Claim Case Studies & Legislation: Medical Marijuana and the Workplace

Although the use of medical marijuana by employees has been an issue for employers since 2001, with the legalization of recreation marijuana, it is expected to become even more prevalent.

Several cases have made their way through the legal system and some precedents have been set.

Burton and Shelter Island Restaurants Ltd.[1]

The Complainant Darin Burton was an employee of the Respondent Restaurant. Mr. Burton's position as a Bartender and occasional Assistant Manager involved serving alcohol to customers and monitoring their consumption. He was also required to ensure that the liquor service was compliant with applicable liquor control legislation. It was also Mr. Burton's duty to ensure that the restaurant's common law duty of care to ensure that customers did not cause harm to themselves or others was being met.

The restaurant had a drug use prohibition policy of which the Complainant was aware. The policy stated that the consumption of alcohol or drugs was prohibited "without exception" while employees were on duty. Immediate dismissal was the consequence of failing to comply with the policy.

When the Complainant was dismissed due to poor work performance, he filed a complaint with the Human Rights Tribunal alleging that he was terminated because he was caught smoking marijuana while on duty. He claimed that he smoked medical marijuana to deal with chronic pain caused by degenerative disc disease.

Evidence suggested that the Complainant's condition was not diagnosed until after he was terminated. The Respondents claimed that they were not aware of the Complainant's chronic pain or the fact that he was smoking medical marijuana to alleviate the pain.

The B.C. Human Rights Tribunal had previously established that an employer must be aware of the disability of an employee or "ought reasonably to be aware, before a duty to accommodate will be triggered."[2]

1 *Burton v. Tugboat Annie's Pub 2016 CarswellBC 1791, 2016 BCHRT 78, [2016] B.C.W.L.D. 4864, [2016] B.C.W.L.D. 4869*

2 *Gardiner v. Ministry of Attorney General, 2003 BCHRT 41, paras. 152-154*

The Complainant was unable to establish a connection between his disability and his dismissal and, therefore, his complaint was dismissed.

Takeaway

Although this case was decided in favour of the employer, a point to note is the Tribunal Member's reference to the fact that an employer does not have a duty to accommodate unless they are aware of the employee's disability or "ought reasonably to be aware". This would indicate that if it is obvious that an employee has a disability, even if it has not been disclosed, a Judge could decide that a reasonable employer should have known of the disability which may trigger the duty to accommodate.

International Brotherhood Lower Churchill Transmission Construction Employers' Assn. Inc. and IBEW, Local 1620 (Tizzard)[3]

In this case before the Newfoundland and Labrador Arbitration Board, the Grievor, who was a union member, applied for employment with Valard Construction who was a contractor working on the construction of a hydroelectric generating facility. The Grievor claimed that he was discriminated against on the basis of his disability when he was not hired.

The Grievor's disability involved a painful medical condition for which he had been prescribed medical marijuana. The issue was whether the Employer failed to accommodate a disability in employment at the project.

The Grievor disclosed his medical condition and medical marijuana use when he applied for the position. Valard felt that due to the safety sensitivity of the position, they required more information as to the dosage he was prescribed and the recommended time that should elapse between consumption and the performance of safety sensitive work.

Medical experts provided differing opinions on the length of time that the Grievor would be impaired and, therefore, unable to perform safety sensitive work.

The Tribunal Member denied the grievance and found that the employer had not hired the Grievor because, based on the available technology and resources, the employer was unable to measure his impairment on the jobsite and this created an unacceptable risk. Further, the inability to measure and manage the risk of harm constituted undue hardship for the employer.

Takeaway

Employers have a duty to accommodate the disability of an employee to the point of undue hardship. In the case of positions that are safety sensitive, the decision concerning undue hardship for an employer will be based on many factors including:

1. inability to measure impairment caused by cannabis,
2. level of use,
3. safety sensitivity of the position, and
4. potential for residual impairment after use.

3 *International Brotherhood Lower Churchill Transmission Construction Employers' Assn. Inc. and IBEW, Local 1620 (Tizzard), Re 2018 CarswellNfld 198, 136 C.L.A.S. 26*

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