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**Termination for Failure to Comply with Attendance Policy Not Discriminatory** . . . . . 2

**Progress of Legislation**

British Columbia . . . . . 4

Manitoba . . . . . 5

New Brunswick . . . . . 5

Nova Scotia . . . . . 6

Ontario . . . . . 6

Quebec . . . . . 7

Yukon . . . . . 8

**Recent Cases** . . . . . 8

## HRTO FINDS NO DISCRIMINATION WHERE USE OF MEDICAL MARIJUANA AT WORKSITE BREACHED ZERO TOLERANCE POLICY

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In *Aitchison v. L & L Painting and Decorating Ltd.*, 2018 HRTO 238, the Human Rights Tribunal of Ontario (HRTO) found that an employer did not discriminate against the applicant when his employment was terminated for smoking marijuana while at work, which was contrary to the employer's "zero tolerance" policy.

The applicant was employed as a seasonal painter from 2011-2015 for the respondent employer. His duties required him to perform work on a swing stage located 37 floors above the ground. Due to chronic pain from a degenerative disc disease, the applicant smoked marijuana while at work, including smoking by himself on that swing stage during his breaks.

Among other issues raised in his application, the applicant asserted that his supervisor was aware of and condoned his use of medical marijuana in the workplace. However, his supervisor denied having any knowledge of the applicant's marijuana use in the workplace. The respondent employer also had a "zero tolerance" policy regarding intoxicating drugs and alcohol, of which the applicant was aware.

In June 2015, the applicant was observed smoking on the swing stage, untethered and not wearing his hard hat. The supervisor consulted the owner of the company and sent the applicant home. As a result of this incident, the owner terminated the applicant's employment due to the company's "zero tolerance" policy. The owner further noted the health and safety concerns of others on his site, as well as public safety concerns should an item fall from a swing stage located 37 floors above the ground. He testified that it would be "reckless" for him to allow the applicant to perform his duties in a "potentially intoxicated state." Moreover, company rules prohibited employees from being on a swing stage alone for safety concerns.

After weighing the credibility of the witnesses, the HRTO found in favour of the employer. It stated:

- while the applicant had a disability for the purposes of the *Human Rights Code*, his supervisor had never condoned his marijuana use at work;
- there was no evidence provided that the applicant suffered from an addiction requiring accommodation;
- there was no evidence that the applicant had ever requested accommodation for his use of medical marijuana;

- the applicant's assertion that there was an agreement that the applicant could go outside and smoke on the swing stage by himself "flies in the face of the health and safety protocols that were in place";
- there was no breach of the procedural duty to accommodate; the respondent did not have to consider if the applicant could be reasonably accommodated after "he provided the grounds for his own termination";
- the applicant did not "have an absolute right to smoke marijuana at work regardless of whether it is used for medicinal purposes."

The HRTO concluded that the employer's reliance on its "zero tolerance" policy for the termination of the applicant's employment did not result in discrimination, nor was there any evidence that the applicant's disability was a factor in the decision to terminate his employment. The claim was dismissed.

It is good news for employers that the HRTO noted there is no "absolute right" to use marijuana at work regardless of whether it is medicinal. In this case, the health and safety issues clearly were a significant factor in upholding the "zero tolerance" policy.

While the HRTO placed weight on the employer's "zero tolerance" policy in upholding the termination and arriving at its decision, it is important for employers to be aware that "zero tolerance" policies will still be subject to the duty to accommodate in appropriate circumstances. As with any "blanket" policy, they cannot be applied mechanically without regard to the individual circumstances of the employee and the nature of the workplace. It will not be enough for an employer to exclusively rely on a zero tolerance policy: however, where factors such as health and safety are at play, as they were in this case, the policy will be an important relevant consideration.

*Jessica Toldo is a labour and employment lawyer in Hicks Morley's Toronto office. She provides advice to employers and management in both the private and public sectors on labour, employment and human rights issues. This includes labour disputes, grievance arbitrations and human rights and accommodation.*

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