DRUG AND ALCOHOL TESTING - THE LATEST WORD

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INTRODUCTION

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In the example given in the advertisement for this seminar, we were presented with the case of a payroll clerk who was terminated as a result of a positive random drug test imposed on him by his employer. The company had no cause to conduct this test other than its drug testing policy which provided for blanket testing of all its employees. The policy had been in place for over a year and had been communicated to all the employees, so the payroll clerk could not claim the demand that he submit to the testing procedure came as a surprise. We assumed, for the purposes of the example, that the employer was provincially regulated and, therefore, came under the jurisdiction of Alberta's *Human Rights, Citizenship and Multiculturalism Act*.

The question posed by this factual scenario is whether the employee would be likely to succeed with a complaint to the Alberta Human Rights and Citizenship Commission. The short answer is yes. It is now generally accepted that, in Canada, mandatory universal drug testing is a discriminatory policy which will not be permitted by a human rights tribunal.

The purpose of this paper is to examine the law as it relates to drug testing in the workplace and the most recent decisions on the topic, as well as to consider the changes brought about as a result of the most recent decision of the Supreme Court of Canada with respect to discrimination in the workplace. This paper will not provide an in-depth look at the history of drug testing in Canada as that subject has been thoroughly discussed by other writers,[1] but rather, will provide a summary of the current position of the courts on this issue. After summarizing the law, we will provide practical advice on how an employer can deal with a substance abuse problem in the workplace.

Readers are reminded of the distinction between universal drug testing and testing designed to deal with the specific problem of a particular employee. Universal testing means that all employees of an employer may be required to submit to a drug test at any time, upon the request of their employer. The request may be made randomly, so that there is no guarantee that an employee will ever be tested or an employer may establish a testing program where all employees will be tested on a regular basis, so that every employee knows when he or she may expect to provide a urine or blood sample. On the other hand, an employer may be faced with a situation where an employee has demonstrated a substance abuse problem. In this case, as part of an employee assistance program, an employer may require regular testing for a period of time to monitor whether the employee is following the terms of his or her

1 See, for example, Employee Privacy Rights and Management's Right to Monitor Employees, presented by Gordon R. Meurin on June 11, 1997, at the Labour Arbitration Conference, sponsored by the Industrial Relations Research Group, a joint initiative of the Faculties of Law and Management at The University of Calgary, located in Calgary, Alberta.

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rehabilitation.

It is also important to keep in mind that there is a great deal of difference between the law as it has developed in the United States and in Canada. In the United States, the development of the law has been greatly influenced by the reaction to incidents such as the Exxon Valdez disaster. In Canada, the analysis has been informed more by the notion of individual rights as those rights have developed in the human rights context. It would be an accurate summary of the law in Canada to say that in the federal sphere, and in all provincial jurisdictions, whether dealing with the private or the public sector, an employer is prohibited from discriminating on the basis of a physical or mental disability. While there may be some debate as to whether alcohol and/or drug addictions are more appropriately classified as a mental or physical disability, it is now generally accepted that these addictions are covered by human rights legislation.

In some jurisdictions, the relevant human rights legislation explicitly protects an employee from discrimination based on dependence on drugs or alcohol. The *Canadian Human Rights Act* is an example of this.[2] In other jurisdictions, such as Alberta, the legislation does not make specific reference to addiction but speaks only of mental and physical disabilities. We submit that this is a difference without a distinction. Whether an employer is regulated by federal or provincial legislation, the result will be the same. As was stated in the *Toronto Dominion Bank*[3] case, which is discussed in detail below, the central issue to be considered is whether the employer's policy has the effect of depriving or tending to deprive drug dependent persons of employment opportunities. Any employment policy aimed at ensuring a work environment free of illegal drug use must necessarily have a negative impact on a drug dependent employee.

IS ALCOHOLISM AND DRUG DEPENDENCY A DISABILITY?

In the past, an employee's drug or alcohol addiction was treated as an issue of employee misconduct. This was based on the belief that individuals were able to control and take responsibility for their actions. As such, an employee could be terminated for reporting to work while impaired. However, in the past 20 years, there have been great changes due to the advent of human rights legislation and the *Charter of Rights and Freedoms*. Whereas before an employer could treat an employee's addictions as a misconduct issue, and the affected employee could be subject to discipline based on the traditional model of warning followed by termination, this belief has, in recent years, given way to the recognition that addictions are more like an illness and should be treated as such. For some time now, it has been accepted that drug and alcohol addictions are disabilities, rather than self-induced misconduct.[4] Along with this recognition has come the acknowledgement that principles of human rights law will affect the employer's ability to discipline or dismiss an employee for addiction related problems. As a result of the treatment of addiction as a disability, an employer has the duty to accommodate an employee to the point of undue hardship. The duty to accommodate is discussed in more detail below.

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2 Section 25 of the Canadian Human Rights Act defines "disability" as "any previous or existing mental or physical disability and includes disfigurement or previous or existing dependence of alcohol or a drug".

3 (1998), 32 C.H.R.R. D/261 (Fed.C.A.).

4 See Re American Motors (1979), 23 L.A.C. 2nd 119 (Ont. Arb. Bd.); Kelsey-Hayes Canada Ltd. v. C.A.W., Local 199 (1990), 12 L.A.C. (4th) 377 (Ont. Arb. Bd.), and cases cited therein.

ALBERTA HUMAN RIGHTS AND CITIZENSHIP COMMISSION

The Alberta Human Rights and Citizenship Commission takes the position that blanket drug testing of employees is ill-advised.[5] In an advisory on the subject, the Commission states that alcohol and drug addiction can be viewed as a physical and/or mental disability which is prohibited in Alberta by virtue of the *Alberta Human Rights, Citizenship and Multiculturalism Act*.

In the advisory, the Commission states that, if drug testing is conducted, it should only be carried out where there is a reasonable suspicion that an employee's ability to perform the functions of his or her job are impaired. The obvious concern is with regard to the ability of the employee to perform job functions without risking harm to him or herself, other employees, and members of the public.

The Commission takes a slightly more relaxed view when it comes to prospective employees. In its advisory, the Commission states:

> Employers may be entitled 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 it 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.

A further question which may arise where an employee has been adversely treated as a result of a positive drug test is whether that employee was so treated based on an actual substance abuse problem or the perception of such a problem. For the purpose of human rights legislation, the result will likely be the same. The Human Rights Tribunal in *Canadian Civil Liberties Assn. v. Toronto Dominion Bank*[6] took note of the policy of the Canadian Human Rights Commission which states:

> In the absence of compelling evidence to the contrary, when an individual is treated adversely as the result of a "positive" test, it may be presumed that the employer perceived the individual as drug dependent.[7]

IS RANDOM ALCOHOL OR DRUG TESTING LEGAL?

The following section considers the most recent cases involving drug testing and also looks at the anticipated effect which the recent changes to the treatment of discriminatory work policies is expected to have on drug testing.

5 The Alberta Human Rights and Citizenship Commission has produced a one page advisory which may be viewed at http://www.albertahumanrights.ab.ca/help/drugtest.html. We have attached a copy of the advisory to this paper. We have also included a copy of the advisory produced by the Canadian Human Rights Commission, which advisory may be viewed at http://www.chrc-ccdp.ca/Legis&Poli/drgpol-poldrg.asp?l=e.

6 (1994), 22 C.H.R.R. D/301.

7 See the advisory produced by the Canadian Human Rights Commission, supra, note 5.

To answer this question, the differences between testing for alcohol and drugs must be remembered, as well as the difference between specific testing and universal testing.

There is no test to determine whether an employee was previously intoxicated. In order to show positively that an employee is intoxicated, the employee must be tested during the period of intoxication. Conversely, drug testing usually only indicates the presence of drugs in an employee's system but does not indicate whether an employee is currently impaired. A positive drug test only means that the employee ingested drugs sometime prior to the test. There is generally no way to tell if an employee is impaired at the time of the test, or while at work. In certain cases of drugs which disappear from the system very quickly, a test indicating their presence may mean an employee is currently impaired, however, this is an exception.

Universal testing refers to a policy where every employee is tested, either at specific intervals or on a random basis. We use the term specific testing to distinguish it from universal testing. When we use this term, we are referring to testing that is conducted on one employee, usually in response to a perceived or acknowledged substance abuse problem specific to that employee.

Recent drug testing cases

On July 23, 1998, the Federal Court of Appeal released its decision on universal drug testing in *Canada (Human Rights Commission) v. Toronto Dominion Bank*.[8] On October 1, 1990, the Bank had instituted a policy which required that all new or returning employees submit to a urine test within 48 hours of accepting an offer of employment. New or returning employees who refused to submit to the test were terminated for failing to comply with a condition of employment. If an employee tested positive and was drug dependent, the bank offered a rehabilitation program at no cost. During the period of rehabilitation, the bank continued to provide full wages and other employment benefits. An employee could be terminated if he or she refused the offer of the rehabilitation program or if rehabilitation efforts were not successful. Casual drug users could be terminated if they persisted in using illegal drugs and after having tested positive on at least three occasions.

The bank maintained that its objective was to achieve a workplace free from the effects of illegal drug use. Its stated concerns underlying the policy were the potential impact on the health and work performance of employees; the security of funds and information; and the possible connections between illegal drug use, criminal activity, and the reputation of the bank. The bank placed heavy emphasis on the fact that the banking industry is founded on the principles of honesty, integrity, and trust. The bank stated that its ethical standards were an integral part of maintaining customer trust and confidence.

The Human Rights Tribunal[9] ruled that the policy was not discriminatory because no one was denied employment on the basis of drug dependence. On judicial review of the Tribunal's decision, the Federal Court Trial Division[10] held that the policy constituted adverse effect discrimination. Despite finding that the policy could be justified on the basis that the bank had taken steps to accommodate drug dependent employees to the point of undue hardship, the Court referred the matter back to the Tribunal for a further hearing on whether the policy was rationally related to the performance of the job. The decision of the Trial Division was then appealed to the Federal Court of Appeal where it was held that the policy was discriminatory and could not be justified. As a result, the bank was not allowed to drug test its employees. As will be discussed further below,

8 Supra, note 3.

9 Supra, note 6.

10 (1996), 25 C.H.R.R. D/373.

the decision of the Federal Court of Appeal was not as clear as it otherwise might have been as the three judges deciding the case did not agree on the decision. Two judges thought the policy was discriminatory and could not be justified while the third did not think the policy was discriminatory. To further complicate matters, of the two judges who held that the policy was discriminatory, one thought it was a case of direct discrimination and the other thought it was a case of adverse effect discrimination.

At this point we note that the Supreme Court of Canada has recently made substantial changes to the manner in which the issue of discrimination is analyzed.[11] To our knowledge, there have been no cases which have considered the issue of drug testing under the new procedure set out by the Supreme Court. As the new test is really a combined version of the two alternate tests which were formerly used, and which are discussed below in the context of the *Toronto Dominion Bank* case, we can predict how this issue will be approached in the future by considering how the analysis was conducted in the past.

Formerly, when an employee made a complaint that he or she had been discriminated against, there was a requirement that the employee establish a *prima facie* case of discrimination. This means simply that the employee had to show that it appeared that discrimination had occurred. The onus then shifted to the employer who had to provide a reasonable excuse for its conduct. If it could not provide an excuse, the employee's complaint was upheld. The effect of a finding against the employer could include a variety of orders including reinstatement, pay for lost wages, damages for pain and suffering, or an apology.

There are two types of discrimination. They are referred to as "adverse effect discrimination" and "direct discrimination". Adverse effect discrimination is also referred to as indirect discrimination. Direct discrimination is probably the most easily understood, although it is the less common of the two types. In a case of direct discrimination, an employer adopts a rule or policy which is discriminatory on its face. An example used by the Supreme Court of Canada in an early case was a policy which stated "No Catholics or no women or no blacks employed here"[12]. This is blatantly discriminatory.

Adverse effect discrimination arose where an employer for genuine business reasons adopted a rule or policy which was neutral on its face, and which was to be applied equally to all employees, but which had a discriminatory effect on a particular employee or group of employees because of a characteristic unique to the person or group. The characteristic had to be one which would otherwise be protected by human rights legislation. An example of this type of discrimination would be a rule that said all employees must work on Sunday, which would have an adverse effect on those employees whose religious beliefs required that they not work on Sunday. Another example would be a rule which said that all police officers had to be at least 180 cm tall, which would tend to exclude women as they are, on average, shorter than men.

There were a few key differences between the two types of discrimination. One was the nature of the defence available to the employer. Once an employee succeeded in establishing a *prima facie* case of discrimination, the onus shifted to the employer to show that the discriminatory policy was justified. In a case of direct discrimination, the employer had to establish that the policy was a Bona Fide Occupational Requirement (usually

11 See the discussion below regarding British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U. (1999), 176 D.L.R. (4th) 1.

12 Ontario (Human Rights Commission) v. Simpsons-Sears Ltd., [1985] 2 S.C.R. 536 at page 551.

referred to as a BFOR). If the employer was able to do this, it did not have to do anything to accommodate the employee. In a case of adverse effect discrimination, the employer had to demonstrate that it had made an attempt to accommodate the employee to the point of undue hardship.

A second key difference was the difference in remedy ordered depended on whether the discrimination was classified as direct or adverse effect. If a policy was found to be direct discrimination, and the employer could not defend the policy, the court would strike it down. On the other hand, if the discrimination had an adverse effect, and the employer could not show that it had accommodated the employee to the point of undue hardship, the employer would be ordered to accommodate the employee. The policy which caused the problem in the first place, however, remained intact.

Justice Robertson of the Federal Court of Appeal in *Toronto Dominion Bank* pointed out the inherent difficulties with the requirement that the discrimination be classified as either adverse effect or direct discrimination. For one, it was not always easy to do this as many policies could be categorized as either. This led to lawyers having to consider the remedy they wanted before characterizing the nature of the discrimination. Courts were also tempted to creatively categorize a particular problem depending on the remedy, if any, they wanted to grant. The second problem was the fact of different remedies. Because an employer did not have to accommodate an employee where the discrimination was direct and where a BFOR had been established, it was possible for an employee to be denied relief when the employer may have been able to provide accommodation.

The *Toronto Dominion Bank* case provides an example where the characterization of the discrimination was of critical significance because of the difference in the defences and the different criteria to be met. A review of Justice Robertson's decision indicates that he wanted to strike down the policy, rather than require that drug dependent employees be accommodated. It is because of differences such as this which led the Supreme Court of Canada, as we will see below, to move to eliminate the differences depending on whether discrimination was direct or adverse effect.

Once faced with a *prima facie* case of discrimination, to establish that a rule is a BFOR, an employer had to meet the following criteria:

1. The rule or policy must have been imposed in good faith for a purpose related to job performance; and
2. The rule or policy must be reasonably necessary to assure the efficient and economic performance of the work in question without endangering the employee, his fellow employees, or the general public.

The first criteria is regarded as the subjective element of the test while the second is seen as the objective element. The second criteria was further broken down to define what was meant by the phrase "reasonably necessary". The courts held that a rule or policy could be said to be reasonably necessary if the following two questions could be answered affirmatively:

2(a). Is the job qualification rationally connected to the employment concerned? This allowed the court to decide whether the employer's purpose in establishing the requirement is appropriate in an objective sense given the nature of the job in question.

2(b). Is the rule or policy properly designed to ensure that the job qualification is met without placing an undue burden on those to whom it applies? This allowed the

court to enquire as to the reasonableness of the means the employer chose to test for the presence of the requirement for the employment in question. This branch of the test was interpreted to impose a requirement on the employer to show that there was no other more reasonable, or less intrusive, alternative to the policy chosen.

In *Toronto Dominion Bank*, Justice Robertson held that the first branch of the test had been met as the bank had imposed the policy in good faith for a purpose related to job performance.

The bank's drug testing policy failed to pass the tests imposed by the second branch of the test. As stated earlier, the second branch of the test was composed of two parts. Justice Robertson first examined objectively the validity of the bank's reasons for adopting the policy. He did not accept the bank's arguments, having found no evidence to support the conclusion that there was a drug problem within the banking community.

The second part of the second branch of the test was to consider whether the bank's drug testing policy was reasonably necessary to ensure job performance. Justice Robertson ruled that the policy was not reasonably necessary as it had not been made applicable to all bank employees, just those who were new or returning.

Even though he had concluded that the drug policy was not reasonably necessary, he went on to consider whether the bank had any reasonable alternatives. Here, he found that the bank had failed to prove that drug testing was the least intrusive of the reasonable methods for assessing job performance. Physical observation of employees, which was the conventional method of assessing performance, was not shown to be an ineffective option in this case. Observation was thought to be a viable solution which achieved the same objectives without bringing into issue privacy concerns and was therefore preferable to drug testing.

In concluding his comments on the subject of direct discrimination, Justice Robertson said that there may be other jobs where the issue of integrity was of such importance that drug testing could be justified. He mentioned law enforcement and amateur sport as two areas where mandatory drug testing may be acceptable.

Justice McDonald agreed with the result of Justice Robertson's decision but not the analysis by which he arrived at that result. Where Justice Robertson characterized the policy as direct discrimination, Justice McDonald thought that the policy constituted adverse effect discrimination. In reaching this decision, Justice McDonald relied on the fact that the policy applied equally to all employees to whom it was meant to apply, those being new and returning employees.

The test to be applied in cases of adverse effect discrimination was very similar to that applied in cases of direct discrimination. In cases of adverse effect discrimination, the employer had to establish that the policy was rationally related to the employment. Rationally connected was defined to mean "an employment rule honestly made for sound economic or business reasons, equally applicable to all to whom it is intended to apply".[13]

If a policy was rationally connected to the employment in question, the employer then had to prove that it had taken all reasonable steps to accommodate the employee's characteristic which led to the discrimination complaint to the point of undue hardship. This differed somewhat from the BFOR test in that the BFOR test required that the employer prove that there were no other more reasonable, or less intrusive alternatives to the

13 Central Alberta Dairy Pool v. Alberta (Human Rights Commission), [1990] 2 S.C.R. 489 at pages 514-15.

policy chosen. This left no room for the employer to argue undue hardship. Where discrimination was classified as direct, if there was a more reasonable, or less intrusive alternative to the policy chosen, the employer would be required to implement that alternative, regardless of the difficulty it would experience in doing so. The undue hardship test allowed an employer in effect to say "Yes, there is a more reasonable or less intrusive alternative, but it would be too difficult to implement and therefore I should not be required to do so".

The difference between the two tests can likely be attributed to the view that direct discrimination was more offensive as a group of people were singled out on the basis of a specific personal characteristic whereas in a case of adverse effect discrimination, it was merely a matter of unfortunate circumstance that a person was negatively affected by a policy in a way in which his or her co-workers were not. As will be seen below, the Supreme Court of Canada has sent a strong message that this distinction is no longer acceptable and that all forms of discrimination, whether direct or indirect, will be viewed as a serious limitation on the rights of the individual. The effect of eliminating the difference between the two tests is to require that an employer consider each person as an individual and, through accommodation, give each person an opportunity to succeed.

In the *Toronto Dominion Bank* case, Justice McDonald held that the policy was not rationally connected to its objective as it did not apply equally to all employees, only to new and returning employees. If it the bank had been truly concerned with the correlation between drug use and employee job performance and responsibility, drug testing would have been required of all employees, including those employees at senior levels. Also, a finding of trace amounts of drugs in an employee's system did not mean the employee was unproductive or likely to engage in a crime.

Because he found that the policy was not rationally connected to employment, there was no need to consider whether the policy's provision of rehabilitative programs satisfied the duty to accommodate. However, Justice McDonald stated that had it been necessary to consider this question, he would have found the bank to have reasonably accommodated employees to the point of undue hardship.[14]

Drug testing was also considered in *Imperial Oil Ltd. v. Ontario (Human Rights Commission) (re Entrop)*.[15] In *Entrop*, Imperial Oil had implemented a policy which required all employees in safety sensitive positions to disclose past and current substance abuse problems. The policy also provided for random substance abuse testing and, if tests results were positive, provided for that employee to be reassigned. In cases of reassignment, the policy stated that an employee could not be reinstated for seven years. Pursuant to this policy, Mr. Entrop disclosed a past problem with alcohol as well as the fact that he had been alcohol-free for seven years. Shortly after he made this disclosure, Mr. Entrop was transferred to a less desirable position.

The Ontario Court of Justice (General Division) was asked to review the decision of the Human Rights Board of Inquiry which reinstated Mr. Entrop to his former position and awarded him damages as a

14 As a result of amendments in 1998, section 15(2) of the Canadian Human Rights Act now provides that in order to establish a bona fide occupational requirement the employer must establish that it could not accommodate the employee without undue hardship. By incorporating the duty to accommodate, which previously only applied to cases of adverse effect discrimination, into the bona fide occupational requirement defence, which applied to direct discrimination, the significance of the difference between direct and adverse effect discrimination, in the federal sector, was greatly diminished.

15 (1998), 35 C.C.E.L. (2nd) 56 (Ont. Gen. Div.).

result of the infringement of his rights under the Ontario *Human Rights Code*. The Court agreed that there was objective evidence to support Imperial Oil's claim that it had the right to insist that employees perform safety-sensitive jobs free from impairment by drugs or alcohol. However, the Court also agreed with the Board of Inquiry's conclusion that, in the circumstances, Imperial Oil had failed to show that its treatment of Mr. Entrop could be objectively justified as reasonably necessary. This was especially so considering the amount of time that Mr. Entrop had been alcohol-free. In other words, Imperial Oil had failed to show that, based on his past illness, Mr. Entrop had a present incapacity to perform the functions of his job. The Court quoted the following passage from the decision of the Board of Inquiry:

> [Imperial Oil] is required to prove, on the balance of probabilities, that the risk associated with Mr. Entrop's past alcohol problem objectively justified its differential treatment of him as an employee.

Even though the case with respect to Mr. Entrop was concluded by this portion of the Board of Inquiry's decision, the Board of Inquiry continued with its examination of Imperial Oil's policy to consider whether the policy's provisions of self-declaration, removal from the job and reinstatement on conditions were reasonable methods of assessment of possible incapacity of employees in safety sensitive conditions as a method of accommodation. The Board held that these were unreasonable requirements due to the existence of other more reasonable alternatives.

> Where alternative measure exist, in order to meet the "accommodation" standard under s.17(2) of the Code, employers should utilize the least drastic means of assessing its workforce for alcohol impairment risks.

These "least drastic means" would include such things as physical observation of employees. The Board of Inquiry also took note of the fact that a positive drug test did not mean an employee was impaired. As a result, the purpose of drug testing, which was to ensure an impairment free workplace, was not thought to be achieved by a policy of mandatory drug testing. The Board of Inquiry also took note of several Parliamentary Committees which have recommended that all but "for-cause" testing be banned.

The Board of Inquiry in *Entrop* struck down the provisions of the policy regarding random and pre-employment testing. It held that drug testing "for cause", "post-incident", "upon certification for safety sensitive positions", and "post-reinstatement" may be permissible, but only if the employer could establish that testing is necessary as part of a wider drug abuse assessment process.

Entrop recognized an employer's right to ensure that employees employed in safety sensitive positions are not impaired. There was no dispute that freedom from impairment is a genuine requirement of the job for these employees. The Board said:

> This Board agrees that an employer has the right to ensure that its business operations are conducted safely, and a corresponding right to assess whether employees are incapable of performing their essential duties. For safety-sensitive jobs, Imperial Oil also has the right to assess whether its employees are free from impairment on the job, whether caused by alcohol or drug abuse or otherwise.[16]

The problem in Entrop was the fact that drug testing is not an effective way to ensure an employee is free from impairment. In *Entrop*, the assumption

16 Entrop v. Imperial Oil Ltd., [1996] O.H.R.B.I.D. No. 30, at para. 92.

that universal drug testing of employees in safety sensitive positions will prevent impairment was questioned. Physical observation was thought to do at least as good, if not better, a job at detecting and preventing impairment.

In Entrop, before the Board of Inquiry, the Ontario Human Rights Commission conceded that breathalyser tests did indicate impairment and that breathalyser testing "for cause" and "post-incident" was permissible. Because these matters were conceded, the Board of Inquiry did not rule on these issues. However, the Board of Inquiry did strike those provisions of the policy that permitted mandatory random alcohol testing because Imperial Oil had not established it was reasonably necessary to detect alcohol impairment on the job. Again, physical observation was seen as a more reasonable alternative.

Notwithstanding these clear statements of law, the courts do not always follow the analysis set out above. In *Walker v. Imperial Oil Ltd.*,[17] Mr. Walker was seconded from his employment with Imperial Oil in Alberta to Imperial's parent company, Exxon Chemical Americas, in Louisiana. It was a term of his contract that, upon conclusion of the secondment, he would resume employment with Imperial Oil in Alberta. In response to the Exxon Valdez disaster, Exxon had instituted a policy of mandatory random drug testing. Pursuant to this policy, a positive test result or a refusal to submit to testing was grounds for discipline including termination of employment. The policy also required that an employee inform Exxon of any drunk driving convictions and any prior counselling for the abuse of alcohol or drugs. Any employee who had a problem with alcohol or drugs could self-declare, voluntarily enter a treatment program, and retain his or her employment with Exxon. Mr. Walker signed a Statement of Compliance which indicated he had been informed of the policy and understood the consequences of its breach.

On the morning of September 22, 1993, Mr. Walker was one-half hour late for work. He tried to get out of working his shift that day but was told that it was too late to arrange for a replacement. As it turned out, Mr. Walker was scheduled to be tested for drugs and alcohol that day. Mr. Walker tested positive for alcohol, having registered a level of 89 mg of alcohol per 100 ml of blood. As such, he was legally intoxicated. On September 30, 1993, Mr. Walker's employment with both Exxon and Imperial Oil was terminated.

After his termination, but prior to trial, his employer learned that he had two previous convictions, the first coming in 1982 for refusing to provide a breath sample, and the second coming in 1989 for driving while impaired. In 1986, Mr. Walker had attended the Alberta Alcohol and Drug Abuse Centre Detoxification and remained there for several days. Arrangements were made for Mr. Walker to attend five information sessions after he left but he only attended one. He later told an Imperial Oil doctor that he had attended all the sessions.

The Court stated that it was unnecessary to decide whether random drug testing and the disclosure provisions of the drug policy could be upheld in the human rights context and noted the different approach taken by the American courts and the prevailing view in the United States was to allow employers great leeway to impose mandatory testing on employees. The Court was satisfied that Mr. Walker's blood alcohol content would have affected his abilities to discharge his responsibilities at work. Because of the possible consequences of Mr. Walker's actions to himself, other employees, the public, and the environment, the court upheld Mr. Walker's dismissal. While unstated, it is apparent that the Court was influenced by the fact that the incident had occurred while Mr. Walker was working in the United States.

17 (1998), 39 C.C.E.L. (2nd) 271 (Alta. Q.B.).

We have seen how the courts have reviewed an employer's decision to implement a drug testing policy. However, as has been previously mentioned, the method of analysis has recently been changed. As this has happened so recently, there are no cases of which we are aware that have considered drug testing in light of the new rules. However, based on our knowledge of how the various elements of the new test have been treated in the past, we can get a sense of how cases will be decided in the future.

In *British Columbia (P.S.E.R.C.) v. B.C.G.S.E.U.*,[18] the Supreme Court of Canada finally addressed the complaints which had arisen from the difference in treatment of a workplace policy depending on whether the discrimination complained of was categorized as direct or adverse effect discrimination. Now, once an employee has made out a *prima facie* case of discrimination, the employer will be required to demonstrate that the policy or rule in question is a BFOR. The old BFOR test has, however, been modified to include the aspect of the adverse effect discrimination test which required accommodation to the point of undue hardship. The new test is:

1. The employer must show that it adopted the rule or policy for a purpose rationally connected to the performance of the job. The focus here is not on the validity of the rule or policy, but rather on the validity of its more general purpose.
2. The employer must show that it adopted the rule or policy in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose.
3. The employer must show that the rule or policy is reasonably necessary to the accomplishment of the legitimate work-related purpose. To show the rule or policy is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristic of the claimant without imposing undue hardship on the employer.

In this case, the court was presented with Ms. Tawney Meiorin, a female forest firefighter, who had been dismissed from her employment after failing to run 2.5 km in 11 minutes. In four attempts to meet this standard, her best time was 49 seconds too slow. The government of British Columbia argued that firefighters had to be physically fit and that it had adopted this standard to test for fitness, particularly aerobic fitness. Prior to the implementation of this standard, Ms. Meiorin had been employed for three years without complaint as to her ability to perform the duties expected of a forest firefighter. Ms. Meiorin argued that this standard discriminated against her because women have a lower aerobic capacity than men.

The court had no problem finding that the first part of the test had been met. Clearly, the standard was designed to ensure the safe and efficient performance of the job. The court also quickly disposed of the second part of the test, finding no evidence to suggest a lack of good faith on the part of the government in imposing the standard.

It was at step three of the test that the government failed to establish that the policy complied with human rights legislation. By the time the analysis moves to step three, the employer will have established that the standard was imposed in good faith and is rationally connected to the performance of the job. At step three, the employer must establish that the impugned policy is reasonably necessary for the employer to accomplish its purpose, in this case to ensure workplace safety and the efficient performance of job functions, and that the employer cannot accomplish its purpose in any other way which would have a lesser impact on the employee,

18 Supra, note 11.

without suffering undue hardship.[19]

The court considered some of the questions to be asked before an employer's claim that it had adopted the least intrusive standard available was accepted. As an example of the analysis the employer must be prepared to face if its policy is challenged, the court listed examples of questions to be considered:

a. as the employer investigated alternative approaches that do not have a discriminatory effect?
b. If alternative standards were investigated and found to be capable of fulfilling the employer's purpose, why were they not implemented?
c. Is it necessary to have all employees meet the single standard for the employer to accomplish its legitimate purpose or could standards reflective of group or individual differences and capabilities be established?
d. Is there a way to do the job that is less discriminatory while still accomplishing the employer's legitimate purpose?
e. Is the standard properly designed to ensure that the desired qualification is met without placing an undue burden on those to whom the standard applies?
f. Have other parties who are obliged to assist in the search for possible accommodation fulfilled their roles?[20]

In an attempt to provide further clarity, the court said:

> Notwithstanding the overlap between the two inquiries, it may often be useful as a practical matter to consider separately, first, the procedure, if any, which was adopted to assess the issue of accommodation and, second, the substantive content of either a more accommodating standard which was offered or alternatively the employer's reasons for not offering any such standard.

In this case, the government had established the 11 minute standard by conducting tests using a number of test subjects, both male and female. The government had observed the test subjects completing various tasks and then ascertained their aerobic capacity. That capacity was established as the minimum standard required of every forest firefighter. It was then decided that, if an individual could run 2.5 kilometres, he or she had sufficient aerobic capacity. However, the Court held that merely describing the characteristics of a test subject does not establish the standard minimally necessary to allow the safe and efficient performance of the work. The average performance of a group of test subjects is irrelevant to the question of whether that average is a minimum threshold which can not be altered without causing the employer undue hardship. The goal should have been to determine the minimum threshold of aerobic capacity a woman must have in order to allow her to perform her job functions safely and efficiently.

The court then went on to assume the government had properly addressed the question in the procedural sense and found that the actions of the government were also deficient from a substantive perspective. The government had not presented any evidence of the cost of accommodation. The primary argument of the government was that,

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19 The requirement that hardship be "undue" has been interpreted to mean that some hardship is acceptable. See, for example, Central Okanagan School District No. 23 v. Renaud, [1992] 2 S.C.R. 970 (S.C.C.) at page 984. This recognizes that, although for an employer it may be most satisfactory to adopt a standard that is uncompromisingly stringent, if the standard is to pass muster under human rights legislation, it must accommodate factors relating to the unique capabilities and inherent worth and dignity of every individual, up to the point of undue hardship.

20 As noted in Renaud, supra, note 19, the task of determining how to accommodate individual differences may also place burdens on the employee and, if there is a collective agreement, on the union.

because the aerobic standard was necessary for the safety of the individual firefighter, the other members of the firefighters crew, and the public at large, it would experience undue hardship if compelled to deviate from the standard in any way. The court rejected this argument, saying that the government had only presented "anecdotal" or "impressionistic" evidence concerning the magnitude of risk involved in accommodating Ms. Meiorin. The evidence did not establish that Ms. Meiorin posed a serious safety risk to herself, her colleagues, or the general public. Simply put, the government had not satisfied the court that a different standard, one which Ms. Meiorin could have met, could not have been used.

This case gives us a good idea of what an employer would have to establish if it were to implement a mandatory drug testing plan. To meet the first branch of the new test, the employer must prove, on a balance of probabilities, that it adopted the rule for a purpose rationally connected to the performance of the job. Assuming the rule was adopted for safety and/or efficiency reasons, the employer should have no trouble meeting this arm of the test.

To meet the second branch of the new test, the employer must establish that it adopted the rule in an honest and good faith belief that it was necessary to ensure the work-related purpose (assumed above to be safety and efficiency). Again, in most cases, this will not be a difficult standard to meet.

The real challenge will come at the third arm of the test. The employer will have to show that the employee was involved in work where it was a job requirement that the work be performed while the employee was free from impairment. Such considerations may include the safety of the employee, the employee's co-workers, the general public, and the environment. Other concerns could include the importance of public confidence in the institution by which the employee was employed. As previously mentioned, law enforcement and amateur sport may qualify.

The employer will then have to establish that there were no other lesser intrusions which could have been adopted which would have accomplished the same objective, and which would not have imposed undue hardship on the employer. It is at this stage of the analysis that employers will have the greatest difficulty when defending a mandatory drug testing policy. As the court noted in the *Toronto Dominion Bank* case, an employer is usually able to observe an employee's performance. In that context, problems can be dealt with as they arise. Before an employee is asked to submit to drug testing, the employer should have a reasonable belief that there is a problem. In this regard, problems with alcohol are more easily detected. If an employee exhibits symptoms of intoxication, the employer is likely within its rights to insist that the employee submit to a test. However, in the case of drugs, the fact that an employee has ingested drugs may have no effect on his or her performance at a later date, in much the same way as the fact that an employee had a drink on Thursday night has little bearing on whether he or she is fit to work on Friday afternoon, unless the employee is, for example, an airline pilot. If there is reason to believe an employee has a drug problem, if he or she is caught in the act of taking drugs, or voluntarily admits to the problem, drug testing may be imposed as part of an overall rehabilitation program, to ensure the employee "sticks with it". However, none of these reasons will justify a mandatory testing program which applies to all or a group of employees.

CAN AN EMPLOYER REQUIRE ITS CONTRACTORS TO DRUG TEST THEIR EMPLOYEES?

In the same way that an employer may find itself in contravention of human rights legislation if it requires that all its employees submit to universal drug testing, so may the same occur if an employer requires that an independent contractor, as a term of the contract with the employer, require that its employees submit to a drug testing program.

A further problem which may arise is in the situation where the independent contractor's status as such is questioned. There are frequently good reasons why an employer wants certain work performed by an independent contractor rather than an employee. However, it is not enough to simply call someone an independent contractor. If challenged, the court will review the circumstances of the relationship between the parties to determine the true nature of the relationship. If a person previously classified as an independent contractor is later determined to be an employee, the employer may find itself liable to pay Canada Pension Plan and Employment Insurance premiums, as well as tax withholdings that may be owed.

One of the factors that the court will consider before deciding whether a person is an employee or independent contractor is the degree of control exercised over that person by the contracting employer. If the employer has demanded that an independent contractor submit itself and its employees to drug testing, this may factor into the court's decision whether the contractor is really an independent contractor.[21]

To avoid these concerns, and to protect its interests, an employer may insist on a term in the contract between itself and the independent contractor that its workplace shall remain drug and alcohol free. The contract may state that, if an employee of the independent contractor is believed to be impaired while performing work for the employer, that employee will be immediately removed from the job site and/or shall not be allowed to perform further work for the contracting employer on that contract. The responsibility for the impaired employee then rests with his or her own employer, who has contracted to perform services. In this way, the problem of impairment is handled and the responsibility to deal with the problem is left with the true employer.

The issue of whether an employer could insist that a contractor's employees submit to urine testing was recently decided by the Ontario Labour Relations Board in *International Union of Operating Engineers, Local 793 v. Sarnia Cranes Ltd.*[22] In that case, Sarnia Cranes operated a crane rental and equipment repair company. One of Sarnia Cranes' largest customers was Imperial Oil, which operated an oil refinery in Sarnia. Sarnia Cranes and Imperial Oil entered into three year crane rental contract which contained a drug and alcohol policy. It was a term of the contract that the drug and alcohol policy implemented by Sarnia Cranes had to be substantially similar to Imperial Oil's own policy.

Under the terms of the new policy, all of Sarnia Cranes' employees were to be tested on November 23, 1997. The policy required four different types of testing. These were "pre-access", "reasonable cause", "post-incident", and "monitoring". The policy also distinguished between those employees who performed safety sensitive work and those who did not. Employees performing safety sensitive work were to submit a urine sample every 12 months. Any employee

21 This occurred in Castlegar Taxi (1988) Ltd. v. British Columbia (Director of Employment Standards), [1991] B.C.J. No. 2712 and in Five Star Limousine Group Inc. v. Canada (Minister of National Revenue), [1991] T.C.J. No. 304. In both these cases, the fact that the employers had instituted strict rules, which included rules pertaining to the effect of drug use, was taken into account by the Court in coming to its decisions that the individuals in question were employees and not independent contractors. In neither case was this the determinative factor, but it contributed to the decision in each.

22 [1999] O.L.R.D. No. 1282.

who refused the test was deemed to have failed it. Although this was technically not the same as random testing, the Board considered that type of testing in conjunction with pre-access testing.

The remaining three types of testing were applicable to all employees, whether performing safety sensitive work or not. Reasonable cause testing occurred if there was reason to believe there was a problem of impairment. Such testing was to take place within four hours of the time the decision was made to test. Post-incident testing provided for testing after a serious accident, even in absence of proof or suspicion of impairment. Finally, monitoring was to apply to those employees who had previously tested positive for drugs and/or alcohol, who had attended a rehabilitation program, and who wished to return to work.

A positive test result under any of the above described tests meant that the employee could never return to Imperial Oil's Sarnia worksite.

Considering whether the policy violated the Ontario *Human Rights Code*, the Board held that there was no proof of widespread use of alcohol or drugs in the crane rental industry or within Sarnia Cranes' workforce. The Board made this finding despite uncontradicted evidence from one of Sarnia Cranes' supervisors that he had, over the past 30 years, sent home many employees who he suspected of having arrived at work in an impaired state.

In deciding that all parts of the drug and alcohol testing policy imposed by Sarnia Crane violated the Ontario *Human Rights Code*, the Board took note of the fact that a positive drug test did not provide evidence of on-the-job impairment. The Board also accepted medical evidence that there was no absolute correlation between the implementation of a drug and alcohol policy and the reduction of workplace accidents. The Board held that visual observation was an effective way to ensure a workplace free from impairment. It was accepted that individuals could be trained in a relatively short period of time to make accurate visual assessments of impairment.

The Board also held that Sarnia Cranes should develop an employee assistance program, health promotion programs, and should provide training to individuals in the concept of "constructive confrontation" as part of an overall plan to eliminate impairment in the workplace.

This decision is unfortunate as it extends the concept of requiring the employer to implement other, lesser intrusions as an effective substitute far beyond the bounds of previous case law. While one would expect that the Board would have struck down the provisions of the policy requiring mandatory testing, as we have seen in other cases, it is surprising that the Board would also reject testing for the purpose of monitoring a employee's rehabilitative efforts or in cases where there was reasonable cause to require a test, although the Board hinted that it may have approved of a less invasive method than urine testing in cases of post-incident and monitoring.

It does not seem that the Board in this case turned its mind to the effect of its decision. It is somewhat misleading to suggest that visual observation is an effective tool given the nature of the workplace and the fact that these employees were not employees of Imperial Oil but of Sarnia Cranes. As crane operators, they worked alone, without supervision. They were locked in the cab of the crane where others would be unable to closely observe them. As well, they worked off the ground. Further, they were independently contracted by Imperial Oil through their employer. As such, they were not closely supervized by Imperial Oil - it was expected that they would supervize themselves and do the job for which they had been contracted. For these reasons, *Sarnia Cranes* should not be relied upon for the

proposition that invasive methods of testing such as blood and urine analysis will be disallowed in all circumstances.

On a final note with regard to the issue of who will bear the liability in a case such as this, the Board held that Sarnia Cranes had violated the Ontario *Human Rights Code*, but made no comment with regard to Imperial Oil. We also caution anyone relying on this decision for the proposition that the contracting party will not be held liable for a human rights violation if it requires that the employers it contracts test their employees.

HOW TO DEVELOP A SUBSTANCE ABUSE POLICY

There is no one policy which will be acceptable in every circumstance. As is the case with most workplace policies, a substance abuse policy should be drafted by someone with experience in the area, and who understands the needs of the employer, the nature of its business, and the peculiarities of its workplace. To that end, what follows is not intended to be advice as to how a policy must or should be implemented but, rather, is meant to provide some practical pointers that may help guide an employer through the process of developing and implementing a substance abuse or education program.

The first step is to consider the nature of the work being performed. Is the work safety sensitive? For example, an employer can not realistically be as concerned about the substance abuse problems of a janitor, as it may be about an airline pilot, the engineer of a train, the operator of some form of public transportation, or the operator of an oil tanker, to name a few safety sensitive occupations. We do not mean to be taken to suggest that, from a human perspective, the problems of the janitor are not as worthy of concern, only that his or her problems do not raise the same issues of concern to the general public and/or co-workers.

The next question to be asked is the nature of the workforce. Are the workers employed under the terms of a collective agreement? If so, the employer must review the terms of the agreement to see if it has the right to unilaterally impose a drug testing policy. Under many collective agreements, the employer maintains its rights to impose workplace policies under the management rights clause. Even then, the policy could be challenged by the union as an unreasonable workplace rule.

The employer must then consider whether there are any terms of employment which exist in writing or to which verbal agreement was reached which speak to the ability of the employer to unilaterally implement such a policy.

The employer should also consider if its workers belong to a professional organization, or are regulated in some other manner. If workers are members of a professional organization, that organization may have by-laws or other rules which address this issue. Again, the example of airline pilots shows that there are Transport Canada regulations which address impairment.

Once an employer has satisfied itself that there are no impediments to the imposition of a workplace substance abuse policy, the employer should consider whether it is desirable to consult the employees, or their bargaining agent or professional organization. If there is a possibility of involving these groups in the drafting process, the implementation of the policy will almost certainly proceed more smoothly. There is also a lesser likelihood that a policy will be challenged if those subject to its terms feel they have had a fair say in its development.

Before we discuss the contents of a substance abuse policy, we have listed the factors which an employer must establish in order for a breach

of a workplace policy may constitute cause for discharge, such that an employee may be terminated without notice or pay in lieu of notice. The Law of Dismissal in Canada[23] states the following:

> In order to constitute cause for dismissal the rules must be:
>
> a. distributed. Distributing a pamphlet to notify employees will suffice.
> b. known by the employees.
> c. unambiguous.
> d. consistently enforced by the company.
> e. enforced and consequently employees must be warned that they will be terminated if a rule is breached.

The above list of factors does not take into account human rights legislation. Superadded to this list is the duty to accommodate.

Once an employer is at the stage of actually drafting the policy, it should consider the goals it intends to achieve and how it intends to achieve them. This should include a consideration of the cost of drug testing. It is not an inexpensive matter to engage the services of a lab to test for drugs. As well, some drugs are more difficult to detect than others. An employer is wise to investigate the cost of implementing such a policy as well as the types of drugs that may be commonly tested for. Additionally, an employer should make arrangements with the lab ahead of time. An employer will want to avoid being faced with the need to conduct a drug test and yet not know where to obtain drug testing services.

A substance abuse policy should start off by explaining the purpose for which it was implemented. Most often this will be to address safety and efficiency concerns. The policy should then clearly state that the employer is adopting a rule that impairment at work will not be tolerated and is not permitted. The policy should state that, if an employer has reason to believe that an employer is attending work while impaired, the employee will be the subject of an investigation. If, after the conclusion of this investigation the employer still has reason to believe that an employee was impaired while at work, the policy should state that the employee will be asked to submit to a drug and/or alcohol test. If the employee refuses, the consequences of refusal should be set out. If an employee actually does refuse, the employer should consult its legal counsel before making the decision to discipline or terminate.

If the employee consents to the test, and the test is positive, the employee should be given the chance to explain the positive test. Again, there may be an explanation, such as the fact that the employee took drugs on his or her own time and was not impaired while at work. If this is the case, an employer should consult its legal counsel before making the decision to discipline or terminate.

If the employee admits to impairment while at work, the employer should consider whether this was a one time incident or whether the employee has an addiction. If the employee admits to an addiction, the employer should offer counselling services. The employee may need time off work to attend these programs. If the employee needs time off work, the employer should consider whether its insurance coverage will pay all or a portion of the employee's wages while he or she is off work. If there is no coverage, the employer should consider whether it will continue to pay the employee or, if not, whether it will cover the cost of the program. An employer may also want to look into purchasing insurance for this purpose prior to implementing the policy. The more the employer is willing to do to help an employee suffering an addiction, the more likely that, in the

23 The Law of Dismissal in Canada (2nd ed.) at page 179. Howard A. Levitt. Canada Law Book Inc. 1992.

case where it becomes necessary to terminate the employee, the court, arbitrator, or human rights tribunal will hold that the employer met its duty to accommodate the employee to the point of undue hardship.

Once it is established that an employee has a problem, mandatory drug testing may be implemented to monitor the employee's process during the period of rehabilitation, and for some time after. The length of time the employee may be subjected to this requirement will vary depending on various factors. Again, once a problem is established, the employer should engage legal counsel. It is often the desire of an employer to move quickly to terminate an employee with an addiction problem, especially if that employee is engaged in safety sensitive work, however, a precipitous move by the employer may lead to a long road of litigation. It is by far the better choice to do as little as is reasonably required to address safety and efficiency issues before speaking with a lawyer with expertise in this area and developing a plan to address the situation. By this we mean that an employer is within its rights to move quickly to transfer an employee who it is known or reasonably suspected to be impaired while at work. A transfer may be to another area of the employer's business where there is less concern for the consequences if an employee is impaired. If no such position is available, an employer may send an employee home with pay while the employer, in consultation with its legal counsel, decides how best to proceed. The cost of paying an employee a few days wages is minimal compared to the legal costs and damage awards which may result if the employer does not proceed in an appropriate manner.

The policy implemented should make room for self-disclosure. In this case, it should also be clear that an employee who voluntarily comes forward will not be subject to discipline. The employer should encourage employees with addiction problems to come forward as a proactive measure to deal with substance abuse problems in the workplace. Again, the consequences of coming forward should be clearly laid out so that an employee knows of the counselling services that are available to help him or her return to gainful employment.

In summary, a drug and alcohol policy should clearly lay out the rules so that every employee knows the standard to which he or she will be held. When addressing these problems and developing policies to deal with them, an employer will not be well served by secrecy. A good substance abuse policy should be structured to ensure that an employee with an addiction problem is given every reasonable opportunity to return to work. The policy should clearly lay out the steps that will be followed. The policy should also state the consequences if an employee fails to cooperate or if the employee fails to follow the treatment program established. A good rule of thumb when drafting a substance abuse policy is, at every step of the procedure, to hope for the best, but plan for the worst. By this we mean that the policy should itself offer encouragement to an affected employee while at the same time spelling out the consequences if the employee fails to succeed in dealing with his or her addiction. Modelling a policy on other discipline policies in the workplace may cause a court, arbitrator, or human rights tribunal to find that the employer has not met its duty to accommodate.

Of interest to employers in this regard is the recent decision of Arbitrator Larson in *Cominco Ltd. v. United Steelworkers of America, Local 9705.*[24] The hearing of this case took place over two years. Although final argument had been concluded before the Supreme Court of Canada rendered its decision in the BC firefighter case,[25] Arbitrator Larson had not written his decision by the time that

24 [2000] B.C.C.A.A.A. No. 62.
25 Supra, note 11.

case was released. In *Cominco*, the employer had imposed a mandatory no smoking policy which applied to its entire workforce and was in effect over all of its property, which was some 460 acres. The smoking ban applied whether an employee worked outside or inside. Arbitrator Larson held that the policy discriminated against employees who were heavily addicted to cigarettes as this addiction was, in substance, no different than an addiction to alcohol, heroin, or cocaine. Cominco's policy provided for various rehabilitation programs if an employee was not able to refrain from smoking at work. However, if these programs were not successful, an employee could be disciplined up to and including termination of employment. Arbitrator Larson made an important observation in criticizing Cominco's policy. He said:

> … the problem with the policy is that it is almost wholly based on a disciplinary model. Certainly, this is one area that could properly be reviewed as to whether it complies with the requirement to accommodate. It assumes that addicted smokers will be able to control their habit through the normal coercive effect of discipline. Certainly, the Company should, as a pure matter of principle, be entitled to terminate employees who do not comply with a valid policy but I am not convinced that it would be appropriate to conclude that the limit of the requirement to accommodate would be reached in every case with a fifth or even sixth offence.
>
> In fact, there may be any number of suitable ways to accommodate heavily addicted employees which might include … a program of gradual adaptation with perhaps a lighter schedule - essentially the kind of thing that is done for employees who are injured and are brought back to work with lighter duties.

How much of an influence these remarks will have remains to be seen, however, it gives employers an idea of the potential scope of the duty to accommodate. Arbitrator Larson mentioned that five or even six failed attempts to rehabilitate may not be sufficient to justify termination, however, we note that smoking does not raise the same safety concerns as does impairment. It is unlikely that an employer will be unable to terminate an employee who has tested positive on six separate occasions and who has been offered the benefit of an employee assistance program. The importance of these comments, in our opinion, is the recognition that, if addiction is considered as a disability, it may not be appropriate for an employer to respond to the problem as a purely disciplinary matter. The purpose of human rights legislation with regard to drug testing is to ensure that an individual who is drug dependent is given the same opportunity to succeed as a non-addicted employee. This imposes certain obligations on the employer to provide support to that employee. The concept of discipline, at least in Arbitrator Larson's opinion, is to some extent at odds with the requirement of support.

EMPLOYEE ASSISTANCE PROGRAMS AND EDUCATION AND TRAINING PROGRAMS

There is no statutory or common law requirement that an employer establish an employee assistance program or that it establish education and training programs. However, if an employer wishes to minimize its liability in the event of a workplace accident due to the impairment of an employee, these programs will go a long way to satisfy the court, arbitrator, or human rights tribunal that the employer took all reasonable steps to ensure a safe workplace.

Further, the establishment of these types of programs will be, if not essential, then of very great help in assisting an employer to establish that it has taken steps to accommodate an employee's substance abuse problem to the point of undue hardship. If an employee has a drug or alcohol problem, and refuses assistance, or has been offered counselling and rehabilitation services, and continues to abuse alcohol or drugs, the employer will be in a much stronger position to terminate the employee for cause, such that no notice of termination is required and the danger of being found liable for a human rights violation is minimized. If no such program is in place, the employer runs the risk that a court, arbitrator, or human rights tribunal will find that the employer has not satisfied its duty to accommodate the problem of the employee. In this case, the employee may be found to have been wrongfully dismissed or may be reinstated. In the case of reinstatement, the employee may be awarded damages equivalent to the lost wages between the date of termination and the date of reinstatement.

An education program allows an employer to spread the message throughout the workplace that impairment due to drugs and alcohol is not allowed. It also provides an opportunity for an employee to come forward and admit to a problem of which the employer was previously unaware. If an employer makes its policies in this area known, an employee will have been provided ample warning of the consequences of impairment at work. Education and discussion are the most effective proactive tools an employer can use to address the issue of substance abuse in the workplace. While it is a good idea to have plans in place which address how a substance abuse problem will be dealt with once discovered, it is at least as good an idea if employers address the issue ahead of time, in the hope that it will not take a workplace accident, which may have catastrophic consequences, to bring a specific problem to their attention.

CONCLUSION

In summary, it seems clear now that, except possibly in very rare circumstances (i.e. in the case of law enforcement officials and amateur sports), an employer can not implement random and general pre-employment testing programs designed to detect or illicit information about past or current substance abuse. This is based on the belief that these tests are neither fair nor accurate in assessing an employee's ability to perform the job functions required. Nor is there a sense, in Canada at least, that concerns of public safety permit employers to disregard employees' rights to be free from assessments made on such grounds.

However, there are still a number of circumstances where we believe an employer will be able to require an employee submit to substance abuse testing. It should be kept in mind that the law in this area is not yet settled and the Supreme Court of Canada has not laid out the grounds where testing will be permissible. In any case involving substance abuse, before doing anything, an employer will be well advised to consult its legal counsel.

We are of the opinion that an employer can require an employee submit to an alcohol and/or drug test in the following circumstances:

1. Prior to an employee's certification to work in a safety sensitive position.
2. Where it is suspected that an employee has a substance abuse problem and where that opinion was formed as a result of physical observation. This is commonly referred to as "for cause" testing. An employer in this circumstance can expect that, for the demand for testing to be found reasonable, it will have to establish that its grounds for suspecting drug use were reasonable and were based on more than allegations and impressions.

3. Post-incident. In this case, where there has been a workplace accident, an employer can ask the employee(s) involved to submit to testing to determine if the accident can be attributed to a drug abuse problem.
4. For the purposes of monitoring an employee's rehabilitative efforts. In this case, whether an employee's substance abuse was discovered by the employer, or whether the employee voluntarily disclosed the problem, the employer may require testing to ensure that the employee is following the rehabilitative program and is not regressing to their former dependency on drugs and/or alcohol. This testing is as much to provide encouragement to an employee to stay clean as it is to allow the employer to monitor the employee's progress. An employer will also have to carefully consider how long the employee will be subject to the testing requirement. At some point, the employee will have tested negative enough times that the concerns of current drug abuse will be sufficiently low that the employee can be treated like every other employee. How long the monitoring period will last is dependent on all the circumstances and should be determined with the advice of legal counsel.

If drug testing is implemented, regardless of the reason, the employer must be prepared to establish that it is necessary as one facet of a larger process of assessment of drug and/or alcohol abuse. Assuming the testing is implemented pursuant to a written substance abuse policy which has been distributed to employees, and is for one of the four reasons listed above, the employer should be able to establish this. It is essential to keep in mind at all times that the primary purpose of any substance abuse policy is not to provide grounds for the employer to terminate the employee's employment, but rather to ensure a safe workplace and to provide employees with a substance abuse problem the opportunity to get well.

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