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Alcoholism and drug addiction constitute “handicaps” under human rights legislation, triggering an employer’s obligation not to discriminate and to accommodate to the point of undue hardship. The Ontario Court of Appeal and a leading arbitrator recently applied this human rights analysis in the context of reviewing the drug and alcohol testing policies of two major employers, Imperial Oil and the Canadian National Railway Company.

The policy considered in *Entrop v. Imperial Oil Ltd.* stipulated that employees testing positive on a random drug or alcohol test were considered substance abusers and were subject to sanctions. The Ontario Court of Appeal struck down mandatory *drug testing* because the drug tests did not establish actual impairment of ability to perform the job.

The Court upheld *alcohol testing* as being justified following a major accident or where reasonable cause exists to suspect an employee’s alcohol use at work. The Court also upheld *random alcohol testing for employees in safety-sensitive jobs* because the testing provides a reasonable means of detecting impairment on the job.

However, the Court stipulated that any sanctions imposed must be tailored to the employee’s circumstances and fulfil the employer’s duty to accommodate. Imperial Oil’s automatic dismissal policy following a single positive test was determined to be inconsistent with the company’s duty to accommodate. Accommodation measures could include supporting an alcoholic employee through a rehabilitation program.

In *CAW v. Canadian National Railway*, the arbitrator concluded that neither drug nor alcohol testing are reasonable or necessary incursions into the privacy of employees holding non-risk sensitive positions.

The arbitrator took a somewhat different view with respect to employees occupying or transferring into safety-sensitive positions. He concluded that these employees could be subjected to drug and alcohol testing, *but only on reasonable grounds* such as after a significant accident or in circumstances where there is a basis for believing that an employee was impaired while on duty. Testing may also be part of the terms of an employee’s reinstatement following an absence due to substance abuse, and may include consensual random drug testing, administered in a non-abusive fashion.

The arbitrator struck down the employer’s rule which provided for the automatic discharge of an employee who violated the drug and alcohol policy. It was noted that a positive drug test is not conclusive of impairment but, in light of other evidence, could support a finding of impairment justifying discipline or discharge.

The most recent arbitration decision on the issue of drug testing, *Fording Coal Ltd. v. United Steel Workers of America*, further clarified the factual circumstances in which individual drug testing by an employer will be permitted. This case involved an employee who had been dismissed for having been found in possession of marijuana in the workplace. As a condition of the employee’s reinstatement, the employer demanded that he submit to random drug testing in the form of urine samples for a period of two years.

The arbitrator considered the principles established in the *CAW* decision, but confirmed that those principles are of limited application in situations where a random testing requirement has been imposed on a particular employee who is known to be a regular user of marijuana. On the facts in this case, the employer was found to have had “*reasonable cause*” to require the employee to submit to random drug testing because the employee:



- was in a safety-sensitive position;
- had been found in possession of marijuana at the work site;
- refused to voluntarily submit to a drug test;
- admitted to having used marijuana regularly over a long period of time; and
- acknowledged from personal experience that use of the drug impaired his ability to function.

In upholding the random testing, the arbitrator noted that the employer's options in response to a positive drug test result were varied and, depending on the broader circumstances involved, could include removing the offending employee from the workplace as a disciplinary measure, referring him to an employee assistance program, or closer monitoring through testing to ensure that he remained drug free at work.

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