

Employee Found Sleeping on the Job Rightly Required to Undergo Drug and Alcohol Testing

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Employers in all industries across Canada have an obligation to maintain a safe workplace. While discharging this obligation, one issue that often arises for employers is the legality of drug and alcohol testing, particularly in safety-sensitive environments. Human rights legislation generally only permits random drug and alcohol testing when employers have “reasonable cause” to do so. Establishing “reasonable cause” is a fact-specific analysis; however, in safety-sensitive environments, any potential incapacity can be a significant factor in determining whether it is appropriate to impose a drug and/or alcohol test.

In a recent arbitration decision, *TTC v. ATU, Local 113*,¹ the Toronto Transit Commission (TTC) was found to have reasonable cause to require one of its bus drivers to submit to a drug and alcohol test after he was found asleep and dishevelled in his parked bus.

The bus driver in this case was on the night shift. He had parked his bus on a residential street, contrary to the TTC’s workplace rules. When the bus driver was found by his supervisor, he was fast asleep with the bus’ lights off, window shade pulled down, and the driver’s seat fully reclined. The bus driver was dishevelled, sweaty and appeared to have the flu.

When the supervisor asked why the bus driver was parked and sleeping while on duty, the bus driver claimed he had been instructed by a manager not to wait in a layover area with his bus in reverse. The supervisor found this explanation nonsensical and unconvincing and initiated the drug and alcohol testing procedure.

A TTC Assistant Manager arrived on scene shortly thereafter. The Assistant Manager observed that the bus driver appeared slow and confused, with red, glossy eyes. The Assistant Manager transported the bus driver to a nearby subway station, where the bus driver underwent drug and alcohol testing. He then drove himself home. The bus driver ultimately tested positive for cannabis and his employment was terminated.

There was no dispute that the TTC is a safety-sensitive workplace, and the bus driver performed a safety-sensitive role. The TTC had a Fitness for Duty Policy in place, which required employees to report for work free from drug or alcohol impairments (the Policy). The Policy provided that drug and alcohol testing would be required whenever a supervisor had reasonable grounds to believe that an employee on duty exhibited signs of drugs or alcohol use.

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The union representing the bus driver filed a grievance. It argued that while the bus driver was admittedly asleep on duty, there was no reasonable cause to subject him to drug and alcohol testing. The union pointed to the fact that the TTC permitted the bus driver to drive himself home, which they asserted proves there was never any reason to believe the bus driver was impaired and thus, demonstrated no reasonable cause for testing.

The arbitrator found there was reasonable cause in the circumstances to require a drug and alcohol test. Both the supervisor and Assistant Manager observed various indicia that the bus driver was impaired by drugs or alcohol. The arbitrator noted the bus driver was not only sleeping, but was disheveled, sweaty, and parked offsite on a residential street. Additionally, the bus driver had provided an unpersuasive and ultimately unbelievable explanation for his appearance and conduct.

The arbitrator noted that the test for assessing reasonable cause is a reasonable, good faith basis for concluding there may be impairment. The standard is not perfection. It is not necessary to prove that the employee was, in fact, impaired before proceeding to testing.

The arbitrator noted it was hard to understand the TTC's decision to allow the bus driver to drive home, considering the supervisor and Assistant Manager's concerns that he may be impaired. However, the assessment of "reasonable cause" to initiate drug and alcohol testing must consider the factual circumstances at the time that decision was made. By the time the bus driver was permitted to drive home, the decision to initiate testing had already been made and that decision, the arbitrator found, was justified and reasonable in the circumstances. Accordingly, the arbitrator concluded the TTC had reasonable cause to order a drug and alcohol test.

This decision provides a useful example of the relevant considerations when assessing reasonable cause to require an employee to submit to a drug and alcohol test in a safety-sensitive environment. The test is whether there is a reasonable basis, made in good faith, for concluding that there *might* be impairment.

In addition, as the arbitrator pointed out in this case, actions taken by the employer after assessing the need for testing (like allowing the bus driver to drive home while potentially impaired) have no bearing on the reasonable cause analysis. The assessment of reasonable cause must be made on the factual context at the time the decision to test was made.

For employers, juggling their obligation to maintain a safe workplace along with an employee's human and privacy rights can be challenging. An employer's accommodation obligations may also be engaged for employees with substance abuse issues or addictions. Employers, particularly those in safety-sensitive industries, may find it useful to implement a drug and alcohol testing policy, along with a clear accommodation policy, to manage these various concerns. However, it is important to bear in mind that when it comes to drug and alcohol testing in the workplace, the determination of what is reasonable in the circumstances is a fact-driven analysis. Please reach out to a member of our experienced Employment &

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Labour Group if you wish to discuss potential risks regarding drug and alcohol testing concerns.

¹ *TTC v ATU, Local 113*, [2024 CanLII 106159](#) (ON LA).

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