



*Canadian Human Rights Commission Policy on Alcohol and Drug Testing
Consultation Paper*

Canada Human Rights Commission of Canada

**SUBMISSIONS OF
THE AMALGAMATED TRANSIT UNION, CANADIAN COUNCIL**

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INTRODUCTION

These are the submission of the Amalgamated Transit Union, Canadian Council (“ATU”) in response to the Canadian Human Right’s Commission’s (“CHRC”) request for submissions on the proposed revision of the CHRC’s Policy on Alcohol and Drug Testing.

Established in 1982, the Canadian Council is the highest authority and voice in Canada for the Amalgamated Transit Union on all issues of Canadian interest including legislation, political, educational, health and safety, cultural and social welfare matters.

Founded in 1892, at present the ATU is the largest labour union for transit workers in North America. Today the union has over 180,000 members in over 273 local unions in 46 states and 9 provinces. The ATU membership includes bus, subway, light rail and ferry operators, clerks, baggage handlers, mechanics and others in public transit, inter-city and school bus industries.

A part of the ATU’s mandate is to support the struggle for equity among union members, through support for members who face discrimination in the workplace through the operation of workplace policies, including policies on alcohol and drug testing.

THE CHRC REFORMS

A. Areas of Concern

1. Preemployment and Random Testing in Commercial Bus and Trucking Operations

The ATU does not support the CHRC’s decision to endorse pre-employment and random drug and alcohol testing of charter bus operators and by extension trucking operations as a part of the CHRC’s Policy on Alcohol and Drug Testing.

The Commission’s endorsement of these practices appears to be based solely on the Commission’s decision in *Milazzo*.

With respect, the ATU does not read the Commission’s decision in *Milazzo* as a wholesale endorsement of pre-employment and random drug and alcohol testing in Canadian commercial bus and trucking operations. The decision in *Milazzo* was circumscribed to a small cross-border charter bus operation where the Commission determined that it would cause undue hardship to require the employer to create and maintain separate pools of employees in order to comply with US regulations requiring bus drivers operating vehicles in the United States to be subject to pre-employment,

random, post-accident and for-cause drug testing.

As such, it is and has always been the position of the ATU that the Commission's decision in *Milazzo* was of limited import insofar as it did not define the acceptable parameters of testing with respect to larger commercial bus and trucking operations, some of which are engaged in cross border transport and some of which are not.

The Commission's reforms to its Alcohol and Drug Testing Policy, however, serves to broaden the scope of the *Milazzo* decision well beyond its intended application. The Commission's decision to apply the conclusion in *Milazzo*, ultimately upholding preemployment and random drug and alcohol testing, to employees in all commercial bus and trucking operations irregardless of their size and scope of operation is inconsistent with the *Milazzo* decision itself and a significant departure from the Commission's current policy on alcohol and drug testing in cross-border trucking and bussing operations.

The ATU submits that the Commission's current policy pertaining to alcohol and drug testing in cross-border trucking and bussing operations should continue to apply without modification. The ATU takes the position that the Commission's current policy is in line with the decision in *Milazzo* and continues to represent a balance between the right of trucking and bussing employees to be free from discrimination because of actual or perceived disabilities while still ensuring that smaller cross-border bus and trucking outfits are able to meet US regulatory requirements.

2. Drug Testing

The Commission clearly states in its policy that workplace rules and standards that do not impact on job safety and performance are in violation of an employee's human rights.

The ATU agrees with the commission that drug testing does not assess the effect of drug use on performance. The ATU agrees that drug testing methods do not measure impairment, how much of a drug was used or when it was used and only determine past exposure to drugs. As such, a drug test is not a reliable measure of determining whether a person is capable of performing his or her job in a safe and efficient manner.

In recognition of the inaccuracy of drug testing, it is the ATU's position that employee's in any position, safety sensitive or otherwise, should not be subject to drug testing by their employers.

Despite explicitly recognizing the limitations of drug testing in its policy, the Commission has set out that it will be appropriate for an employer to subject an employee to a drug test for "reasonable cause" or "post accident" and/or following disclosure of a current drug or alcohol dependency or abuse problem. Further the Commission has endorsed random and pre-employment drug testing for employees in the commercial bus and trucking industry.

The ATU disagrees that an employee in any position should ever be subject to drug testing by their employer unless it is a bona fide occupational requirement (i.e. reasonably necessary in order to comply with external regulations). As drug testing is not a reliable measure of impairment, and given the severity of the employment consequences which may follow a positive test result, an employee should not be required to participate in a drug test at their employer's bequest. The Commission's policy is entirely contradictory insofar as it appears to recognize the inaccuracy of drug tests as a measure of impairment and/or a reliable predictor of future impairment, yet in the same policy the Commission continues to sanction the use of these tests, particularly in bus and trucking operations.

Much of the Commission's policy in respect of drug testing appears to emanate from the decision in *Milazzo* where the tribunal determined that a positive drug test was a "red flag" that helped to identify drivers at a higher risk of accident. Further, the Commission relies on the tribunal in *Milazzo's* reasoning that a drug testing policy would serve to deter at least some employees from using drugs and alcohol in the workplace.

The ATU takes the position that the decision in *Milazzo* was wrongly decided on these points and the legitimacy of this reasoning has since been challenged by the more recent decision and more extensive drug testing analysis in *Kellogg*. In *Kellogg* it was recognized at para 132:

While there is a rational connection between impairment and job performance, the link between a positive preemployment urine test and workplace impairment is tenuous and uses predictions based on statistical risk to bar particular people. Preemployment urine tests do not test for non-impairment at work and to the extent they may provide some information about the risk of such impairment, there are other more direct, effective, efficient and individual methods for employers to monitor impairment at work.

As such, it is the position of the ATU that with respect to preemployment and random drug testing of individuals in safety sensitive positions, the decision in *Milazzo* is only useful in so far as it recognized that the need to comply with US department of transportation legislation was a bona fide occupational requirement in a smaller enterprise which could not accommodate by creating two pools of drivers without jeopardizing its competitive position in the cross border transport industry.

3. Preemployment and Random Alcohol Testing

The ATU supports the use of alcohol testing by way of an independently and properly administered breathalyser test in circumstances where there is reasonable cause to believe that an employee in a safety sensitive position is impaired on the job or that an employee in a safety sensitive position's impairment may have been a factor in a preventable accident.

Further, the ATU is not averse to the idea of random alcohol testing of employees in safety sensitive positions following a positive test administered on the basis of reasonable cause, so long as this testing is for a limited period of time and is part of a broader treatment program recommended by a rehabilitation provider.

Otherwise, the ATU does not support the use of random alcohol testing in any position where there is no cause to administer the test. Further, The ATU does not agree that any employee in any position, safety sensitive or otherwise, should ever be subject to preemployment alcohol testing. As clearly stated in the *Entrop* decision, preemployment testing cannot measure likely impairment on the job. As such, preemployment alcohol testing is not reasonably necessary to accomplish the legitimate objective of creating a safe workplace free from impairment.

Further and as recognized in the *Kellogg* decision and in the Commission's proposed policy, a preemployment alcohol test will in no way predict whether the individual will be impaired at any time while on the job. Because preemployment testing cannot contribute to the creation of a safe and impairment free workplace nor predict the risk that a particular employee may become impaired while on duty, an employee's right not to be discriminated against because of an actual or perceived disability should outweigh any perceived benefit of screening out employees who may or may not suffer from alcohol dependency. As such, it is the ATU's position that preemployment alcohol testing should always be contrary to the *Act* in any position or set of circumstances, including but not limited to positions in the commercial trucking and bussing industry.

4. Mandatory Disclosure of Drug or Alcohol Use

The ATU does not agree that mandatory disclosure of a past drug and/or alcohol dependency should be considered a bona fide occupational requirement for employees in safety sensitive positions. So long as an employee has received treatment and/or is no longer dependent on drugs and/or alcohol, the employee should not be required to disclose a past disability to their employer.

The presumption that an employee who has suffered from addiction in the past will be an employment risk is discriminatory and is not reasonably necessary to accomplish the objective of maintaining a safe workplace. The presumption that an employee who has suffered from a disability in the past is a threat to the safety of the employer's enterprise relies heavily on inherently stereotypical assumptions about the disability itself and about the particular individual who has suffered from and overcome the disability.

Should the Commission elect to continue supporting mandatory disclosure provisions for safety sensitive positions, the ATU suggests that the time frame from the date of recovery to the end of the obligation to disclose ought to be significantly reduced.

Further, clarification of the consequences of disclosure, whether the disability is past or present, must be elaborated upon to ensure that an employee is not penalized for coming forward on their own volition. At present, the operation of mandatory disclosure

rules in practice has often resulted in the imposition of severe employment consequences to the employee who comes forward about their disability.

Although it is not entirely clear from the Commission's proposed policy, it appears the Commission is somewhat endorsing this practice insofar as the Commission has taken the position that it will be justifiable to require employees who disclose a disability to be subject to an increased level of alcohol and drug testing.

The Commission is not clear in its proposed policy whether this testing should be completed on a prescribed or random basis and/or how this decision to elevate the disclosing employee's testing ought to be made. It is the ATU's position that automatically subjecting an employee who follows the disclosure rules to more invasive and ongoing testing procedures will often not be warranted and may actually discourage employees from complying with the provisions and seeking help with their condition. Clarification is needed from the Commission on this point.

B. Areas of Agreement

1. Zero Tolerance Policies

The ATU supports the Commission's recognition that policies which result in the automatic loss of employment, reassignment or that impose flexible reinstatement conditions without regard for personal circumstances will not meet the requirement to accommodate to the point of undue hardship. However, the ATU would go further than the Commission's policy and suggest that any drug and alcohol policy which automatically imposes any form of penalty and/or negative employment consequence as a result of a positive test would not meet the requirement to accommodate up to the point of undue hardship under the *Act*.

2. Non-Safety Sensitive Positions

The ATU is in agreement that random alcohol testing in non safety sensitive positions is not appropriate. Further, the ATU is in agreement that it is generally not appropriate for employees in non safety sensitive positions to be required to disclose past dependency on alcohol or drugs.

CONCLUSION

If the objective of reform is to bring about change for the better, it is essential that the CHRC revisit the proposed reforms to the Policy on Alcohol and Drug Testing, in order to assess its impact on commercial bus and trucking employees as well as its impact on the public's interest in human rights enforcement.

The ATU is in agreement that clarification of this area of the law is necessary, in order to allow the efficient design of alcohol and drug testing policies that balance an employee's right to be free from discrimination on the basis of actual or perceived

disabilities with the employer's right to create and maintain a safe workplace.

However, it is the ATU's position that the reforms proposed by the CHRC to their Alcohol and Drug Testing Policy only serve to create more confusion surrounding the legitimacy of drug testing for any position given the explicit recognition by the CHRC that the results of drug testing are an inaccurate measure of impairment and fail to predict future on-duty drug and/or alcohol use.

Further, the ATU does not believe that the CHRC has properly applied the *Milazzo* decision in its proposed policy by subjecting all Canadian trucking and bussing operations to US regulatory requirements despite the fact that the operation may not travel to the US and/or the operation may be fiscally stable enough to accommodate two pools of drivers. Many commercial bussing and trucking operations have incorporated a two pool policy into their drug and alcohol testing requirements since before and after the *Milazzo* decision and it is unquestionable that the CHRC's proposed policy reforms will have the effect of upsetting this long-term industry generated solution.

Also, greater clarification is called for from the CHRC with respect to the impact of mandatory disclosure provisions. The ATU submits that employees who have suffered from a drug and/or alcohol dependency in the past but who no longer continue to do so should not be required to disclose the past disability. With respect to employees in safety sensitive positions who currently suffer from a drug and/or alcohol dependency, it would be helpful to have a clear policy statement from the CHRC about the appropriate response by an employer when an employee complies with the provision by recognizing and reporting their illness. To the extent that the Commission's proposed policy appears to support more frequent and invasive testing for employees who disclose a current disability, without consideration of the employee's individual circumstances, some clarification from the Commission is necessary.

Overall, the ATU commends the Commission for attempting to revitalize its Alcohol and Drug testing policy, however the ATU submits that the Commission ought to reconsider some of the reforms proposed (and/or provide a more robust clarification) in order to strike a more equitable balance between the right of an employee to be free from discrimination in their workplace and the right of an employer to create and maintain a safe working environment.