

# Substance Abuse in the Workplace: Rights and Responsibilities

## The Winning Solution E Division Workshop March 26, 1998

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## Outline

### 1. **Introduction**

- (a) general legal framework

### 2. **Acute Abuse at the Workplace**

- (a) (i) possession
- (ii) sale
- (iii) use

- (b) legal framework

- (c) proposed response

### 3. **Chronic Abuse**

- (a) identify the symptoms

- (b) legal framework

- (c) proposed response

- (i) treat the problem, not the symptoms
- (ii) do what is best for the employee
- (iii) employee assistance programmes

## 1. (a) General Legal Framework

Federal/Provincial

Charter of Rights

Human Rights Laws

Health and Safety Regulations

Employment Standards legislation

Labour Codes

Privacy Law

Criminal Law

- may be different in union/non-union/management situations

    a collective agreement may override the common law or statute

- can be reduced to:

### **Individual Rights**

(r) golden rule a good standard

### **Public Rights**

(r) people and property

(r) a collective golden rule

### **Business Rights**

(r) property, productivity, reputation

- each right creates an obligation and some rights compete

- how these are balanced may surprise, but such rights will be recognized and applied

## 2. Acute Abuse

*Discovered possession, use or being under the influence of alcohol or an illicit drug at the workplace or during working hours.*

Note: The discussion does not include the possession or use of a licit drug. Possession of such is not a crime and use is often prescribed or recommended by a physician. Nevertheless, employers may soon have to begin paying attention to licit drugs since their use is much more pervasive than, and their effects are often as great as, illicit drugs.

### **(a) (i) possession**

### **(ii) sale**

*Corporation of City of North York (1994), 43 L.A.C. (3d) 52 (Solomatenko)*

*driver-loader of garbage trucks pleaded guilty to simple possession and trafficking of hashish  
employee had substance abuse problem  
no evidence of selling drugs, only of giving them to others  
employer terminated on basis of the trafficking conviction  
discharge replaced with time served suspension on condition of completing rehab program*

Generally speaking, it is not the employer's function to enforce the general laws of the land. Instead, its right to discipline an employee for conduct in the workplace derives from the fact that the nature or quality of the employee's conduct is incompatible with the employment relationship.

In my view, the "trafficking" which would be so repugnant to the employment relationship as to invoke immediate dismissal ... must be trafficking in the nature of the activity of someone who would be known colloquially as a "dealer", that is, a person whose purpose is motivated solely by profit from an illegal activity and who uses the workplace as a ready market-place for that purpose.

### **(b) legal framework**

#### **Individual Rights**

- private life
- privacy (r) searches

*Privacy Law*

#### **Public Rights**

- criminal law

*Narcotics Control Act  
Food and Drug Act*

*Canadian Pacific Ltd. (1987), 31 L.A.C. (3d) 179 (Picher)*

*railway conductor charged with cultivation and possession of marijuana  
refused to explain to the employer and to submit to a drug test  
dismissal upheld*

... the company has a particular obligation to ensure that those employees responsible for the movement of trains perform their duties unimpaired by the effects of drugs. To that end the company must exert vigilance and may, where reasonable justification is demonstrated, require an employee to submit to a drug test. ... On the other hand, it is not within the legitimate business purposes of an employer, including a railroad, to encroach on their privacy and dignity of its employees by subjecting them to random and speculative testing. (at pp. 186-187)

## **Business Rights**

- benefit of the employment contract
- use of property
- reputation

### *Common Law*

#### *Collective Agreement*

*Craigdallie, [1997] B.C.E.S.T.D. No. 328*

*cabaret employee suspected of selling drugs at the workplace; not denied by employee employer considered such conduct put its business and liquor licences at risk*

The commission of a serious criminal offence on the Employer's premises and while on duty gives just cause for dismissal.

*Port Aux Basques Integrated School Board (1996), 55 L.A.C. (4th) 335 (Alcock, Amos, Butt)*

*teacher convicted of growing marijuana in the summer before starting with school school discovered it in October and suspended him for balance of school year*

In [the employee's] view there is no connection between his teaching responsibilities and what he considers to be a private personal matter which has been dealt with by society through the legal system. He is wrong. ... the grievor's offence was a breach of trust, a serious employment matter which justified the imposition of a lengthy suspension as a punitive measure. ...

To establish just cause the Employer did not have to prove actual damage to its reputation. It was sufficient to demonstrate that the grievor's conviction for possession of marijuana was likely to be prejudicial to the Employer's reputation in the community.

*Board of School Trustees of School District No. 60 (Peace River North), September 20, 1994 (Hope)*

*school maintenance employee dismissed after laying of criminal charges for possession of marijuana and hashish for purpose of trafficking and for cultivation of marijuana, apparently on a large scale  
grievor failed to offer an explanation  
that failure constituted just cause for suspension and dismissal*

The facts raised an implication that the Grievor was engaged in a commercial operation which involved the cultivation and sale of marijuana on a large scale. Involvement in such an operation is clearly incompatible with continued employment with the Employer charged with the education of students.

Board of School Trustees of School District No. 37 (Delta) (1993), 31 L.A.C (4th) 93 (Fraser, Canas, Bradbury)

*school custodian convicted of trafficking in cocaine  
grievor was admitted alcoholic and incident occurred while he was heavily intoxicated and attempted to facilitate the purchase of a gram of cocaine by an undercover policeman  
grievor remorseful and had stopped drinking*

...while not diminishing the seriousness of a conviction for trafficking in cocaine, we have concluded that ... the grievor's criminal conviction is not of such a nature as to overwhelm the personal mitigating circumstances of the grievor in the employment contract.

**(a) (iii) use**

**- outside working hours**

**(b) legal framework**

**Individual Rights**

- private life

- privacy

(r) searches

(r) testing

*Privacy Law*

*Charter of Rights*

*Human Rights legislation*

Board of School Trustees of School District No. 23 (Central Okanagan) (1994), 44 L.A.C. (4th) 430 (Laing, Winthrope, Dingman)

*school board painter with previous drug possession and impaired driving convictions  
grievor had given up drugs, was a moderate drinker and was in a stable relationship  
employee reinstated on written undertaking to abstain at all times from alcohol and illicit drugs, consent to undergo any medical examinations required by the employer, forego the grievance procedure if his undertaking was breached and regularly attend local AA meetings*

while it is imperative that employees maintain the highest standards of personal conduct and behaviour so as to protect the rights and interests of the students from any improprieties and to ensure that they are not influenced by unacceptable behaviour of employees, it is also important to look at the interests of the employee;

while the criminal activities were serious they were the private affairs of the employee and distinct from any kind of work related activity

BC Housing Management Commission, July 15, 1993 (Thompson)

*resident caretaker found intoxicated on duty*

*instructed to enrol in residential treatment and any failure to follow programme would result in dismissal*

*while in treatment, grievor found intoxicated off duty and was dismissed  
reinstated*

the fact that employees live on site does not eliminate the barrier between work and their private lives;  
no evidence that work performance affected

### **Public Rights**

- safety (r) other employees

(r) customers

(r) public

*Health & Safety Regulations*

Gray Line of Victoria, January 31, 1996 (Ready)

*coach operator involved in accident and licence suspended for 24 hours because RCMP suspected alcohol impairment  
employer had zero tolerance policy on operating coach while under the influence*

... a job which carries with it the grave responsibilities of a public carrier driver, necessitates that an employee have the confidence of his Employer and the public.

Ontario Hydro, [1997] O.L.R.D. No. 2888 (Ont. L.R.B., MacDowell)

*employee at nuclear generating station found in possession of, and using, marijuana at work  
clear and consistently enforced zero tolerance policy  
grievor's claim of addiction rejected; dismissal upheld*

... the company's 'zero tolerance policy' is a reasonable one, so that a construction worker at a nuclear power site can expect to be discharged if s/he has drugs or alcohol in his/her possession, or consumes those substances at work.

### **Business Rights**

- productivity

- quality

- reputation

**- during working hours**

Re-Con Building Products Inc. (1997), 62 L.A.C. (4th) 20 (Taylor)

*two employees observed passing lit object in car in parking lot  
smell of marijuana, signs of impairment  
grievors' denials and explanations contradictory*

I am persuaded that the use of drugs at this worksite raises a serious safety hazard. The Employer has a strict policy against the use of drugs and neither Grievor contradicted the evidence of the Employer that it was discussed at crew meetings on four occasions in 1995 and 1996.

Cominco Ltd. (1992) 32 L.A.C. (4th) 206 (Williams)

*two long term employees smoking marijuana on company property at lunchtime  
no evidence of impairment  
immediate confession and cooperation  
dismissal replaced with three month suspension subject to drug rehabilitation programme*

Army, Navy and Airforce Veterans of Canada Unit #45 (October 19, 1994; Albertini)

*employee of club had drink while working  
five day suspension reduced to three days*

ICBC, May 7, 1991 (Ladner)

*convicted of impaired driving in company vehicle  
third conviction for impaired driving  
dismissal upheld  
ICBC's interest in fighting drinking and driving cited as a consideration*

Pacific Elevators Ltd. (1991), 22 L.A.C. (4th) 346 (Ready)

*use of cocaine at work  
poor work record  
safety concern  
not seriously taking part in rehabilitation programme nor doing everything in his power to cure  
the addiction  
dismissal upheld*

... where employees work with moving equipment and in ladderways and runways, some of which stand high above the floor, the use of alcohol or drugs cannot be tolerated. Working in this type of environment requires alertness and good judgment at all times.

## **(c) Proposed Response**

### **(i) policy**

- general in scope
- simple in language
- principled in approach
- reasonable in application
- clear in consequences

Considerations for a policy:

- any reason for an employee to have alcohol or a non-prescribed drug at work at any time?
- zero tolerance for use?
- consider happy hours and the bar in the executive suite
- remember consequences of:



(r) policy by default

(r) policy by practice

Jacobsen v. Nike Canada Ltd. (1996), 19 BCLR (3d) 63 (S.C.)

*employees required to drive to work site so they could transport certain items for employer given beer by supervisor towards end of long shift  
Jacobsen had 8 bottles of beer and was considered "drunk" at time of finishing work  
employees going to bar after work and becoming intoxicated  
one of employees seriously injured in car accident after leaving the bar  
HELD: employer 75% liable for injuries*

It is hard to imagine a more obvious risk than introducing drinking and driving into the workplace.

*Collective Agreement  
Employment Contracts*

Saanich General Hospital, October 1, 1993 (Munroe)

*hospital housekeeping employee dismissed for unauthorized use of drugs on duty contrary to policy  
dismissal upheld*

part of arbitrator's reasoning was the specific mention in the policy of unauthorized drug use on duty and the fact that the grievor had been told of the policy and of consequences on two occasions

Canadian Telephones and Supplies Ltd., December 8, 1994 (Germaine, Harris, Moore)

*serious accident while employees using company vehicle for personal purposes and after consuming alcohol  
one-20 day suspension upheld; one-30 day suspension reduced to 20 days  
evidence established that there was a company vehicle policy but the grievors were not aware of its physical existence  
some discrepancies in employer's administration of the policy*

but the grievors admitted breach and the policy had been adequately communicated and enforced in relation to personal use

Government of B.C., July 23, 1993 (Dilon)

*employees dismissed for smoking marijuana on duty  
same offence committed in previous year  
reinstated subject to completing drug rehabilitation programme*

part of the arbitrator's reasoning was based on the ambiguous wording in the employer's standards of conduct which discussed use of marijuana while on duty

## **Proposed Response (cont'd)**

### **(ii) individual cases**

- identify and eliminate immediate risks
- removal from machinery, equipment, production
- may affect investigation, discipline
- investigate
- gather third party and objective evidence quickly and quietly
- determine scope of problem
  - (r) others involved/affected?
  - (r) symptom of larger problem?
- confront
- discipline
- proportionate response
  - (r) make the punishment fit the crime
- consider implications
  - (r) is this a symptom of a larger problem?
  - (r) do other practices, policies have to change?
- EAP referral

### 3. Chronic Abuse

*Apparent abuse of alcohol or illicit drugs indicated by negative effects on work.*

#### **(a) identify the symptoms**

- lateness
- absenteeism
- poor productivity
- poor relations with co-workers
- deterioration in performance or attitude
- physical and emotional

The concern for an employee's privacy often leads to the employer, fellow workers and the union ignoring the real problem. I suggest this is neither wise nor appropriate and that the privacy concerns are misplaced. The cases to follow will explain why.

#### **(b) legal framework**

##### **Individual Rights**

- addiction as disability

*Westar Timber Ltd., July 26, 1991 (Hickling)*

*grievor reported to work under the influence  
extensive disciplinary record for tardiness, some for reporting for work under the influence of  
alcohol and some for poor performance, perhaps related to alcoholism  
only punitive measures taken from 1983 to 1990 were four verbal warnings, a couple of  
written warnings and a one day suspension  
a number of attempts at corrective action and several counselling sessions that resulted in  
notes to personnel file  
grievor disputed Employer's right to raise issue of alcoholism  
reinstated without backpay on condition of completing course of treatment*

Held:

- any party to an arbitration can raise the question of whether the grievor is an alcoholic
- culpable/non-culpable distinction neither appropriate nor helpful
- the employer should provide "a progressive escalating response", or "constructive confrontation by degrees" leading to a "crisis precipitation" i.e. the employee knows his job is on the line
- treat alcoholism as a chronic disease of which denial is the hallmark
- focus on rehabilitation potential
- consider post-dismissal events as relevant to rehabilitation potential

Westview Towing Ltd., July 30, 1991 (Kelleher)

*excessive absenteeism  
employer suspected alcoholism  
grievor would not concede he had an alcohol problem  
dismissal replaced with two week suspension with employee to be put on medical leave and complete a treatment programme before returning to work*

Avenor Inc., July 14, 1994 (Glass)

*repeated warnings, suspension and final warning letter for sleeping on the job  
found sleeping in the middle of a day shift and dismissed  
drug and alcohol abuse problem unknown to the employer until after grievance proceedings commenced  
grievor had not availed himself of EAP nor did he attend a treatment centre while on nine month disability leave  
entered treatment programme three weeks before arbitration but no evidence of progress and prospects  
dismissal upheld*

even after allowing for the abuse problem, this was a serious case of serious disregard for his senior employment responsibilities

Thomson Canada Ltd. (1997), 64 L.A.C. (4th) 271 (McPhillips)

*alcoholic employee with 22 years service  
repeated attempts to help by management and union over two year period, including residential treatment  
continued poor attendance*

In this case it must be concluded that the Employer's behaviour was reasonable in the circumstances.

The one possible criticism that could be made of the Employer was that Mr. Byer was not given written documentation concerning the extent of his peril. However, on the facts of this case, it is clear that Mr. Byer knew his job was in jeopardy. ... even the dismissal itself does not appear to have brought home the problem to Mr. Byer.

Crestbrook Forest Industries Ltd., July 26, 1996 (Chertkow)

*alcoholic employee with 26 years service  
termination upheld after two failed attempts at rehabilitation under last chance agreement*

I find the company here treated Mr. Pinchak as being genuinely ill, it offered more than a reasonable time for him to confront and tackle his dependency on alcohol and it took all reasonable steps in the circumstances to assist him in that endeavour. Regretfully, it was to no avail.

*Human Rights Law*

- privacy (r) searches

(r) testing

Williams v. Elty Publications Ltd. (1992), 20 C.H.R.R. D/52 (B.C. Council of Human Rights)

*a recovered alcoholic has a disability within the meaning of the Human Rights Act (British Columbia)*

Canadian Human Rights Act, s. 25

*"disability" includes previous or existing dependence on alcohol or a drug*

**Public Rights**

- safety

**Business Rights**

- benefit of the employment contract
- productivity
- quality
  - balancing these interests is the challenge
  - perception that Human Rights law leaves the employer defenceless
  - discipline as discrimination
  - systemic or adverse effect discrimination
  - *bona fide* occupational requirement
  - duty to accommodate

Corporation of the Town of Espanola (1997), 61 L.A.C. (4th) 149 (Marcotte, Carriere-Uren, Piquette)

*alcoholic employee on last chance agreement failed to meet its conditions  
duty to accommodate under human rights law considered*

The employer did not fail "to meet its obligation to accommodate the grievor by way of his handicap. We find, also, that based on the legitimate and real health and safety requirements attending the grievor's work circumstance, that to reinstate the grievor to the public works department would lead to undue hardship."

Samuel, Son & Co. (1995) 50 L.A.C. (4th) 321 (Clement)

*problems with alcohol spanned 14 years and 12 incidents of problems  
employer tried to help employee deal with problem*

held that the employer's treatment met its duty to accommodate the grievor's illness or handicap

Canadian Airlines International Ltd. (1997), 39 BCLR (3d) 131 (C.A.); leave to appeal to Supreme Court of Canada denied March 19, 1998.

*pilot with 20 years service addicted to marijuana and alcohol for 15 years regularly smoked marijuana and transported it on aircraft knowing it to be contrary to law and company regulations and knowing of risks of impoundment of aircraft arbitrator ordered reinstated on condition of admission to Airline Pilot Health and Rehabilitation Program*

HELD on appeal:

Knowing, repeated and protracted breaches by the grievor of clear and unequivocal rules designed to protect the safety of the company's passengers and property, is manifestly conduct which would destroy an employer's trust and confidence in the employee. To disregard the effects of that conduct on the employer, and its interests, and to focus exclusively on the grievor's addiction and his prospects for rehabilitation, is so unreasonable as in my view to meet the very high standard of review set by caselaw [i.e. that the decision was patently unreasonable or without a rational foundation].

### **(c) Proposed Response to Chronic Abuse**

(i) always better to treat the problem, not the symptoms

(ii) do what is best for the employee

(iii) offer access to and/or time for professional help

(iv) Employee Assistance Programme

- save wasted disciplinary effort

## **CASE STUDIES**

### **1. The Single Incident Case**

Consider these facts:

- two employees observed leaving the workplace, going to the back of the building and trying to conceal themselves under the loading dock
- they are observed lighting something and passing it back and forth
- the employees work in an inherently hazardous workplace
- the smell of marijuana is detected
- the employees know that any workplace drug use is prohibited by policy
- the employees are suspended indefinitely pending further disposition and subsequently terminated

*What will the employer have to prove to justify any discipline?*

To justify any discipline, the employer will have to establish:

- the employees were actually smoking something
- that "something" was an illegal drug

- the employees knew it was not allowed

*What will the employer have to prove to justify termination?*

To justify the eventual termination, the employer will also have to establish:

- a clear policy calling for termination
- the policy was known to the employees
- the policy was consistently enforced

The employer can anticipate being challenged on several questions:

- did anyone else see the incident
- how good was the employer's view
- were they actually smoking something
- what were they smoking
- how does the employer know the smell of marijuana
- how can the employer distinguish the smell of marijuana from other substances

Each incident will present its own evidentiary challenges. Before an employer can confidently impose discipline it must be satisfied that there is no reasonable explanation to contradict the allegation. That will require careful consideration of the elements of the offence and all possible explanations. It will also require the comprehensive collection of evidence to prove the elements and eliminate the possibility of an innocent explanation.

As explained by *Brown and Beatty* with regards to cases of suspected impairment at work:

... if the arbitrator is uncertain as to which version of facts to accept, the indecision should be resolved in the grievor's favour. For example, where, after all the evidence had been adduced, the arbitrator was unable to attribute the cause of impairment to alcohol rather than to an illness or medication, the discipline imposed was not sustained.

The quality of the investigation by the employer usually has a direct impact on its success at arbitration. As one arbitrator noted, after commenting adversely on the employer's intention of video taping some suspicious activities:

... it would be helpful for the company to consider appropriate training for management personnel on how to deal with situations as one finds here which, no doubt, will arise again in the future. (*CHEP Canada Inc.*, December 10, 1997 (Chertkow))

### **A Post Script to the First Case Study**

There are other significant issues typically faced in such an arbitration. The example facts used above for our first case study are based on the *CHEP Canada Inc.* case.

Prior to observing the grievor and his companion apparently smoking something by the loading dock, the employer had suspected drug use at the workplace and had done surveillance on the night in question. The Regional Operations Manager and the Depot Supervisor hid themselves

in some bushes to observe the rail dock door. They also had a still camera and video camera but could not use them because of darkness.

Several issues arose in the CHEP hearing:

### *Credibility*

The grievor and his companion contradicted the evidence of the employer's witnesses and to some extent contradicted one another. The arbitrator, as most arbitrators in British Columbia do, quoted *Faryna v. Chorny* (1952), 2 D.L.R. 354 (B.C.C.A.):

... the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

### *Onus and Burden of Proof*

The onus is on the employer to prove that the employee smoked marijuana on the job. A collective agreement arbitration is not a criminal proceeding, so the standard to meet is the balance of probabilities (*is it more probable than not that the grievor was smoking marijuana?*) not proof beyond a reasonable doubt. However:

... where the allegation contains elements of criminal misconduct or moral turpitude, the trier of fact must scrutinize the evidence with greater care than would otherwise be required for lesser employment offences.

In other cases, it has been stated that evidence in such cases must be "clear, cogent and convincing", but the test remains the balance of probabilities.

### *Circumstantial Evidence*

In this as in many cases, the employer did not have the "smoking gun" with clear proof of the offence. Instead, there was a variety of facts making up a "circumstantial" case suggesting the conclusion that the grievor had smoked marijuana at work. In such a case, the arbitrator has to consider all the evidence and be convinced:

... that it is consistent with the guilt of the grievor and that any other conclusion is too improbable to take into account.

### *Obligation to Provide an Explanation*

A circumstantial evidence case can be buttressed by arbitrators' insistence that an explanation from the employee may be called for:

... the obligation to give an explanation is an opportunity that is given to an employee; it is not a duty that he or she must carry out. However, should an adequate explanation not be given then a *prima facie* case may be made out against him. ... suspicious circumstances require an explanation.

## **2 The Multiple Incidents Cases**

Consider these two sets of facts:

- (a) • registered nurse repeatedly stole drugs from work
- to obtain drugs he under-dosed patients, took wastage and falsified records



- when confronted, he admitted everything, apologized, assured management he had not used any of the drugs while at work and stated his willingness to get treatment
- he began immediate treatment and abstained from drugs

(b) • liquor store employee of 12 years fired for repeated planned thefts from bottle return revenues

- six weeks after dismissal, employee apologized and claimed severe alcohol addiction required the extra money
- no previous indication of alcohol problem and no performance problem

### **How should the employer respond in these circumstances?**

#### **The Results**

In both cases, the employer argued that there was repeated, pre-meditated and carefully executed theft, i.e. it was culpable conduct, but the results were different:

(a) HELD: *I am convinced, on the evidence available to me, that what the grievor did to get the drugs was an integral part of his addiction and, while it is difficult to do, it must be treated by the Employer as a manifestation of the illness.*

Castlegar & District Hospital (1997), 64 L.A.C. (4th) 107 (Larson)

(b) HELD: *Mr. Brousseau attended at work regularly and on time. His appearance was neat and he never smelled of alcohol or showed any other signs of alcohol use. Further, Mr. Brousseau never indicated that his financial problems were linked to the use of alcohol.*

*There is no medical verification that Mr. Brousseau is an alcoholic. ... Even if Mr. Brousseau is an alcoholic, it is clear that alcoholism did not cause the thefts. ... Mr. Brousseau chose to deal with his financial problems by stealing from his employer ... .*

British Columbia Government, August 13, 1997 (Taylor)

The employer is in the difficult position of trying to run its business in a safe and efficient manner while having a responsibility to identify and sympathetically deal with substance abuse problems among employees. The employer cannot afford to be duped by false claims of chronic substance abuse problems but neither can it treat real problems as strictly disciplinary matters.

One answer to the potential dilemma is to consistently counsel employees about workplace issues in such a way that they are encouraged to openly deal with any addiction or to seek assistance from another source.

Even for the employee with a problem that has no apparent connection to addiction, there is no risk of a quiet word from the employer which directly or indirectly asks if there is some problem outside of work that is affecting his performance. Such inquiries are all the more effective if there is a well publicized and effective Employee Assistance Programme or if the employer can state its willingness to help as it can through referrals, leaves etc.

#### **CONCLUSION**

In summary, it is best for all parties to look at their individual responsibilities rather than concentrating on their individual rights or the obligations of others. There are both legal and practical reasons for that but the most effective response to the tragedy of substance abuse will come from a genuine commitment to help.