NL Supreme Court Undue Hardship Can Arise from Inability to Measure Cannabis Impairment

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Even before the legalization of cannabis in Canada, employers were in the throes of dealing with the impact of medically prescribed cannabis in the workplace. This has been particularly challenging for safety-sensitive employers struggling to strike the delicate balance between both safety and human rights obligations.

The recent decision from the Newfoundland and Labrador Supreme Court in *International Brotherhood of Electrical Workers, Local 1620 v. Lower Churchill* Transmission Construction Employers' Association Inc.*1 (Lower Churchill)* is an important decision on the limits of accommodation for employees who may be using medically prescribed cannabis in a safety-sensitive workplace.

Background

The employee, a labourer of more than 30 years, had been suffering from chronic pain due to Crohn's disease and osteoarthritis for a decade or more. Despite attempting several conventional therapies and medications without success, he was eventually prescribed medical cannabis which provided him with greater pain relief.

The employee disclosed his use of medical cannabis, after which he was denied employment on the Lower Churchill Transmission Construction Project because of concerns regarding the potential for impairment in the performance of safety-sensitive duties. A grievance was subsequently filed; the union took the position that the refusal was discriminatory and contrary to both the collective agreement and the human rights legislation.

Both the union and the employer agreed that the employee had a disability which required cannabis to effectively treat. It was also accepted that there were no non-safety-sensitive positions available.

Arbitrator and Supreme Court Decisions

At arbitration, the primary question was whether the employer had met its duty to accommodate the employee's disability without undue hardship.

There was competing expert evidence from general practitioners, pharmacologists, toxicologists and pain management specialists as to the effects of cannabis and how long any impairment might last. The arbitrator found that medical cannabis can impair the ability of a worker to function safely in a safety-sensitive environment, that this impairment can last up to 24 hours, that the employee may be unable to determine that they remain impaired, and that there are no testing methods available to accurately determine impairment from cannabis use in the workplace.

As such, the arbitrator concluded that undue hardship would arise if the employer were to put the employee to work. In other words, because the employer could not adequately measure impairment – both in terms of effect and duration – it could not appropriately manage the safety risk and thus, there would be an unacceptable increased safety risk if the employee were to return to the workplace.

In dismissing the judicial review application, Justice Daniel M. Boone found that the arbitrator's findings were within the range of reasonable outcomes. The union argued that the employer was obligated to hire the employee unless they could demonstrate an impairment. On that point, Justice Boone affirmed that once the issue of possible impairment had been raised, the employer was reasonably entitled to request medical information which demonstrated the employee's ability to work safely. There was no obligation on the part of the employer to hire the employee to assess the risk first-hand.

Takeaway

As there are relatively few reported decisions on this issue, the *Lower Churchill* decision will no doubt be of interest, and may well be of some persuasive value in future decisions as they relate the limitations associated with an employer's duty to accommodate when dealing with an inability to measure and mitigate the impairment associated with medically prescribed cannabis.

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