

# Is Drug or Alcohol Addiction an Excuse for Employee Misconduct?



***"It wasn't me, it was my drug addiction."***

Addiction, whether to drugs, alcohol, gambling, or anything else, **is** an illness. As such, it requires reasonable accommodation under human rights laws. Thus, knee jerk disciplinary reactions, such as terminating employees automatically for failing a drug test under a zero-tolerance policy, are highly problematic. By the same token, the law doesn't require you to make accommodations that would impose undue hardship.

As a central player in the disciplinary process, HR directors must be able to distinguish between reasonable accommodation and undue hardship to keep their companies compliant. But trying to draw this line in actual situations is anything but simple. The key to making legally sound decisions is to look at how courts and arbitrators have ruled on cases involving discipline against employees who blame their transgressions on a dependency or addiction. While each case turns on its own facts, here are 7 lessons HR directors can learn from case law.

## **1. Judgment of Redeemability Must Be Based on Medical Assessment Not Subjective Belief**

The purpose of reasonable accommodation is to give employees with disabilities the same opportunity to succeed as employees without disabilities. Undue hardship is reached if and when it becomes clear that the employee is a lost cause and that making (or when dealing with repeat or habitual offenders, continuing to make) accommodations would be futile. But the judgment that the employee is beyond redemption must be based on medical assessment by a health professional and not just opinion or speculation.

**Example:** An arbitrator ordered a Québec paper plant to reinstate a veteran machine operator fired for repeatedly not showing up for work. The plant knew that the operator's attendance problems were related to alcohol dependency because it offered him treatment once before. In concluding that the operator was irredeemable and that further treatment would be useless without seeking a medical assessment, the plant violated its duty to accommodate, the arbitrator reasoned [[Unifor, Section Locale 905](#)

## 2. Employers Must Accommodate Addictions They Know About

The duty to make reasonable accommodations applies to disabilities the employer actually knows about. This isn't an issue in the vast majority of cases where an employee actually requests accommodation for a disability. But addiction accommodations don't always follow this pattern, lawyers caution. "Employees often hide their addictions and dependencies; it's only after they get into trouble that they disclose their problems to the employer."

**Basic Rule:** Employers must accommodate addictions that they actually know about. Thus, evidence that employees concealed, denied or lied about having an addiction can help employers defeat a disability discrimination claim. **Example:** The Ontario Human Rights Tribunal ruled against an alcoholic shift worker who got fired for showing up to work drunk, citing his dogged denials of having a drinking problem and refusal to cooperate with accommodation efforts [[Cudmore v. Inter Cap Industries](#), 2009 HRT0 174 (CanLII)].

## 3. Employers Must Also Accommodate Addictions They Should Reasonably Know About

Ignorance is not an absolute defense. That's because companies must also accommodate addictions that they should reasonably be aware of. This duty is interpreted as carrying a responsibility to inquire. According to the Ontario Human Rights Commission, employers "must attempt to help a person who is clearly unwell or perceived to have an addiction by inquiring further to see if the person has needs related to a disability and offering assistance and accommodation." **Example:** A BC court ruled in favour of a miner who got fired for smoking marijuana at work, faulting the employer for not making an effort to determine whether he had an addiction and how to accommodate him [[Kemess Mines Ltd. v. International Union of Operating Engineers, Local 115](#), 2006 BCCA 58 (CanLII)].

**Compliance Strategy:** That's why companies should ask employees about their addictions and need for accommodation, especially in response to red flags of substance abuse. Treat substance abuse as a problem, not a form of misconduct, and establish a [self-disclosure policy](#) promising to get employees who [self-disclose](#) the help they need without being subject to discipline. Then, if employees don't accept the amnesty you offer, you'll be in a stronger position to discipline them for being unfit for duty.

## 4. Duty to Accommodate Covers Only Addiction-Driven Behaviour

The duty to make reasonable accommodations for addictions applies only to the misconduct the addiction actually causes or affects. Employees with addictions remain fully accountable for behaviour within their own control. While the rule is straightforward, applying it to real-life situations is anything but.

**Compliance Strategy:** In determining the nexus between addiction and behaviour, or lack thereof, many courts and arbitrators group misconduct into 3 categories.

**Addiction Driven Behaviour:** One end of the spectrum is behaviour driven by the addiction to such an extent that the employee has no real control. This is your

basic: "it wasn't me, it was my addiction" situation. Such behaviour requires accommodation to the point of undue hardship.

**Non-Addiction Driven Behaviour:** At the other end of the spectrum is behaviour that the employee's addiction doesn't cause. This kind of misconduct doesn't require accommodation and can be dealt with the same way as if it was committed by an employee that isn't disabled.

**Hybrid Behaviour:** Most addiction-related misconduct falls between the two extremes. Such "hybrid behaviour" is **both** voluntary (aka "culpable conduct") and addiction-driven (aka "non-culpable conduct")—that is, the addiction influences but doesn't completely drive the behaviour. In other words, employees still have enough of their own unaddicted free will to make their own choices. Employers do have to make reasonable accommodations for hybrid behaviour up to the point of undue hardship.