Drug Testing - The Current State of the Law

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Issues surrounding substance abuse in the workplace are complex, and the law has had difficulty in framing consistent principles and applying them in individual situations. Responses to drug or alcohol addiction or impairment on the job range from viewing it as culpable behaviour justifying discipline to treating it as a manifestation of a disability requiring the employer to accommodate the affected employee up to the point of undue hardship. Excessive absenteeism will be tolerated to a greater degree than on the job impairment that affects the safety of the employee, his fellow workers, the employer's property, or the environment. In any case, what is reasonable for an employer to do to maintain a safe workplace must be balanced in each case with an employee's right to privacy in relation to off-duty conduct.

The balance weighs more in favour of the employer when the testing in question follows a workplace accident or involves an employee who engages in substance abuse on the job. Although an employer's failure to take an employee's post-termination efforts to undergo rehabilitation and treatment may render the termination itself unreasonable[1], post-incident drug testing, or testing imposed as a condition of reinstatement, accompanied by disclosure of the results to the employer, is considered permissible and has formed a part of arbitration awards.[2] Nevertheless, it is important to guard against too-intrusive disclosure of employee medical information, including the results of drug tests.. The Alberta Information and Privacy Commissioner has rebuked an HR firm which released to an employer more information than was necessary about an employee who tested positive for marijuana.[3]

While in other provinces, last chance agreements have been held to be discriminatory and unenforceable when they impose terms to which other employees are not subjected, the Alberta Court of Appeal has held that Alberta's human rights legislation cannot override "the clear terms of a settlement agreement entered into by the parties agreeing to resolve future problems in a specified manner."[4] However, if the last chance agreement is draconian or not unequivocably accepted by the employee's union, it will not be enforced.[5]

Random or pre-employment testing has been the focus of intense scrutiny in Alberta. A recent decision of the Alberta Court of Appeal, Alberta (Human Rights and Citizenship Commission) v. Kellogg Brown & Root, signals a more employer-friendly approach by the judiciary to such drug and alcohol testing. When KBR hired John Chiasson to fill a safety-sensitive non-union position on a construction site in Ft. McMurray, he was required to take and pass a pre-employment drug test. There was no such requirement for unionized workers on the same job site. Six days before taking the test, and a few days before he was interviewed and hired, Chiasson had smoked marijuana, but, thinking that enough time would elapse before the test that he would not test positive, he did not advise his new employer. Nine days after he began working for KBR, Chiasson's test results came back positive. Although he advised KBR that he had not taken any drugs at work and KBR considered him a good worker, his

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employment was terminated.

Chiasson challenged KBR's practice of mandatory pre-employment drug testing as discriminatory on the basis of disability under Alberta's Human Rights, Citizenship and Multiculturalism Act. He testified that his use of marijuana was recreational, outside of work, and was not caused by an addiction. The Human Rights Panel agreed that KBR did not accommodate Chiasson, but held that there was no discrimination because Chiasson did not suffer from a disability or a perceived disability.[6] The Panel also accepted that the testing policy was reasonably necessary because marijuana use impairs workplace performance[7] in an extremely congested and inherently dangerous workplace where operating heavy equipment and physical dexterity in inspecting load materials were part of the job.

Chiasson appealed to the Alberta Court of Queen's Bench which allowed the appeal[8] and held that KBR had not justified its drug testing policy by showing it to be reasonably necessary to fulfill a legitimate work-related purpose and or that it would accommodate individual employees in the claimant's position to the point of undue hardship.[9] Therefore, KBR's pre-employment drug testing policy discriminated against both recreational and dependant users alike and assumed all were substance abusers.

The Alberta Court of Appeal allowed KBR's appeal and upheld its mandatory pre-employment drug testing policy because it was directed at actual effects suffered by recreational marijuana users and addressed the safety risk in an already dangerous workplace. Based on the medical evidence before the Panel, the Court accepted that the effects of marijuana linger for days, so that the policy's effects were not misdirected in their application to Chiasson. The Court disagreed with the lower court that the issue turned on the discriminatory effect of perceived disability based on drug use. As a result, an employee cannot rely on an alcohol or drug dependency to excuse culpable conduct if he won't acknowledge being addicted.[10] Drug testing of workers already employed at a work site can also survive arbitral scrutiny on human rights principles.[11]

The judgment in KBR is not entirely consistent with one handed down in the same month by the Quebec Court of Appeal, which held that Goodyear Canada's random drug testing for high risk jobs is not a reasonable minimal impairment under the Quebec Civil Code and the province's Charter of Human Rights and Freedoms. The Court noted that arbitrators in Canada have concluded that to subject employees to an alcohol or drug test is an unjustified affront to employees' dignity and privacy when there is no reasonable cause to do so, or in the absence of an accident or near miss and outside the context of a rehabilitation plan or last chance agreement for an employee with an acknowledged drug or alcohol problem.[12]

The approach of the Quebec Court of Appeal has long found favour in Alberta. It remains to be seen in future judgments and tribunal decisions whether the KBR decision will be followed or distinguished. The Alberta Court of Appeal itself has established that the crucial threshold issue is whether the employer's policy is properly applied to the individuals before the Court or arbitrator, especially when there is no elevated safety risk and no discernable purpose for applying the policy to those individuals.[13] After all, drug and alcohol testing is presumed to be discriminatory[14], and it is up to the employer to justify its application.

(Footnotes)

[1] This is a debatable point; see Quebac Cartier [1995] 2 SCR 1095, 125 DLR (4th) 577. In Alberta, the Court of Queen's Bench quashed an arbitrator's decision because post-discharge evidence had been admitted: Canada Safeway v. U.F.C.W., Local 401 (1997) 197 A.R. 349.

[2] Examples: Great Atlantic and Pacific Co. v. U.S.W.A., Local 414 (Gordon grievance) (1997) 65 LAC (4th) 306 (Ont.); Westmin Resources Lttd. V. C.A.W., Local 3019 (1997) 63 LAC (4th) 134 (BC); Fording Coal v. USWA, Local 7884 (Shypitka) (2001) 94 LAC (4th) 354 (Hope); Construction Labour Relations v. C.J.A. Locals 1325 & 2103 (Hewett) (2001) 96 LAC (4th) 343 (Alta.:Beattie)

[3] Order P2007-IR-001: Banwell Human Solutions

[4]Brewery, Beverage and Soft Drink Workers, Local 250 v. Labatt's Alberta Brewery (1996) 38 Alta. L.R. (3d) 308 (CA)

[5] Suncor Enerty v. Communications, Energy & Paperworkers Union, Local 707 (Woods Grievance), [2008] A.G.A.A. No. 11 (Abells).

[6] John Chiasson v. Kellogg Brown & Root, June 7, 2005 (Human Rights Panel: HColonel (Ret'd) Delano W. Tolley)

[7] Much has been made of the fact that a drug test does not measure current "impairment" in the way alcohol testing does, but medical opinion appears

to establish that performance risks are increased for some period of time after drug use; see Dr. Brendan Adams, "Independent Medical Opinion, pp. M-1-M-5, in Construction Owners Association of Alberta, "Canadian Model for Providing a Safe Workplace" (October 2005), found at http://www.coaa.ab.ca

[8] Alberta (Human Rights and Citizenship Commission v. Kellogg Borwn & Root, 2006 ABQB 302.

[9] The third part of the justification test established by the Supreme Court of Canada in BC v. BCGSEU ("Meiorin") [1999] 3 S.C.R. 3.

[10] Alberta (Human Rights and Citizenship Commission) v. Kellogg Brown & Root Canada, 2007ABCA 426; see also Premier/KBM Concrete v. Teamsters Local 230 (1993) 31 LAC (4th) 146 (Gray)

[11] United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 488 v. Bantrel Constuctors Co. [2007 A.J. No. 1330

[12] Communications, Energy and Paperworkers Union of Canada, Local 143 v. Goodyear Canada Inc. [2007] J.Q. No. 13701; 2007 QCCA 1686.

[13] Alberta (Human Rights and Citizenship Commission) v. Elizabeth Metis Settlement, 2005 ABCA 173 (Alta. Court of Appeal).

[14] Sonia Jacknife/Cassandra Collins v. Elizabeth Metis Settlement, May 15, 2006 (Human Rights Panel: Brenda F. Scragg)