

Case In Point

Appellate Court Considers Cannabis Impairment and Accommodation Issues

Date: April 24, 2019

In [*International Brotherhood of Electrical Workers, Local 1620 v. Lower Churchill Transmission Construction Employers' Association Inc.*](#), the Supreme Court of Newfoundland and Labrador judicially reviewed an arbitration decision in which the key issues were measuring impairment from cannabis use and accommodation obligations. The Arbitrator found that there is currently no way to accurately measure such impairment. As a result, it was an undue hardship to require an employer to accommodate a Grievor who regularly used cannabis and who had applied for a position on a safety-sensitive project (Project). The Court held the decision was reasonable and dismissed the application.

By way of background, the Grievor suffered from chronic pain and received a prescription for medical cannabis after traditional interventions failed. The undisputed evidence was that he used cannabis each evening after work. The Grievor had been actively employed on the Project and had reported his cannabis use to his direct supervisor, who did not report it further. The Grievor had not been involved in any safety-related incidents during this time. He was then laid off.

When the Grievor exercised his recall rights to return to work on the Project, he failed a drug and alcohol screen. He explained his medical cannabis use and several medical opinions were garnered, but he was refused a safety-sensitive position on the Project.

The Grievor challenged this decision and the Arbitrator dismissed the grievance for the reasons noted above.

The union brought this application for judicial review, claiming that the Arbitrator's award was unreasonable because: (1) the Arbitrator erred in determining that the risk of impairment from cannabis use continued for a longer period of time after ingestion than expected by the Grievor's treating physician; (2) the Arbitrator effectively reversed the onus of proof in respect of accommodation and undue hardship; and (3) the employer's actions and the Arbitrator's decision perpetuated the stigma and stereotypes associated with cannabis users.

On judicial review, the parties did not dispute that the Grievor's condition constituted a "disability," that denying him employment was *prima facie* discrimination and that the employer had a duty to accommodate his disability. The employer argued that the issue was whether the Grievor's use of cannabis would impair his ability to perform work safely. The union argued that the employer was

obligated to hire the Grievor unless or until it could demonstrate that his ability to work safely would be impaired by his cannabis use.

The Court rejected the union's argument regarding the onus of proof as it "disregard[ed] the fact that the Grievor's hiring was contingent on his passing a drug test, which he failed to do." The Court observed that, while there had been no "formal" testing done in the case before it, there was sufficient circumstantial evidence and agreement from the parties that there would have been a positive result had the test been done.

The Court stated that the only way the Grievor could be accommodated was by demonstrating that he "could work in one of the positions in issue, with or without modification, notwithstanding his cannabis use; through another position being made available to him; or through a different regime being adopted for treatment of his disability."

The evidence indicated that there were no positions available that were not safety-sensitive and that there were no "other medical or therapy modalities" available to the Grievor because conventional interventions had failed.

On the basis of these findings, the Court concluded that the Grievor could not be accommodated without undue hardship:

[42] The Arbitrator considered the expert evidence adduced by both Union and Employer, as summarized earlier in this decision. He properly considered the issues before him on the basis of the evidence, which had been adduced in this case noting that the evidence may have been different in those cases cited where the outcomes were different. **He concluded from the evidence that the use of marijuana can impair the ability of a worker to function safely in a safety-sensitive workplace, that this impairment can last up to 24 hours after use, that the impairing effects may not be known to the user, and that there was no available means or method for accurately testing impairment from cannabis use in the workplace.** [emphasis added]

This decision is helpful to employers as it provides guidance on how adjudicators may approach accommodation of cannabis use in safety-sensitive workplaces at a time when requests for such accommodation are rising and current testing methods are unable to accurately assess impairment.

While the decision is persuasive authority, employers should note that every accommodation issue is unique and all requests for accommodation must be determined on a case-by-case basis.