

Arbitrator states worker's use of medical cannabis results in "unacceptable increased safety risk"- grievance dismissed

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The recent legalization of recreational cannabis has highlighted the fact that there are a number of questions regarding the impairing effects of cannabis and how they may be measured. These questions generally focus on driving under the influence of cannabis and the apparent lack of technology to quickly and accurately measure impairment levels. As a recent arbitration decision from Newfoundland demonstrates, these issues are also arising in the workplace in the context of medically-authorized cannabis use.

In *Re International Brotherhood Lower Churchill Transmission Construction Employers' Assn. Inc. and IBEW, Local 1620 (Tizzard)* (April 2018), the grievor alleged that the employer failed to accommodate his disability when it refused to hire him on the basis of his use of medically-authorized cannabis. By way of background, the grievor was a construction worker who suffered from osteoarthritis and Crohn's disease. His physician prescribed cannabis to manage the pain arising from his conditions. The grievor consumed the medically-prescribed cannabis at night before rest. He claimed that by morning the impairing effects of the cannabis were gone.

In late 2016 and early 2017, the grievor applied for two labour positions on a project involving the development of a hydroelectric generating facility. In each case, the employer refused to hire him on the basis of his use of medical cannabis. The grievor grieved, arguing that by not hiring him, the employer failed to accommodate his disability.

The employer defended its decision on the basis of its statutory obligation to ensure a safe workplace for all workers and the fact that the two positions the grievor applied for were "safety-sensitive." The employer argued that while it had met its obligation to individually assess the grievor's disability and possible accommodations, ultimately the safety risks arising from the grievor's use of medical cannabis brought the employer to the point of undue hardship.

At arbitration, there was no dispute that the employer was obligated to ensure a safe workplace, nor that the grievor's medical condition was a disability requiring accommodation to the point of undue hardship. The issue was whether the grievor could be accommodated such that he could work safely in either of the two positions. If he could not, then those safety risks would result in undue hardship for the employer.

A key question was whether the grievor could potentially be impaired while at work. While the arbitrator accepted that the grievor's use of cannabis was in the evenings, he noted that the lasting effects of impairment were not known with certainty. The arbitrator relied on the lack of reasonable ability to measure impairment in persons using cannabis. Specifically, the fact that blood and urine

tests do not measure current impairment, coupled with the lack of individuals specially trained to observe and measure impairment were found to present a risk of harm that could not be readily mitigated.

The arbitrator thoroughly considered the parties' evidence submitted and concluded:

1. The regular use of medically-authorized cannabis products can cause impairment of a worker in a workplace environment. The length of cognitive impairment can exceed simply the passage of 4 hours after ingestion. Impairment can sometimes exist for up to 24 hours after use.
 2. Persons consuming medical cannabis in the evening may sincerely believe that they are not impaired in their subsequent daily functioning; they can, however, experience residual impairment beyond the shortest suggested time limits. The lack of awareness or real insight into one's functional impairment can be a consequence of cannabis use. In that context, a person may not experience 'euphoria' (as mentioned in the Health Canada Guidance), yet still not function, respond or react normally while impaired by cannabis use.
- 2[sic]. A general practicing physician is not in a position to adequately determine, simply grounded on visual inspection of the patient in a clinic and a basic understanding of patient's work, the daily safety issues in a hazardous workplace. Specialized training in understanding workplace hazards is necessary to fully understand the interaction between cannabis impairment and appropriate work restrictions in a given fact situation.
3. There currently are no readily available testing resources within the Province of Newfoundland and Labrador to allow an employer to adequately and accurately measure impairment arising from cannabis use on a daily or other regular basis.

It was this final point that may have tipped the scales in favor of the employer. If the employer could be satisfied that the grievor was not impaired while at work, there would be no reason to refuse his employment. But, given the lack of reliable testing measures, there was no ability to confirm this. The arbitrator stated:

“The safety hazard that would be introduced into the workplace here by residual impairment arising from the Grievor's daily evening use of cannabis products could not be ameliorated by remedial or monitoring processes. Consequently, undue hardship, in terms of unacceptable increased safety risk, would result to the employer if it put the Grievor to work. As previously stated, if the employer cannot measure impairment, it cannot manage risk.”

Having found the increased safety risk amounted to undue hardship for the employer, the arbitrator dismissed the grievance.

In our view

This case confirms that the increased safety risk arising from impairment in the workplace can amount to undue hardship. This will likely continue to be the case until there are reliable technologies that can accurately and effectively measure impairment. While this decision is certainly positive, employers are reminded that the duty to accommodate requires an individual assessment for each request for accommodation. This continues to apply in the context of medically-authorized cannabis use and safety-sensitive positions.

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