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HRTO applies SCC ruling on treatment of zero tolerance policies and the use of marijuana in the workplace

A commercial contractor involved in the restoration of high-rise buildings terminated an employee for smoking marijuana on the job, even though he presented a medical marijuana prescription card. The former employee (the "Applicant") brought a claim pursuant to the Ontario *Human Rights Code* (the "*Code*") for wrongful termination due to disability. The Applicant claimed that he was prescribed marijuana to manage chronic pain as he suffered from a disability - degenerative disc disease.

There were many factors that led to the Tribunal's decision[1], which are all important in recognizing the context of the case. There was no dispute that the Applicant smoked marijuana while on the job on a particular given day. The Applicant claimed that he had been using marijuana at work for a year prior to his termination and he began using medical marijuana through a prescription for his disability approximately 3 months prior.

It was the Applicant's position that the employer was well aware of his use of marijuana while on the job. The employer's position was that it had caught the employee smoking marijuana once on the job, and he was immediately sent home and told not to come back to work until the owner of the Respondent company came back from vacation. The employer denied that anyone had prior knowledge that the Applicant was using marijuana on the worksite, which the Tribunal accepted. The Tribunal accepted that the Applicant was confronted and sent home for having used marijuana at work on the day he was caught. There was objective evidence that the Applicant faxed his medical marijuana prescription card to the employer's office prior to his termination.

There was also no evidence that the Applicant had asked for an accommodation to use prescribed medical marijuana during work hours. The evidence demonstrated that the employer had a zero tolerance policy in addition to the project's general contractor's policy. While the employer could not demonstrate that the Applicant acknowledged having received the specific policies, the Applicant did not dispute that they existed as there was evidence that he viewed health and safety videos, which communicated the possibility of facing discipline, including termination, if a worker breached the policy. All employees, including the Applicant watched the video and filled out a questionnaire about having viewed it just two months prior to the Applicant's incident with marijuana while on the job.

The Tribunal was clear that even if the applicant had made a request for accommodation to use medical marijuana for his chronic pain disability on the

[1] *Aitchison v. L & L Painting and Decorating Ltd.* 2018 HRTO 238

job, the employer would have had the right to take the position that it is an unreasonable accommodation in light of the zero tolerance policy and the importance thereof. It is also important to note that the Applicant's doctor, who prescribed him with the marijuana to manage his chronic pain, testified during the hearing and stated that had he known the Applicant worked as a painter on high-rise buildings, he would have not recommended using the medical marijuana during work hours.

The Applicant attempted to argue that the employer failed to accommodate him procedurally by failing to consider whether he suffered from an addiction to marijuana before terminating him. However, there was absolutely no evidence before the Tribunal to suggest an addiction, which therefore did not trigger the employer's legal obligations to accommodate same.

The most important factor was the genuine concern for health and safety, which supported the company's zero tolerance policy on drug use. The Tribunal relied on the recent SCC decision *Stewart v. Elk Valley Coal Corp.*[2] to reaffirm the fact that a termination relying on a zero tolerance policy does not necessarily equate to discrimination under the *Code*. In the circumstances, the employer had no opportunity to consider how, if ever, it would be able to accommodate the Applicant and allowing him to use prescribed medical marijuana during work hours. The Tribunal concluded that the Applicant's disability was not a factor in his termination. The Applicant in this case had no prior record of discipline with the company.

The Tribunal also applied the three-part test[3] to determinate whether the zero tolerance policy was a *bona fide* requirement of the job. The Tribunal easily found that the policy was reasonably related to the objective of health and safety, it was adopted in an honest and good faith belief that such a policy is necessary, and the policy's conditions, including discipline if in breach, is necessary to accomplish to protect the health and safety of workers and the public. Therefore, the Tribunal found that the policy was not discriminatory and the claim was dismissed.

As the proposed legalization date for marijuana is fast approaching, this decision is an important reminder for employers, including school boards, that in certain workplaces, the importance of health and safety may mean that the use of marijuana by employees during work hours, even as an accommodation, may constitute undue hardship for the employer.

School boards will likely see a rise in requests for accommodations to use medical marijuana to treat disabilities during work hours, as the use of marijuana, including medical marijuana, will destigmatize further after it is legalized. School boards need to continue to individually assess employees' disabilities and consider the issue of impairment in the workplace when accommodation requests are made with respect to medical marijuana. Without a doubt, teachers hold safety sensitive positions, especially those working with younger students and those with special needs.

[2] 2017 SCC 30
[3] The *Meorin* test arising from *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1993] 3 SCR 3