SCORECARD: Drugs in the Workplace Court Cases from 2019

What's At Stake

An employer's right to test and discipline employees for workplace drug and alcohol use or impairment comes down to a balancing of competing interests:

- The employer's interest, nay imperative, in maintaining a safe workplace; and
- The employees' right to privacy and, where the employee has a dependency or addiction, accommodations for disabilities.

Responsibility for making this crucial balance falls not to legislators but courts, arbitrators, human rights and other tribunals who have to draw the lines in particular cases. And while it's been going on for decades, the process of lawmaking via litigation assumed an added importance when Canada officially legalized marijuana in October 2018. Here's a look at the key cases from 2019.

EMPLOYER WINS (7 cases)

Federal: OK to Fire Engineer for Using Cocaine While Operating Train

What Happened: An engineer had to take a for-cause drug test after driving his train off the rails. The test came back positive for cocaine and the engineer was fired. The union contended the engineer had a drug dependency and that the railroad violated his right to accommodation by firing him.

Ruling: The federal arbitrator upheld the termination.

Analysis: The medical evidence of dependence, namely, a doctor's note referring to the engineer's 'problem,' was thin and suggested that he was actually a casual user. As a result, the case was a disciplinary rather than disability discrimination matter and operating a train while impaired was just cause to

terminate.

Teamsters Canada Rail Conference v Canadian Pacific Railway, 2019 CanLII 89682 (CA LA), September 22, 2019

Qu□bec: OK to Fire Employee for Drinking While on Safety Duty

What Happened: A warehouse worker was found drinking beer in his car while serving as shift safety supervisor. After initially insisting he had only half a beer, he finally 'fessed up and asked for leniency.

Ruling: The Qu□bec tribunal ruled that the employer was justified to fire him for safety reasons.

Analysis: He knew the rules banning drinking at work and deliberately violated them while on safety duty. 'He has irreparably broken the employer's trust and must bear the consequences,' reasoned the tribunal.

Pelletier and Costco Wholesale Canada Ltd. / Costco L□vis, 2019 QCTAT 4890 (CanLII), November 6, 2019

Ontario: OK to Fire Employee Caught Smoking Pot on the Job

What Happened: A waste management company fired a worker for smoking pot at work. Among the evidence was video from a colleague's cell phone showing the worker, who was already under suspicion due to the marijuana odor on his clothes and his history of toking on the job, smoking from a pipe on the second floor of the work facility. The worker denied the charge, insisting that the guy on the cell phone wasn't him and that he hadn't gotten high at work for a 'long time.'

Ruling: The Ontario Labour Relations Board found just cause to terminate.

Analysis: As even the worker admitted, toking in that safety-sensitive workplace was a clear violation of company policy and grounds for termination. And even without the cell phone video, there was plenty of evidence showing that he was smoking pot at work that day.

Miller Waste Systems Inc. v Christopher Charlebois, 2019 CanLII 29752 (ON LRB), April 2, 2019

Ontario: OK to Fire Worker for Breaking Promise to Submit to Random Drug Testing

What Happened: As part of a return to work agreement, a personal support worker (PSW) agreed to submit to off-site random drug testing. But when her supervisor asked her to take a test, she refused. As a result, she was fired.

Ruling: The Ontario arbitrator dismissed the union's wrongful termination grievance.

Analysis: While acknowledging that the refusal violated the agreement, the PSW

blamed it on humiliation and the tough personal times she was experiencing with her mother. But the agreement provided for this possibility and specifically said that the PSW 'cannot use childcare obligations or any other reason as an excuse' to not undergo testing.

Regional Municipality of Peel and Community Workers The Sheridan Villa v Canadian Union of Public Employees, Local 966, 2019 CanLII 91782 (ON LA), September 26, 2019

Alberta: OK to Fire Medical Cannabis User for Refusing Medical Assessment

What Happened: Just as he was about to undergo random testing, a cement operator admitted to using medical marijuana. After he tested positive for THC, the employer referred him for medical assessment and looked for non-safety-sensitive jobs he could do. But the operator made a stink and didn't show up for the assessment. As a result, he was fired.

Ruling: The Alberta Human Rights Commission dismissed the operator's disability discrimination complaint.

Analysis: The operator's deliberate failure to cooperate torpedoed the employer's efforts to accommodate the operator's medical cannabis use.

Bourassa v Trican Well Service Ltd., 2019 AHRC 13 (CanLII), May 2, 2019

Federal: OK to Fire Driver for Concealing Medical Marijuana Use

What Happened: A bus driver who fell asleep at the wheel was fired for not disclosing his sleep problems and the fact he smoked pot to treat them on his pre-employment medical questionnaire. While not denying the allegation, the union grieved claiming the termination letter was too vague as to the reasons for firing.

Ruling: The federal arbitrator upheld the firing.

Analysis: The termination letter was fine. And even if it was defective, the driver's concealment of his sleep and drug issues was grounds for finding that he was hired under false pretenses and that his employment contract was null and void.

Outaouais Transportation Corporation (STO) c United Transportation Union (Unit 591), 2019 CanLII 49260 (CA SA), May 31, 2019

Newfoundland: OK to Deny Medical Marijuana User Safety-Sensitive Job

What Happened: After one successful stint, a veteran and reliable construction worker was rehired to work on another project provided that he pass a drug test. Before taking the test, he revealed that he legally vaped about 1.5 grams of medical marijuana containing up to 22% THC each night after work to manage pain

related to Crohn's disease. So, the employer revoked the offer in the interest of safety. The union claimed discrimination.

Ruling: The Newfoundland but the arbitrator nixed the grievance.

Analysis: The worker was entitled to accommodations but letting him do a safety-sensitive job would be undue hardship. Although he vaped only after work hours, THC remains in the system at potentially impairing levels for up to 24 hours. Offering him a non-safety-sensitive position would be a reasonable accommodation but no such jobs were available.

IBEW, Local 1620 v. Lower Churchill Transmission Construction Employers' Association Inc., 2019 NLSC 48 (CanLII), Feb. 22, 2019

EMPLOYER LOSES (10 cases)

Saskatchewan: Not Enough Evidence to Prove Nurse Stole Drugs from Patient

What Happened: A health agency disciplined a veteran nurse for stealing a bottle of morphine tablets from the home of a patient she was treating. The nurse denied the charge.

Ruling: There were no eyewitnesses, only circumstantial evidence showing the nurse committed the theft. What was clear is that the nurse had a 20-year discipline-free service record and so much to lose if she got caught. And since the employer had the burden of proof, the close case went in the nurse's favour.

Saskatchewan Health Authority v CUPE, 2019 CanLII 2192 (SK LA), Jan. 3, 2019

Ontario: Firing Addict Nurse for Stealing Drugs May Be Discrimination'Case 1

What Happened: A nurse admitted stealing drugs from the hospital for her own use but blamed it on her addiction. The arbitrator didn't buy it and found that her actions were 'voluntary.'

Ruling: The Ontario appeals court reversed the arbitrator's ruling as unreasonable.

Analysis: 'Voluntary' for purposes of committing a criminal act is different from voluntary for purposes of determining if there's a causal connection between behaviour and an addiction disability. Because the arbitrator's decision didn't address this issue, the case had to go back down for a new trial.

Ontario Nurses' Association v. Royal Victoria Regional Health Centre, 2019 ONSC 1268 (CanLII), June 10, 2019

Ontario: Firing Addict Nurse for Stealing Drugs May Be Discrimination'Case 2

What Happened: A hospital fired a registered nurse with 28 years of service for

stealing narcotics. The arbitrator agreed that the nurse had a disability, namely drug addiction, but still upheld the termination.

Ruling: The Ontario appeals court found the arbitrator's ruling unreasonable, ordered a new trial and awarded the nurse $8,000 in legal costs.

Analysis: Having found that she was addicted and that her addiction was a contributing factor in stealing the drugs, the arbitrator should have recognized that the nurse had a valid legal claim and given her a chance to prove it at trial.

Ontario Nurses' Association v. Cambridge Memorial Hospital, 2019 ONSC 3951 (CanLII), July 17, 2019

Northwest Territories: Firing for Alcohol without Asking about Dependency = Discrimination

What Happened: A social welfare worker in a distant, isolated rural community where alcohol was banned got fired after the RCMP confiscated a package addressed to her containing beer, wine and hard liquor. The union claimed discrimination because the employer didn't first ask the worker if she had an alcohol dependency requiring accommodation.

Ruling: The arbitrator found the employer liable for failure to accommodate and upheld the grievance.

Analysis: To activate the accommodations process, employees are supposed to come forward and seek help for their dependencies. The problem is that employees often don't realize they have dependencies. And given previous indications, the employer should have at least asked the employee if she had alcohol issues before deciding to fire her for smuggling in booze.

Union of Northern Workers v Govt. of the Northwest Territories, 2019 CanLII 18391 (NT LA), Feb. 19, 2019

Alberta: Finding Drug Kit ' Grounds to Test Everyone at Plant

What Happened: All 4 employees on shift at the time a supervisor at a safety-sensitive paper mill found a drug paraphernalia kit in the men's washroom were required to undergo'and passed'for-cause drug testing. The union claimed that the testing was unjustified.

Ruling: The Alberta arbitrator agreed and awarded the employees damages for breach of privacy.

Analysis: Just being at the plant when the kit was found wasn't sufficient evidence to trigger testing under the policy. There had to be at least circumstantial evidence linking the kit to the particular *individuals* tested.

Weyerhaeuser Canada v Unifor Local 447, 2019 CanLII 116919 (AB GAA)

British Columbia: Maid Gets to Keep Her Job Despite Violating Last Chance Alcohol Agreement

What Happened: A ritzy hotel fired a housekeeper who got caught with alcohol in her lemonade bottle at work 10 months after signing a last chance agreement promising not to drink before shifts.

Ruling: The BC arbitrator reinstated the housekeeper with no loss of pay.

Analysis: The hotel had a legitimate interest in maintaining its reputation. It also recognized the and tried to accommodate the housekeeper's stress issues via the last chance agreement. For her part, the housekeeper was forthright and honest about her alcohol use. So, the arbitrator decided that termination was too harsh and reinstated her with no loss of pay, provided that she complied with new, stricter conditions in her last chance agreement.

Harrison Hot Springs Resort v Unite Here, Local 40, 2019 CanLII 28162 (BC LA), March 11, 2019

Ontario: Transit Worker Fired for Refusing Drug Test Wins Reinstatement

What Happened: A worker was found asleep in his car 30 minutes into his shift. Upon waking him up, the foreman notice that his eyes were bloodshot and that he was walking and talking unusually slowly. Suspecting drug/alcohol use, the foreman asked the worker to submit to testing under the company's fitness for duty (FFD) policy. The worker refused and was fired.

Ruling: The arbitrator found no just cause to terminate and reinstated the worker.

Analysis: As is often the case, it came to the witnesses. Most of them testified that the worker seemed 'very alert' during the shift and was normally sluggish. The arbitrator found the foreman who testified against the worker to be less credible and suggested that his 'negative history' with the worker might have factored into his demand that the worker undergo FFD testing.

Toronto Transit Commission v Amalgamated Transit Union, Local 113, 2019 CanLII 36521 (ON LA), April 24, 2019

Federal: Train Engineer with Alcohol Dependency Gets His Job Back

What Happened: An engineer tested positive for alcohol after his locomotive collided with a vehicle. While acknowledging that the engineer was impaired on the job, the union claimed that termination was too harsh and violated his right to accommodations.

Ruling: The federal arbitrator agreed and reinstated the engineer, provided that he promised to stay clean, submit to drug and alcohol testing and get clearance from the employer's doctor before returning'preferably to a non-safety-sensitive position.

Analysis: The union's evidence showed that the engineer had a disability'alcohol addiction'and that the disability factored into the decision to fire him.

Canadian Pacific Railway v Teamsters Canada Rail Conference, 2019 CanLII 8545 (CA LA), Feb. 15, 2019

Newfoundland: Union Wins Temporary Ban on Random Drug Testing Policy

What Happened: The union challenged a helicopter transport company's random drug testing of safety-sensitivity employees and asked the arbitrator to bar enforcement of the policy until the case was heard.

Ruling: The Newfoundland arbitrator granted the union's request.

Analysis: The damage to employees' privacy outweighed the safety interests, especially since the company could still test on a pre-employment and post-incident basis. And if the policy ultimately was found illegal, money damages wouldn't be enough to undo the privacy harms suffered by randomly tested employees.

Office and Professional Employees International Union v Cougar Helicopters, 2019 CanLII 66726 (NL LA), July 12, 2019

British Columbia: Firing Medical Marijuana User May Be Disability Discrimination

What Happened: A store fired an assistant manager soon after learning that she used medical marijuana for migraine headaches and anxiety. The assistant manager claimed the timing was no coincidence and sued for disability discrimination.

Ruling: The BC Human Rights Tribunal allowed the case to go to trial.

Analysis: At this stage, it was too early to rule out the possibility that the assistant manager had actual disabilities and that this factored into the decision to fire her. So, dismissing the claim without giving her a chance to prove the allegations would be premature and unfair.

McNish v. The Source and others, 2019 BCHRT 126, June 21, 2019