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Can Exposure To Second-Hand Cannabis Smoke Possibly Trigger A Positive Drug Test Result?

This was the main issue raised by a paramedic during a grievance proceeding challenging his dismissal because he had failed to comply with his duty to refrain from consuming illegal drugs.

The facts

Due to the nature of the employer's business, a zero-tolerance policy governed specific categories of employees, including paramedics. The policy applied where the presence of any trace of drugs in the body was detected.

The paramedic had already entered into a "last-chance" agreement as a result of an earlier investigation into his drug use. The agreement provided for the administration of random drug tests over a certain period of time.

Notwithstanding this undertaking, the paramedic failed a new drug test.

Although the employer was entitled to proceed with an administrative dismissal, a decision was taken to grant a second "last chance" pursuant to a new agreement which included a commitment to refrain from using illegal drugs or opiates, and that all testing would reveal no trace of drugs in his system. The agreement also provided for dismissal in the event of any further violation of the agreement.

One year later, the paramedic once again tested positive based on a random hair follicle test contemplated under the agreement. More specifically, the test disclosed the presence of THC-COOH in the paramedic's hair. THC-COOH is the active element of cannabis (THC) metabolized by the human body.

Confronted with the positive result, the paramedic denied having consumed any cannabis, claiming he had been exposed to second-hand cannabis smoke during a visit at the home of a user. In this regard, the evidence in fact disclosed that one month prior to the drug test, he had carried out an intervention in an apartment where there had been a strong odour of cannabis.

In order to assess this explanation, the employer retained the services of a specialist firm, that came to the conclusion that this justification was insufficient to

explain the positive result of the drug test. The employer then terminated the employment of the paramedic as provided under the second last-chance agreement between the parties.

The grievance hearing

The paramedic maintained this version of the events throughout the grievance hearing challenging his dismissal.

In reply, the employer filed the expert medical report demonstrating that it was highly unlikely that exposure to second-hand cannabis smoke during a thirteen (13) minute intervention in an apartment could have triggered a positive test result.

According to the expert report, the presence of THC-COOH in the hair, i.e. the metabolized form of THC, demonstrated that there was consumption of cannabis during the previous 1 to 3 month period.

Although the ruling didn't refer to this point, the expert's report distinguished between traces of cannabis that could have been deposited **on** the complainant's hair during brief exposure from second-hand cannabis smoke and traces of THC-COOH found **inside** hairs.

The union produced no expert's report that refuted the findings of the employer's expert.

Under the circumstances, the arbitrator judged that on a balance of probabilities, the paramedic had consumed cannabis in violation of his last-chance agreement.

As the punishment of dismissal was predetermined in the last-chance agreement, the arbitrator had no jurisdiction to substitute a less severe penalty. He therefore dismissed the grievance.

To conclude, we would add that in view of the imminent legalization of cannabis, employers are now faced with issues that involve the implementation and review of current zero-tolerance policies and drug tests. An anticipated growth in the use of this drug will undoubtedly trigger an increasing number of situations of exposure to second-hand smoke and attempts to justify positive drug test results on this ground.

Reference : *Syndicat du préhospitalier (FSSS-CSN) v. Corporation d'Urgences-Santé (François Paré)*, 2018 QCTA 323, Arbitrator Richard Marcheterre.

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