

Impairment and the Workplace - the Union view

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Waiver

- ▶ Nothing in this presentation should be taken to constitute legal advice.
- ▶ All information provided is related to general knowledge and not in relation to any particular circumstances, If a particular circumstance arises, recommend seeking legal advice from a professional
- ▶ No representations made by the speaker should be seen to constitute representations made on behalf of the International Union of Operating Engineers, Local 793.

Overview

- ▶ Determining Impairment
- ▶ Workplace Policies
- ▶ Workplace drug testing
- ▶ On-duty vs. Off-duty Conduct
- ▶ Accommodation

Determining Impairment

Detecting Impairment

- ▶ No blood or urine threshold has been determined for impairment.
- ▶ Canadian Centre for Occupational Health and Safety (CCOHS) list of signs of impairment includes:
 - ▶ The odor of alcohol or drugs emanating from an employee
 - ▶ Glassy or red eyes
 - ▶ Unsteady gait
 - ▶ Poor coordination
 - ▶ Employer's may also look for slurred speech, fatigue, and low attention
- ▶ Some workplaces have taken zero tolerance approach (or 28 day abstinence)

Effects



Acute:

Smoked - effects last about 4-6 hours

Orally ingested - effects last about 6-8 hours and are less

Cognitive, psychomotor, memory



Chronic:

Cardiovascular

Respiratory

Cognitive

Testing does not measure present impairment

- ▶ The Ontario Court of Appeal has ruled that testing for non-alcoholic drugs may discriminate against employees who are addicted to them because, cannot measure present impairment
- ▶ No currently accepted method of measuring current impairment at work for cannabis with a test alone
- ▶ To establish employee was impaired, employers must produce evidence of clinical symptoms of impairment or show the intoxicant affected the employee's ability to perform his work safely and satisfactorily
- ▶ Prior Use does not, in of itself, demonstrate impairment

Workplace Policies

Safety Sensitive Position

- ▶ Ontario Human Rights Commission, *Policy on Drug and Alcohol Testing*, p. 8:

- ▶ Describes a safety-sensitive job as:

A safety-sensitive job can be characterized as one in which incapacity due to drug or alcohol impairment could result in direct and significant risk of injury to the employee, others or the environment. Whether a job can be categorized as safety-sensitive must be considered within the context of the industry, the particular workplace, and an employee's direct involvement in a high-risk operation. Any definition must take into account the role of properly trained supervisors and the checks and balances present in the workplace.

Workplace Policies

- ▶ Validity of Employer Rules still starts with the famous *KVP Co. Ltd and Lumber & Sawmill Workers' Union, Local 2357 (1965)*
- ▶ A rule unilaterally introduced by the company, and not subsequently agreed to by the union must satisfy the following requirements:
 - ▶ 1. it is consistent with the collective agreement;
 - ▶ 2. it is reasonable;
 - ▶ 3. it is clear and unequivocal;
 - ▶ 4. it was brought to the attention of the employee(s) affected before the employer attempts to act on it;
 - ▶ 5. where the rule is invoked to justify discharge, the employee was notified that a breach of the rule could result in discharge; and,
 - ▶ 6. the employer has enforced the rule consistently since its introduction.

Examples of Workplace Policies

- ▶ Pre-Employment Drug and alcohol testing has passed the test (*BC Hydro and Power Authority and IBEW, Local 258 (Alcohol & Drug Testing), Re*)
- ▶ Random drug and alcohol testing policy violated KVP (*Teck Coal Ltd*)
- ▶ Periodic drug and alcohol testing policy not reasonable under KVP (*Seaspan ULC*)

Rules must be reasonable

- ▶ When management makes a rule, arbitrators will assess the extent to which the rule is necessary to protect employer's interests with the impact of the rule upon the employees' interests
- ▶ Arbitrator will strike a balance that gives an appropriate effect or proportional regard to each interest
- ▶ For example, if a rule is intended to regulate or concern itself with an employee's private life, it must establish a substantial connection with its legitimate interest

Examples

- ▶ For example, rule prohibiting drivers from consuming alcohol during meal breaks held to be reasonable (*Associated Beer Distributors Ltd.* 1986)
- ▶ Automatic requirements of medical certificates and medical examinations have in the past been seen as unlawful interference with employee's right of privacy (*St. Michael's Extended Care Centre v. C.H.C.G.*, 1994)
- ▶ Smell of alcohol on grievor justified test for alcohol but not for drugs (*Vancouver Drydock Co.* 2018)

Workplace Drug Testing

Workplace Testing

Reasonable
cause
testing

Post-
incident
testing

Random
testing

Reasonable Cause & Post-Incident Testing

“Reasonable Cause” exists where an employee has reasonable grounds to believe that the actions, omissions, appearance or conduct of an individual while on duty are indicative of drug or alcohol use.

“Post-incident testing” may be required as part of a full investigation following a significant work-related accident or incident.

Post-Incident Testing

Post-Incident Testing

- ▶ In order for a post-incident test to be reasonable the following elements must be met:
 - ▶ (1) there must be a connection between the employee's area of responsibility and the accident;
 - ▶ (2) it must be necessary to investigate whether the actions or omissions of the employee contributed to or caused the accident;
 - ▶ (3) the test must assist in the investigation by negating impairment as a possible cause or contributing factor;
 - ▶ (4) the incident must be a significant event;
 - ▶ (5) the investigation must incorporate the employee's explanation of the incident; and
 - ▶ (6) the decision to test must be based on a connection between the incident and the employee to be tested.

- ▶ *Rio Tinto and United Steelworkers, Loc. 5795*, (2017) 281 L.A.C. (4th) 1 (Alcock):
 - ▶ Accident and investigation
 - ▶ Employer tested for drugs - positive for marijuana
 - ▶ No evidence of impairment to trigger drug test
 - ▶ Arbitrator refused to consider the drug testing evidence

- ▶ *Airport Terminal Services Canadian Co. and Unifor, Local 2002 (Sehgal), Re, 2018 CarswellNat 991, 135 CLAS 28 (Canada Arb)*
 - ▶ Worker was employed as a "ramp agent" at an airport, a safety-sensitive work position.
 - ▶ Involved in accident causing 45 minute delay for takeoff
 - ▶ Post-incident testing was positive for THC marijuana, which he had a prescription to use. He was fired after declining to partake in programs offered by the employer for treatment of dependency.
 - ▶ Dismissal Overturned. Employer did not have just cause to dismiss the employee, and violated Canadian Human Rights Code.
 - ▶ There was no evidence that the grievor was high while at work. The employer's accommodation process was only surface level, and took no real attempts to pursue solutions short of discharge

Reasonable Cause Testing

Reasonable Cause Testing

- ▶ The jurisprudence surrounding what amounts to “reasonable cause” is scarce. What we do know is that employers are entitled to look at factors such as: bloodshot eyes, flushed skin, and an overall lack of attention and sleepiness.
- ▶ “Reasonable cause” must be determined on a case-by-case basis. The test is subjective and supervisors who make the call must be accorded deference. Ultimately, testing for “cause” will be found to be reasonable if the following holds true:
 - ▶ “the supervisor [had] sufficiently observed the individual employee, had directed their mind to the person’s physical appearance, including such factors as their speech or gait, [and] had weighed any other relevant information at their disposal and ultimately had exercised their judgment in good faith. Other relevant information could, for example, include the presence of a drug or drug paraphernalia. Moreover, in keeping with the company’s policy, where practicable, a supervisor who contemplates directing an employee to undergo drug and alcohol testing based on his or her observations should seek the benefit of a second opinion from another supervisor or other person in a position to observe the employee in question.” (emphasis mine)
 - ▶ *Canadian National Railway and CAW, Local 100 (CAW12-2011-00071), Re, (2013) CarswellNat 273*

Difference between post-incident testing and reasonable cause testing

- ▶ Post-incident testing is similar but different in important ways. The difference between “reasonable cause” and “post-incident” testing was articulated in *Weyerhaeuser Co. and CEP, Local 447*:
 - ▶ “The two circumstances are not the same. Reasonable cause tests are justified when employees exhibit, or other evidence points to, impairment sufficient to give the Employer reasonable cause to suspect the employee may be at work impaired by alcohol or drugs. There need to be observations, plus the forming of a reasonable opinion, but there does not need to be an incident of harm to precipitate the demand for a test. The inquiry in post-incident testing is precipitated by an event and the need to inquire into that event to determine its cause. If the possibility emerges that the event might have been caused by a particular employee’s impairment and it is reasonable for the Employer to conclude that it is necessary to explore that possibility and, by testing, perhaps rule it out as a cause or significant contributing factor in the incident, then testing may also be justified.”
- ▶ *Weyerhaeuser Co. and CEP, Local 447 (Kelly), Re, 2012 CarswellAlta 2068, 225 L.A.C. (4th) 294 (Alta. Arb.)* at para 62.

Random Testing

Workplace Testing

- ▶ *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34

Facts:

- ▶ The Union grieved after the employer unilaterally implemented a random and mandatory alcohol testing policy in the workplace.
- ▶ The new policy allowed for the random selection of 10% of employees who were working in areas deemed to be safety sensitive to be tested each year.
- ▶ Testing positive for alcohol would result in disciplinary action against the employee, with the possibility of dismissal.

Workplace Testing

- ▶ *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34

Finding:

- ▶ The SCC adopted a "balancing of interests" proportionality approach.
- ▶ This balanced approach means that an employer may introduce a rule with disciplinary consequences only if the need to do so outweighs the negative effects on an employee's right to privacy.
- ▶ An employer may test a given employee if there is reasonable cause to believe the employee was impaired during work, was involved in an accident at work or returned to work after a substance abuse treatment program.

Workplace Testing Continued

- ▶ With respect to random testing, the main condition that must be met before implementation is the general existence of a workplace problem with drugs or alcohol.
- ▶ In this case, there was a definite lack of an alcohol abuse problem to justify the unilateral introduction of a random testing policy. Therefore, the possible safety gains to be had by implementing a testing policy were minimal in contrast to the intrusive impact the policy would have on employee privacy.

Random Testing is generally not allowed

-- In *Irving Pulp & Paper* the Supreme Court indicated that on-the-job testing can generally only be justified in the following circumstances:

- ▶ Where there are reasonable grounds to believe that the employee was impaired while on duty (See Issue #2 for further discussion).
- ▶ Where the employee was directly involved in a significant workplace incident or accident (See Issue #2 for further discussion).
- ▶ Where the employee returns to work after treatment for substance abuse.
- ▶ Where there is a demonstrated problem with alcohol or drug use in the workplace.
- ▶ These qualifications apply even in safety-sensitive workplaces (although, the Court observed that random drug and alcohol testing may be acceptable, even absent a demonstrated problem in the workplace, in "extreme circumstances.") In other words, as a general matter, it must be shown that there is a widespread problem of drug and alcohol abuse in a workplace before random or blanket drug and alcohol testing can be implemented.
- ▶ *supra* note 5 at para 45. [*Irving*]

- ▶ The case law is equally clear that random drug and alcohol testing will be upheld for those with a demonstrated drug or alcohol dependency problem. For example, while the arbitrator in *Dupont Canada Inc.* accepted the premise that “an employee’s conduct during non-working related time is not subject to control or discipline by the Company as long as it has no impact on work performance,” the arbitrator went on to note the following:
 - ▶ Where a job is safety sensitive, as are all the jobs in question in this bargaining unit, considerations beyond those relevant to the assessment of reasonable cause testing must be brought to bear when an employee either has recently demonstrated that he or she is drug or alcohol dependent, has recently shown that he or she has a problem with drug or alcohol abuse affecting the workplace or is in the process of drug or alcohol rehabilitation. ...
 - ▶ For an employee who has demonstrated that he or she either has, or recently has had, a drug or alcohol dependency or addiction or, even if not addicted, has recently demonstrated that he or she has engaged in the abuse of drugs or alcohol affecting the workplace or is in a drug or alcohol rehabilitation process, the focus respecting employee conduct legitimately shifts from preventing drug or alcohol abuse affecting the workplace to preventing drug or alcohol use. Accordingly, the focus of the Company in overseeing the wellness of an employee in the process of behaviour modification or rehabilitation appropriately shifts from ensuring that the employee is not working under the influence of drugs or alcohol to ensuring that the employee in question is not using drugs or alcohol at all, i.e. either at work or away from work.
 - ▶
 - ▶ Where the employee has demonstrated that he or she has, or recently has had, a problem with drug or alcohol dependency or abuse affecting the workplace or is in a drug or alcohol rehabilitation process, the appropriate balance between the employee's privacy and workplace safety is not achieved with reasonable cause testing. Rather, we conclude, the appropriate balance between the interests of the employee in such circumstances and the interests of the rest of the workplace is achieved with random testing which monitors use per se, as long as the imposition of that random testing is done in cooperation with, and with the full awareness and agreement of, the Union. Should the Union unreasonably withhold its agreement, the Company, in such circumstances, may unilaterally impose random drug or alcohol testing for a two-year period. (emphasis added)
- ▶ This was affirmed in *Spectra Energy Transmission* (2012), where an arbitrator upheld random drug and alcohol testing for a worker in a safety-sensitive position for a period of two-years. The employee had admitted to smoking 1 - 2 “joints” of marijuana per day.

It should be noted, however, that the imposition of random drug and alcohol testing does not mean that these tests can be undertaken with whatever frequency the employer chooses. In *Spectra Energy*, the arbitrator found it inappropriate for an employer to test the employee on a monthly basis, and instead reduced the frequency to a maximum of six tests over the two-year period.

On-Duty vs. Off-Duty Conduct

Regulation of Off-duty Conduct

- ▶ An inherent problem with drug testing is, as mentioned, that it tends to reveal - and thus regulate - the off-duty consumption habits of workers. This is because, as the Ontario Court of Appeal noted in *Entrop*, drug tests only reveal information about whether the subject has used a substance recently - they cannot show evidence of current impairment.
- ▶ Indeed, as a general rule, arbitrators and courts have come down hard on employers who attempt to regulate the off-duty consumption habits of employees. As noted in *Trimac Transportation Services - Bulk Systems v T.C.U.*:
 - ▶ For example, it is pointed out that there was no expert evidence of the nature in this case that off-duty conduct does in fact impact driver response time in *Provincial American Truck Lines (supra)* and the other cases that accept that drug and alcohol use in an employee's off-duty hours has no impact on employee performance at work. It is submitted that the awards since *Provincial American Truck (supra)* focus on the inappropriateness of inquiring into the off-duty activities of employees and thereby ignore the key issue; that is the need for an employer to minimize the risk associated with impairment from drugs and alcohol while the employee engaged as a truck driver.

Privacy Interests

- ▶ The seriousness of employer inquiries into the private consumption habits of citizens was also noted in *Provincial American Truck Transporters*, where the Arbitrator observed that:
 - ▶ The authorities cited to us which dealt with testing urine for the presence of both legal and illegal substances recognize that such testing compromises the privacy of the individual just as a search would do. There is a further aspect to the privacy argument in that, even assuming that the urine specimen is not used to determine anything other than whether there has been any past ingestion of alcohol and/or drugs, such testing necessarily involves the employer in an inquiry into what an employee is doing in his/her off-duty hours. Most reasonable people would probably consider that it was none of their employer's business if they happened to drink wine or beer with their meals away from work or enjoy a drink or two in their off-duty hours. Therefore, what one would expect, absent some term in the collective agreement, is an arbitral response to drug testing which is similar to that taken to employee searches and to employer interest in off-duty conduct. (Emphasis Added)
- ▶ *Provincial-American Truck Transporters v Teamsters, Local 880*, 199 CarswellOnt 6447 at para 28.

Use does not equal abuse

- ▶ Off-duty regulation of marijuana use was also rejected in *Hamilton Street Railway*, but this was largely predicated on the proposition that “use does not equate to abuse.” This was interpreted in *Ideal Roofing* to mean that off-duty consumption of marijuana is not the business of an employer where it cannot be linked to ill-performance at work. As the arbitrator in that case put it:
 - ▶ It must be noted that arbitrator Rayner was dealing [in *Hamilton Street Railway*] with off-duty use of marijuana which was minimal and declining and where there was no evidence of impact on the employee's work performance nor was there any evidence of potential risk regarding his work performance. However, the learned arbitrator pointed out the difference in perception in arbitral jurisprudence in respect to the effect of marijuana on impairment as opposed to the effect of alcohol where in both cases the consumption is minimal.
- ▶ This is generally indicative of the current state of the law regarding off-duty drug and alcohol use regulation. In order to impose any sort of regulation or sanction, an employer must show that the off-duty use impairs the employee’s ability to perform his or her job while at work.
supra at para 33.
- ▶ *Hamilton Street Railway v A.T.U., Local 127*, 2002 CarswellOnt 5493, 72 C.L.A.S. 132 at p. 20.

Accommodation

Accommodation

- ▶ General Principles - engage both issues of discrimination and privacy rights
- ▶ D + A testing amounts to adverse effects discrimination for those suffering from drug or alcohol dependency - can only justify this if it is impossible to accommodate the disabled employee without incurring undue hardship
- ▶ Any requirement must be 'reasonably necessary'
- ▶ If asking for accommodation, employer must know about what you're asking - employee cannot assume employer has knowledge of worker's conditions
- ▶ I'm sure my friends at the human rights tribunal are likely to provide you with more detail on this part of the presentation

The Law Is Unchanged

- ▶ Medical usage:
 - ▶ Consider opioids - permitted outside (and sometimes during) working hours; also psychoactive
 - ▶ Depends on whether position is safety sensitive
 - ▶ Depends on how frequently i.e. can it be used well outside of working hours (but what about monitoring?)
- ▶ Addictions:
 - ▶ If an employee has an addiction, they are entitled to accommodation
 - ▶ Typically involves obtaining treatment and abstaining

- ▶ Calgary (City) and CUPE, Local 37 (Hanmore), Re 2015 CarswellAlta 1834:
 - ▶ Told his supervisors as required by company policy. Kept working without incident for a year driving heavy equipment on city streets - safety sensitive. Higher management became aware and removed him from work. Smoked well outside of work hours (not ingesting at work). No evidence using outside of work impaired his abilities to do the job. Reinstated and compensated, in part b/c he self-reported.

- ▶ *IBEW, Local 1620 and Lower Churchill Transmission Construction Employers' Assn. Inc. (Uprichard), Re, 2017 CarswellNfld 375:*
 - ▶ Medical marijuana in a zero-tolerance setting. Failed to disclose. Employer found out and terminated. Upheld on appeal but remitted regarding whether termination excessive. Clearly violated some policies about taking drugs and disclosing. Part of the problem was that failing to disclose deprived the employer of the ability to assess whether there was in fact any impact on his performance or whether he remained impaired while working.
 - ▶ In the second arbitration on the matter on July 18, 2017 Arbitrator Oakley ordered that the grievor be reinstated to status of employee without pay, and was to be eligible to return to work according to terms of accommodation arrangement.

▶ *Stewart v. Elk Valley, 2017 SCC 30 (CanLII):*

- ▶ Employer policy was that if employee reported addiction before an accident, they would cover treatment and keep employed; if employee tested positive after an accident and then admitted addiction, employee was terminated. Employee had an accident, tested positive for cocaine, was terminated. SCC upheld the arbitrator's decision as reasonable in part because the policy was reasonable.

▶ *French v. Selkin Logging*, 2015 BCHRT 101:

- ▶ Didn't have a medical certificate; smoked while driving and hit a moose. Tribunal comments that strict zero tolerance when person has medical clearance might violate the *Code*, but those weren't the facts. Found that zero-tolerance was a BFOR in the circumstances; reciprocal duty on both employee and employer. No contravention of the code. Of course, he didn't have a certificate.

▶ *Brown v. Bechtel, 2016 BCHRT 170* :

- ▶ Chronic pain & prescription, consumes before bed. Terminated for consuming and failing to disclose (though had told third-party at pre-employment testing). He also did not conceal it - everybody basically knew about it. Tribunal refused to dismiss indicating employer should have asked about why he was smoking.

- ▶ *Wilson v. Transparent Glazing Systems (No. 4)*, 2008 BCHRT 50 (CanLII):
 - ▶ Had a certificate and allegedly disclosed when hired (denied by employer) and did not smoke before or during work. Supervisor alleged medication impaired ability to work. Fired for allegedly arguing and lack of professionalism. Held employer was aware of back problem and that impairment may be due to medication. Duty to inquire, which it did not. No opportunity given to respond to allegations of drug abuse. Disability factor in termination.

- ▶ *Int'l Brotherhood Lower Churchill Transmission Construction Employers' Assn. Inc. and IBEW, Local 1620, Re, 2018 CarswellNfld 198, 136 CLAS 26*
 - ▶ Grievor had prescription to use medical marijuana
 - ▶ When he disclosed and failed a pre-employment drug screen, employer requested more info. Despite supportive medical reports, employer refused to hire.
 - ▶ Arbitrator: where an employee has a disability that requires the nightly intake of high-dosage THC marijuana, an employer is not required to accommodate the employee's disability by hiring or returning that employee to a safety-sensitive position.

The background features abstract, overlapping geometric shapes in various shades of green, ranging from light lime to dark forest green. These shapes are primarily located on the left and right sides of the frame, leaving a large white central area. The shapes are composed of triangles and polygons, some of which are semi-transparent, creating a layered effect.

Thank you