



CANNAMM

DRUG & ALCOHOL TESTING FOR THE WORKPLACE

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CLIENT UPDATE

Canadian Human Rights Tribunal

BETWEEN:

SALVATORE MILAZZO - Complainant

And

CANADIAN HUMAN RIGHTS COMMISSION

And

AUTOCAR CONNAISSEUR INC. - Respondent

And

MOTOR COACH CANADA - Interested Party

This client update is provided in part. Basically the Respondent was conducting random and pre-employment drug testing for its employees who work in Canada which was upheld by the Canadian Human Rights Tribunal. There was however remedies required and orders issued to the company as you will see. Companies with CannAmm's policies and programs would have passed this process as all our clients accommodate and operate under the philosophy of "Remove the substance and keep the individual".

Background

For several years, Salvatore Milazzo drove a bus for Autocar Connaisseur Inc. In August of 1999, Mr. Milazzo was ordered by his employer to undergo a drug test. The results came back positive for the presence of cannabis metabolites. As a result, Mr. Milazzo's employment with the company was terminated, in accordance with Autocar Connaisseur's 'zero tolerance' drug policy.

Mr. Milazzo alleges that in failing to accommodate his perceived drug dependence, and in terminating his employment, Autocar Connaisseur has contravened section 7 of the *Canadian Human Rights Act*. It is further alleged that Autocar Connaisseur's policy requiring that bus drivers undergo drug tests violates section 10 of the Act.

Mr. Milazzo was required to attend at a small clinic in downtown Montreal. He was asked for proof of his identity, and then told to go into a washroom, and provide a urine sample. The entire process took 10 to 15 minutes.

On August 24, Mr. Milazzo received a telephone call from a doctor associated with the clinic, who advised him that his urine had tested positive for the presence of cannabis metabolites. The doctor further advised Mr. Milazzo that the positive test results would be reported to AutocarConnaisseur.

On August 25, 1999, Mr. Milazzo reported to work as usual. After completing one airport run, Mr. Milazzo was told to go to the office, where he met with one of the dispatchers – an individual identified only as “Denis”. According to Mr. Milazzo, Denis told him that the company had been notified of Mr. Milazzo’s positive test results. Denis then advised Mr. Milazzo that he was suspended from work for two days, until Pierre Bougie could review the matter, and decide what to do with Mr. Milazzo.

It appears that Autocar Connaisseur had recently become unionized. Although Mr. Milazzo asserts that he was not a member of the union, he says that in the course of his discussion with Denis, Denis told Mr. Milazzo that he would try to get a union delegate to assist Mr. Milazzo, and that hopefully, Mr. Milazzo would be able to stay with the company.

Two days later, Mr. Milazzo met with Pierre Bougie a senior manager at Autocar Connaisseur. A couple of days later, Mr. Milazzo received his Record of Employment from AutocarConnaisseur, indicating that he had been dismissed.

THE LEGAL FRAMEWORK

Mr. Milazzo’s complaint is brought pursuant to sections 7 and 10 of the *Canadian Human Rights Act*. Section 7 makes it a discriminatory practice to refuse to employ, or to continue to employ, an individual, on a prohibited ground of discrimination. Section 10 makes it a discriminatory practice for an employer to establish or pursue a policy that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

Section 3 of the *Act* designates disability as a prohibited ground of discrimination. Section 25 of the *Act* makes it clear that the term ‘disability’ includes “previous or existing dependence on alcohol or a drug.”

Pursuant to section 15(1)(a) of the *Act*, it is not a discriminatory practice to treat an employee in a differential fashion, where the differential treatment is based upon a *bona fide* occupational requirement.

Conclusion Regarding Mr. Milazzo's Section 7 Complaint

This is not an action for wrongful dismissal, and it is not for this Tribunal to determine whether testing positive for the presence of a cannabis metabolite constitutes just cause for Mr. Milazzo's dismissal by Autocar Connaisseur.

In order to benefit from the protections afforded by the *Canadian Human Rights Act*, a complainant must demonstrate the involvement of one or more of the proscribed grounds listed in section 3 of the Act. Having failed to establish that he was either disabled, or was perceived by Autocar Connaisseur to be disabled, Mr. Milazzo has not established a *prima facie* case of discrimination, and accordingly, his section 7 complaint must therefore be dismissed.

Has Autocar Connaisseur Discharged its Burden?

Having found that Autocar Connaisseur's drug testing policy is *prima facie* discriminatory, [because there is no accommodation] the onus shifts to the respondent to establish that not having drug metabolites in one's system is a *bona fide* occupational requirement. There are three elements that must be established in order to demonstrate the existence of a *bona fide* occupational requirement. Each of these elements will be considered in turn.

Rational Connection

In order to prove the existence of a *bona fide* occupational requirement, Autocar Connaisseur must first establish that requiring that its bus drivers not have drug metabolites in their systems is rationally connected to the function that drivers perform. The focus at this stage is not on the validity of the standard in issue, but rather on the validity of its more general purpose.

We have previously identified the purpose of Autocar Connaisseur's drug testing policy as being the prevention of employee impairment. The Commission concedes, and we find that Autocar Connaisseur's goal of promoting road safety by preventing driver impairment is rationally connected to the business of providing bus transport.

Good Faith

The second element that must be demonstrated by Autocar Connaisseur is that it adopted its zero tolerance standard in relation to the presence of drug metabolites in good faith, in the belief that it is necessary for the fulfillment of a legitimate work-related purpose. If the standard was not thought to be reasonably necessary or was motivated by discriminatory considerations, then it cannot be justified.

Once again, the Commission concedes that Autocar Connaisseur has acted in good faith in the promulgation of its drug testing policy. The Tribunal notes that, like other

Canadian transport companies doing business in the United States, Autocar Connaisseur was placed in a very difficult position, as a result of the introduction of the American Department of Transport drug testing regulations. Transport companies were essentially left to fend for themselves, without any guidance or assistance from the Canadian government as to the appropriate method for satisfying American drug testing requirements within the Canadian legislative environment. It appears that Autocar Connaisseur did the best that it could, in difficult circumstances.

In all of the circumstances, the Tribunal is more than satisfied that the good faith element of the *Meiorin* test has been met.

Reasonable Necessity

Finally, the onus is on Autocar Connaisseur to establish that its refusal to tolerate employees having drug metabolites in their system while at work is reasonably necessary to accomplish the company's goal of promoting road safety, by preventing driver impairment. To show that the zero tolerance standard is reasonably necessary, it must be demonstrated that it is impossible for Autocar Connaisseur to accommodate disabled employees who test positive for drugs, without imposing undue hardship on the company.

Mr. Devlin described the duties associated with driving a motor coach, explaining that alertness, as well as an ability to 'multi-task' are essential. The inability on the part of Autocar Connaisseur management to closely supervise its workforce presents particular challenges for the company in monitoring employee performance.

Mr. Crowe described the precarious economic position of the Company. As Mr. Devlin explained, Autocar Connaisseur's ability to monitor its workforce was also limited by the financial constraints under which the company operated.

The Effects of Cannabis on the Brain

Dr. Baker and Dr. Chiasson each gave testimony with respect to the effects of cannabis consumption on the human brain, and once again were in substantial agreement on many points. The active ingredient in cannabis is Nine Delta tetrahydrocannabinol or 9.THC. The level of 9.THC in the cannabis available in Canada today is significantly higher than in the past, and the drug accordingly that much more potent.

Nine Delta tetrahydrocannabinol is released when cannabis is first ingested. The 9.THC takes effect immediately, with the acute phase of intoxication peaking ten to thirty minutes later. Cannabis users generally remain acutely intoxicated for a couple of hours, followed by a period of sub-acute intoxication. This sub-acute intoxication lasts for an additional 12-24 hours.

During the period of acute intoxication, the cannabis user experiences a sense of euphoria or 'high'. During this phase, cannabis affects the user's memory, cognition, perception

and motor activity. This is followed by a period of ‘coming down’, that can last an hour or so. During this period, the user’s concentration, memory and reflexes may be affected. The intoxicating effect of cannabis may be enhanced or multiplied, if cannabis is ingested along with another intoxicant such as alcohol.

According to Dr. Chiasson, for chronic cannabis users, the sub-acute or ‘hangover’ phase of cannabis intoxication is characterized by ongoing neuropsychological dysfunction that can impair the user’s ability to drive a motor vehicle. Chronic users of cannabis can require up to 28 days of abstinence or ‘washout’ before their neuropsychological tests results return to normal. Dr. Baker testified that studies have shown impairment of fine motor skills for up to 24 hours, post-consumption, although he indicated that there is some question as to the validity of these studies.

In some cases, the consumption of cannabis can have longer-term effects on the user’s ability to function. Chronic cannabis users can go through a period of withdrawal if they stop using the drug. Symptoms of withdrawal include irritability, restlessness, vivid disturbing dreams and poor concentration. These symptoms can persist for one to three weeks. During the withdrawal period, the user’s perception, cognitive functioning and motor skills could be sufficiently impaired that the individual should not operate a motor vehicle.

Flashbacks are a second potential long-term effect of chronic cannabis use. Dr. Chiasson testified that in some cases, chronic cannabis users can experience the symptoms of acute cannabis intoxication quite suddenly, without having actually ingested the drug. These recurrences or flashbacks typically occur when the user is tired or under stress.

Dr. Baker and Dr. Chiasson agree that individuals employed in safety sensitive positions that is, positions where an employee could put his own safety or the safety of others at risk –should not be performing tasks such as driving motor vehicles while their ability to drive is impaired by the use of cannabis.

According to Dr. Baker the preferable course is for employers to have clearly articulated policies, which are consistently applied. The workforce should be educated about substance abuse and the problems that it can cause. One goal of this training is to encourage employees to come forward if they observe a co-worker in trouble, rather than covering for the colleague, as is often the case. Supervisors should also be educated as to the warning signs of substance abuse disorders. Indicators that can often signal the presence of a substance abuse problem include things such as erratic employee attendance at work, behavioral issues and performance problems. This evidence certainly suggests that the use of drugs by drivers in the transportation industry is a real problem, with significant implications for public safety.

In situations where employees are going to be put into safety sensitive positions, Dr. Baker says that employers have a responsibility to have the individuals medically assessed in order to ensure that they are able to safely carry out their job. This evaluation should include a thorough biological, psychological, social and addiction evaluation,

looking for any conditions that could interfere with the person's ability to perform his job safely, including invisible disabilities such as diabetes, coronary artery disease and substance dependence. Drug testing may play a useful part in such an assessment.

Dr. Chiasson acknowledges that there are many other things that can impair employee performance, apart from the 5 drugs tested for in the NIDA 5 group. Drug testing is, however, one quick, reliable, cheap and easily administered tool that can effectively assist employers in identifying potential problems in employees in safety sensitive positions.

Dr. Chiasson explained the difficulty in identifying some substance dependent individuals, noting that he has employed four secretaries with drug problems. Despite his training in the field, in each case, he was unaware of the individual's situation.

Dr. Chiasson testified that he has assessed patients whose substance abuse problems were not obvious to him. In these cases, the diagnosis was ultimately made with the assistance of drug testing. For Dr. Chiasson, drug testing provides useful, objective information.

What a drug test does do is provide a snapshot, at a specific time, which will document whether a person has been in contact with an illegal, and potentially addictive psychoactive substance that has the potential to endanger safety. According to Dr. Chiasson, this signals to the employer that the test subject is at an increased risk of posing a danger to safety in the workplace.

The aspect of a study dealing with the prevalence of alcohol or drug use amongst drivers causing fatal motor vehicle accidents the authors of the study have concluded that the presence of cannabis metabolites in a driver's urine is associated with a 2.2 times greater risk of being involved in a fatal motor vehicle accident.

Conclusions Regarding the use of Drug Testing By Autocar Connaisseur

While the approach advocated by Dr. Baker is a good one, in principle, it is clear from the evidence of Dr. Chiasson that it will not necessarily catch all of those employees who are at risk of putting the lives of passengers in jeopardy. We are also not persuaded that, in the specific context in which Autocar Connaisseur found itself during the summer of 1999, that Dr. Baker's method would have been all that workable. We are satisfied that a positive test result is a 'red flag', to use Dr. Chiasson's term. The presence of cannabis metabolite in an employee's urine does assist in identifying drivers who are at an elevated risk of accident.

We have also found that the presence of a drug testing policy will serve to deter at least some employees from using alcohol or drugs in the workplace, in a manner that would put themselves or others in danger.

We find that Autocar Connaisseur's drug testing policy is reasonably necessary to accomplish the company's legitimate work-related goal of promoting road safety.

We find that Autocar Connaisseur has met the burden on it of establishing that subjecting its employees to pre-employment and random drug testing is a legitimate way to promote road safety.

Findings Regarding Liability and the Section 10 complaint

Under the *Meiorin* and *Grismer* decisions, the burden is on Autocar Connaisseur to establish that its non-accommodating standard is reasonably necessary to achieve its goal of promoting road safety.³⁷ While Autocar Connaisseur has justified its policy of subjecting its bus drivers to pre-employment and random drug tests, it has not satisfied the burden on it of demonstrating that it could not accommodate bus drivers who have tested positive for alcohol or drugs and are alcohol or drug dependent. Accordingly, Mr. Milazzo's section 10 complaint is sustained.

REMEDY

The Company cannot continue to do is to automatically withdraw an offer of employment or terminate the employment of drivers who test positive in employer-sponsored drug tests, where those employees or prospective employees can establish that they suffer from substance-related disabilities.

We therefore direct Autocar Connaisseur to immediately cease the discriminatory practice of failing to accommodate employees or prospective employees who test positive in company-sponsored drug tests, in cases where the individual can establish that he suffers from a substance-related disability.

If you would like a copy of the full decision please contact CannAmm at 800-440-0023.