

APRIL 2004

# clientbulletin

TRANSPORTATION LAW



## DRUG & ALCOHOL TESTING: ZERO TOLERANCE IS AGAINST THE LAW

*Carole McAfee Wallace*

A decision of the Canadian Human Rights Tribunal, released November 6, 2003 (the “Tribunal’s Decision”), partially resolves the dilemma facing transportation companies about what they can and cannot do with respect to drug and alcohol testing for their employees. While resolving one important issue, the Tribunal’s Decision leaves a number of important questions unresolved. Chief among the unresolved questions is whether a transportation company, which operates wholly within Canada, can require its employees to take pre-employment and random drug and alcohol tests.

Canadian bus and trucking companies who drive into the United States have always faced the dilemma of how to comply with the American drug and alcohol regulations without offending Canadian human rights law. American law requires that drivers operating vehicles in the United States be subject to pre-employment, random, post-accident and for-cause drug and alcohol testing. “For cause” means that where an operator has a reasonable suspicion that a driver is unfit for duty due to drug or alcohol use, it can require that the driver be tested.

The Canadian Department of Transport has left it to the individual commercial motor vehicle operators to determine for themselves how best to deal with the American legal requirements while still complying with Canadian human rights law.

The Canadian Human Rights Commission has developed a policy on drug and alcohol testing, dated June 2002 (“The Commission’s Policy”), which provides that the following types of testing are not acceptable:

- (a) Pre-employment drug testing
- (b) Pre-employment alcohol testing
- (c) Random drug testing
- (d) Random alcohol testing of employees in non-safety sensitive positions

Random alcohol testing of employees in safety sensitive positions is permitted as alcohol testing can indicate actual impairment of the ability to perform essential duties while drug testing, because of technical limitations, can only detect the presence of drugs and not if or when an employee may have been impaired by drug use.

The Tribunal’s Decision addresses three key questions which all transportation companies face:

1. Can a cross-border transportation company conduct pre-employment and random drug and alcohol testing?
2. Can a Canada-only transportation company conduct pre-employment and random drug and alcohol testing?
3. What are the transportation company’s obligations when these tests result in a positive reading?

The Tribunal’s Decision provides a clear answer to question numbers 1 and 3. The Tribunal’s Decision is less persuasive in its answer to question number 2. What follows is, firstly, a review of the Tribunal’s

Decision and its response to questions numbers 1 and 3 and, secondly, a discussion of what the Tribunal’s Decision means with respect to question number 2.

Summary of what the Tribunal’s Decision means for Canadian cross-border transportation companies.

1. Pre-employment and random drug and alcohol testing of those drivers who have a “reasonable potential” for driving into the United States does not offend the Canadian *Human Rights Act*.
2. Refusing to hire a driver who fails a pre-employment drug and alcohol test, and terminating a driver who fails the random drug and alcohol test, also known as “zero tolerance” may offend the Canadian *Human Rights Act*, if the driver suffers from a disability.
3. Drug or alcohol abuse, and possibly dependency, is a disability. While the onus is on the employee to prove that he or she suffers from a disability, the employer must be sensitive to the possibility that the employee may have a disability, and should be aware that denial plays a role in substance abuse disabilities.
4. If a driver who fails a drug or alcohol test has a disability, the employer cannot terminate the driver or refuse to hire the driver, and has a duty to accommodate the driver, to the point of undue hardship.
5. A drug and alcohol policy which makes no provisions for accommodating those with a disability will violate section 10 of the Canadian *Human Rights Act*.
6. What is necessary to discharge the employer’s duty to accommodate will depend on the facts of each case, and, in particular, the size and nature of the employer’s operations.

### Facts of the Case

This case arises from a complaint to the Tribunal by a bus driver who was terminated by his employer (the “Bus Company”) after he failed a random drug test.

The terminated bus driver alleged:

1. that his employer failed to accommodate his perceived drug dependence and, in terminating his employment, contravened section 7 of the *Canadian Human Rights Act* (the “Act”); and,
2. that his employer’s drug and alcohol policy requiring drivers to undergo drug testing violates section 10 of the Act.

The Bus Company’s business is largely dependent on tourism and seasonal, with the summer being its busiest period. The Bus Company provides intercity and interprovincial service and cross-border services into the United States.

The Bus Company in this case had a long-standing unwritten “zero tolerance” policy regarding drugs and alcohol. In the early 1990s, it introduced a written policy which provided for both pre-employment and random drug and alcohol testing (the “Bus Company’s Policy”). All drivers were subject to pre-employment drug and alcohol testing. If a prospective employee tested positive for either drugs or alcohol, the offer of employment would be withdrawn. Once employed, drivers were required to undergo a random drug and alcohol test, based on random lists of names generated periodically by a computer. Drivers could also be tested after an accident or where the company had concerns regarding possible drug or alcohol use. The Bus Company’s Policy stated that all positive test results would result in immediate termination of the driver’s employment.

In this case, the driver had been selected for a random drug test. He tested positive, was suspended and a few days later was terminated in accordance with the Bus Company’s Policy. Although not set out as part of its written policy, the Bus Company does accommodate employees with substance abuse problems, provided that the employee comes forward and voluntarily admits the problem. In this case, no attempt was made by the Bus Company to determine whether the driver suffered from substance abuse and no attempt was made to accommodate the driver.

Against these facts, the Tribunal considered whether the Bus Company’s standard of zero tolerance for drug

or alcohol in a driver’s system, contravenes section 7 or section 10 of the Act.

### Section 7

Section 7 of the Act provides that it is a discriminatory practice to directly or indirectly refuse to employ, or continue to employ, any individual on a prohibited ground of discrimination. Section 3(1) of the Act lists the prohibited grounds of discrimination, which includes “disability”, the ground relied upon by the driver in this complaint. The burden is on the complainant to prove that he suffers from a disability. In this case, the Tribunal found that the driver did not meet the burden of proving that he had a disability.

Notwithstanding that the driver could not prove that he had a disability, the Tribunal held that if the Bus Company perceived that he had a disability, terminating him would be contrary to the Act. The evidence shows that the driver was tested in August 1999 because the Bus Company had discovered that he had not been given a pre-employment test. There was nothing in the evidence to suggest that the Bus Company had any suspicions that the driver might be using drugs or was otherwise concerned with his performance. When the driver failed the drug test, the driver was terminated in accordance with the Bus Company’s Policy. No questions were asked and no investigation was made to determine whether the driver was dependent on drugs. The Tribunal concluded that the Bus Company did not perceive that the driver suffered from a drug-related disability.

Having failed to establish that he was disabled, or perceived to be disabled, the driver failed to establish a *prima facie* case of discrimination and the section 7 complaint was dismissed. By necessary implication, had the driver established that he had suffered from a disability or that the Bus Company perceived he had a disability, and that was the reason for his termination, the Tribunal would have found that there was a breach of section 7 of the Act.

### Section 10

Section 10 of the Act provides that it is a discriminatory practice for an employer to establish or pursue a policy

or practice that deprives or tends to deprive an individual, or group of individuals, of any employment opportunities, on a prohibited ground of discrimination.

The Tribunal found that the Bus Company's Policy *prima facie* discriminates against employees with a disability, i.e., drug or alcohol dependence. The onus then shifted to the Bus Company to establish that not having drugs or alcohol in a driver's system is a *bona fide* occupational requirement, based on three elements as follows:

1. **Rational Connection:** The Tribunal concluded that the Bus Company's goal of promoting road safety by preventing driver impairment is rationally connected to the business of providing bus transportation.
2. **Good Faith:** The Tribunal concluded that the Bus Company acted in good faith in the promulgation of its drug and alcohol policy, in that it believed the policy was necessary for the fulfillment of a legitimate work-related purpose.
3. **Reasonable Necessity:** The Tribunal concluded that the Bus Company's Policy is reasonably necessary to accomplish its legitimate work-related goal of promoting road safety. Because the Bus Company was a small operation, with seasonal workers, and had to be in a position to respond quickly to customer demand, the Tribunal found that all of the Bus Company's drivers had the "reasonable potential" for crossing the border and so it was reasonable to test all of its drivers, and it was not reasonable to have a Canadian only pool of drivers.

Once it had been determined that the Bus Company's Policy was based on a *bona fide* occupational requirement, the Bus Company must then show that it is impossible for it to accommodate drivers who test positive for drugs, and who suffer from a drug-related disability. Any accommodation must not impose undue hardship on the Bus Company.

The Tribunal made a distinction between the situation where an employee uses alcohol or drugs as a matter of

personal choice and voluntarily breaches the Bus Company's Policy, and one in which the individual suffers from a condition that qualifies as a disability. In the first situation, the Bus Company may well have the right to terminate that employee for a failed test. In the second situation, the Bus Company has the obligation to accommodate the employee to the point of undue hardship, unless it is impossible to do so.

The fact that an employee tests positive in a drug or alcohol test does not, in and of itself, mean that the employee is disabled. The onus is on the employee, or prospective employee, to demonstrate that he or she suffers from a disability and, as a result, is subject to protection under the Act. The Tribunal offered little guidance as to how an employer can determine whether an employee suffers from a disability and suggests that a professional assessment by a health practitioner may be necessary. The employer must also be sensitive to the role denial plays in substance abuse disorders.

The Tribunal found that the Bus Company's Policy, which made no provisions for any form of accommodation, offends section 10 of the Act. The Tribunal did not accept that the Bus Company could not accommodate alcohol or drug dependent employees who test positive in random testing, or prospective employees who test positive in pre-employment testing, especially in circumstances where the Bus Company does accommodate employees who voluntarily come forward and admit to a problem.

In determining what is necessary to discharge the duty to accommodate, the Tribunal acknowledged that it would not be appropriate to require the Bus Company to assign the driver to a Canadian only route, in light of the safety concerns created by the positive test. In this case, given the small size of the Bus Company, the Tribunal acknowledged that there may be no alternative non-driving positions available. However, the Tribunal held that, at a minimum, the Bus Company should offer the same accommodation to the driver who tests positive for drugs or alcohol as it does to those who come forward voluntarily and admit to a problem. The individuals should be given the opportunity to rehabilitate themselves and return to work when they are fit to do so. The Tribunal

acknowledged that the Bus Company would be justified in implementing appropriate follow-up monitoring to ensure the individual continues to abstain from drugs or alcohol. The Tribunal cautiously suggests that the Bus Company may be able to terminate the employment of those individuals who fail to rehabilitate themselves after being afforded a reasonable opportunity to do so.

The Tribunal also held that the Bus Company cannot withdraw an offer of employment if the individual fails the pre-employment test, without first addressing the issue of accommodation. The Tribunal acknowledged that there may be circumstances where it is not possible to accommodate the prospective driver when, for example, the individual is being hired to meet an immediate, short-term need and the time required to complete a program of rehabilitation would be longer than the employment. The Tribunal was clear that what will meet the duty to accommodate must be carefully assessed on a case-by-case basis.

### Questions Raised by the Tribunal's Decision

While the Tribunal's Decision provides the cross-border transportation industry with some comfort that drug and alcohol testing is, in certain circumstances, permitted, it also raises a number of complicated compliance issues, which are discussed below.

1. The Tribunal found that the Bus Company's Policy was reasonably necessary to accomplish its legitimate work-related goal of promoting road safety. The Tribunal also stated that putting a driver with an alcohol or drug disability on a Canadian-only route would not be appropriate, given the safety concerns created by a positive test. The necessary implication of these statements is that it would be reasonable for a Canada-only trucking company to conduct pre-employment and random drug and alcohol testing not because they have to comply with U.S. regulations, but because of their own safety concerns. In light of the Tribunal's statements, it would be reasonable for a Canada-only transportation company to conclude that pre-employment and random drug and alcohol testing

does not offend Human Rights law. However, the difficulty for Canada-only transportation companies is that throughout its Decision, the Tribunal continually references the operating environment of this Bus Company and, in particular, its cross-border business and obligations to comply with U.S. regulations. The effect of these references suggest that the Tribunal may not have intended to rule on Canada-only operations. As a result, any Canada-only transportation company who tests its drivers for drugs and alcohol should be aware that it may be met with a complaint that those tests violate the Act.

2. The Tribunal's Decision fails to answer the question of how an employer makes a determination that the employee has a disability. The Tribunal's suggestion of having the employee assessed by a health or addiction professional is a costly and time-consuming prospect.
3. The Tribunal's Decision is unclear as to what accommodation a company would have to make in order to fulfill its obligations under the Act. The Tribunal's comments about what this Bus Company must do to accommodate its drivers should not be taken as any indication of what is appropriate for other transportation companies. In particular, while the Tribunal held that assigning a driver to a non-driving position may not have been an accommodation that this Bus Company could make, it may very well be required in a different operating environment. Without clear guidance as to what is necessary to fulfill the duty to accommodate, a company is vulnerable to, again, being accused of non-compliance with Human Rights legislation if it fails to discharge this obligation appropriately.

For assistance in determining whether your company's drug and alcohol testing policy, as well as your company's accommodation policy, comply with Canadian Human Rights laws, please contact Carole McAfee Wallace.



*Carole McAfee Wallace practises civil litigation and focuses on transportation law. She represents some of Canada's largest bus and trucking companies on a wide variety of transportation issues including disciplinary matters and compliance with legislative requirements.*

*Carole also defends her clients in Provincial Offences Courts across the province and appears on their behalf before administrative tribunals. She works with her clients to set up effective management systems in order to achieve compliance with relevant legislation. Carole also carries on a general civil litigation practice which includes wrongful dismissal matters, contract disputes and corporate/commercial litigation. Carole can be reached at 416-947-5098 or by e-mail at [cmcafee@weirfoulds.com](mailto:cmcafee@weirfoulds.com).*