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CLEARING THE CANNABIS HAZE: SAFETY IS STILL PARAMOUNT

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Few headlines have garnered more attention in the Canadian media this year than the legalization of cannabis.

While the announcement has been well received by some, employers — especially those with safety-sensitive operations — remain concerned about workplace safety.

Adding to the concern for employers is the human rights duty to accommodate an employee who has been prescribed medical marijuana to deal with a physical or mental health condition. A recent labour arbitration decision out of Atlantic Canada may, however, help to clarify the law around accommodating employees who use medical marijuana.

In *Lower Churchill Transmission Construction Employers' Assn. Inc. -and- IBEW, Local 1620 (Tizzard Grievance) (Unreported: April 30, 2018)*, Arbitrator John Roil, Q.C. considered whether an employer's inability to accurately measure the impairing effects of cannabis in the context of a safety-sensitive position amounted to undue hardship under human rights law.

While it remains to be seen whether the decision will survive judicial review, the reasoning of the arbitrator was generally sound and should be persuasive in British Columbia.

Background

Harold Tizzard applied for a labourer position with Valard Construction LP. The company was seeking personnel to assist with its contracting work on the Lower Churchill project, the development of a hydroelectric generating facility in Labrador.

At the time of applying for the job, Tizzard had a medical prescription permitting him to consume up to 1.5 grams of cannabis with THC levels of up to 22 percent on a daily basis. He suffered from pain associated with a diagnosis of Crohn's disease and osteoarthritis. After other medication proved to be unsuccessful in alleviating his pain, he was prescribed medical marijuana.

Valard hired Tizzard on the condition that he successfully complete a pre-employment drug and alcohol test. Shortly after learning that he had a prescription for medical marijuana and

failed the test, Valard retained the services of an independent medical expert and sought medical information from Tizzard.

After months of discussion with Tizzard's union and thoroughly considering his medical information, Valard declined to employ him because of its concerns about workplace safety.

Decision

The issue before Arbitrator Roil was whether Valard had failed to accommodate Tizzard's disability by not providing him with a job.

The arbitrator first considered whether the labourer positions at Valard in which Tizzard was interested were safety-sensitive. He had no difficulty determining that the positions were inherently hazardous because it was clear on the evidence that the job sites had harsh weather conditions and difficult terrain.

Arbitrator Roil was satisfied that Valard did not have non-safety-sensitive positions in its operations. He was also satisfied that Tizzard had explored other medication options to alleviate his pain but none of those options had been successful. The arbitrator was thus left with the question of whether Tizzard could work safely as a labourer while consuming medical marijuana.

A number of medical experts were called to give evidence on Tizzard's possible impairment after consuming 1.5 grams of cannabis each evening the day before his shift. Relying exclusively on expert testimony and medical literature, the arbitrator concluded that the impairing effects of cannabis can last up to 24 hours after use and there was no readily available testing resource in the province at that time to allow an employer to adequately and accurately measure impairment from cannabis following daily or regular use.

Highlighting the unknowns around impairment while on the job and the applicable occupational health and safety legislation, the arbitrator concluded that Valard should not be required to assume the safety risk. He ruled that the inability to measure Tizzard's impairment posed an unmeasurable safety hazard and accordingly amounted to undue hardship for the employer.

Takeaways

1. **Evidence remains key.** To win at arbitration, employers must be able to speak to the safety-sensitive nature of a particular position and perhaps the business and industry as a whole. Expert medical evidence on the impairing effects of cannabis may well be required.

2. **Residual effects of cannabis use can last up to 24 hours.** While the scientific research is ongoing, there is evidence that the impairing effects of cannabis can last

up to 24 hours after use. Indeed, in a position statement released very recently, the Occupational and Environmental Medical Association of Canada stated, "*[I]t is not advisable to operate motor vehicles or equipment, or engage in other safety-sensitive tasks for 24 hours following cannabis consumption, or for longer if impairment persists.*"

3. **Employee self-reporting on cannabis use and its effects is unreliable.** The arbitrator in this case gave short shrift to Tizzard's self-reporting on the impact of cannabis consumption on his level of functioning. It can be inferred that adjudicators will be likely to reject medical evidence based on similar self-reporting.

4. **Inability to accurately measure impairment may amount to undue hardship.** There is much to commend an approach in which an employer's inability to accurately measure the impairing effects of cannabis, and properly assess the associated risk for a safety-sensitive position, is considered to be undue hardship under human rights law. The approach is compelling because it errs quite rightly on the side of caution and tips the balance in favour of workplace safety.

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