Workplace Drugs & Alcohol Cases Scorecard, 2020 to 2021

Employers continue to lose drug test cases more often than they win them.

October 17, 2021 marks the third anniversary of legalized recreational cannabis in Canada. Slowly but surely, courts, arbitrators and labour boards are hammering out the rules governing enforcement of workplace drug use and testing policies in the era of legalization. And it's been an uphill struggle for employers. Of the roughly 44 cases reported since legalization, employers have won only 15; employees and unions have won 28, and there's been 1 split decision. Most of the cases involve one or more of the following issues:

- Whether a drugs/alcohol testing policy was legal;
- Whether an employer had proper justification to perform testing under the policy;
- Whether a positive test was just cause for termination;
- Whether an employer had to accommodate an employee's dependency or addiction; and
- Whether an employee's failure to self-disclose his/her use of drugs/alcohol was just cause for termination.

Here's a look at the reported cases from the past 12 months from September 1, 2020 to August 31, 2021.

EMPLOYER WINS (6 CASES)

In most of the cases where the employer won, the decisive factor was that the employee targeted for drug/alcohol testing or dismissal was safety-sensitive.

1. Arbitrator Can't Bar Random Testing Mandated by Federal Regulation

What Happened: After 10 years of study, the Canadian Nuclear Safety Commission (CNSC) issued a regulation requiring nuclear power plants to perform random, post-incident, reasonable cause and pre-assignment alcohol and drug testing on safety-sensitive and safety-critical workers. As expected, when plants implemented testing policies implementing the new testing policy, the unions grieved. They also asked the arbitrator to "stay," that is, bar enforcement of the policy until a ruling on the merits of the grievance.

Ruling: The Ontario arbitrator denied the stay.

Analysis & Takeaway: In a significant ruling that the unions are bound to appeal, the arbitrator concluded not that the testing policy was legally valid but that labour arbitrators don't have jurisdiction, i.e., legal authority, to prevent enforcement of testing policies incorporating regulatory requirements mandated by a federal agency like the CNSC. However, the arbitrator ruled that the part of the policy that the plants added requiring testing of a group of workers not addressed by the CNSC regulations was fair game for review and issued a stay temporarily barring enforcement of those provisions.

Ontario Power Generation, Bruce Power, Power Workers' Union, Society of United Professionals, The Chalk River Nuclear Safety Officers Association and International Brotherhood of Electrical Workers, Local 37 v Canadian Nuclear Laboratories and New Brunswick Power, 2021 CanLII 65284 (ON LA), July 8, 2021

2. Positive Drug Test Ends Employer's Duty to Accommodate Alcoholic Employee on Last Chance

What Happened: For years, a plant tried to assist a mill hand in his battle against alcoholism. But after repeated DUI convictions and unsuccessful rehab attempts, the worker tested positive for alcohol in violation of his last chance agreement. It was the last straw and the plant terminated him.

Ruling: The New Brunswick arbitrator tossed the union's grievance.

Analysis & Takeaway: Although the plant had a duty to accommodate the worker's alcoholism, things had reached the point of undue hardship. The worker's job was safety-sensitive and after years of assisting him without success the plant was justified in concluding that further attempts at rehab would be futile.

Unifor, Local 907 and J. B. v Irving Paper, Limited, 2020 CanLII 89671 (NB LA), November 6, 2020

3. Smoking Pot at Work Is Just Cause to Fire Railway Worker

What Happened: A railway worker was fired after getting caught smoking pot at work twice. The worker didn't deny consuming cannabis at work or claim he had an addiction. He just relied on his clean disciplinary record, sincere remorse, family problems that made him turn to pot and the supposed condonation of his supervisor.

Ruling: The federal arbitrator upheld termination.

Analysis & Takeaway: The key factor in the arbitrator's eyes was that the worker smoked pot at work on more than one occasion even though his safety-sensitive railway job demanded that he be focused and alert at all times.

International Union of United Metallurgy, Paper and Forestry, Rubber, Energy Manufacturing, Services and Allied Industries (Local 9344) c Compagnie de chemin de fer du littoral Nord de Québec and du Labrador inc. (IOC Mining Company – Rio Tinto), 2020 CanLII 83837 (CA SA), November 3, 2020]

4. Near Miss Is Justification for Post-Incident Drug Testing

What Happened: After a Self-Propelled Modular Transporter (SPMT) collided with a set of scaffold stairs erected at the end of the dock against a barge, the manager at the site ordered the worker serving as spotter to undergo drug/alcohol testing. The union

claimed that the incident wasn't a "Significant Event" justifying post-incident testing under the employer's testing policy because there were no injuries and only minimal property damage.

Ruling: The BC arbitrator sided with the employer.

Analysis & Takeaway: A near miss met the policy definition of "Significant Event," the arbitrator concluded, given the serious potential for significant injury and damage. The manager also followed the correct investigation procedures and SPMT crashes are rare events, supporting the suspicion of impairment

Vancouver Shipyards Co. Ltd v Marine and Shipbuilders, Local 506, 2020 CanLII 103785 (BC LA), December 29, 2020

5. OK to Fire Truck Driver for Not Disclosing Medical Marijuana Use

What Happened: The driver of a concrete truck claimed he disclosed his legal medical marijuana use before undergoing post-incident testing and then got fired for testing positive for marijuana. The company claimed he was fired not for the positive test result but because he never disclosed his medical marijuana use as required by the company's drug policy.

Ruling: The Alberta Human Rights Commission found that the employer didn't violate its duty to accommodate the driver.

Analysis & Takeaway: There was no evidence that the driver ever mentioned or that the company ever knew about his medical marijuana use until after the lawsuit. And since failure to disclose was the real violation, the actual test results were irrelevant.

Bird v Lafarge Canada Inc., 2021 AHRC 50 (CanLII), February 23, 2021

6. Federal Arbitrator Says Legalized Marijuana Gives Employer More Leeway for Random Testing

What Happened: The union contended that unannounced random urine drug testing of safety-sensitive airport workers was an undue invasion of privacy. While acknowledging that case law has weighed heavily against random drug testing, the airport noted that those cases were decided before marijuana legalization. The situation has changed dramatically since then, the airport argued.

Ruling: In a potentially significant ruling, the federal arbitrator upheld the random test policy.

Analysis & Takeaway: Even though its urine and saliva testing methods were highly intrusive, the arbitrator said the policy was an essential safety measure and deterrent, particularly in the age of legalization.

Ottawa Macdonald-Cartier International Airport Authority v Ottawa Airport Professional Aviation Fire Fighters Association, 2021 CanLII 44861 (CA LA), May 18, 2021

EMPLOYER LOSES (7 CASES)

Several of the cases ruling for the unions emphasize that because of marijuana's metabolic properties and the fact that it can remain in the system long after the buzz is gone, a positive marijuana test isn't enough to prove the employee was impaired at the time of testing. Another important point is the need to accommodate

employees with a dependency, as opposed to casual drugs and alcohol users.

7. Firing Worker for Alcohol-Related Absenteeism Is Failure to Accommodate

What Happened: A veteran mine worker with a history of attendance problems got fired for not showing up for 2 shifts in a row without notifying a manager at least an hour before the shift began in violation of his last chance agreement (LCA).

Ruling: The Nova Scotia arbitrator ruled that the LCA was invalid and reinstated the worker.

Analysis & Takeaway: The LCA addressed just the absenteeism issue without dealing with its underlying cause, namely, the worker's alcohol dependence. True, the worker never acknowledged his dependence; but the employer had plenty of evidence and didn't take the trouble to explore and confirm its suspicions. As a result, enforcing the LCA violated the worker's rights to accommodation.

UNIFOR, Local 823 v K + S Windsor Salt Ltd (Pugwash Facility, Nova Scotia), 2020 CanLII 64088 (NS LA), September 9, 2020

8. Firing Alcoholic Employee for Coming to Work Drunk Is Disability Discrimination

What Happened: What would you do if one of your employees showed up late to work intoxicated by alcohol and prescription drugs, interrupted a staff meeting and belligerently cussed out his boss to the point where you had to call his wife to pick him up and take him home? The car dealer in this case decided on termination.

Ruling: The Alberta Human Rights Tribunal found disability discrimination and awarded the employee $30,000 in damages

Analysis & Takeaway: Termination might have been justified had the employee just been a casual drinker. But this employee had an alcohol dependency. The dealer knew or should reasonably have known of the dependency and how it rendered the employee incapable of complying with the workplace sobriety policy and at least considered making accommodations to the point of undue hardship.

Kvaska v Gateway Motors (Edmonton) Ltd., 2020 AHRC 94 (CanLII), December 14, 2020

9. Employer Must Try to Accommodate Safety-Sensitive Worker's Alcoholism

What Happened: After nearly 16 years of excellent performance, a millwright found himself on the wrong end of progressive disciplinary actions for lateness, harassing a colleague and other offences, culminating in his termination. Not coincidentally, the problems began when the millwright developed a drinking problem. The union contended that the dependence caused the misconduct and claimed disability discrimination.

Ruling: The Alberta arbitrator agreed and reinstated the millwright without loss of pay or seniority.

Analysis & Takeaway: The fact that the position was safety-sensitive didn't justify the company's decision to fire him without even trying to accommodate him. Nor could the company blame the millwright for failing to come forward and seek help since it didn't have a mandatory self-disclosure policy.

United Steel- Paper And Forestry, Rubber, Manufacturing, Energy, Allied Industrial And Service Workers International Union, Local 5220 v Altasteel, 2021 CanLII 7103 (AB GAA), February 3, 2021

10. Unsupported Suspicions Not Enough to Require Post-Incident Drug Testing

What Happened: A safety-sensitive refinery worker was the prime suspect for causing the roughly $1,100 worth of bumper damage to a truck he admitted to commandeering for personal use during his shift. As a result, he had to undergo testing, which came back positive for marijuana, ultimately leading to his termination.

Ruling: The Saskatchewan arbitrator knocked the penalty down to a 6-months' suspension.

Analysis & Takeaway: First, the employer's suspicions, which weren't supported by any evidence, weren't adequate grounds for post-incident testing. And even if they had been, the positive test didn't prove he was high because the company's metabolic standards for impairment were too low. However, the worker deserved to be disciplined for lying about his marijuana use.

Gibson Energy (Moose Jaw Refinery Partnership) v Unifor, Local (Mike Chow), 2021 CanLII 16446 (SK LA), February 16, 2021

11. Positive Marijuana Test Doesn't Prove Worker Was Impaired at Time of Testing

What Happened: A machine operator subjected to post-incident testing after backing his Cat Loader into a pole, tested positive for THC, the ingredient in marijuana that causes impairment. As a result, he got fired.

Ruling: The federal arbitrator reinstated him without loss of pay and $5,000 in damages.

Analysis & Takeaway: The company didn't give the union all of the necessary evidence before doing the test. Just as importantly, the THC levels weren't enough for the company to prove that the operator was impaired **at the time of testing**. The arbitrator dismissed the company's contention that the nature of the incident was all the evidence necessary to show impairment as a "flimsy" argument.

Canadian National Railway Company v United Steelworkers, Local 2004, 2021 CanLII 30111 (CA LA), April 15, 2021

12. Positive Urine and Negative Oral Swab Test Don't Prove Marijuana Impairment

What Happened: A railway worker had to undergo post-incident drug testing after being involved in a hi-rail truck derailment. He tested positive for marijuana and the railway company fired him.

Ruling: The federal arbitrator reinstated the worker.

Analysis & Takeaway: The derailment wasn't reasonable cause for drug and alcohol testing. "An accident, by itself, is usually not enough to justify testing," the arbitrator reasoned. Besides, because marijuana lingers in the metabolism after the high disappears, the positive test didn't prove he was impaired at the time of the incident, especially since his alcohol and swab tests came back negative. "A positive

urine test, but a negative oral swab test, do not demonstrate impairment" under current case law, according to the arbitrator.

Canadian Signals and Communications System Council No. 11 of the IBEW v Canadian Pacific Railway Company, 2021 CanLII 69959 (CA LA), August 4, 2021

13. Failing to Disclose Medical Marijuana Use Doesn't Cost Worker His Job

What Happened: A welder on a last-chance agreement and subject to random testing knew that ingesting medical marijuana might cause him to flunk his drug test. But since the pot was legally prescribed, he assumed he could just take the stuff without telling his employer. It turned out to be a bad assumption.

Ruling: The Saskatchewan labour board reinstated the welder.

Analysis & Takeaway: The board agreed that the employer had just cause to discipline the welder for violating the company drug policy and last-chance agreement. But because it was an honest mistake and the welder had diligently abstained from the alcohol that got him into the last-chance testing protocol in the first place, it reinstated the welder provided that he complete return-to-work education provided by the employer.