in which the Superior Court was asked to grant an interlocutory injunction to prevent the TTC from imposing random drug and alcohol testing in the workplace pending the outcome of an arbitration dealing with the employer's authority to implement such a policy under the collective agreement. I find the arbitrator's reliance on *TTC* to be illogical. *TTC* was not a case dealing with the employer's right to implement a random drug or alcohol testing policy under a collective agreement; rather, it was an application of the three-part test for an interlocutory injunction from *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311. That test requires a court to consider whether there is a serious issue to be tried; whether the party seeking interim relief will incur irreparable harm if the relief is not granted; and whether the balance of convenience favours granting the injunction.

[29] The Court made no finding about the legality of the TTC random testing policy, noting that there was a serious issue to be tried before the arbitrator concerning the policy. I note that Marrocco A.C.J.S.C. appears to agree with the Association's submission in the present case about the task of the arbitrator in determining the employer's authority to impose such a policy. He stated, "For example, the Arbitrator must determine how the decision of the Supreme Court of Canada in *Irving Pulp and Paper* is to be applied in this case and whether the *Irving Pulp and Paper* threshold requirement of a demonstrated workplace problem with alcohol and drugs has been met" (at para. 29) (emphasis added). See, as well, his reference to *Irving* at para. 139.

[30] In sum, the *TTC* case did not determine an employer's authority to implement a random testing policy. Accordingly, it cannot reasonably be characterized as the "leading case" for purposes of the present arbitration. However, the arbitrator here does not seem to recognize that the Court was carrying out a very different task from the one he was to exercise.

[31] There is a second significant flaw in the arbitrator's use of the *TTC* case. He relied on the evidence before the Court in *TTC* in determining whether there was a legitimate safety concern, stating at para. 88, "The parties [sic] case law confirms the appropriateness of random drug testing clearly established in *TTC supra* in a public complex public transportation setting of 2017".

[32] There are a number of problems with his approach. First, the Court had extensive affidavit evidence about safety concerns at the TTC because of drug use, as well as evidence about the reliability of buccal swab testing to reveal impairment by drugs, given the standards for impairment adopted by the TTC. The Court relied on that evidence when determining whether employees would suffer irreparable harm if testing continued pending the arbitration decision and whether the balance of convenience, including a concern for the public interest, weighed against granting the injunction. In contrast, in the present case, there was no evidence about the experience with respect to drug use at the Ottawa airport and no evidence of the reliability of an oral swab test to show impairment.

[33] Second, the Court explicitly found that the extensive evidence demonstrated there was a workplace drug and alcohol problem at the TTC. Notably, the Court concluded (at para. 139):

> The evidence satisfies me that there is a demonstrated workplace drug and alcohol problem at the TTC which is currently hard to detect and verify. This is factually different from the *Irving Pulp and Paper* decision where the arbitration board concluded that the employer exceeded the scope of its management rights under a collective agreement by imposing random alcohol testing in the absence of evidence of a workplace problem with alcohol use.

[34] The arbitrator had no such evidence respecting the Ottawa airport. There is a fatal flaw in his logic when he assumes that there is a problem at the Ottawa airport because of the evidence before the Court in *TTC*. There is also unfairness to the Association in relying on evidence from another case which the Association is not able to challenge.

[35] The Authority argued that the arbitrator was not bound by strict rules of evidence because of the terms of the parties' agreement on the arbitral process. He was permitted to accept any evidence submitted that was relevant. I note that this section does not justify the arbitrator's reliance on evidence in another case. There was no evidence provided to the arbitrator in the present case. In particular, there was no evidence respecting a drug problem at the Ottawa airport.

[36] The arbitrator also assumed that there was an increased safety risk of drug use because of the legalization of marijuana. Again, he had no evidence to that effect, unlike the Court in *TTC*, which had evidence about a problem in the particular workplace.

[37] In sum, it was unreasonable to treat the *TTC* case as a leading authority and to rely on its evidence in the present case.

The arbitrator's consideration of privacy interests was flawed

[38] Near the end of his reasons, the arbitrator states that he has considered and balanced the employer's safety concerns against employee privacy interests (at para. 88). Again, his analysis leaves much to be desired.

[39] First, unlike the decision in *Irving*, there is no clear articulation of the employees' interest in privacy. The employer's Policy, as written, requires a urine sample when testing for drugs. Such a test is highly intrusive, significantly affecting employees' right to privacy.

[40] I note that the arbitrator agreed with the Association that a positive urine test does not provide evidence of impairment or likely impairment on the job (at paras. 58 and 66). He then deals with this problem with the test by turning to the *TTC* case and holding that the Court found saliva testing to be the appropriate testing method for drugs in the public transportation industry (at para. 75). In fact, the Court made no such finding, but rather weighed the efficacy of such testing, in light of the standards for impairment applied by the TTC, against the impact on employees when deciding whether there would be irreparable harm to the employees if an injunction were not granted. He observed that the standards set for a positive test for cannabis were likely to show impairment (at para. 144):

> Because cannabis impairs cognitive and motor abilities and because oral fluid testing at the TTC cut-off levels identifies recent use of cannabis (i.e. within approximately 4 hours of being tested), I conclude that oral fluid testing for cannabis at the TTC cut-off level will detect persons whose cognitive and motor abilities are likely impaired at the time of testing.

Again, he did not rule on the appropriate method of testing for drugs in other workplaces.

[41] Nevertheless, despite the absence of any evidence before the arbitrator or consideration about cut-off levels in this workplace, the arbitrator concluded (at para. 85):

> Oral fluid is clearly the determinative test for drugs at this time as established based on expert opinion in *TTC supra*.

He then stated that "[u]se of oral fluid testing is a necessary and required provision to ensure the balancing of interests" (at para. 87).

[42] Given that conclusion, one would logically expect that he would find the Authority's Policy was unreasonable and not justified as drafted. Given that urinalysis is an undue intrusion on privacy rights and does not show impairment, the reasonable remedy would be to allow the grievance and strike the reference to the use of urinalysis to test for drugs. The arbitrator did not do that. Indeed, he did not provide any remedy to the Association despite a flawed Policy. Rather, he left it to the parties or to future grievances to safeguard employee privacy interests. Again, I find this illogical, given his finding that urinalysis is intrusive and does not demonstrate impairment.

Other analytical problems

[43] On a number of occasions, the arbitrator notes that members of the bargaining unit represented by PSAC at the airport are subject to the random testing Policy, and PSAC has not grieved. He seems to treat the lack of such a grievance as evidence supporting the reasonableness of the Policy.

[44] However, PSAC represents a different bargaining unit from the Association's, and it may well have its own particular reasons for not pursuing a grievance or awaiting the outcome of the Association's grievances. Again, there is no evidence respecting PSAC's strategy or the number of safety-sensitive positions in its bargaining unit. In any event, this is not evidence that the Policy meets the established test in the arbitral jurisprudence for random testing.

[45] The arbitrator is also critical of the Association for failing to negotiate with the Authority on random testing. Again, this is not a logical conclusion. The Association accepted the parts of the Policy where arbitral jurisprudence has clearly permitted testing for drugs or alcohol: where there is cause to suspect impairment, after an accident, or as part of monitoring after a return to work after treatment for drug or alcohol dependency.

[46] The Association refused to agree to random drug testing of employees in safety-sensitive positions without demonstrated proof of an elevated safety risk or a problem of drug use in the workplace. Its position was consistent with the existing arbitral jurisprudence. Refusal to accept random drug testing, while not opposing the other provisions for drug testing in the Policy, was a reasonable position for it to take, given the state of the law and the lack of evidence of a workplace drug problem at the airport.

Conclusion

[47] Deference is owed to arbitrators when they are interpreting a collective agreement. However, in the present case, there are serious flaws in the arbitrator's analysis that cumulatively render his decision unreasonable. The Authority has pointed to no case in which an arbitrator has upheld a mandatory random drug testing policy in Canada where an employee can be disciplined for non-compliance without some evidence of a workplace drug problem. The arbitrator gave no justification for departing from the established arbitral approach to random drug testing.

[48] Moreover, the arbitrator had no evidence of a drug use problem among workers at the Ottawa airport. He unreasonably relied on evidence in the *TTC* case to support his finding that the Policy was reasonable if oral testing replaced urinalysis. However, he had no evidence particular to the workplace with which he was dealing, and he made no order preventing the use of urinalysis. Finally, he never engaged with the very important employee privacy interests affected by mandatory testing, as the jurisprudence requires.

[49] For these reasons, I conclude that the award of the arbitrator is unreasonable. I would grant the application for judicial review and set aside the award and refer the Association's policy grievance to another arbitrator.

[50] The parties have agreed that each party shall bear its own costs.

_____

Swinton J.

I agree

_____

J.A. Ramsay J.

I agree

_____

Kurke J.

Date of Release: August 17, 2022

CITATION: Ottawa Airport Professional Aviation Fire Fighters Association v. Ottawa Macdonald-Cartier International Airport Authority, 2022 ONSC 3298
DIVISIONAL COURT FILE NO.: DC-21-2656
DATE: 20220817

ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

Swinton, J.A. Ramsay and Kurke JJ.

BETWEEN:

The Ottawa Airport Professional Aviation Fire Fighters Association Local 3659 International Association of Fire Righters

Applicant

– **and** –

The Ottawa Macdonald-Cartier International Airport Authority

Respondent

REASONS FOR JUDGMENT

Swinton J.

Date of Release: August 17, 2022