Accommodating Medical Marijuana In The Workplace: An Appeal Court Speaks Out Labour, Employment and Human Rights Bulletin



A Canadian appeal court has overturned a lower court ruling that an employer could refuse to hire a worker who used medically authorized cannabis at a construction project. The Court of Appeal of Newfoundland and Labrador recently decided in *International Brotherhood of Electrical Workers, Local 1620 v. Lower Churchill Transmission Construction Employers' Association Inc.* that the earlier decisions were not "reasonable" because the arbitrator failed to accommodate the worker to the point of "undue hardship". In three separate judgements, the Court addressed undue hardship limits on the duty to accommodate a worker who uses medical marijuana in a safety-sensitive workplace.

The Facts

The facts determined by the arbitrator were not in dispute. The grievor was refused employment at a construction project where he would have been involved in electric tower construction. All positons were designated as safety sensitive. When the grievor attended his lawful pre-employment drug screening, he disclosed his medical authorization for cannabis. The grievor used cannabis daily for pain management. Valard Construction refused to hire the grievor and the union filed a grievance. The arbitrator determined that it would be an undue hardship for the company to accommodate the grievor because of the safety risk to the grievor and other workers on the job.

The Arbitrator's Decision

The arbitrator decided that the grievor's use of medically authorized cannabis created a risk of impairment on the construction project. The arbitrator also said that the employer's inability to measure and manage that risk of harm constitutes undue hardship for the employer.

The Court of Appeal's Decision

The Court of Appeal did not agree with the arbitrator.

Even though it was accepted that there was no scientific or medical standard of assessing whether the grievor was impaired, Justice Walsh of the Appeal Court decided that was not enough to establish accommodation. In order to discharge the onus to accommodate the grievor to the point of undue hardship, "*… it was necessary for the employer to demonstrate that to assess the grievor for impairment by some other means on a daily or periodic basis would result in undue hardship*". The Court said that just because there is no reliable standard does not lead necessarily mean "*…there is no means by which to determine whether an employee, by reason of ingesting cannabis, would be incapable of performing a specific job, including a safety-sensitive job*".

The Appeal Court provided no definitive guidance on what that means but did offer the following rhetorical questions:

- *Was a scientific or medical standard the only option? If so, why?*
- *If alternate options were identified, why were they not implemented?*
- *For example, was a functional assessment of the grievor before his shift considered? If rejected, why?*
- *What discussions were had with the Union to identify and assess alternate options for determining whether the grievor was capable of safely performing the job despite his use of cannabis in the evening?*

In a separate concurring, majority judgement, Justice Butler dismissed the express prohibition in the applicable Occupational Health and Safety law that prohibited a worker being at work while being impaired from their ability to work safely on the basis that the applicable human rights law "take precedence" over all other provincial laws. However, there was no explanation or consideration by Justice Butler why co-workers and supervisors should have their health and safety put at risk to accommodate a worker who was using cannabis and under its influence in the dangerous workplace.

What Should Employers Do?

Whether this Appeal Court decision stands, is appealed, or is re-litigated before an arbitrator, it should not be ignored. Although the duty to accommodate to the point of undue hardship is entrenched in Canadian arbitral and human rights jurisprudence, it continues to be challenging for employers to apply the duty in individual cases.

Immediate take-a-ways for employers include the following:

- As medically authorized cannabis increases, self-disclosure policies and lawful testing are important to address for safety sensitive positions in Fitness for Duties policies.
- Consultation and support from unions is always advisable in developing, training on and enforcing Fitness for Duties policies.
- Before any employment related decisions are taken that adversely impact a worker, an employer must carefully conduct the accommodation analysis.
- Individualized duty of accommodation assessment options should be considered and applied consistently with the employer’s Occupational Health and Safety and Fitness for Duties policies.

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The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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