2009 CarswellBC 3701
British Columbia Arbitration

Vancouver Drydock Co. v. Marine Workers & Boilermakers Industrial Union, Local 1

2009 CarswellBC 3701, [2010] B.C.W.L.D. 3393, [2010] B.C.W.L.D. 3398, 186 L.A.C. (4th) 405, 99 C.L.A.S. 6

In the Matter of an Arbitration between Vancouver Drydock Company Ltd. and Marine Workers and Boilermakers Industrial Union Local 1

Donald R. Munroe Member

Heard: June 9 - July 9, 2009
Judgment: July 22, 2009
Docket: A-058/09

Counsel: David Wong, for Employer
Richard Edgar, for Union

Subject: Labour; Public

***Donald R. Munroe Member*:**

I

1 On February 11, 2009, in circumstances described below, the grievor was asked by the employer to submit to a test for the purpose of determining blood-alcohol content. When the grievor declined, he was sent home, and later was told by letter from the employer that he had been "...suspended without pay for reporting to work in a suspected impaired condition...and for refusing testing as per the [employer's] Substance Use Policy & Procedures".

2 By the same letter, the employer informed the grievor that his "...refusal to test is considered a positive result and therefore you are required to attend an Independent Medical Evaluation (IME) as per [the same Policy & Procedures] as soon as possible" (the grievor was later given the names of five physicians who specialize in addictions medicine from which he could choose for purposes of the IME).

3 The letter went on to inform the grievor that if he was willing to submit to the IME, he would immediately "...be put on pay until the IME is conducted, and recommendations and return to work conditions are determined"; but that "...if you refuse to attend the IME you will remain suspended without pay while the company determines your employment status".

4 The grievor declined to attend the IME, and has been suspended without pay ever since (with the exception of a brief period resulting from an interim arbitral direction).

5 This arbitration proceeding arises from the union's challenge, on behalf of the grievor, to the employer's actions as briefly summarized above.

II

6 The employer runs a dry dock operation at North Vancouver. The grievor's employment at that operation was as a rigger. There is no dispute that the rigger position is a safety-sensitive position; nor indeed that the work site as a whole is one where safety considerations must be at the forefront.

7 Until the mid-2000's, the employer took a traditional progressive-discipline approach to alcohol- or drug-related problems in the workplace. However, commencing in the early 2000's, the employer began moving toward an approach that was less punitive, and was aimed more at the identification of employees with substance-use problems and the treatment thereof.

8 In the result, in January 2005, the employer published a "Substance Use Policy" (the Policy). Somewhat confusingly, there are two versions of the Policy: one being a free-standing document titled "Substance Use Policy"; the other bearing the title "Drug and Alcohol Abuse Policy", and being one part of a booklet given to employees containing general plant and safety rules. In addition to the different titles, there are some differences in the texts of the two versions of the Policy. But for present purposes there is nothing pivotal about those differences, and there seems to be no question that the grievor had received at least the booklet version, and probably both versions. The extracts from the Policy that are reproduced in this award are drawn from the booklet version.

9 The Policy is central to this case, for this reason: As the matter was argued by counsel, and as I confirmed with counsel during an exchange earlier in the arbitration hearing, the Policy is the justification (coupled with the facts) that is put forward by the employer for having suspended the grievor without pay: initially upon the grievor's refusal to submit to a blood-alcohol test, and then subsequently, and for an indeterminate period, when the grievor refused to submit to an IME.

10 The Policy begins by reciting the employer's reasons for its development:

- To provide employees with a drug free, alcohol free workplace in accordance with the law.
- To provide guidance for employees who voluntarily seek help to cure an alcohol and/or drug dependency problem.
- To establish procedures for testing and monitoring employees in safety sensitive positions.
- To provide guidance when violations of this policy are suspected and validated.
- To provide guidance to supervisors on implementing this policy.

11 The Policy then sets forth the following core prohibition:

> No one shall report to, return to or engage in any work for [the employer] in an impaired or intoxicated condition or under the influence of alcohol or drugs.
>
> This is a Zero Tolerance Policy.

12 The next part of the Policy deals with "Reasonable Cause" and "Post Incident" drug and alcohol Testing. It provides as follows:

> "Reasonable Cause" and "Post Incident" Drug and Alcohol Testing. Where circumstances suggest that an employee has reported to work impaired by alcohol or drugs or where an accident, a near miss or a report of an employee's dangerous behavior suggests a possibility that the involved employee was impaired by alcohol or drugs, a confidential independent medical evaluation including body fluid and breath test may be conducted as soon as is reasonably practical.

13 A few sections later (and these are the final sections I will reproduce), the Policy addresses what it calls "Enforcement":

> **Employee Discipline**
>
> Violation of this Policy will result in action/consequences/discipline. Those employees with substance dependencies will be sent for assessment, treatment and will require re-evaluation prior to return to work.
>
> **Other conditions of continuing employment**

> Where an employee has violated this policy in appropriate circumstances [the employer] may impose conditions on the future employment of such an employee, including but not limited to: Monitoring (including body fluid/breath test), by a qualified health professional for a period of time.
>
> Successful completion of biological, psychological and psychosocial assessment by a physician skilled in addiction medicine, completion of treatment plan determined from the assessment, signed agreement to participate in a monitoring relapse prevention program.

14 The Policy applies to a family of companies of which the employer party to this proceeding is just one member; and therefore the union party to this proceeding is not the only union that represents employees who are covered by the Policy. In 2006, one of the other unions raised a general challenge to the Policy — saying that the Policy was unlawful on its face and therefore void. The ensuing arbitration award is *Vancouver Shipyards Co. v. U.A., Local 170* (2006), 156 L.A.C. (4th) 213 (B.C. Arb.) (Hope). Some extracts from that award:

> [17] The sole question in this dispute is whether the Policy as written is unlawful and therefore beyond the power of the Employer to introduce. The rights of the Unions and their members are secured in the reasonableness criteria that governs the application of the Policy. In this dispute the question is whether it is necessary for the Unions to challenge the Policy through to arbitration as a prelude to challenging individual application of its terms. The answer is, no. The Unions remain free to challenge any application with which they disagree.
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> [18] The authorities stand for the proposition that policies that are challenged with respect to their introduction, as opposed to a particular application, are evaluated in the context of whether they are in breach of statutory rights of privacy or are otherwise unlawful....
>
> [24] The Policy is viewed by the Employer as an essential adjunct to programs it employs in its various workplaces to combat drug and alcohol abuses in safety sensitive environments where impairment is a manifest risk to individuals who consume drugs or alcohol and to other employees who are exposed to them. The Employer's submission was that, while it is willing to acknowledge aspects of the sensitivity of the Unions, it is of the view that, as a matter of law, it is entitled to introduce the Policy with an acknowledgement that it is not contractually binding on the Unions or their members and that, in its application, the Employer is required to meet the test of reasonableness.
>
> [25] In reading this ... Award, it is essential to understand as a first premise that the Unions are not bound by the Policy in any sense and that nothing in the Award serves to make it binding upon them. The sole issue raised in this aspect of the grievance is whether the Policy is unlawful in the sense contemplated in the authorities and is therefore void. Hence, a finding on that question favourable to the Employer does not serve to impose the Policy on the Unions, it simply preserves the unilateral right of the Employer to introduce it.
>
> [26] The introduction of the Policy remains subject to the reasoning of Bora Laskin, former chief justice of the Supreme Court of Canada, sitting as an arbitrator in *Re Canadian General Electric Co. (Peterborough) and U.E.W., hoc. 524* (1951), 2 L.A.C. 688. On p. 689 he wrote:
>
> > The Company has, however, unilaterally set out a number of plant rules with indicated penalties for infractions, and these are posted throughout the plant. In doing this the Company has given its interpretation of the scope of its disciplinary powers. It is unnecessary in this case to determine how far the Company, by publishing certain rules, is estopped from relying on other grounds for discipline. While the published rules may be controlling for the company in what they cover, they are not, of course, controlling under the Agreement except as they may be found to square with "reasonable cause".
>
> [27] The major controversy with respect to the introduction of discipline policies, including drug and alcohol abuse policies, is of relatively recent origin and appears to have evolved from the statutory enhancement of privacy rights in the work place. As stated, the issue appears have appears to focus on whether particular aspects of an individual policy are unlawful

> in the sense that they transgress those statutory rights of privacy. The rights of employees recognized in contemporary judicial and arbitral jurisprudence prohibits any disciplinary initiative, regardless of its source, which is unreasonable in either its terms or its application.
>
> [28] In my reading of the Policy, (with the exception of the Mandatory Disclosure Section), I was not able to find any provision which could be viewed as unlawful on the language itself. That is, except for the Mandatory Disclosure Section, the very fact that every aspect of the Policy and its application is subject to the test of reasonableness answers the concerns raised by the Union. In particular, the reasonableness test can be translated into the context of the specific concerns outlined by the Union in Appendix II.
>
> [29] For example, the phrases, "where circumstances' suggest", and, "suggests a possibility", found in 28.4.1, do not introduce a test which is less than reasonableness. In particular, "where circumstances suggest", does not differ in terms of an arbitral review from "has a reasonable basis for believing" and "reasonable possibility", being the language proposed by the Union. Both tests are subjective and in both cases the onus upon the Employer is to establish that it had reasonable grounds to require testing in a particular circumstance. Hence, I view the two versions as equivalent in their intent.
>
> [30] At this stage I note that arbitral decisions in which policies are deemed unlawful on their face arise mainly in the context of provisions seen as contrary to rights of privacy in a sense that goes beyond the overriding principle of reasonableness. Those provisions generally involve mandatory testing applied on a random basis where random testing is not shown to be responsive to the nature of the work and, in that sense, are a requirement that constitutes a breach of an employee's statutory right of privacy which is not justified by the facts.
>
> [31] The overriding test of reasonableness that protects employees was recognized as determinative in *Canadian National Railway Co. and CAW and DuPont Canada Inc. and CEP, Local 28-0*. In those decisions, Arbitrators M.G. Picher and P.C. Picher, cited the *KVP* case for the proposition that any rules of conduct unilaterally imposed, including drug and alcohol policies, are subject to the reasonableness test in both their terms and their application....
>
> [40] My understanding of the authorities that govern the introduction of drug and alcohol policies, as distinct from their application, is that, with the exception of the Mandatory Disclosure Section, the Employer is entitled to introduce its current Policy unilaterally and that it does not need to obtain acceptance by the Unions or their members in order to invoke it in particular circumstances. However, in the application of the Policy in particular circumstances, both the Policy and its application must pass the reasonableness test....

15 Both parties to this proceeding accept the above-cited award as authoritative. More particularly, the union does not challenge the Policy itself, but rather asserts that on the facts of the present case, the manner of its application was unreasonable.

III

16 That takes me to the facts. As stated above, the grievor's employment at the dry dock operation was as rigger. His shift on February 11, 2009 started at 3:00 p.m. The grievor reported for work on time, and nothing of consequence occurred for roughly the first hour of the shift. At about 4:00 p.m., the grievor approached his supervisor, Robert Morton, to speak to him about a safety matter. Following brief discussion, Mr. Morton said to the grievor that the two of them should speak to Domenic Finamore about it. Mr. Finamore is the employer's safety manager.

17 Mr. Morton and the grievor then walked together to Mr. Finamore's office.

18 Mr. Morton testified that when he and the grievor were speaking about the safety matter, he smelled alcohol on the grievor's breath. Mr. Morton did not suggest in his testimony the presence of any other indicia that the grievor might be impaired or intoxicated or in any degree under the influence of alcohol. Neither do Mr. Morton's notes of the day suggest any such indicia.

19 Mr. Morton and the grievor arrived at Mr. Finamore's office. Mr. Finamore's testimony about what then occurred was as follows:

> I was in my office on the phone. [The grievor] came to my office...I got off the phone and asked him into my office. He voiced a concern to me about a crane operator. I acknowledged the concern and that we were dealing with it.
>
> I detected the odor of alcohol on [the grievor's] breath. [Mr. Finamore later testified that he and the grievor were 1 $^{1}/_{2}$ to 2 feet apart during this encounter.]
>
> I asked if he'd been drinking that day. He said he'd had a beer with lunch.
>
> I said he couldn't work that shift. I strongly urged him to get union representation, and I contacted Max Palpizi, the senior supervisor on site.
>
> Max came to my office. I relayed my concern to him, and Max and I then demanded that [the grievor] submit to testing.
>
> I also told him he had a right to refuse testing if he wished.
>
> Max told [the grievor] the consequences. I can't recall the specifics but he said something about a refusal would be considered a positive. I can't recall the conversation but something about that.
>
> [The grievor] refused the testing.
>
> We contacted Peter Borzillo of the Union. [The grievor] and Peter spoke on the phone. I don't know what was said.
>
> I spoke to Peter and reiterated my concern — that I suspected [the grievor] was impaired and demanded testing.
>
> [The grievor] once again refused testing.
>
> [The greivor] then went to change. We told him we'd be contacting a taxi to arrange a safe ride home for him.
>
> We were talking to him, and also Peter [Borzillo] had [now] arrived.
>
> [The grievor] again refused a test, and Max again said the consequences of a refusal.

20 As can be seen from those evidentiary extracts, Mr. Finamore, while demanding that the grievor submit to a test, also told him that "...he had a right to refuse testing if he wished", albeit with additional testimony about Mr. Palpizi saying something to the grievor (Mr. Finamore was unable to recall the exact words) about a refusal to submit to a test being "considered a positive".

21 Indeed, as Mr. Finamore subsequently testified, "I repeatedly said to [the grievor] that he didn't have to take the test", along with telling the grievor of "...his right to talk to the union". Mr. Finamore said in evidence that his several statements to the grievor to the effect that he (the grievor) had the right to refuse testing was "...because I did not want to unduly influence him".

22 Mr. Finamore's repeated advice as aforesaid to the grievor was described by Mr. Finamore in an email prepared by him not long after the encounter with the grievor. The whole of that email is as follows:

> At approximately 1550 pm on February 11, 2009 [the grievor] came into my office to have a conversation regarding crane operator framing. During the course of the conversation I noticed an odor of alcohol on [the grievor]. I then asked [the grievor] how he was doing, and if he had consumed any alcohol prior to coming in to work: he indicated that he had consumed a beer with his lunch at aprox. 1130 am. I then enquired if he had a stop steward onsite and attempted to contact Max Palpizi. I was able to contact Max and we requested that the grievor provide us with a sample for alcohol testing as per our drug and alcohol policy. I repeatedly advised the grievor that he had the right to refuse testing and urged him to contact his union for representation. Max was able to contact Peter Borzillo at the Marine Workers and Boilermakers Industrial Union Local 1. The grievor then spoke to Peter on the phone, Peter requested to speak to me, which I did and informed him that if the grievor refused to submit to testing we would be sending him home via a cab. The grievor then

> spoke to Peter and the grievor refused to test. The grievor was then advised that he would be unable to work this evening and that we would provide him with (taxi) transport home. The grievor then went to change out of his work clothes.
>
> Peter Borzillo [of the union] then came onsite to speak to the grievor, the grievor then once again refused to submit to testing and Peter then indicated that he would be providing him with transport home. The grievor was then escorted from the site by Peter.
>
> During the aftermath of the incident Robert Morton (VDC safety officer) indicated that he had also smelled an odor of alcohol on the grievor's breath while he was in the safety office.

23 I appreciate that the above email was not intended by Mr. Finamore, who was a thoroughly credible witness, to be in the nature of detailed minutes of evidence, but rather was intended to be exactly what it was: a summary account to senior management of what had occurred. Nevertheless, the following portion of the email bears repeating for present purposes:

> ...I was able to contact Max and we requested that [the grievor] provide us with a sample for alcohol testing as per our drug and alcohol policy. I repeatedly advised [the grievor] that he had the right to refuse testing and urged him to contact his union for representation. Max was able to contact Peter Borzillo at the Marine Workers and Boilermakers Industrial Union, Local 1. [The grievor] then spoke to Peter on the phone, Peter requested to speak to me, which I did and I informed him that if [the grievor] refused to submit to testing we would be sending him home via a cab. [The grievor] was then advised that he would be unable to work this evening and that we would provide him with (taxi) transport home. [The grievor] then went to change out of his work clothes.

24 Based on that summary account, which, as I have said, was prepared by Mr. Finamore shortly after the events being recounted:

> 1. Mr. Finamore (together with Mr. Palpizi) asked the grievor to provide a sample for alcohol testing, but Mr. Finamore also repeatedly told the grievor that he was not required to do so.
>
> 2. When Messrs. Finamore and Palpizi reached Mr. Borzillo by telephone, Mr. Borzillo asked to speak to Mr. Finamore, at which point Mr. Finamore told Mr. Borzillo that the consequence of the grievor's refusal to submit to testing "...would be sending him home by cab", after which Mr. Borzillo spoke to the grievor who then refused to be tested.
>
> 3. The grievor was then told that he would be "unable to work this evening", and would be provided with safe transport to his home.

25 There is no mention in the email of Mr. Palpizi telling the grievor that a refusal to submit to a test would be considered the equivalent of a positive test. I accept Mr. Finamore's evidence that Mr. Palpizi said something of that sort to the grievor, the precise wording of which Mr. Finamore cannot now recall. But that must be appraised in the light of Mr. Finamore's repeated advice to the grievor, in Mr. Palpizi's presence, that he (the grievor) was not required to take a test; and in the light of Mr. Finamore's statement of consequences to Mr. Borzillo (the grievor would be sent home by cab); and in the light of Mr. Finamore himself saying to the grievor, upon the final refusal to take the test, that on that account he would be unable to work that evening and would be provided with taxi transportation to his home.

26 In cross examination, it was suggested to Mr. Finamore that when Mr. Palpizi arrived at his office and was told the situation, he (Mr. Palpizi) said "I don't smell anything". Mr. Finamore's initial reply to that suggestion was: "He may have". Some seconds later, Mr. Finamore added to his initial reply by saying, "I don't recall it; I can't confirm or deny".

27 That is important because of Mr. Borzillo's testimony that when he was contacted by telephone at the union hall and initially spoke to Mr. Palpizi, he asked Mr. Palpizi whether the grievor was drunk *or smelled of alcohol* (my emphasis) to which Mr. Palpizi replied, "No".

28 I do not doubt that Mr. Finamore and Mr. Morton smelled alcohol on the grievor's breath. But neither of them testified to the strength of the odor, and, as noted above, Mr. Finamore's testimony was that during his encounter with the grievor, the two of them were only about $1\ ^{1}/_{2}$ to 2 feet apart — which is very close proximity.

29 Mr. Borzillo, after speaking by telephone with Messrs. Palpizi, Finamore and the grievor, drove from the union office to the employer's dry dock operation; and it was Mr. Borzillo, not a taxi driver, who took the grievor home. Mr. Borzillo testified that he did not smell alcohol on the grievor, either at the site or in his vehicle while driving the grievor home, and neither did the grievor exhibit in any signs of impairment.

30 Again, I do not doubt the testimony of Messrs. Finamore and Morton about detecting the odor of alcohol. However, the evidence supports a finding that the odor detected by them was a slight one.

31 As to signs of impairment generally, Mr. Finamore agreed in cross examination that none were present. That is, the grievor was not slurring his words in any degree; there was no lack of physical coordination; no glassy eyes or constricted pupils; and no unusual or uninhibited behaviour of any sort.

32 Mr. Finamore further agreed that in the conversation he had with the grievor about the safety concern, the grievor "...expressed himself clearly and rationally and explained himself well"; that there was "...no reason to think by the way [the grievor] was talking that he was impaired by alcohol, nor by his physical appearance or conduct".

33 In terms of the Policy, Mr. Finamore agreed that the "circumstances suggesting] that [the grievor had] reported to work impaired by alcohol" were limited to the odor of alcohol (which I find to have been slight) and the acknowledgement by the grievor that he had had a beer with lunch about 3-4 hours previously.

34 I have identified Max Palpizi as the senior supervisor on site at the material time, and as having been present during some of Mr. Finamore's encounter with the grievor. Mr. Palpizi also gave evidence, to which I have not thus far referred. I must frankly say that that is because I do not regard Mr. Palpizi as a reliable witness. In addition to giving evidence that was both argumentative and exaggerated, Mr. Palpizi was one of those witnesses who claims absolute certainly about everything he is saying, and who refuses, until it becomes utterly impossible to continue doing so, the suggestion that he might well have been mistaken about certain things. Troubling, too, was Mr. Palpizi's claim to have made detailed notes of the encounter with the grievor, but his present inability to find his notebook for the relevant period, despite his testimony that all his "600 notebooks" from over the years are carefully kept and maintained by him in chronological sequence.

35 I have put Mr. Palpizi's evidence aside in my determinations of the material facts.

IV

36 As noted earlier in this award, the employer gave the grievor a list of five physicians from which he could choose for purposes of the IMF that the company was demanding (the employer going on to say that a refusal to submit to the IME would result in the grievor's suspension without pay being continued for an indeterminate period). The five physicians named by the employer practice addictions medicine. One of the physicians on the employer's list was Dr. Ray Baker.

37 Dr. Baker was asked by the employer to prepare a report which, among other things, describes his procedures where an individual has been referred to him for assessment. Dr. Baker's report says this:

> The referred individual is instructed, by means of a description letter, about the nature and thoroughness of the assessment process, prior to coming for the assessment. On the day of the assessment the individual is again informed about the nature of the assessment, the role of the MD-assessor and the reporting arrangements and is asked if he/she consents to this procedure. If they agree, the assessment proceeds. The assessment consists of a detailed structured medical history, physical examination, structured diagnostic addictions interview, structured diagnostic psychosocial interview, laboratory testing (both urine and blood tests as indicated, based upon the findings of the medical history and physical exam) and examination

of PharmaNet printout. There are also self-administered questionnaires and pen-pare screening tests completed by the individual being assessed. Additional collateral information may be requested from attending physicians, counselors or workplace personnel.

38 In cross examination at the arbitration hearing, Dr. Baker elaborated on the above extract from his report. He described the assessment as including a "structured diagnostic psychosocial interview" (as well as a physical examination) that typically takes two hours or so, which is followed by the individual being asked to complete a self-administered questionnaire. Dr. Baker also undertakes a review of PharmaNet and other relevant medical information from the family physician, etc. For the person being assessed, the whole process is about three hours' duration during which, as Dr. Baker agreed in cross examination, the person is "...asked about their entire life looking for certain things to assist in the diagnosis". Dr. Baker explained that an addictions disorder has three components: psychosocial; bio-medical; and psychiatric — all of which must be explored. The assessment interview includes a pre-planned review of the person's "...chronological lifelong history: patterns of behaviour, activities, interests — looking for problem areas".

39 Additional to the above, and depending on the circumstances, Dr. Baker may also speak to, or seek information from, the person's employer, past counselors (if any) or other health professionals or agencies.

V

40 I refer back to the Policy which, as I said near the outset of this award, is the justification put forward by the employer, on the facts at hand, for demanding that the grievor provide a sample for blood-alcohol testing, and then for demanding that the grievor submit to an IME of the sort described by Dr. Baker in his report and evidence.

41 Examining the language of the Policy alongside the earlier-cited award by Arbitrator Hope, which the parties accept as authoritative, the principal issues requiring adjudication may be summarized as follows:

1. Was it reasonable in the circumstances for the employer to require the grievor to submit to a blood-alcohol test?

2. Was it reasonable in the circumstances for the employer to require the grievor to submit to an IME for addiction-assessment, and to suspend the grievor without pay when he declined to comply with that requirement?

42 It is proper to break the matter down into those two questions, as was similarly done in *Eurocan Pulp & Paper Co* [2009] B.C.C.A.A.A. 12 (Taylor), rather than conflating those questions into a single unitary issue. It seems unlikely that if there is a negative arbitral response to the first question, there could nevertheless be an affirmative response to the second question. On the other hand, while one can posit that where it is reasonable for an employer to demand that the employee provide a test sample, it will often be judged reasonable to also demand an IME for dependency-assessment (as was the case in *Eurocan*), such will not always and automatically be the case.

43 In *Eurocan*, the employer's policy prohibited employees from "reporting to duty under the influence of alcohol" or from conducting company business or being on company premises with "...an alcohol test of .04 blood alcohol content or greater". The policy went on to say, under the heading "Reasonable Cause", that:

a. Reasonable Cause: Testing will take place whenever the company has reasonable grounds to believe that the actions, appearance or conduct of an individual while on duty are indicative of the use of drugs and alcohol. The decision to test shall be made by a supervisor, with concurrence of the department manager or manger on call. The basis for the decision will be documented as soon as possible after action has taken place. The referral for a test will be based on specific, personal observations resulting from, but not limited to such indicator as:

- observed use or evidence of use of a substance (e.g. smell of alcohol);
- erratic or atypical behaviour of an employee;
- changes in the behaviour of the employee;

> e. Failure to Test: Failure to report directly for a test, refusal to submit to a test, refusal to agree to disclosure of a test result to management, a confirmed attempt to tamper with a test sample, or failure to report an accident which may require testing, are a violation of this policy.

44 I note that the *Eurocan* policy called for testing whenever there were circumstances "...indicative of "*...the use of alcohol*" (such as "the smell of alcohol"), as contrasted with the Policy before me: which speaks of "...circumstances suggest[ing] that an employee has reported to work impaired by alcohol...."

45 In all events, in *Eurocan* there were multiple indicia not just of the "use" of alcohol, but also of generally aberrant behaviour warranting reasonable concern about the presence of an addiction. First of all, the smell of alcohol about the grievor on the day the testing demand was made by management "... was of a high level of intensity". Second, there was a previous occasion on which the grievor in that case had smelled of alcohol at work. Additionally, as it was put by the arbitrator at para. 18 of the Award, there was the grieving employee's "erratic" behaviour including:

- His failure to remain at the work site on the day in question despite being told by his supervisor to do so;
- driving his own car home that day knowing the police had been notified;
- a police report that at 11:00 a.m. that day the grievor was drinking;
- the grievor's "mostly incoherent" conversations with two mangers a few days previously; and
- messages "supposedly left" by the grievor for his mangers that were not returned.

46 In the circumstances, the arbitrator in *Eurocan* concluded that both the demand for a blood-alcohol test and the requirement of a dependency-assessment were reasonable — those two questions being separately addressed and adjudicated.

47 The circumstances before me are very different, as well as differing from the circumstances of other cases to which I was referred.

48 I start with the Policy. The core prohibition, as I earlier called it, is that employees must not report to work "...in an impaired or intoxicated condition or under the influence of alcohol or drugs". That is the direction given to the employees covered by the Policy: "You must not report for work impaired or intoxicated or under the influence of alcohol or drugs." [1] The Policy does not say, for example, that employees must not consume any alcohol at all on a scheduled work day, or, as another example, that employees must not consume any alcohol within, say, four or six hours of reporting for work. And neither does the Policy say that an employee who reports for work with the odor of alcohol about him oilier will in all instances be required to undergo testing — i.e., regardless of the absence of any other indicia of impairment — which in turn may lead to a requirement of an IME of the kind described by Dr. Baker.

49 The Policy states clearly that it is "Zero Tolerance". But the zero-tolerance warning would obviously be understood by employees reading the Policy as being in relation to what the Policy actually prohibits — what I have described as the core prohibition.

50 In support of the core prohibition, the Policy then states that testing and an IME may be required, "Where circumstances suggest that an employee has reported to work impaired by alcohol or drugs...." The overall message to employees, then, is this: "Don't report for work in a seemingly impaired condition, and if you do report for work in such condition you will be tested and sent for an IME". Once again, the message to employees, as conveyed by the Policy, is *not* that the use of alcohol on a scheduled work day, no matter how modest or how far in advance of the scheduled start time, may result in a demand for a blood-alcohol test and an IME, but rather is cast in terms of circumstances suggesting "impairment".

51 How, then, could an employee like the grievor stand forewarned that having a beer with his lunch, a lawful activity in itself, some 3-4 hours prior to his scheduled start time, could or would result in a demand for a blood-alcohol test and a requirement that he submit to an IME of the lengthy, comprehensive and invasive sort described by Dr. Baker in his evidence?

52 I appreciate that the immediately preceding paragraph, expressed as a rhetorical question, presumes that the facts of the case are as the grievor (who did not give evidence) described them to Mr. Finamore in response to Mr. Finamore's inquiry about whether he (the grievor) had consumed any alcohol that day. The grievor's response to that question was that he had had a beer with lunch at approximately 11:30 a.m. (recall that the grievor's start time that day was 3:00 p.m.).

53 But the grievor's response as aforesaid is entirely consistent with the other evidence: first, that the odor of alcohol (as I have found) was slight; and second, that apart from the slight odor, there was a complete absence of any hint of impairment.

54 The employer argues that the grievor's refusal to submit to a test was itself a circumstance (i.e., additional to the odor of alcohol) suggesting impairment: "Why would the grievor refuse the test if he had nothing to hide?" But while I can imagine circumstances where that argument might have persuasive force, that cannot be the case in a situation where, as here, the demand for a test is clearly not reasonable under the Policy in the first place.

55 In that connection, I refer not only to the facts and circumstances earlier recounted, but also to the fact that when the test was demanded of the grievor, he was not told the nature of the test — i.e. whether it would be a breath test, a blood test or a urine test. The Policy speaks both of "bodily fluid" and "breath" tests. I was told during the hearing that the employer's intention in this instance was a breath test. However, that was never communicated to the grievor. He was simply told that he must "submit to a test" (Mr. Finamore's testimony) or "provide a sample" (Mr. Finamore's contemporaneous email to senior management). Testing, by its nature, is invasive in varying degrees according to the nature of the test. And it seems fundamental, as part of a general requirement of reasonableness, that the demand for a test should be accompanied by a description of the test being demanded.

56 Neither was the grievor told what would comprise a "positive" test for purposes of the Policy, including for purposes of a demand for an IME. Would 0.01 blood-alcohol content be considered a "positive" test for Policy purposes; or something more like 0.04 as in *Eurocan*? It was clear on the evidence that the employer has not actually considered the question of what would amount to a positive test for any or all Policy purposes. Mr. Finamore, when asked about it during his evidence, seemed to presume that "any trace amount" of alcohol would be a positive test — i.e., sufficient on its own to warrant a demand for a full-scale IME. However, that clearly was an on-the-spot reaction by Mr. Finamore to a question put to him, rather than being a considered corporate response.

57 I hasten to say that I am neither endorsing nor commenting adversely on any particular level of blood alcohol content being considered a positive test for purposes of the Policy. The point is simply that the Policy is silent on that score; that nothing was said to the grievor in that regard when the test-demand was made of him; and neither has the employer at any time turned its corporate mind to that question.

58 I think that all of that is another factor going to the issue of reasonableness in the application of the Policy in the present circumstances.

59 Lastly, I emphasize what I have already noted more than once: that when the demands for a test were made of the grievor, Mr. Finamore "repeatedly" told the grievor that he had "the right to refuse testing". True, Mr. Palpizi said something to the grievor about a refusal being considered a positive test. But that proposition nowhere finds expression in the Policy; and at the very least, the grievor was being given mixed messages. The Policy does not itself expressly tell employees the consequence of declining to be tested; and it must fairly be said that there was an absence of clarity in that regard in the case at hand.

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60 I refer back to the award by Arbitrator Hope; in particular, para. 29, which I reproduce again for convenience:

> [29] For example, the phrases, "where circumstances' suggest", and, "suggests a possibility", found in 28.4.1, do not introduce a test which is less than reasonableness. In particular, "where circumstances suggest", does not differ in terms of an arbitral review from "has a reasonable basis for believing" and "reasonable possibility", being the language proposed by the Union. Both tests are subjective and in both cases the onus upon the Employer is to establish that it had reasonable grounds to require testing in a particular circumstance....

61 There can be no doubt that employers must be given ample scope to properly address alcohol and drug use by employees who work in safety sensitive positions and industries. Alcohol and drug use by employees in such positions and industries can present very substantial dangers to the employees themselves; to their co-workers; and to the legitimate property- and liability-related interests of their employers. Arbitrators must be careful not to parse too finely the judgments made by employers in their attempts to address the potential for such dangers, which are a very real and substantial concern.

62 At the same time, the policies established by employers to address those very real dangers must clearly convey to employees what is expected of them, and demands made of employees in purported reliance on those policies must be supportable in terms of the policies themselves and must generally satisfy the test of reasonableness in their application in individual cases — particularly where they are put forward as the justification for a deprivation of continued employment.

63 Here, the employer should be commended for seeking to deal with alcohol-and drug-related issues in a proactive and enlightened way. However, I must and do find, for the reasons and in the circumstances outlined in this award, that the employer did not have reasonable grounds under its existing Policy to require that the grievor undergo testing; and further, that the employer did not have reasonable grounds under its existing Policy to require the grievor to submit to an IME of the sort described by Dr. Baker, and to suspend the grievor without pay until he agreed to do so.

64 Both in evidence and argument, the union said that it did not object to the employer having sent the grievor home on February 11, 2009 for the balance of his shift that day, with a reduction of pay accordingly. Its complaint, said the union, is about the subsequent suspension of the grievor based on his refusal of the test-demand and his refusal to submit to an IME.

65 My award, then, is that the grievor's suspension is set aside. He must be reinstated forthwith to his rigger position with back pay and benefits (subject to mitigation), except for any loss of pay attributable to February 11, 2009.

66 The matter is referred back to the parties for calculation and agreement on amounts owing to the grievor as the result of this award. I will remain seised to resolve any disagreement between the parties in that regard.

Footnotes

1 It is important to note that this case involves alcohol only, not drugs. Unlike certain drugs that cause workplace problems, the use of alcohol is not *per se* illegal. What is more, the dissipation rate for alcohol is well known scientifically, and can be contrasted with the science that suggests much slower dissipation rates for certain illegal drugs. As Dr. Baker testified, the blood-alcohol dissipation rate for an average-size healthy individual is known to run about 15 milligrams per hour. But as I have said, the evolving science is to the effect that cognitive impairment arising from the use of certain illegal drugs can linger much longer than from the use of alcohol. I therefore emphasize that my analysis and conclusions about "reasonableness" in this case are not necessarily transferable to a case involving drugs.