



Ganja Liberalization:

**Impact On Employment
Contractual Rights And
Obligations**

**General Legal Council
CLPD Series**

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Carla-Anne Harris-Roper

“Legalize it, Don’t Criticize it
Legalize it; and I will advertise it...”



Peter Tosh

www.youtube.com/watch?v=ABc8ciT5QLs



Introduction

- After decades of review and consideration on April 15, 2015 Jamaica's legal landscape was fundamentally changed in respect of the statutory regime that governs the use of Cannabis (Ganja).
- This change was implemented by the enactment of the **Dangerous Drugs (Amendment) Act 2015**.

Introduction

- As legal practitioners how much do you really know about the amendments?
- What impact (if any) does/will the amendments have on a contract of employment with respect to an employee's personal interaction with ganja on the one hand and the employer's requirements for the job on the other?
- We will be examining this issue with a view to equipping you to address possible issues raised by clients (both employees and employers) which may arise by virtue of the changes in the law.

Outline of Presentation

- What was the pre 2015 legal framework?
- Main changes effected by the 2015 amendment to the Dangerous Drugs Act (DDA);
- Usual usage and possible effects on individuals;
- Possible impact within the employment/labour law sphere.

Pre 2015 Legal Definition of Ganja

- **Section 2 – Dangerous Drugs Act**
- **“Ganja”** - includes all parts of the plant known as cannabis sativa from which the resin has not been extracted and includes any resin obtained from that plant, but does not include medicinal preparations made from that plant.



What is Ganja?

- See **R. v George Green (1969) 14 WIR 204**



- The main psychoactive part of cannabis is Tetrahydrocannabinol (THC)
- This is one of 483 known compounds in the plant
- The more potent the level of THC in the cannabis the greater the psychoactive effect – the “high” that is experienced when the drug is used by an individual

Ganja... by any other name smells just as sweet?

- marijuana
- reefer
- joint
- dope
- green goddess
- Mary Jane
- locoweed
- grass
- Pot
- Spliff
- Weed
- Collie weed,
- Herb,
- Sensimillia
- Kaya
- Holy herb

Pre 2015 Legal Framework

- As a signatory to the **Single Convention on Narcotic Drugs** of 1961 Jamaica is obliged to enact laws which prohibit production and supply of specific (nominally narcotic) drugs and of drugs with similar effects except under licence for specific purposes, such as medical treatment and research.
- In Jamaica the **Dangerous Drugs Act (1948) (DDA)** has been utilised in this regard to regulate the use of specified “dangerous drugs” - Ganja was so designated

Pre 2015 Legal Framework

- Before the amendment, **Section 7** of the DDA provided for virtually the full prohibition on the following activities related to ganja :
 - **export or import, (taking steps preparatory to)**
 - **cultivation,**
 - **selling,**
 - **dealing in,**
 - **transportation/trafficking,**
 - **possession (and also possession of paraphernalia e.g. chillum pipes)**
 - **smoking**

Pre 2015 Legal Framework

- Sanctions ranged from a fine of \$100.00 for each ounce possessed **Section 7C (b)**
- To possible fines of up to \$500,000.00 or 3 years imprisonment for each ounce (on summary conviction) **(Section 7A 1(a))** and \$200,000.00 or up to 35 years imprisonment for each ounce if convicted in the Circuit Court **(Section 7A 1(b))** : - for exporting, cultivating, selling and dealing in ganja

Pre 2015 Legal Framework

- Persons convicted of possession for personal use were usually arrested, sometimes not given bail by the police and kept in police cells/lockups until brought before a Magistrate and fined.
- Consequences:
 - Entanglement with the police and criminal justice system;
 - Police record of criminal conviction which could have negative impacts for prospective employment

Pre 2015 Legal Framework

- 1977: A Joint Select Committee of Parliament recommended the decriminalization of possession of ganja for personal use in small quantities (2 ozs), and for medical use under prescription.
- 2001: The National Commission on Ganja Chaired by the late Professor Barry Chevannes submitted its report, also recommending decriminalization for possession of small quantities and for use as a sacrament for religious purposes by Rastafarians
- 2003: A Joint Select Committee of Parliament endorsed the Report of the National Commission on Ganja

Movements in Legal Framework

- Over the years addiction to illicit substances particularly ganja steadily began to be seen not only as a crime concern but also as a social and public health issue;
- As part of the actions taken to address this a Drug Court established in 2001 by the **Drug Court (Treatment and Rehabilitation of Offenders) Act**,
- Provided Court supervised rehabilitation
- Eligible person must not have been caught with more than 8 ounces (227 grams)
- They would have no criminal record on successful completion of rehabilitation program

Movements in Legal Framework

- **The Criminal Records (Rehabilitation Of Offenders) Act 1988** was amended in October 2014 to accomplish the following:
 - Automatic expungement of the criminal records for offences of smoking ganja, of ganja and possession of smoking utensils and possession of ganja where the fine does not exceed \$1000
 - Its Effect is retroactive; However impacted persons must make application to relevant authority for this to be addressed



Movements in Legal Framework

- **The Criminal Records (Rehabilitation Of Offenders) Act 1988 :**
- Fine for the offence of exclusion from employment from any office, profession, occupation because of a spent or expunged conviction which the employer knows or has reasonable cause to suspect is a spent or expunged conviction and which is not required to be disclosed under any law was **increased from Ten Thousand Dollars (\$10,000.00) to One Million Dollars(\$1,000,000.00)**



Movements in Legal Framework

- **The Criminal Records (Rehabilitation Of Offenders) Act 1988 – made consequential amendment to the Dangerous Drugs Act :**
 - Section 7C (*possession of ganja*) “notwithstanding subsection (1), no conviction for the offence of possession of two ounces (0.057kg) or less of ganja, or such other amount as the minister may by order prescribe, shall be recorded on the criminal record of the offender.”
 - Section 7D (*smoking of ganja*) “notwithstanding subsection (1), no conviction for an offence under subsection (1) (c) or (d) shall be recorded on the criminal record of the offender



Major Provisions of Dangerous Drugs (Amendment) Act 2015

Post 2015 Legal Definition of Ganja

o Section 2 – Dangerous Drugs Act

“Ganja” includes all parts of the plant *cannabis sativa* from which the resin has not been extracted and includes any resin obtained from that plant, but **does not** include-

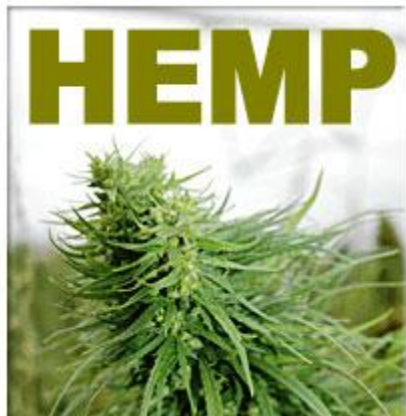
- (i) medicinal preparations made from that plant;
- (ii) hemp;

Refined Definition of Hemp

o Section 2 – Dangerous Drugs Act

“Hemp” means the plant *cannabis sativa*, or any part thereof, with a THC concentration of no more than 1.0% or such other concentration as may be prescribed by the Minister by order published in the Gazette;

“THC” means Δ^9 -Tetrahydrocannabinol (6aR, 10aR)-6a, 7, 8, 10a-tetrahydro-6, 6, 9-trimethyl-3-pentyl-6H-dibenzo [b,d] pyran- 1 -o1). (THC)



Possession

- Possession of 2 ounces or less of ganja is no longer an offence for which one can be arrested or detained and it will not result in a criminal record; hence the term “decriminalization”



- However, the police may issue a ticket to a person in possession of 2 ounces or less of ganja, similar to a traffic ticket, and the accused person has 30 days to pay the sum of **J\$500** at any Tax Office. The ticket is called a “fixed penalty notice” in the DDA. **(Sections 7F & 7G)**

POSSESSION

- It is an offence to fail to pay a ticket for smoking ganja in public or for possession of 2 ounces or less of ganja.
- The offender will be required to attend the Petty Sessions Court, and may be ordered to do community service, or in the rare case where community service cannot be arranged, pay a fine of \$2,000.
- A person who is found in possession of 2 ounces or less and who is under the age of 18 years, or who is 18 years or older and appears to the police to be dependent on ganja, will also be referred to the National Council on Drug Abuse for counselling, in addition to having to pay the ticket. **(Section 7G)**



What Does 2 Ounces look like?

POSSESSING MARIJUANA: a visual aid

1 OUNCE



8 OUNCES



1 POUND



POSSESSION

- It remains a criminal offence to be in possession of **over 2 ounces** of ganja, and offenders can be arrested, charged, tried in court and, if found guilty, sentenced to a fine or to imprisonment or both.
- Such convictions will also be recorded on that person's criminal record. **(Section 7C)**



Possession - Exclusions

- Possession of ganja for religious purposes as a sacrament in adherence to the Rastafarian faith
- Possession of ganja for medical or therapeutic purposes as recommended or prescribed by a registered medical doctor or other health practitioner or class of practitioners approved by the Minister of Health
- Possession of ganja for purposes of scientific research that is conducted by an accredited tertiary institution or is approved by the Scientific Research Council
- Possession of ganja pursuant to a licence, authorization or permit issued under the DDA. **(Section 7C)**

SMOKING OF GANJA

- Smoking of ganja in a public place or within five metres of a public place is prohibited in a manner similar to cigarettes. **(Section 7E and First Schedule)**
 - Included in this designation are “residences and guesthouses for the use of staff employed therein”
- A person who smokes in public cannot be arrested or detained. However, the police may issue a ticket to that person, who will have 30 days to pay \$500 at any Tax Office. **(Section 7G)**

SMOKING OF GANJA

- For the purposes of these smoking rules, a public place **includes a workplace**, and any place which is for the use of, or accessible to, the public, such as sidewalks, bus stops, restaurants, offices, educational institutions, pharmacies, hospitals, areas used by children, supermarkets and parks. **(First Schedule)**
- "workplace" means any area or place used by persons during their employment, work or contract for services, and includes-
 - (a) vehicles used in the course of employment or for work purposes;
 - (b) connected, annexed places or common areas; and
 - (c) residences used for commercially-operated childcare activities.



- Smoking of ganja at privately-occupied residences that are not used for commercial purposes is not an offence, but is governed by the rules on possession of ganja referred to above.
- Smoking of ganja will be legally permitted in places that are licensed for the smoking of ganja for medical or therapeutic purposes.
- Adherents of the Rastafarian faith will also be permitted to smoke ganja for sacramental purposes in locations registered as places of Rastafarian worship.

IMPORTATION OF GANJA FOR TERMINAL OR SERIOUS CHRONIC ILLNESS



- A person who is suffering from cancer or any other terminal or serious chronic illness may import medicine or a therapeutic product derived from or containing ganja.
- In order to do so, a registered medical practitioner must certify that the person is suffering from the illness, and must recommend the person's use of the medicine or therapeutic product.
- The importation of the medicine or therapeutic product must comply with regulations which are to be made. **(Section 7 A)**



VISITORS TO JAMAICA WHO ARE USERS OF MEDICAL MARIJUANA

- Persons who do not ordinarily reside in Jamaica (for example, tourists or visiting Jamaicans who live overseas) may apply for a permit to allow them to lawfully purchase and possess **up to 2 ounces** of ganja at a time, for medical or therapeutic purposes
(Section 7 D)





Importation of Ganja for research

In furtherance of scientific research, an accredited tertiary institution or other body approved by the Scientific Research Council may apply for authorization to import ganja (including any part of the plant) from any jurisdiction where the export of it to Jamaica is lawful. The importation of ganja for research purposes must comply with regulations which are to be made by the Minister responsible for Science and Technology. **(Section 7 D)**

CULTIVATION OF GANJA BY HOUSEHOLDERS

- Each household is allowed to legally grow no more than five(5) ganja plants on their premises.
- If there is more than one household on any premises, each household may grow five (5) ganja plants.
(Section 7 B)



CULTIVATION FOR SCIENTIFIC RESEARCH

- An accredited tertiary institution or other body approved by the Scientific Research Council may apply for authorization to cultivate ganja in furtherance of scientific research, on lands approved for that cultivation.



- An authorization to cultivate ganja for research purposes also protects any third party who is engaged by the scientific institution or body for this purpose.
- Ganja which is cultivated, processed, used and otherwise handled in accordance with this type of authorization is not subject to the rules against ganja under the DDA. **(Section 7 D)**



CULTIVATION FOR RASTAFARIAN SACRAMENTAL PURPOSES

Persons 18 years or older who are adherents to the Rastafarian faith, or Rastafarian organizations, may apply for authorization to cultivate ganja for religious purposes as a sacrament in adherence to the Rastafarian faith. **(Section 7 D)**

- Ganja that is cultivated under such authorization may not be smoked in public places other than at locations registered as places of Rastafarian worship, or sold or otherwise dealt with commercially, or exported from Jamaica, but is otherwise not subject to the rules against ganja under the DDA.



EVENTS TO CELEBRATE/OBSERVE THE RASTAFARIAN FAITH

- Persons who are adherents of the Rastafarian faith, or Rastafarian organizations, may apply for an event promoted or sponsored by them to be declared an exempt event. In order to apply, the event must be **primarily** for the purpose of the celebration or observance of the Rastafarian faith.
 - E.G. **Cannabis Bowl - Negril Nov. 2015**
 - **Herb Curb – Rebel Salute January 2016**
- Where an event is declared exempt, persons who attend the event will not be liable to be arrested, detained or prosecuted for smoking ganja or possession of ganja at the event, or transporting ganja to the event, as long as they have complied with the amounts and conditions specified in the order declaring it an exempt event. **(Section 7 D)**



HEMP

- Hemp is defined in the DDA as a ganja plant having a THC content of less than 1%. Hemp is used to make a wide variety of products from cloth, paper and rope to medicines, beverages and cosmetics. Hemp is excluded from the provisions in the DDA that apply to ganja.
- However, the cultivation, processing, sale, import, export and other handling of hemp will be regulated by a licensing regime administered by the Cannabis Licensing Authority.
(Section 9A)



THE CANNABIS LICENSING AUTHORITY

- A Cannabis Licensing Authority is created by the DDA for the purpose of enabling a lawful, regulated industry in ganja for medical, therapeutic or scientific purposes, and in hemp, to be established in Jamaica.
- The Cannabis Licensing Authority will be responsible for issuing licences, permits and authorizations for the handling of hemp and ganja, and for monitoring and otherwise regulating persons who have been issued licences, permits and authorizations.
- It is specifically mandated to ensure that regulations do not contravene Jamaica's international obligations.
(Section 9A & Second Schedule)



Dr. Andre Gordon Chairman, Cannabis Licensing Authority

- Established in May 2015.
- Comprised of 16 reps from various government ministries and civil society
- Governed by 8 guiding principles
- Currently working to produce Regulations to provide the legal framework for issuing licences

USE OF REVENUES FROM GANJA

- The fines in the DDA have also been significantly increased for export, cultivation, possession, selling and trafficking of illegal drugs.
- The DDA provides that the **Minister of Finance** shall direct that a percentage of the revenues earned from issuing licences, permits and authorizations relating to ganja and hemp be used for:
 - Strengthening the capacity and programmes of the National Council on Drug Abuse, including public education programmes to discourage the use of ganja by persons under 18 years, persons with a mental disorder, pregnant women and other vulnerable groups
 - Strengthening Jamaica's mental health institutions and services
 - Funding scientific and medical research into ganja and hemp
 - Supporting the regulatory arrangements of the Cannabis Licensing Authority. **(Section 7D)**



Perceived Benefits of new regime

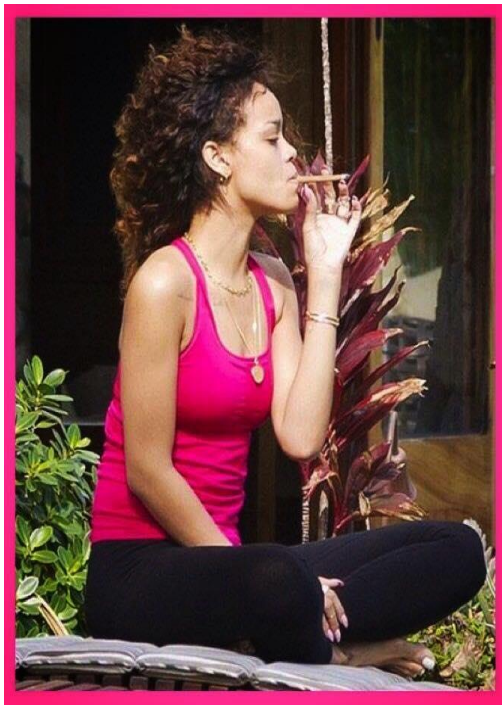
- Strengthening respect for the rule of law and building a more just society, by eliminating a common cause of corrosive antagonism between the Police and young men, particularly in less affluent communities; -
(MARIO DEANE scenarios)
- Reducing the heavy burden of cases on the Resident Magistrates' Courts;
 - **E.G. HWT RM Court -Jan –June 2014**
 - **Possession of Ganja – 3,033 cases; smoking ganja 367 cases**
 - **Source: Legal Reform Dept/HTW Criminal Court**
- Acknowledging the constitutional rights of the Rastafari community, who use ganja as a sacrament;

Rastafarians and the use and possession of Ganja

- Rastafarianism is a religion with roots in Jamaica which go back to the first half of the 20th Century.
- It has received judicial recognition see **R v Hines and King (1971) 12 JLR 545**
- **Forsythe v. The Director Of Public Prosecutions Et Al (1997) 34 JLR 512**
- The saving provision for pre-independence laws that was formerly in section 26(8) of the Constitution was a critical factor in the defeat of the challenge of the Constitutionality of the DDA where one uses Ganja as an essential aspect of religious observance
- The repeal of that savings provision by the legislation establishing the Charter of Rights within the Constitution means that breaches of rights guaranteed by the Charter of Rights now have to be shown as being demonstrably justified in a free and democratic society.

Perceived Benefits of new regime

Pave the way for the emergence of a lawful, regulated legitimate medicinal and industrial marijuana/hemp industry that may have significant economic opportunities and benefits.



Example

- Rihanna Barbadian R & B superstar announced at the first exempt event in Negril November 2015 “the Cannabis Cup” that she was launching her own branded ganja line called **“MaRihanna”**
- It will sell different types of ganja such as Karibbean Kush, Haitian Haze and Jamaican High Grade



Usage and

Effects of Cannabis

Approved in treatment of migraines and epileptic seizures

Reddening of eyes, decrease in intra-ocular pressure, helpful with glaucoma symptoms

Alleviates asthma symptoms, relaxes muscles in chest and lungs

Relaxes muscles, reduces spasticity, approved for treatment of joint pain arthritis pain, and stiffness and spasticity in ALS and in multiple sclerosis

Feeling of well-being, distortion of time, increased appetite, increased depression and anxiety, euphoria, increased perception, enhanced recollection, decreased problem solving

Dryness of mouth

Increased heart rate

Relief of nausea, increases appetite resulting in weight gain, approved for treatment of severe nausea, and anorexia

www.facebook.com/montereybayholistic

Ganja Usage



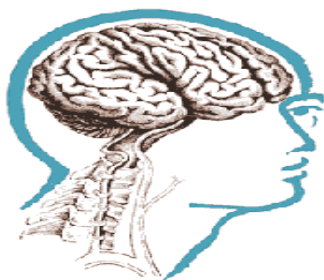
- Ganja use is widespread in Jamaica for recreational, religious and medical purposes.
- It is most usually smoked as a hand made cigarette or “spliff”
- At times it is combined with other drugs such as cocaine or other additives to make a “seasoned spliff”
- It is also been known to be mixed into food and eaten
- Made as a “tea” brew
- Soaked in rum and ingested by mouth for medicinal purposes
- Is also sometimes used as an oral preparation – to massaging painful areas of the body

Ganja Usage

- The plant has also been used to manufacture medicinal preparations which can be prescribed by registered medical practitioners to treat a variety of ailments
- E.g. Jamaican Dr. Manley West, developed a cannabis extract **Cannasol** that is used to treat glaucoma
- Dr. West and colleagues also developed **Asmasol**, for the treatment of cough, cold and bronchial asthma.



How Cannabis Works



**Endocannabinoids
(Brain Derived)**

Foods: Omega-3s & Omega-6s

Anandamide (AEA)



**Phytocannabinoids
(Plant Derived)**

Buds, Tinctures, Extracts

THC, CBD, CBN, etc.



**Synthetic Cannabinoids
(Pharmaceutical Lab)**

Patented Synthesized Compound

THC-only (Marinol)

**Endocannabinoid Receptors
(Brain Receptors)**

CB1, CB2, etc.

The endocannabinoid system (ECS) is involved in regulating a variety of physiological processes including appetite, pain and pleasure sensation, immune system, mood, and memory.

Two types of Cannabis



Sativa vs. Indica **Medical Effects**



Sativa/Indica Hybrid strains will have a mixture of effects.

Mind Dominant
Anti-Anxiety
Anti-Depresant
Activating
Uplifting
Increase Alertness
Increase Energy
Enhance Creativity

Body Dominant
Sedating
Relaxing
Muscle Relaxant
Treats Accute Pain
Reduce Nausea
Increase Appetite
Increase Dopamine

Possible Negative Effects of Ganja Usage

Short Term Effects

- Rapid Heart Beat
- Disorientation
- Lack of coordination
- Panic Attack/Anxiety
- Impaired Short Term Memory

Long Term Effects

- Brain Damage
- Reduction in Male/Female Hormones – reduce fertility
- Suppression of immune system
- Lung Cancer
- Severe Hereditary effects

Effect of Ganja Usage

- It is difficult to know how Ganja will affect each individual at any specific time because its effects vary based on personalized factors such as:
 - Genetics
 - Prior Ganja or other drug usage
 - Volume of Ganja consumed
 - Potency/THC levels in the Ganja
- Effects can also be unpredictable especially when used in conjunction with other drugs
- The onset of effects is usually within minutes when smoked and about 30 minutes when eaten. The effects can last for between two and six hours.
- Typically traces of THC will remain the body for at least 2 weeks for a frequent user and 4 days or more for an occasional user



EMPLOYMENT LAW IMPLICATIONS

Employment Law Implications

- The amendments in and of themselves do not directly speak to the employment relationship, except in the area of smoking ganja;
- **Smoking is prohibited in the workplace as defined**
- However by necessary implication, the new regime is very likely to impact on employment especially because of actions workers may take outside of the workplace in furtherance of the changes, which could be in sharp contrast to what is required of them at the workplace by virtue of the terms of their employment contract or other company policies.

- Notable issues which arise include:
 - Breach of express and implied terms governing the employment contract
 - Pre-Employment/Post employment drug testing –
 - Employee right to privacy and data protection
 - Disciplinary policies
 - Medical usage
 - Rastafarian employees

Breach of specific employment contractual terms

- The employment contract constitutes the fulcrum around which the employment relationship operates
- Some contracts based on the specific nature of the work to be performed prescribe that the use of illicit drugs are strictly prohibited (either on or off the job)
- Some of these jobs include situations where dangerous equipment is being operated that can cause injury to the operator or others if used while impaired or the handling of hazardous materials
- There are of course many other professional pursuits where harm could occur if the person(s) involved is impaired by the effect of drugs such as ganja

Breach of employment contractual terms

- Additionally it goes without saying that employers generally require that employees are able to properly fulfill their duties
- This may also raise the issues of breach of the implied term to exercise reasonable care in the performance of contractual duties and to perform diligently and competently:
- **Lister v. Romford Ice & Cold Storage Co Ltd (1957)**
- **Janata Bank v Ahmed (1981)**

The employer has a duty to take reasonable care and ensure the safety of his employees by providing and maintaining a safe system of working.

- In the United Kingdom this implied term was relied on in the case ***Walton & Morse v Dorrington (1997)*** by the claimant to ground a case of constructive dismissal when exposed to second hand cigarette smoke in the office setting and the employer made no attempt to remedy the issue after being advised

Vicarious Liability

- The employer may also become vicariously liable to other employees / members of the public who may be hurt by the wrongful actions of the employee who is under the influence of ganja while acting in the course of his employment.
- **Dave Robinson and sentry Service Company Limited v Inez Brown 2003 (SSCA 18/99 (unreported) delivered April 3, 2003**
- A fellow employee who is adversely affected by any such action may leave the employment and claim constructive dismissal

Disciplinary policies

- Many employers operate disciplinary procedures which indicate that the use of drugs (including ganja) is prohibited
- The new DDA regime and the employee's response to the same will not necessarily affect the employers' rights to act against an employee if breaches of these provisions occur.
- However there should be clear procedures in place within the organization to proceed to action the breaches against employees
- This should however be viewed in light of the provisions for medical use of ganja and with respect to Rastafarian workers under the amended DDA.

Can the Employer dismiss/discipline an employee?

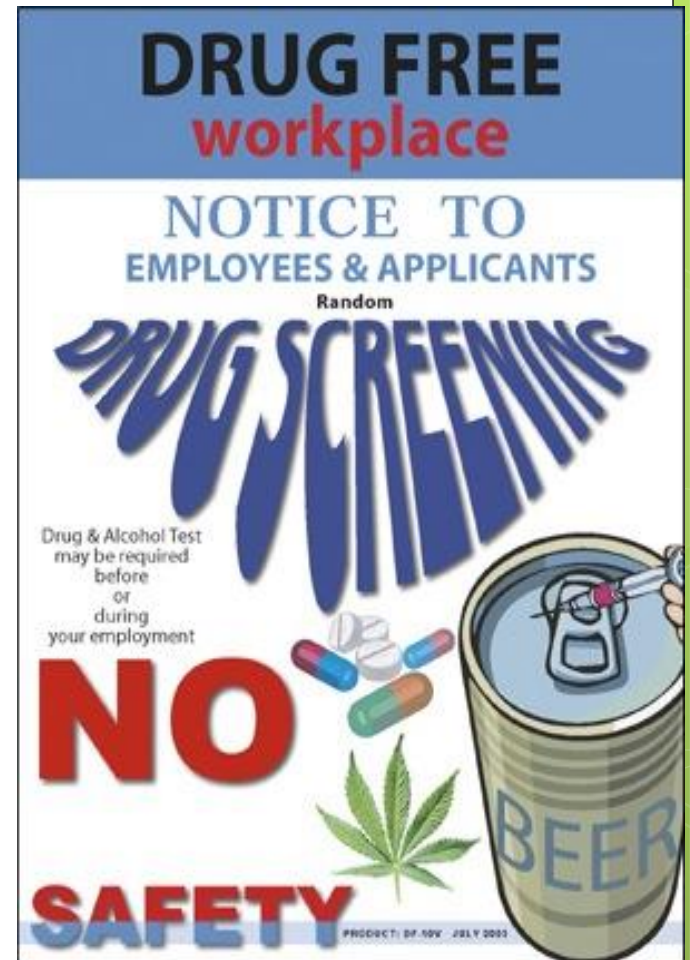
- Legally the employer may dismiss an employee who is in breach of the express terms of their contract which specifically indicates that the use of Ganja (illicit drugs) is not allowed.
- The question of whether this can be a **summary dismissal** will of course be subject to whether the “offence” constitutes gross misconduct – Issues such as this are usually outlined in employer’s Disciplinary policy or handbook
- This is also of course subject to the employer following the relevant procedures to avoid an **unjustifiable dismissal** claim

Unjustifiable Dismissal

- If proper procedure are not used even if employee is in breach of contract they may still make a successful claim
- The employer must therefore take into account:
 - Labour Relations Code
 - Internal disciplinary procedures
 - Natural Justice considerations
 - Due Process
- **Desnoes And Geddes Limited (D&G) v. University And Allied Workers Union** Jamaica Industrial Disputes IDT No. 5 of 2001 (unreported) Delivered February 28, 2002
- **The Shipping Association Of Jamaica v. The Bustamante Industrial Trade Union** Jamaica Industrial Disputes IDT 34 of 1987 (unreported) Delivered August 31, 1988
- **The Jamaica Pegasus Hotel v. The Bustamante Industrial Trade Union** Jamaica Industrial Disputes IDT 4 of 2004 (unreported) Delivered December 17, 2004

Pre-Employment/Post employment drug testing

- Some organisations routinely do drug screening for new employees prior to confirmation, and persons can be denied employment if prohibited drugs are detected in their bodies.
- Additionally, some companies also carry out random drug testing of employees, during employment with serious penalties and possibly termination for failed drug tests.



Pre-Employment/Post employment drug testing

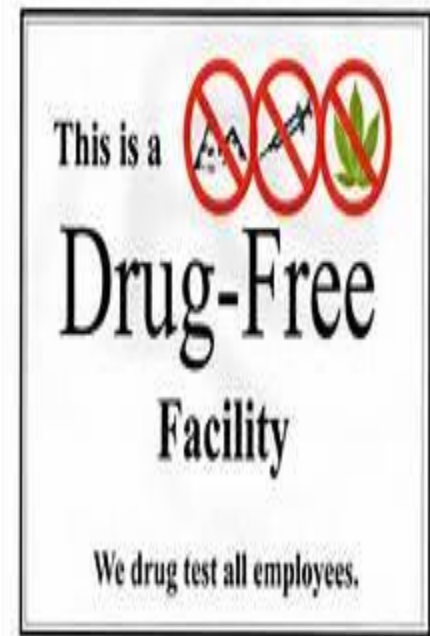
- Workplace drug testing is an inherently controversial subject, one that questions where the line should be drawn between the right to privacy and the obligation to provide professionalism
- Former Justice Minister Golding, urged employers following the passage of the amendments to review their drug-testing policies to make them “fall in line with the new regulations that now govern the use of ganja in Jamaica”.
- He further stated
 - ..."However, although I don't think this is something the Government should take the lead on, perhaps the Ministry of Labour could address this issue with employers. But I do think it is something the Jamaica Employers' Federation (JEF), PSOJ (Private Sector Organisation of Jamaica) and the trade unions should look at....."

Pre-Employment/Post employment drug testing

- The first argument in favour of workplace drug testing (WDT) pertains most to “safety-critical” professions in industries such as medicine, transport and construction where impaired senses and judgement can have extreme consequences;
- Business safety in terms of productivity and property are also serious concerns.
- In addition, proponents of WDT argue that employers have a “duty of care” to provide a safe working environment.

Pre-Employment/Post employment drug testing

- The issue is complicated by the fact that testing only measures whether a person has recently used a drug; it doesn't measure impairment.
- Because marijuana is a confusing issue for employers, employees and job applicants, one of the best ways to avoid the confusion is to have a zero-tolerance policy in place that is not based on "impairment" but rather is simple and strict standard of no use.
- This is called a "*per se* zero tolerance" standard. Any positive drug test is *per se* evidence of a violation of the employer's drug-free policy, with no necessity of showing impairment to carry out the job



Human Resources 101

© 2010

Employers should remember two things....

- So far, an employer's right to take action against a worker who is under the influence of drugs at work has not been overruled.



- Just because alcohol is a legal substance that doesn't mean an employer needs to tolerate employees under the influence of alcohol. It would seem that employers may take the same attitude toward marijuana

Case Law

- **Communication Workers' Trade Union V. R.B.P Lifts Limited** –
Trinidad & Tobago Industrial Court Trade Dispute 228 of 2010 (unreported) Delivered May 16, 2013
- **National Union Of Government and Federated Workers V. Contract Caterers Limited**
Trinidad & Tobago Industrial Court Trade Dispute 65 of 2007 (unreported) Delivered July 6, 2012
- **Oilfields Workers' Trade Union V. Schlumberger Trinidad Incorporated**
 - Trinidad & Tobago Industrial Court Trade Dispute 110 of 2003(unreported) Delivered March 8, 2007
- **All Trinidad Sugar And General Workers' Trade Union V. Seereeram Brothers Limited**
 - Trinidad & Tobago Industrial Court Trade Dispute No. 90 of 1995(unreported) Delivered October 14, 1996

Medical Usage Case Study

- **No Employment Protections For Medicinal Cannabis Patients In New Mexico**



Medical usage

- Challenges occur where employers are not aware that the employee has a medical condition which he is treating with medically prescribed ganja (privacy vs employer's necessity to be advised)
- If they are so advised, the company may consider how to deal with the employee to see how/if their condition can be accommodated.
- At the same time, the employee should explain his condition the treatment, and exactly what kind of accommodation he needs so that the parties can have a dialogue about it.

Medical usage

- While a company may consider reasonably accommodating a medical condition, clearly they cannot allow the employee to be under the influence while on the clock--it's too risky for the client
- If the situation is chronic even after the employer has sought to assist and the employee is not able to perform his contractual duties or cannot be redeployed, then it may well come to a decision with respect to dismissal .



Possible Effects of the Disabilities Act: 2014

- May also have an effect on the employee need “reasonable accommodation” as defined by this new law

Rastafarian employees

- Certain members of staff, like Rastafarians, may on religious grounds be permitted by law to smoke the herb in some public places.
- It is for management to set the rules that apply to the business it operates. A company would not have a duty to treat the Rastafarian employee any differently from any other member of staff.
- The change in the law does not create new legal rights that may only be enjoyed by some. It creates a new defence, available to persons who qualify, from legal action against them.
- Conversely, if an employer wishes to extend to its Rasta staff the privilege of smoking ganja in the designated smoking area, non-Rastafarian employees would have no proper basis for complaint on the basis of discrimination. There might be many other bases for complaint, such as the lingering aroma, but those are not matters that are within the scope of the law to address.
- ***Weeding out illegal ganja smokers....By Gavin Goffe Daily Gleaner June 24, 2015***

Rastafarian employees

- However using marijuana for religious reasons is not a complete defence, as it would depend on the type of job the person does.
 - "An aircraft pilot, for example, even if he were a Rastafarian, could not take the drug on the grounds of religious sacrament and use that as a reason to justify any breach of regulations, when it comes to public safety," **Bert Samuels Attorney-at-law.**
- **National Union of Govt. and Federated Employees v S & G Maintenance** Trinidad & Tobago Industrial Court Trade Dispute 168 of 2006 (unreported) Delivered July 28, 20076
- Employers must review their drug-testing policy in order to make it clear, for example, to Rastafarian employees that company policy has nothing to do with their use of ganja for religious reasons.

Employers have a vested interest in ensuring a drug free workplace because.....

- It saves on the cost of recruiting and training new employees to replace those whose employment might be terminated because of untreated drug misuse;
- It reduces the cost of absenteeism or impaired productivity;
- It creates a more productive environment by offering support to those employees who declare a drug-related problem, improving employee morale;
- It reduces the risk of accidents caused by impaired judgement;
- It enhances the public perception of your organisation as a responsible employer;
- It contributes to society's efforts in combatting combat illegal drug misuse.



**A safe, healthy and
drug-free workplace is
everyone's business.**

Thanks for making it yours.

U.S. Department of Labor, Working Partners for an Alcohol- and Drug-Free Workplace
www.dol.gov/workingpartners



What YOU may advise your “Employer” client.....

- Create/revise policies
 - There must be a written policy document
 - The content of the policy must be circulated to all concerned so that employees know what is required of them
 - The policy should include steps to address prevention, identification, counseling, treatment, rehabilitation, to provide support and counsel to employees as appropriate
 - Provided details on at what stage disciplinary action will be taken

What Employers SHOULD NOT Do.....

- **DO NOT** move arbitrarily to dismiss to avoid possible unjustifiable dismissal claim
- **DO NOT** move to discipline without evidence and outside of the guidelines of the policy
- **DO NOT** use as the only basis for a decision not to employ a person- except in cases where there is a genuine requirement for employment

What Employers SHOULD DO.....

- Quality must be assured – if testing regime is used
 - Initial screening and confirmation methods must be based on different principles of analytical chemistry
 - Tests should be carried out by an accredited/reputable laboratory using accepted guidelines for procedures.
- Confidentiality:
 - Employee's information must be strictly managed data protection policy implemented



What Employers SHOULD DO....



- Consult:
 - Policy should be developed in consultation with workers and/or their representatives (if applicable).
- Enhance Supervisory level skills :
 - Ensure that management /supervisory staff is aware of policy and trained to act accordingly
- Review:
 - Procedures should be regularly reviewed to make continuous improvement.

Sample Drug Free Workplace Structure



What Employers SHOULD DO.....

- With respect to Employment Contracts
 - Review employment contracts to ensure that they embody the company's policy or have an appropriate link to the policy
 - Ensure that new contracts are clear with respect to employee's responsibility and expectations

What YOU may advise your “Employee” client..

- Take the time to understand what the new provisions of the DDA provide for and how it operates
- Seek to ascertain whether there is a Drug Policy in their workplace and become cognizant of its provisions
- If they have an underlying need to use ganja for medical purposes consider advising the employer so that reasonable accommodations can be considered if applicable
- If disciplinary actions ensue due to alleged breach of policy due to ganja use document for themselves what actions are taken to assist in any legal process they may wish to pursue later

Conclusion

- Despite all the cries to “**Legalise it**” the amendments to the DDA has not in fact done any such thing....
- Rather there has been some “decriminalization” in a limited sense
- **Employees** should make themselves aware of the new legal provisions and workplace policies so that they can operate properly within this sphere
- **Employers** should consider undertaking some of the recommendations outlined above to protect their organisation from the possible debilitating effects of the wide scale misunderstanding of the changes in the law by their employees
- Even when policy is adopted, where appropriate deal with this issue on a case-by-case basis – exercise discretion

