

# New Brunswick Human Rights Commission

## Guideline on Drug and Alcohol Testing in the Workplace

Adopted October 16, 2003\*

**For employers, employer's organisations, employment agencies, employees and job applicants:**

**Provisions under the New Brunswick *Human Rights Code* take precedence and are paramount over the provisions of every other law of the Legislature unless expressly provided otherwise.<sup>1</sup>**

The New Brunswick *Human Rights Code* (hereinafter the "*Code*") states that all persons are equal in dignity and human rights. The aim of the *Code* is to create a climate of tolerance, harmony and mutual respect for the dignity and worth of each individual so that each individual feels able to contribute to the community and feels a part of the community.

According to sections 11 and 12 of the *Code*, the role of the Commission is to enforce the *Code* and the principles underlying it. These principles, such as the right to dignity and the right to be treated equally, are fundamentals; therefore, they must be reinforced by Human Rights Agencies throughout the world. One method used by the Commission in order to enforce these principles is to produce guidelines that reflect its interpretation of the *Code*.

### ***Please Note***

This policy statement embodies the Commission's interpretation of the provisions of the *Code* relating to discrimination as set out in section 3. It is subject to decisions by Boards of Inquiry and the courts. The policy should be read in conjunction with those decisions and with the specific language of the *Code*. If there is any conflict between these guidelines and the *Code*, the *Code* prevails. Any questions regarding this policy should be directed to the staff at the New Brunswick Human Rights Commission. Additionally, this policy is not a substitute for legal advice and any employer considering a drug-and-alcohol-testing policy should seek legal guidance on this issue.

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\* Updated on January 31, 2005 by adding "social condition, political belief or activity" to the excerpts of the Human Rights Act, and by updating the contact information of the Commission.

<sup>1</sup> Newfoundland Association of Public Employees v. Newfoundland (Green Bay Health care Centre), [1996] 2 S.C.R. 3 para. 20  
Human rights legislation is considered quasi-constitutional. The effect of quasi-constitutional status is that this legislation supercedes all other legislation at the federal, provincial or municipal level. As well, the human rights legislation cannot be overridden by local by-laws, contracts, collective agreements or institutional policy.

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### 1.0 WHO SHOULD READ THESE GUIDELINES

These regulations are important to you if you are:

- a person in New Brunswick who owns or manages a business which employs personnel
- an employer in New Brunswick
- an employment agency
- an employer's organisation
- an employee within the province of New Brunswick
- a job applicant within the province of New Brunswick]
- Health professionals within the province of New Brunswick
- any agency of the provincial or municipal governments (inquiries concerning the federal government or within federal jurisdiction will be referred to the Canadian Human Rights Commission.)

### 2.0 INTRODUCTION

The Commission recognises the importance of maintaining a safe workplace. However the need to ensure safety must be balanced against the requirement that employees be treated equally. Workplace policies that have no demonstrable relationship to job safety

and performance have at times been found to be in violation of an employee's human rights.

One method implemented by employers in order to ensure a safe work environment is alcohol and drug testing. These tests are sometimes imposed before and during employment and they can affect a minority of workers or all the workers in an organization. Since more and more organisations are using this method, which is a threat to privacy and freedom from discrimination for the disabled, the Commission believes it is time to examine its conformity with human rights law. Furthermore, the Commission wants to highlight the fact that notwithstanding that this method is quite prevalent in North America, particularly in the United States, employers who use it in New Brunswick must respect the *Code*.<sup>2</sup>

This guideline seeks to clarify the rights and responsibilities of job applicants, employees and employers, with respect to employment-related drug and alcohol testing. The Guideline will also clarify the Commission's interpretation of the *Code* in its compliance function. Commission staff may therefore make reference to the guidelines in the exercise of their functions in application of the *Code*. Commission staff will also be guided by other more general principles of interpretation in the application of the *Code*.

The New Brunswick *Interpretation Act*<sup>3</sup> requires that all statutes of the Legislature be given such fair, large and liberal interpretation as best ensures the attainment of their objectives. Courts have emphasized that this is particularly true of Human Rights statutes and have recognized that these statutes have a quasi-constitutional nature and that their provisions should take precedence over those of every other statute in case of conflict.<sup>4</sup> The Commission interprets the *Code's* provisions in light of the *Canadian Charter of Human Rights and Freedoms* (hereinafter "*Charter*")<sup>5</sup> values and in particular in keeping with Court decisions under the equality provisions of section 15 of the *Charter*. The Commission is also guided by International human rights case law and the treaty obligations imposed on New Brunswick as a result of international human rights treaties ratified by Canada.

Given the absence of express privacy rights protection under the *Charter*, the Commission will give particular weight to international treaty law obligations, in particular to the privacy rights guaranteed under Article 17 of the *International Covenant on Civil and Political Rights*, and under Article 12 of the *Universal Declaration of Human Rights*, in the interpretation of *Human Rights Code* protections in relation to these matters. The values reflected in international human rights law are part of the legal context in which legislation is enacted and read. Therefore, interpretation that reflects these values must be preferred.<sup>6</sup>

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<sup>2</sup> The guideline of the Canadian Human Rights Commission stipulates that for cross-border trucking and busing, where employees would be subjected to United States law, alcohol and drug testing to comply with United States regulations is permitted as long as Canadian Human Rights law is respected. As well, such companies can claim a *bona fide occupational requirement* if it can be proven that it would be an undue hardship to accommodate the employee due to the nature of the business. However, interprovincial and international transportation comes under the auspices of federal jurisdiction - not a provincial jurisdiction. Thus, individuals with complaints in this regards should direct their complaints to the Canadian Human Rights Commission.

<sup>3</sup> *Interpretation Act*, R.S. NB, 1927, c. I-13.

<sup>4</sup> *Supra* note 1.

<sup>5</sup> *Canadian Charter of Human Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K. ), 1982, c. 11.

<sup>6</sup> See *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817. [footnote continued on next page]

### 3.0 COMPLAINT

While the Commission relies on educational programs to promote the *Code*, it also investigates complaints in accordance with section 17 of the *Code* that states that:

17. Any person claiming to be aggrieved because of an alleged violation of this Act may make a complaint in writing to the Commission in a form prescribed by the Commission.

If you are an employee and you think that you have been subjected to an unwarranted drug or alcohol test, dismissed, disciplined or treated negatively as a result of testing positive on a drug or alcohol test; or if you have been subjected to a drug or alcohol test because of a disability or perceived disability, you may wish to file a complaint.

There is no charge for filing a complaint and intake officers of the Commission are available to discuss potential complaints over the telephone or in person. Discussions with members of the staff are completely confidential. Once a decision is made to file a complaint with the Commission, the Commission will appoint an officer to share the complaint with the respondent and conduct an impartial investigation into the matter. The officer may also assist the parties in reaching a settlement. Should all settlement efforts fail the Commission may recommend a Board of Inquiry be appointed to hear the matter. If the Board finds that there has been a violation of the *Act* it has broad remedial powers to order damages and such other relief as is required to make the victim whole. For more detailed information on the complaint process please see the Commission's guideline.

### 4.0 A DEPENDENCE ON DRUGS OR ALCOHOL IS A DISABILITY

Discrimination on the basis of physical disability or mental disability, with respect to all aspects of employment be it the hiring process, employment agencies, or the operation of trade unions and employers' organisations, is prohibited under s.3 of the *Code*. Specifically, section 3(1), which applies to the employer in particular, provides that:

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[continuation of footnote 6] Article 12 of the *Universal Declaration of Human Rights* provides that:

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone, has the right to the protection of the law against such interference or attacks.

Furthermore, article 17 of the *International Covenant on Civil and Political Rights* provides that:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

3(1) No employer, employer's organisation or other person acting on the behalf of an employer shall

- (a) refuse to employ or continue to employ any person, or
- (b) discriminate against any person in respect of employment or any term or condition of employment,

because of race, colour, religion, national origin, ancestry, place of origin, age, physical disability, mental disability, marital status, sexual orientation, sex, social condition, political belief or activity.

Section 2 defines "physical disability" as:

any degree of disability, infirmity, malformation or disfigurement of a physical nature caused by bodily injury, illness or birth defects and, without limiting the generality of the foregoing, includes any disability resulting from any degree of paralysis or from diabetes mellitus, epilepsy, amputation, lack of physical co-ordination, blindness or visual impediment, muteness or speech impediment, or physical reliance on a guide dog or on a wheelchair, cane, crutch or other remedial device or appliance;

Section 2 defines "mental disability" as:

- (a) any condition of mental retardation or impairment,
- (b) any learning disability, or dysfunction in one or more of the mental processes involved in the comprehension or use of symbols or spoken language, or
- (c) any mental disorder;

A dependence on alcohol or drugs is a disability because it is an illness that creates physical disability, mental impairment or mental disorder and interferes with physical, psychological and social functioning<sup>7</sup>.

#### 4.1 PRIOR ALCOHOL OR DRUG DEPENDENCE - THE PERCEPTION OF A DISABILITY

If you have had a prior alcohol or drug dependency, you will be protected by the *Code* under the grounds of physical disability and mental disability. The Commission considers that any action towards an individual based on the belief that a prior dependency creates a disability is discrimination based on the perception of a disability. Such discrimination, therefore, is prohibited under the *Code* on the grounds of physical disability and mental disability. An employment policy that will likely discriminate in this way will be considered a violation of the *Code*<sup>8</sup>. It is worth noting that the perception of disability is not solely about prior

<sup>7</sup> *Entrop v. Imperial Oil* (2000) 50 O.R. 3d 18 (C.A.).

<sup>8</sup> The Ontario *Human Rights Code* specifically includes previous "handicaps" and the N.B. *Human Rights Act* does not. However, the Commission treats discrimination based on the perception of a disability as discrimination based on a disability. Therefore, the wording in *Entrop v. Imperial Oil*, (1996), 27 C.H.R.R., p.1 at D/212 applies in this guideline: [continued on next page]

dependence. For example, if individuals are perceived as having an addiction to drugs or alcohol, even though they do not and never have, the *Code* will protect them as well.<sup>9</sup> In this limited context, the *Code* may protect a person with no addiction who uses drugs or alcohol occasionally. This would not prevent an employer from dealing proactively with substance abuse problems at the workplace; for instance by requiring a drug or alcohol test for reasonable cause or, in some circumstances, following a workplace accident.

### Example

An employee revealed, during a conversation with co-workers at break-time, that she had been through a drug treatment program and was now fully recovered. A supervisor, overhearing this conversation, reported it to the administration. In response, the company announced that it was implementing random drug testing beginning in the department of the employee in question even though it was not a safety sensitive area - and the employee who recovered from drug treatment would be the first to be tested.

Such actions may constitute grounds for a valid complaint under the New Brunswick *Human Rights Act*.

## 5.0 THE EMPLOYMENT APPLICATION

In the past, as an employer you may have screened out applicants with prior or existing drug or alcohol dependencies based on medical information gained through pre-employment medical examinations or questions. These methods of gathering information, which function as part of the application screening process, are now prohibited by s. 3(4) of the *Code*.

Your pre-employment evaluation should be limited to determining an individual's ability to perform the essential duties of a job. A positive pre-employment drug or alcohol test does not predict whether the individual will be impaired while on duty, and is therefore considered an unnecessary discriminatory practice.

Pre-employment drug or alcohol testing may take place after a conditional offer of employment in a safety sensitive position is made in limited circumstances, such as where the

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[continuation of footnote 8] The definition of 'handicap' under the *Code* includes persons who 'has had' a 'handicap'. This ensures that individuals who may have been drug users in the past, but who no longer suffer from an on-going disability, are included within the protection of the *Code*. The language of the *Code* also ensures that complaints that allege discrimination because of past or present drug abuse problems are not required to establish that their condition actually creates a mental or physical disability. To the extent that an employer perceives that the drug use causes a disability and then acts on the basis of this perception to discriminate against employees, this also falls within the ambit of the legislative protection.

<sup>9</sup> The Commission, in this respect, differs from the arbitral jurisprudence of *C.N.R. v. C.A.W. - Canada* (2000), 95 L.A.C. (4<sup>th</sup>) 341 (M.G. Picher), and *J.D. Irving Ltd. v. C.E.P. Local 104 and 1309* (2002) (Picher) regarding the stipulation that would permit an employer to require employees to pass a Substance Abuse Professional Assessment (hereafter SAP Assessment), or any other similar tests, in order for the duty to accommodate to be triggered, as the existence of a drug or alcohol dependency would have to be first proven. The Commission prefers to follow the line of jurisprudence deriving from *Entrop v. Imperial Oil*, [2000] O.J. No. 2689.

individual has disclosed an existing or past abuse problem or where a general medical exam provides reasonable cause to believe that an individual may become impaired on the job. A safety sensitive position is one in which incapacity due to drug or alcohol impairment could result in direct and significant risk of injury to the employee or to others or of damage to the environment.<sup>10</sup> The conditional offer of employment should be written, not verbal.<sup>11</sup> The circumstances under which such testing might be required should be made clear to the applicant. Keeping the selection process free from medical questions and testing ensures that an applicant with any type of disability is considered exclusively on her or his merits.

### **Example**

An applicant for a job that is classified as safety-sensitive disclosed that she had recently recovered from an alcohol abuse problem. The company informed her that, due to the safety-sensitive nature of the job, and the applicant's past alcohol abuse problem, there would be a mandatory alcohol test as a condition of employment - the applicant signed the conditional agreement.

In this situation, the Company has acted in accordance with New Brunswick human rights law.

## **6.0 THE PERSONAL INTERVIEW**

The *Code* prohibits oral or written questions that express preferences of the employer or require a job applicant to divulge information respecting any of the prohibited grounds listed in s. 3(3). As previously stated, drug and alcohol dependencies are protected within the grounds of physical disability and mental disability that are listed in s. 3(3). Notwithstanding this prohibition, mandatory disclosure of present dependency as well as past problems with drugs or alcohol within the last 6 years may be permissible for employees holding safety-sensitive positions.

### **Example**

An applicant for a position as a stockbroker (a non-safety sensitive position) is questioned by interviewers about whether she had any past problems with drug and alcohol dependency. Since this is a non-safety sensitive position, the employers would not be justified to inquire into this area and could be found to be in violation of the Human Rights Code.

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<sup>10</sup> In developing policies related to substance abuse as well as drug and alcohol testing in the workplace, the employer(s) should be careful to clearly define safety sensitive positions. The definition may vary from one employment setting to the next but should reference factors such as the work of the employee, the nature of the equipment that he or she operates, the nature of the material that he or she handles and the presence and role of supervisors.

<sup>11</sup> Canadian Civil Liberties Assn. v. Toronto Dominion Bank. [1994] C.H.R.D. No. 12, No. T.D.

## 7.0 TESTING POLICIES

In the event of a complaint concerning a drug or alcohol testing policy that intends to aid in the removal, demotion, etc. of individuals who use alcohol or drugs, the Commission will consider the policy to be, on the face of it, discriminatory.<sup>12</sup> The question the Commission will ask, in the event of a complaint concerning such a policy, is whether the policy is a *bona fide occupational qualification* (BFOQ). That is to say that the policy is genuinely connected to determining whether the job applicants or employees are able to meet the essential job requirements and that there is no reasonable alternative to the policy that is less discriminatory.<sup>13</sup> The most well known alternatives are: employee assistance programs, peer monitoring, supervisory reviews, health promotion programs, referral services, off-site counselling and functional performance testing.

### Example

The administrative staff of a resort hotel found out that some of its employees were suffering, to varying degrees, from drug addictions. In response, the employers implemented a Drug Prevention Program which involved contracting lecturers and addictions counsellors to run a compulsory weeklong workshop. The follow-up program consisted of group support meetings for addictions that were offered on a permanent basis to employees requesting the service. The company found that the addiction problems abated and employee morale and productivity improved significantly.

## 7.1 DRUG TESTING

The Court stated, in *Entrop*, that random drug testing of employees or pre-employment drug testing is a violation of human rights partly because it cannot assess actual impairment on the job, it can only detect past drug use. Drug tests should be given only where there is reasonable cause to suspect an impaired ability by the employee to satisfactorily and safely perform job duties or if an incident just happened, such as an accident that may have been a result of drug use. In addition, a drug test may be acceptable for an employee who divulged a dependency or for an employee who has reintegrated into the workplace following a rehabilitation program. In each case the drug testing must be part of a larger process of drug abuse evaluation and the employees must be notified that drug testing is a condition of employment.

### Example

An employee at a call-centre tested positive for marijuana under the company's random drug testing policy. While the employee had used marijuana several weeks

<sup>12</sup> *Entrop v. Imperial Oil*, *supra* note 7.

<sup>13</sup> *Imperial Oil Ltd. v. Communications, Energy, and Paperworkers Union of Canada, Local 614*, [1996] B.C.L.R.B.D. No. 257 (B.C. Labour Relations Board) at para. 5.; also see *Cdn Civil Liberties Assn. v. Toronto Dominion Bank*, *supra* note 11, and *Entrop v. Imperial Oil*, *supra* note 7.



ago, he had certainly never used any illicit drugs on a weekday or at the workplace. Since the company considered the results of the test as a reflection of the employee's ability on the job, he was terminated. In this example, the company violated New Brunswick human rights law as the testing did not adequately assess the employee's ability to perform his duties.

## 7.2 ALCOHOL TESTING

In *Entrop*, the Court held that employees in safety sensitive positions where supervision is limited or non-existent may be randomly tested for alcohol use, because a positive breathalyser test for alcohol shows actual impairment on the job. Alcohol testing may also be acceptable in situations where there is just cause to believe an employee is under the influence of alcohol at work or if an incident occurs, such as an accident that may have been a result of alcohol use, or when an employee returns to the workplace after a rehabilitation program. In each case employees must be notified that alcohol testing is a condition of employment and testing must be part of a broader process of alcohol abuse evaluation. Obviously, pre-employment alcohol testing and random alcohol testing of employees in non-safety sensitive positions are prohibited at all times.

### Example

A construction company employs a breathalyser for random alcohol tests on heavy equipment operators (a safety sensitive position). After an accident where a backhoe operator caused a breakage in the water-main, the supervisor, noticing the backhoe operator was red-faced and disoriented at the time, performed a breathalyser almost immediately following the accident. The backhoe operator's alcohol-blood levels were considerably above the employer's safety standard. The backhoe operator was subsequently suspended and he was offered payment to enter a local addiction treatment centre.

The company, in this situation, acted in accordance with human rights law as the breathalyser was used after a suspicious accident.

## 8.0 RENUNCIATION TO THE PROTECTION OF THE CODE

It is clear that no one can renounce the right to equality in an individual contract or a collective agreement<sup>14</sup>.

### Example

A real-estate company has a policy that during the year, each employee would be served with an agreement that required a signature if they wanted to continue work-

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<sup>14</sup> *Ontario (Human Rights Commission) v. Etobicoke (Borough)*, [1982] 1 S.C.R. 202.

ing at the real-estate company. The agreement set a deadline, after which, the employee could be terminated without proof of signature. The agreement gave the real-estate company the right to examine all medical files of employees, as well as the right to perform random drug and alcohol tests regardless of whether the position was safety sensitive or not. The agreement also provided that the employee waived any right to take action or to complain to Employment Standards or the Human Rights Commission as the result of any termination or disciplinary action flowing from a breach of agreement.

This agreement constitutes a violation of New Brunswick human rights law.

## 9 BONA FIDE OCCUPATIONAL QUALIFICATIONS (BFOQ'S)

Once the complainant has proven a *prima facie* case of discrimination the onus shifts to the respondent to raise a defence. To prove a *prima facie* case of discrimination the complainant must demonstrate that there is an existence of a factor such as random drug and alcohol testing, and that the effect results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination. For the purposes of this guideline, the grounds of discrimination would be physical and mental disability. Finally, membership in the protected group must be demonstrated. Basically, a *prima facie* case of discrimination is a case where on first appearance, but subject to further evidence, there is discrimination.

In some circumstances, the nature or degree of a person's disability may preclude that individual from performing the essential duties of a job. Section 3(7)(a) of the *Code* provides that a termination of employment or a refusal to employ a person because of a *bona fide occupational qualification* based on the nature of work or the circumstance of the place of work in relation to the physical disability or mental disability, as determined by the Commission, is allowable.

The standard for the proof of a BFOQ with respect to a drug and alcohol testing policy will be on the balance of probabilities. Human Rights Boards of Inquiry will be asked to consider the invasive nature of drug and alcohol testing and the serious impact that the testing may have on an individual's personal and informational privacy. Here again, we must highlight the difference between drug testing, which is a urine analysis and arguably a more egregious invasion of privacy, and alcohol testing, usually a breathalyser test, which is somewhat less intrusive.<sup>15</sup>

Empirical evidence will be required to show that the policy is necessary, that the methods used are reliable and that the drug or alcohol use discovered by the testing is linked to poor or dangerous job performance<sup>16</sup>.

<sup>15</sup> R. v. Dymnt, (1988) 89 N.R. 249 (S.C.C.)

<sup>16</sup> Cdn. Civil Liberties Assn. v. Toronto Dominion Bank, *supra* note 11.

In the event of a complaint, an employer will be obligated to prove that its testing provisions under its policy are necessary to determine incapability to perform the essential duties of the job to the satisfaction of the Commission. The employer's assessment must be fair and accurate.

In the event of a complaint, an employer who wishes to defend a drug or alcohol testing policy must meet the three-part test developed by the Supreme Court of Canada in *Meiorin*<sup>17</sup>:

- 1) The employer has adopted the testing policy for a purpose that is rationally connected to the performance of the job;
- 2) The employer has adopted the testing policy in an honest and good faith belief that it was necessary to that work-related purpose; and
- 3) The testing policy must be reasonably necessary to accomplish that work-related purpose. To show that the test is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the complainant without imposing undue hardship upon the employer.

The court in *Meiorin* outlined a number of important questions that may be asked in the course of the analysis to the three part tests outlined above including, whether there is a way to do the job that is less discriminatory while still accomplishing the employer's legitimate purpose. Please see the New Brunswick Human Rights Commission Guideline entitled *The Duty to Accommodate and BFOQ's/BFQ's* for more information on how the Commission determines whether a BFOQ exists as a defence in a particular case.

## 10 DUTY TO ACCOMMODATE

If an employer is able to show that a drug or alcohol testing policy is a BFOQ, then the employer will have further obligations to employees found to have drug or alcohol dependencies. The employer must attempt to accommodate an employee with a drug or alcohol dependency up to the point of undue hardship. This means that if accommodations can be made a) without unreasonable financial expense for the employer; b) without extreme interference with the operation of the business, such as would alter the nature of the business; and c) without creating a significant safety risk for the returning employee, other staff or clients, the employer will generally be required to accommodate. This may include taking steps in an effort to provide the employee with a chance to rehabilitate herself or himself and to return to work following a treatment program.<sup>18</sup> Further, the individual must be tested against a realistic standard that reflects his or her capacities and potential contributions. Therefore, accommodation may require individual assessment.<sup>19</sup>

<sup>17</sup> *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.*, (1999) 176 D.L.R. (4th) 1 (S.C.C.).

<sup>18</sup> *Handfield v. Board of School Trustees, School District #26 (North Thompson)*, unreported, January 25, 1995 (B.C. Human Rights Council).

<sup>19</sup> *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, (1999) 3 S.C.R. (S.C.C.).

The duty to accommodate extends to all facets of the employment process: hiring, employment testing, on-the-job training, working conditions, transfers, promotions, etc.

The Human Rights Board of Inquiry has very broad remedial powers. It can impose any reasonable steps deemed necessary for the employer to accommodate the complainant.

Here is a list of examples of accommodation for an employee with drug or alcohol dependency:

- (1) transfer employee from safety-sensitive position to an available non safety-sensitive position for which the employee is qualified or may be well trained;
- (2) offer rehabilitation programs and hire a temporary employee to replace an employee absent during the program if necessary;
- (3) adjust the application of employer policies with respect to job security.

### **Example**

An employee in Hazardous Waste Unit (a safety-sensitive and high stress position) was struggling with a drug addiction which became known to the employers. The employers supported her by allowing time off to participate in a treatment program. In the meantime they temporarily filled her position with the promise, that when she was ready, her job would be waiting for her. Initially, she returned to work in a low stress office position. However, following the advice of her physicians and the company's return to work coordinator, the employee requested to be returned back to her previous position. As promised, she was reinstated.

This is a good example of accommodation. The employers took reasonable steps to accommodate their employee's disability.

## **11 UNDUE HARDSHIP**

Undue hardship means there may be costs. The term implies "inconvenience, and some degree of disruption and expense." In order to be deemed undue, the hardship must outweigh the benefits of providing equal treatment to the worker.

It is the employer that bears the onus of proving that accommodation has been met or that it is impossible to accommodate the complainant due to undue hardship. Therefore, it is critical that the employer document its action in determining whether an employee can be accommodated.

The extent to which the employer is required to accommodate an employee with a drug or alcohol dependency depends on various factors, including:

- (a) costs of the required accommodation;
- (b) size of the operation;
- (c) economic conditions facing employer;
- (d) availability of other positions;
- (e) health and safety concerns,<sup>20</sup> and,
- (f) past efforts to accommodate.

### **Example**

A long-standing employee at a meat packing plant has an alcohol addiction problem. The employer had sent the employee to an addiction treatment program. However, the employee has a pattern of dependency, treatment, sobriety and then dependency again. In addition, the employee had never been found to be under the influence of alcohol at work. Following a three-week alcohol addiction program, the employee returned to work in a non-safety sensitive position - in the packaging division. Regrettably, he showed up drunk at work, broke into the meat cutting division, and an altercation with another employee arose. In the course of the altercation, the employee grabbed a knife and injured his co-worker, inflicting a deep-cut to his forearm. The shift foreman called security; the employee was restrained, calmed down and sent home.

The employee filed a human rights complaint which was dismissed by the Commission following investigation.

## **12 DUTY OF THE INDIVIDUAL WITH A DRUG OR ALCOHOL-RELATED DISABILITY**

A person with an alcohol or drug dependency who seeks accommodation from his/her employer has a responsibility to communicate her or his needs in sufficient detail and to cooperate in consultations and treatment to enable the employer to respond to its duty to accommodate.<sup>21</sup> If the employee refuses to acknowledge the problem and to seek counselling when it is required the employer may implement progressive discipline and performance management and, only if necessary, take further disciplinary steps. The employee's duty to communicate his or her needs does not interfere with the employer's obligation to treat him or her equally.

<sup>20</sup> Alberta Human Rights Commission v. Central Alberta Dairy Pool, [1990], 2 S.C.R. 489.

<sup>21</sup> Handfield v. Board of School Trustees, School District #26 (North Thompson), *supra* note 18.

Where the employer takes reasonable steps towards accommodation and further steps would result in undue hardship, the employee may also have to take accommodating steps to mitigate his or her loss.

### **Example**

A naval mechanic at a shipyard employed in a non-safety sensitive position had a marijuana addiction problem that had progressed to the point where he was consuming drugs every day - which led to a decline in the quality of his work. His supervisor had spoken to him previously about his concerns related to the decline in performance and about his suspicion that the employee's drug addiction was affecting the quality of his work. Eventually, the supervisor recommended a drug rehabilitation program and the employee agreed to enrol. The program assessment confirmed the drug addiction problem. However, after one week, the employee stopped attending the sessions, resumed his drug use, and was subsequently suspended at work for refusing to complete the program. The employee brought a human rights complaint that was settled in early mediation following his undertaking to resume his drug addiction counselling and submit to periodic drug testing as a condition of his return to work.

## **13 CONSIDERATIONS WHEN DEVELOPING ON-THE-JOB TESTING CRITERIA**

Employers should have regard to the following considerations when developing on-the-job testing criteria:

- 1) Qualified professionals must perform drug and alcohol testing and the results must be analysed in a competent laboratory.
- 2) All health assessment information should remain exclusively with the examining physician's files and away from the employee's personnel file.
- 3) Procedures should be instituted for the physician to review the test results with the employee concerned and the employee's access to the test results should not be withheld or unduly delayed.
- 4) Testing should not be used to reveal anything other than drug and/or alcohol use.
- 5) When a test is positive, there should be a second test to confirm the result before any action is taken.
- 6) If a drug test on a dark skinned person reveals the presence of THC, the active substance in cannabis, the employer must be very careful before taking any further measures. This is because dark skinned persons have more melanin in their skin and hair, which produces the same reaction to the test as THC.

## 14 DRUG TESTING IN THE HEALTHCARE SECTOR

The Commission recognizes that Healthcare workers comprise a significant group of employees in New Brunswick. In addition, Healthcare employees, employers and regulating bodies are unique in their public protection concerns and legal liabilities. This guideline takes into account the special circumstances that arise from access to narcotics and controlled drugs in such workplaces and the effect of federal legislation applicable to narcotics and controlled substances.

Substance abuse in the health profession can be considered an occupational hazard. These professions are unique in their access to prescription medications and in their propensity to self medicate. These factors create a vulnerability to substance abuse that is unique from that of the general population and unique among workplaces. Subsequently, there are special challenges in the regulation of substance abuse in the health care sector. Patient health and safety, as well as the reintegration of recovering health professionals into the workplace are key considerations.

### **Example**

Nurses are a prime example of the special circumstances surrounding health professionals. Misappropriating medications is a common practice among nurses with a substance abuse problem. The three following situations are common forms of misappropriation. In the first scenario, medications that the Doctor has ordered to be administered as required, such as pain medications, are stolen by the nurse. However, the nurse charts that the patient received the drug. In the second scenario, medications that the Doctor has ordered, such as narcotics for palliative care, are stolen. Again, the nurse records that the patient received the medication. In the third scenario, medications that have been ordered by the Doctor are substituted with saline solutions or other substances and again the patient charts are falsified. The implications for patient safety are significant.

This guideline acknowledges the necessity of implementing random drug testing in unique circumstances, specifically, one in which a health professional who, upon completion of treatment for substance abuse, is attempting to return to work. It is understood that a health professional who has been identified with a substance abuse problem will probably not be considered for reintegration into the workplace without the assurance that random drug testing provides. In these circumstances, random drug testing is integral to the protection of the public, and the recovery of the returning professional.

However, notwithstanding the unique challenges that the Healthcare sector faces regarding substance abuse in the workplace, its policies must conform to the employer's duty to not discriminate against employees with addiction problems and reflect the principles enunciated in this guideline.

## 15 SUMMARY

The New Brunswick *Human Rights Code* prohibits discrimination on the basis of disability and perceived disability. Disability includes those with a previous or existing dependence on drug or alcohol.

Because they cannot be established as BFOQ, the following types of testing are prohibited at all times:

- Pre-employment drug testing;
- Pre-employment alcohol testing;
- Random drug testing; and,
- Random alcohol testing of employees in non-safety sensitive positions.

If an employer can demonstrate that they are BFOQ, the following types of testing may be acceptable:

- Random alcohol testing of employees in safety sensitive positions;
- Drug or alcohol testing for "reasonable cause" or "post-accident"; and
- Random or periodic testing following disclosure of a current drug or alcohol dependency.

In the limited circumstances where testing is justified, employers must accommodate the employees who test positive up to the point of undue hardship.

The employer will be relieved of the duty to accommodate the individual needs of the disabled employee, if he can show that the proposed accommodation would be impossible because of undue hardship.

The Commission supports the use of non-discriminatory methods for dealing with employee impairment, such as employee assistance programs, peer monitoring, supervisory reviews, health promotion programs, referral services, off-site counselling and functional performance testing.

## 15 FOR MORE INFORMATION

For further information about the *Code* or this policy, please contact the Commission at 1-888-471-2233 toll-free within New Brunswick, or at 506-453-2301. TTD users can reach the Commission at 506-453-2911.

You can also visit the Commission's website at [www.gnb.ca/hrc-cdp](http://www.gnb.ca/hrc-cdp) or e-mail us at [hrc.cdp@gnb.ca](mailto:hrc.cdp@gnb.ca).



**Fredericton Office**

P. O. Box 6000  
751 Brunswick Street  
Fredericton, NB E3B 5H1  
Fax 453-2653

**Saint John Office**

8 Castle St., 2nd Floor

**Campbellton Office**

6 Arran Street

**Moncton Office**

770 Main St., Assumption Place, 4th Floor