

YOU WANT ME TO DO WHAT IN THAT CUP!

**AN OVERVIEW OF DRUG AND ALCOHOL POLICIES IN THE
WORKPLACE**

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Introduction

Recognizing the negative impacts of alcohol and drug use by employees, many Canadian companies are developing and implementing workplace substance abuse policies and programs. The least invasive of these consist solely of employee assistance programs. Increasingly however, workplace substance abuse programs include testing for drug and alcohol use, as a means of preventing drug and alcohol related incidents in the workplace. This paper addresses the reasons for testing and the legal issues surrounding testing.

Reasons for Testing

It is important to recognize that testing for the presence of drugs or alcohol does not, in and of itself, amount to a workplace drug and alcohol policy. Testing should be combined with employee education, supervisor training and employee assistance services to best achieve the overall goals of reducing the negative impact of substance use and enhance safety and productivity in the workplace.

Before an employer implements a drug testing regime it must not only determine who to test, what to test for, and what test to use, but also the reasons why it wishes to put in place a drug testing policy. The answer to these questions will be specific to each workplace and each employer's objectives. While testing for drugs and alcohol may be a useful tool for some employers, for others, it may be unnecessary and inappropriate.

A number of studies have credited alcohol and drug use with increased turnover, accidents, absenteeism, Workers Compensation claims, claims against short and long term disability programs, as well as low productivity and poor quality work product. Also of concern is corporate liability for employee and public safety and the environmental impact of workplace accidents.

In his article, *Canadian Workplace Alcohol and Drug Programs: Development, Implementation and Legal Overview*¹, Roger K. McDougall considered a number of those studies and distilled the following:

- Alcohol use is the most prevalent form of workplace substance abuse;
- Alcohol use is highest in managerial positions and heaviest among blue collar workers;
- Highest current users are found in the financial, upstream oil, forestry/mining and construction industries;
- 10% of the labour force can be classified as heavy drinkers;
- Alcohol use and hangovers are responsible for the majority of negative effects;

¹ Roger K. McDougall, P. Eng., M.B.A., L.L.B., *Canadian Workplace Alcohol and Drug Programs: Development, Implementation and Legal Overview* prepared for the Canadian Corporate Counsel Association 11th Annual Meeting, Edmonton, Alberta, August 1999. (In his article Mr. McDougall had cited the following studies: "Canada's Alcohol and Other Drug Survey 1994"; "Health Canada, Fall 1995"; "Under the Influence", Dave Gower in *Perspectives*, Statistics Canada, Autumn, 1990; "Substance Abuse and the Alberta Workplace: The Prevalence and Impacts of Alcohol and Other Drugs", Price Waterhouse for Alberta Alcohol and Drug Abuse Commission, January 1992; "Substance Abuse in the Workplace: Survey of Employees", Canadian Facts for Imperial Oil Limited, April 1991.)

- 8% of the labour force report that they are current illicit drug users;
- Highest levels of illicit drug use are found in the construction, transportation, upstream oil and forestry/mining industries; and
- Cannabis is the most commonly used illicit drug, and its use by Canadian adults is on the upswing.

Implementing a comprehensive alcohol and drug policy may also serve the laudable goal of promoting a healthier lifestyle amongst members of an employer's workforce. Policies which allow employees to seek counseling or treatment for drug and alcohol problems free of charge through employee assistance programs, should form part of all comprehensive programs. In this way, employment policies can be proactive and preventative as well as reactive and punitive.

The creation and implementation of a workplace substance abuse policy may, in part, be predicated upon the need of an employer to protect itself from third party claimants. An employer may be held liable for the wrongful acts of an employee acting within the scope of, or in the course of his employment. For example, an employer could be found liable to a third party claimant injured by an employee who was driving a company vehicle while intoxicated. While a drug and alcohol abuse policy will be of little use following such an event, except to the extent it prescribes disciplinary action, it may play a proactive role by indicating to employees and the community that the employer is intent on preventing such incidents from occurring.

Many U.S. parent companies are requesting their Canadian subsidiaries implement alcohol and drug policies similar to those in place within the parent company. The 1996 American Management Association Survey² found that 81% of major U.S. firms test employees, job applicants, or both for drug use. The Survey also showed that the most effective workplace substance abuse programs combine testing with education, supervisor training and employee access to assistance.

Employers may find that there are economic pressures in the marketplace with respect to implementing a drug and alcohol policy. However, the Ontario Labour Relations Board decision in *International Union of Operating Engineers, Local 793 v. Sarnia Cranes Limited*³, stands as a warning that an employer should not implement a drug and alcohol use policy solely on the ground that implementation of such a policy will secure additional business for the employer. In that case the Board found that there was no pre-existing history of alcohol or drug related problems at Sarnia, and accordingly the use of intermittent testing was too invasive. It was determined that Sarnia should have first considered less intrusive methods of determining whether or not there was a drug and alcohol problem.

The considerations outlined above, do not constitute an exhaustive list of reasons for an employer to implement a drug and alcohol policy. As previously mentioned, each employer will have its own particular and unique circumstances to consider.

² "Workplace Drug Testing and Drug Abuse Policies", 1996 American Management Association Survey (self-published).

³ Ontario Labour Relations Board, 99 C.L.L.C. 220-072 or [1999] O.L.R.D. No. 1283

Legal Issues

An employer who seeks to implement testing as part of an overall drug and alcohol policy, must consider the balance between the health and safety of employees and the public and the employee's privacy. The most vocal opponents to workplace testing argue that it is an extraordinary invasion of an individual employee's privacy. However, the issue is not whether testing is an infringement on privacy as it undeniably is. Rather, the issue is whether or not the infringement is outweighed by the benefits of testing.

It is in part due to the fact that it is invasive, that the federal government has taken the position that testing is unwarranted and has refused to introduce any legislation with respect to workplace alcohol and drug testing. However, the legal parameters surrounding drug and alcohol testing are somewhat determinable having reference to federal and provincial human rights legislation and labour arbitration decisions. No direction on this issue has, as of yet, been received from the Supreme Court of Canada.

Federal Legislation

Section 25 of the Canadian *Human Rights Act*⁴ specifically states that a physical disability includes previous or existing dependence on alcohol or drugs. This Act also provides that an employer may not limit employment opportunities for any individual on a prohibited ground of discrimination unless the employer is able to establish that the impugned policy is a Bona Fide Occupational Requirement (BFOR). In order to meet the legal requirements of a BFOR, the employer must show that the policy was imposed in good faith for a purpose related to job performance and is reasonably necessary to ensure safe, efficient, and economic performance of the work in question. In addition, it is necessary for an employer to demonstrate that there is no other reasonable less intrusive alternative to achieve the stated purpose of the policy.

A discriminatory policy can be justified if the actual ability of the employee to perform employment duties without risk to themselves or others is in question due to a disability. Although individual employees have the right to be assessed and treated according to their capacity to perform, employers have the right to expect safe, efficient and reliable performance from their employees. If a policy adversely affects an employee or group of employees on a prohibited ground of discrimination, the employer has a duty to reasonably accommodate these employees to the point of undue hardship. In the context of the *Human Rights Act*, undue hardship has been restricted to considerations of health, safety and cost.

Thus far, the only case to receive consideration in the context of federal human rights legislation is *Canadian Civil Liberties Association v. Toronto Dominion Bank*⁵. In this case, an Ontario Human Rights Tribunal considered the validity of Bank's drug and alcohol policy, which required mandatory pre-employment testing for all new employees. The policy stipulated that within 48 hours of an offer of employment, the employee was to submit to a drug test. Refusal to take the test was grounds for a retraction of the offer of employment.

⁴ R.S.C. 1985, c. H-6

⁵ (1994) 6 C.C.E.L. (2d) 196 quashed [1998] 4 F.C. 205

Under the terms of the policy any employee who tested positive for drugs or alcohol, was required to submit to a second test during their probationary period. In the event the second test proved positive, the employee was required to submit to a medical assessment, which could lead to mandatory counseling, attendance on a rehabilitation program and further testing. If a third test was positive, the employee would be terminated. Employees who were assessed as drug dependant, could be dismissed if they refused to take advantage of the prescribed counseling or rehabilitation program. The Bank agreed, within the policy, to underwrite the cost of rehabilitation services to the extent that those costs were not covered under provincial health care plans, and employees undergoing rehabilitation maintained the right to full wages and other employment benefits.

The Canadian Civil Liberties Association took the position that the policy discriminated against employees based on the disability of drug dependence. The Ontario Human Rights Tribunal found that there was no such discrimination, as the policy did not discriminate on the basis of disability, rather, if an employee failed the drug test, he had breached a condition of the employment. The Tribunal stated that if they were mistaken on this point, and there was indeed discrimination in this case, it was adverse effect discrimination, which gives rise to the duty to accommodate. The Tribunal held that the Bank through its program of prescribed counseling or rehabilitation had made reasonable efforts to accommodate. In closing, the Tribunal stated that if they were wrong in that regard, and in the event that the policy constituted direct discrimination, the policy would not be saved, as the Bank had not established a BFOR.

The matter was then referred to the Federal Court of Appeal, which held that the Bank's substance abuse policy discriminated against drug dependent persons, a protected class under the Canadian *Human Rights Act*. However, the Court was split on the question of whether the policy constituted direct or adverse effect discrimination. If the policy constituted direct discrimination and a BFOR was proven, the Bank was under no obligation to accommodate the employee by ensuring that he received counseling or rehabilitation. That is, there was no positive action required by the Bank so long as it could establish that there was a BFOR for implementing the policy. In the event the policy constituted adverse effect discrimination, the Bank would be required to have some form of counseling or rehabilitation program in place to satisfy the duty to accommodate.

Ultimately, the distinction between direct and adverse effect discrimination was of little consequence, as the majority of the Court agreed that the Bank's drug and alcohol policy was not rationally connected to its stated objective. The Bank's rationale for implementing the policy was concern for the effect of drugs and alcohol on work performance and employee responsibility. In addition, the Bank was concerned with maintaining its integrity in the eyes of the community.

The Bank's arguments in this respect fell on deaf ears. The Court ruled that if the Bank was truly concerned with the correlation between drug use and employee performance and responsibility, it would have adopted a policy which prescribed random testing for all employees, not just new hires. Furthermore, the Court concluded that there was no evidence that a trace amount of drugs in an employee's system correlates with that employee being unproductive or predisposed to criminal activity in the workplace. The Federal Court of Appeal found that there was no evidence that drug use was prevalent within the confines of Bank.

The TD Bank case does not rule out the possibility of pre-employment drug testing. In fact, the Federal Court of Appeal provided some guidance as to when such testing is appropriate and would be considered non-discriminatory:

A policy aimed at achieving a drug and alcohol free work place can be neutral if it is concerned with work performance and seeks to rehabilitate those whose work performance has been effected as a result of their drug dependency. Indeed, drug testing in safety sensitive industries is allowed and pursued. The concern, therefore, should be to ensure that the policy is designed to meet the requirements of the Canadian *Human Rights Act*, rather than with banning these policies all together. It makes sound economic and business sense to have in place a procedure to help those whose work performance is effected by drug dependency.

Following the decision in TD Bank, the Federal Human Rights Commission issued a policy on drug testing in the workplace. The policy states that in order to establish non-discriminatory drug testing policies, employers must:

- Establish that drug testing is relevant to determining whether the individual employee has the capacity to perform the essential components of his job safely, efficiently, and reliably;
- Identify a drug-free work place as a bona fide occupational requirement, most likely through a link to safety;
- Demonstrate that testing is needed as an identification mechanism; and
- When possible, avoid any discriminatory effect on an individual employee (i.e., ensure that the individual is accommodated by virtue of counseling or rehabilitative programs).

Provincial Legislation

Section 7 of the Alberta *Human Rights Citizenship and Multiculturalism Act*⁶ states that no employer shall refuse to employ or refuse to continue to employ any person, or discriminate against any person, with regard to employment or any term of employment because of physical or mental disability. Addiction to alcohol or drugs has been determined to be a physical and/or mental disability and therefore constitutes a prohibited ground of discrimination.

The Alberta Human Rights Commission has not, as of yet, had to formally consider the legality of an alcohol and drug testing policy. However, the Commission has published a policy statement relative to drug testing and human rights, the hallmarks of which are:

- The Alberta Human Rights and Citizenship Commission does not recommend blanket drug testing of employees or perspective employees.
- Regarding current employees, tests should only be given where there is reasonable suspicion of an impaired ability to safely and satisfactorily perform job duties.

⁶ R.S.A. 1980, c. H-11.7

- Employers may be able to administer pre-employment testing where drug use or impairment is directly relevant to an employee's ability to safely and efficiently carry out the job in question.
- Pre-employment inquiries about or testing for a condition that is a physical and/or mental disability is allowed only where there is a legitimate occupational requirement of a particular job, or where it is otherwise "reasonable and justifiable".
- Drug testing should be drug specific and job specific.
- The testing procedure should not be done where there is no compelling, job-related reason to test.

An instructive decision was handed down under the Ontario Human Rights Code in *Entrop v. Imperial Oil Limited*.⁷ The Human Rights Board considered Imperial's alcohol and drug testing policy which contained the following provisions:

- 1) Employees in safety sensitive positions must disclose if they have or ever had a substance abuse problem. Upon such disclosure, an employee is not permitted to work in a safety sensitive position until or unless he or she successfully completes a reinstatement process involving complex and onerous conditions, including seven years abstinence from the substance in question. All offers of employment are conditional on a negative test for specified drugs;
- 2) Employees in safety sensitive and specified executive positions are subject to pre-assignment testing for alcohol and specific drugs and to random testing thereafter;
- 3) Employees in safety sensitive and specified executive positions are subject to medical examination every two years, which includes screening for substance abuse;
- 4) Presence in the body of illicit drugs, and prescribed drugs for which a prescription is required, or their metabolites is grounds for disciplinary action under the policy. A positive urine test for specified illicit drugs or their metabolites, is considered conclusive proof of a violation of the policy. For employees in safety sensitive positions, but not the specified executive positions, a positive test results in automatic dismissal. Disciplinary action cannot be avoided by requesting treatment after a positive test; and
- 5) Refusal to submit to a drug test is also grounds for disciplinary action.

The policy was challenged by Martin Entrop, who had worked at the Sarnia refinery of Imperial Oil for 17 years at the time Imperial introduced the alcohol and drug policy.

The stated objective of the policy was to minimize the risk of impaired performance due to substance abuse. In accordance with the policy, Mr. Entrop disclosed that he had experienced problems with alcohol until 1984, but he had been alcohol-free since that time. Imperial reacted by relieving him of his safety sensitive position and re-assigning him to a less desirable position at the same salary. In the event Mr. Entrop wished to return to his previous job, he was required to comply with the reinstatement process which included undergoing medical and psychological evaluation and signing an undertaking that he would comply with any medical recommendations arising out of that process.

Mr. Entrop claimed Imperial's policy was discriminatory, as under the Ontario *Human Rights Code*, drug abuse and drug dependants are "handicaps" within the meaning of the Act. Imperial

⁷ (1998) 35 C.C.E.L. (2d) 56; affirmed [1998] O.J. No. 422 (Q.L.)

asserted the BFOR defence, arguing that employees in safety sensitive positions must be substance free in order to perform their jobs.

The Board ruled that freedom from impairment by drugs is a bona fide occupational requirement. However, Imperial's policy was not sufficiently connected to preventing impairment on the job to justify its discriminatory effect. The policy was problematic in a number of respects. First the required disclosure of any past substance abuse problem was unjustified, given that expert evidence concluded that it was possible to be completely rehabilitated from a past substance abuse problem. Secondly, the requirement of seven years of abstinence prior to reinstatement was considered unduly long in light of the above referenced expert evidence.

It was not necessary for the Board to determine whether or not the Imperial policy met the standard of accommodation to the point of undue hardship. However, it indicated that the policy likely did not make the appropriate accommodation since reassigned employees were not guaranteed a comparable job, and employees who failed to self-declare received no accommodation under the policy. Finally, a positive drug test in and of itself could not demonstrate impairment on the job or incapability of performing the requirements of the job. This finding was premised on expert evidence which demonstrated that urinalysis detected the use of a drug long after the drug's impairing effects had ceased to be of any effect.

With respect to the issue of post-accident testing or upon certification for safety sensitive positions, the Board ruled that testing may be permissible if part of a larger process of assessing the presence of drug and alcohol abuse in the workplace. However, the best and least intrusive manner of assessing impairment on the job was reliance on the observations made by supervisors and co-workers. The Board's decision was upheld by the Ontario Divisional Court. The Court of Appeal has now granted leave to appeal on all points. As of this writing, the Court of Appeal had not rendered a decision.

Canadian Arbitration Cases

Labour arbitration hearings have been a fruitful ground for consideration of alcohol and drug testing policies. Generally speaking, there appears to be a consistent approach taken in these decisions. Provided there are reasonable grounds to believe that an employee in a safety sensitive position may be impaired by alcohol or drugs while on duty, the employer has the right to require that employee to undergo a drug test. However, subjecting employees to random and speculative drug testing is not considered a legitimate business purpose and is viewed as an unlawful invasion of the privacy and dignity of employees.

In her article, "Alcohol and Drug Testing in Canada: Defining the Reasonable Limits"⁸, Soma Ray summarizes effectively the arbitral decisions with respect to workplace drug and alcohol testing.

For employees in safety sensitive positions:

- Management is not entitled to impose the obligation to self-declare "listed medications".

⁸ Employment and Labour Law Reporter June 1997 Vol. 7 No. 3 p. 28

- Employees who are incumbent in or candidates for, safety sensitive positions can be required to notify management if they have a current substance abuse problem, but are not required to notify regarding a past problem or a past conviction.
- The term prescribed by management's mandatory after care program of a minimum of two years followed by abstinence of five years for employees without a past substance abuse problem who wish to return to a safety sensitive position, is excessive.
- Mandatory random testing prescribed for safety sensitive employees is acceptable in the context of rehabilitation, but only for a reasonable period of time, and is otherwise unacceptable.
- Mandatory medical examinations and medical screening by the company's doctor is not acceptable, but is acceptable by the employee's own doctor.

For all employees:

- Mandatory testing of all employees after a significant work accident, incident or near miss, or for reasonable and probable grounds is acceptable.
- Work rules that prohibit the presence in the body of illicit or unprescribed drugs are unacceptable.
- Work rules that focus on use and possession on the company premises and upon the employee's unfitness for work due to alcohol and drugs are acceptable.
- Management is entitled to impose responsibility upon all employees to manage potential impairments due to the legitimate use of medications during working hours.
- Searches on the basis of reasonable and probable grounds of an employee's person without physical contact and an employee's property on company-owned or controlled premises as prescribed, is acceptable.

Illustrative of the above comments are the arbitral decisions in CP Rail and Procor.

In *Re Canadian Pacific Ltd. and United Transportation Union*⁹, the Ontario Labour Relations Board was faced with the termination of a conductor at CP Rail who had been charged with cultivation and possession of marijuana. The employee had been asked by CP to undergo drug testing and upon his refusal, was dismissed. The CP Rail decision is one of the seminal decisions in the arbitration jurisprudence.

The employee brought a grievance through his union to the Board.

⁹ (1987) 31 L.A.C. (3rd) 179

In considering the case the Board reviewed the existing authorities and gleaned a number of general principles. What follows is the off-cited passage from the CP Rail case:

What guidance do the foregoing considerations provide in the instant case? It appears to the arbitrator that a number of useful principles emerge. The first is that as an employer charged with the safe operation of a railroad, the company has a particular obligation to ensure that those employees responsible for the movement of trains perform their duties unimpaired by the effect of drugs. To that end, the company must exert diligence, and may, where reasonable justification is demonstrated, require an employee to submit to a drug test. Any such test, must, however, meet rigorous standards from the standpoint of the equipment, the procedure and the qualifications in care of the technicians responsible for it. The result of the drug test is nothing more than a form of evidence. Like any evidence, its reliability is subject to challenge, and an employer seeking to rely on its results, will in any subsequent dispute, bear the burden of establishing on the balance of probabilities, that the result is correct. The refusal by an employee to submit to such a test, in circumstances where the employer has reasonable and probable grounds to suspect drug use and risk of impairment, may leave the employee liable to removal from service. It is simply incompatible with the obligations of a public carrier to its customers, employees, and the public at large, to place any responsibility for the movement of trains in the hands of an employee whom it has reasonable grounds to suspect is either drug dependent or drug impaired. In addition to attracting discipline, the refusal of an employee to undergo a drug test in an appropriate circumstances, may leave that employee vulnerable to adverse inferences respecting his or her impairment or involvement with drugs at the time of refusal. On the other hand, it is not within the legitimate business purposes of an employer, including a railroad, to encroach on the privacy and dignity of its employees, by subjecting them to random and speculative drug testing. However, where good and sufficient grounds for administering a drug test do exist, the employee who refuses to submit to such a test does so at his or her own peril.¹⁰

In *Procor Sulphur Services and Communications, Entergy and Paperworkers Local 57*¹¹, the Alberta Labour Relations Board had an opportunity to consider a grievance where an employee had been tested for drug and alcohol use in the absence of the company possessing a formal testing policy. In the Procor case the employee had been charged by police with possession and cultivation of marijuana. Following that incident, the employer imposed a mandatory testing

¹⁰ *ibid* at p. 186-187

¹¹ [1998] AGAA No. 106

program. The employee, through the grievance, challenged the validity of that testing program. The decision of the Board and its concerns, are succinctly stated in the following:

Except in the most safety-sensitive of situations, or where the law requires it (and these may be one and the same), this does not give an employer the right to test employees at will. Reasonable and probable grounds must exist of an impairment risk. ... The value placed on our personal privacy generally outweighs the right to test simply because some employees sometimes may be abusing alcohol or drugs and coming to work impaired. The balance tips, however, when the employer has good reason to suspect that the risk factor of impairment has been increased for an employee who occupies a safety-sensitive position. Here, the right to privacy may be outweighed by the need to protect the employee, his co-workers, the public, and company property. Where the balance lies will be determined by the particular circumstances of each case. ... While accepting that urinalysis does not test for impairment, it is obvious that if the grievor remains drug-free, the risk of impairment at the workplace (at least with respect to drugs) is greatly reduced. This accomplishes the company's objective of reducing the risk of impairment to an acceptable level. The Board concludes that testing is reasonable in these circumstances.

It is clear that arbitrators are balancing the employee's right to privacy and the employer's need to protect its employees, the public and its economic interests. The more safety-sensitive the position, the more likely than not, the scales will be tipped in favour of the employer arguments.

Testing Protocol

The technology available for testing for alcohol and drugs is becoming increasingly sophisticated. Historically, workplace drug testing has taken the form of urinalysis, however, it is now possible to detect the presence of alcohol and drugs through blood tests, breathalyzers, saliva tests, hair analysis and eye testing.

An employer wishing to institute a drug testing procedure must ensure they retain a laboratory which follows the Standards Council of Canada Laboratory Accreditation Requirements. If these requirements are not met, the test is not legally defensible. The cost of a testing procedure can be quite high and the employer must ensure that the benefits from the test outweigh the costs. The importance of retaining an accredited laboratory cannot be overstated, particularly in light of the commentary in *Re Canadian Pacific Ltd. and United Transportation*¹².

The testing policy will have to explicitly state what it is that is being tested for. In addition, employers will need to stipulate a "cut-off level" or the threshold permissible amount of an intoxicant. It will be necessary for the employer to work with the accredited laboratory to determine what the appropriate "cut-off levels" are with respect to specific intoxicants. This

¹² *supra*, note 10 at p. 186

should be done with an eye to determining the point at which an individual will experience the adverse effects of alcohol or drugs so as to prevent them from being able perform aspects of their employment.

Barbara Butler addresses the threshold blood alcohol level in Alcohol and Drugs in the Workplace¹³ as follows:

Studies have found that at 0.04% BAC, there are discernable signs of impairment for most, although not all, individuals, and this level is often referred to as the “threshold of impairment”, for it is the point at which decreased cognitive, as opposed to psychomotor, performance is experienced by the general population. In other words, it is around the 0.04% BAC level that risk of serious hazards become significant. A number of Canadian private sector policies, and current American regulations on alcohol use in the transportation industry, have chosen this as the “cut-off” level to establish an alcohol-positive test. However, risk of an accident below the 0.04% BAC level is always possible, and Transport Canada is considering testing for a level of alcohol in the urine that would equate to 0.02% BAC, substantially lower than the current *Criminal Code* Standard for vehicle/vessel operators.

Thus, unregulated employers have critical decisions to make in this area if they choose to prohibit or limit alcohol use in conjunction with work and back that up with a testing program. A policy that allows for no impairment on the job could justify having serious consequence for any test above zero, knowing some individuals can be impaired even at the lowest levels. Due to the need for generalizations when creating a policy, however, a limit of prohibited BAC should be set at a standard at which a sufficient number of individuals would demonstrate performance decrements, to legitimate testing, and other components (pure prevention, supervisory observation) should be in place to identify those individuals that may be impaired in some way at lower levels and to allow for their removal from a situation where they may be a danger to themselves or others.

The consequences of a positive test result for drugs or alcohol must be set out clearly in a comprehensive alcohol and drug policy. It is important to remember that there will be a significant time delay between conducting the test and receiving the results. Drug testing does not address any immediate or crisis situation due to this time delay, and is not an effective method of determining whether an employee has been consuming alcohol and should be sent home.

¹³ Butterworths Canada Ltd. (1993) Vancouver Canada

Although employers may be tempted to terminate any employee whose drug test is positive, there is a danger of running afoul of federal and provincial human rights legislation, which provides that an employer cannot discriminate (read terminate) on the basis of a physical disability such as alcohol or drug dependency. An employee who tests positive and who is alcohol or drug dependent cannot be terminated until an attempt has been made to accommodate the disability. The one exception is where a BFOR can be established.

This exemplifies why testing must be a part of a comprehensive workplace policy on alcohol and drug use, which includes employee education and an employee assistance program. If employees are aware that they can access confidential assistance free of charge through their employer, they are more likely to seek help prior to a positive test result. In the event of a positive test, the employer can refer the employee to the employee assistance program for support and counseling. This allows the employer to discharge the duty to accommodate the employee's disability, and remain within the guidelines of human rights legislation. Failed attempts at rehabilitation and counseling are sufficient to justify termination.

In most cases, immediate termination will not be an appropriate response to a positive drug test, and some form of discipline will be imposed by the employer. It is well settled in common law and labour arbitration that employees who attend for work intoxicated, or who become intoxicated while at work, can be disciplined. Employees in safety-sensitive positions should be subject to more serious disciplinary action up to and including dismissal. However, in those instances where a position is not classified as safety-sensitive, the drug and alcohol policy should stipulate an appropriate disciplinary response such as a probationary period or mandatory counseling.

When disciplinary action is taken there must be some objective assessment of the employee's performance to demonstrate the negative impact of the alcohol or drug use on the workplace. Such evidence can come from fellow employees, the employer's clientele, and more often than not, supervisory personnel that will be able to identify hallmarks of a problem. Such hallmarks may include:

- increased absenteeism;
- increased tardiness;
- increased accidents; and
- lower job performance which persists over time.

Counseling programs or employee assistance programs are an important part of a comprehensive drug and alcohol policy. EAPs have been proven effective in rehabilitating employees, but more importantly, they are recognized for decreasing drug and alcohol use in the workplace. In addition, Human Rights Commissions, and Judges view such programs as a factor in determining whether or not an employee has been reasonably accommodated.

An effective EAP should provide:

- assessment of substance abuse problems;
- established referral procedures that are communicated to all employees;
- follow-up resources;

- competent staff; and
- confidentiality.

In situations where an employee refuses to take advantage of the assistance offered through the drug and alcohol policy, the employer is left with no alternative but to terminate. There are circumstances where despite termination, employers have offered employees a last chance to remain at work. In these circumstances, known as “last chance agreements” the employer will impose conditions on the employee returning to work. The last chance agreement is evidence of a sincere effort on the part of the employer who has then made all reasonable attempts to accommodate the employee.

Typically a last chance agreement will include the following terms:

- the employee will abstain from using alcohol or illicit drugs;
- the employee will attend a counseling or rehabilitation program;
- the employee will provide evidence that he continues to follow the advice of any counselor or medical practitioner that is treating him;
- the employee will secure the proper releases from various medical caregivers so that medical information may be relayed to the employer;
- the employee will make himself available for drug testing at the request of the employer; and
- failure to honour the terms of the last chance agreement will result in immediate dismissal with cause.

We have noted that in circumstances where the employee is engaged in a safety-sensitive position, an employer may move for immediate dismissal in the event a drug and alcohol policy is contravened. A recent Alberta decision bears some discussion.

In *Walker v. Imperial Oil Limited*¹⁴ the Alberta Court of Queen’s Bench considered an alcohol and drug abuse policy which provided that employees working in safety sensitive positions were subject to random or periodic testing for drugs and alcohol. A positive test result or a refusal to submit to testing were grounds for disciplinary action, including termination. The policy also required employees to inform the employer of any impaired driving convictions or counseling for the abuse of alcohol or drugs.

Mr. Walker was employed by Imperial in a safety-sensitive position, and was well aware of the drug and alcohol abuse policy. During a regularly scheduled medical examination, he tested positive for the presence of alcohol. Due to the safety-sensitive nature of his position, he was immediately terminated. Following his termination, the employer discovered Mr. Walker had been convicted of failing to provide a breath sample to police, and ultimately was convicted of impaired driving. In addition, Imperial learned that Mr. Walker had attended an alcohol and drug treatment program for counseling.

Mr. Walker brought an action against Imperial claiming that he was wrongfully dismissed. The Court ruled that although not every situation involving alcohol in the workplace will result in the termination of an individual’s employment, Imperial had a right to ensure that an employee in a

¹⁴ (1998), 230 A.R. 325 (Q.B.)

safety-sensitive position was not impaired by alcohol, thereby constituting a risk to the lives and safety of others. In addition, Imperial was justified in finding that Mr. Walker's failure to disclose his prior convictions and alcohol treatment was a betrayal of trust.

In conclusion, the Court stated:

Was immediate dismissal too severe or were there other reasonable alternatives such as a suspension or reduction of pay or demotion that would have served as sufficient punishment? The oil industry is a high risk business. An accident at Exxon could create a catastrophic incident resulting in injury and death to employees, to the public and to the environment. The Exxon Valdez was a prime example. I am satisfied that an employee in a safety-sensitive position who goes to work with a BAC in excess of 80 milligrams of alcohol per 100 milliliters of blood, poses a great risk of causing an accident in the workplace.

Mr. Walker, in going to work after less than four hours' sleep and having consumed a significant amount of alcohol, posed a risk to the other employees, to the public and to the environment.

The Court found that it was not necessary to decide whether the random drug testing and the disclosure provisions of Imperial Oil's policy were lawful.

A similar situation was considered in *Birchall v. Canadian Helicopter Ltd.*¹⁵ In that case Mr. Birchall was employed as a helicopter pilot by Canadian Helicopter. On December 19, 1996 he was summarily dismissed after one incident of breaching the substance abuse policy maintained by the company, and a substance abuse policy adopted by the company. The company's substance abuse policy forbade consumption of excessive alcohol within a 24 hour period before a flight. In addition, the company was contractually required to comply with the substance abuse policy maintained by its client, Unocal – Thailand Ltd. The Unocal policy provided that it had the right to order pilots who failed the Unocal blood/alcohol content (BAC) test to be removed from Unocal's projects.

The company carried out testing by use of its internal medical department. That department performed a random test on Mr. Birchall one half hour before he was scheduled to fly. The test results demonstrated that Mr. Birchall had a blood alcohol content in excess of the stated standard in the policy.

At issue was whether or not Mr. Birchall's sole breach of the policy (his employment record being otherwise unblemished) justified his summary dismissal. Mr. Birchall led evidence that an engineer employed by the company who had previously tested positive and was impaired while working, received only a suspension and was not terminated for breach of the substance

¹⁵ [1998] B.C.J. No. 3231; affirmed [1999] B.C.J. No. 2359 (C.A.)

abuse policy. In dismissing Mr. Birchall's claim for damages for wrongful dismissal, the Court stated:

Failure to conform with the blood/alcohol limit creates life-threatening risk to passengers and other crew members. An accident caused by an impaired pilot could be catastrophic to the employer's business and reputation. Furthermore, its Unocal contracts would be threatened, or there is at least a realistic probability that these contracts would be threatened. Consumption of alcohol affects the employee's ability to perform his job functions and is prejudicial. Mr. Birchall knew of the unequivocal conditions of his employment. There is no evidence before me of the company's response to previous violations of the substance abuse policy by pilots. There is only their response to an engineer's breach earlier in the year. It inspired the company to make its employees, including Mr. Birchall, acutely aware of the seriousness with which it viewed those terms of the policy.

The *Walker* and *Birchall* decisions each demonstrate that in those circumstances where the employee is engaged in a safety sensitive position, an employer may move for immediate dismissal.

Conclusion

As Employers continue to recognize the negative impacts of alcohol and drug use by employees, the number of workplaces with alcohol and drug policies and programs will increase. These policies and programs must reflect the particular needs of each workplace, employer and industry. If testing for the presence of alcohol and drugs is to form a component of a comprehensive substance use policy it should be coupled with an EAP as well as employee and supervisor training. The policy should be distributed to all employees, and the employer's expectations clearly communicated. The consequences of alcohol or drug use at the workplace or the consequences of a positive drug test should be clearly delineated.