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HRTO Confirms There is No Absolute Right to Use Medical Marijuana at Work

Introduction

In the recent decision of *Aitchison v L & L Painting and Decorating Ltd.*,¹ the Human Rights Tribunal of Ontario (“**HRTO**”) confirmed that there is no absolute right to use medical marijuana in the workplace.

Background

Mr. Aitchison filed a human rights complaint against the respondent, L&L Painting and Decorating Ltd., that it discriminated against him with respect to employment because of his disability and that it failed to accommodate his disability.

The respondent is a commercial contractor involved in the restoration of high-rise buildings. Mr. Aitchison was employed by the respondent for several years as a seasonal painter, and as a part of his job he was required to work on the exterior of high-rise buildings. Due to a prior injury, Mr. Aitchison had degenerative disc disease which resulted in chronic neck and back pain. He managed his pain with medical marijuana, and he self-medicated at work by smoking marijuana during breaks.

In June 2015, Mr. Aitchison was working on a high-rise building and was observed smoking on a swing stage at the 37th floor. The site supervisor sent Mr. Aitchison home. The respondent terminated Mr.

¹ *Aitchison v L & L Painting and Decorating Ltd.*, 2018 HRTO 238 (“*Aitchison*”).

Aitchison's employment for smoking marijuana while at work in breach of its "zero tolerance" policy. The respondent's "zero tolerance" policy for the use of illegal drugs, alcohol on the jobsites, or taking prescription drugs that could cause impairment while working because of the safety-sensitive nature of the work. Prior to termination, Mr. Aitchison never raised the issue of accommodation with the respondent.

Mr. Aitchison did not deny using marijuana at work, but he argued that his supervisor condoned his use of marijuana. The supervisor denied having knowledge that Mr. Aitchison was smoking while at work. Mr. Aitchison also alleged that the true reason for his termination was the respondent's unwillingness to accommodate a separate accommodation his request to limit his use of an electric sander.

HRTO Decision

While the HRTO found both parties' evidence was unreliable, it held in favour of the respondent. The HRTO accepted that Mr. Aitchison had a disability within the meaning of the *Ontario Human Rights Code* (the "**Code**");² however, a number of other considerations weighed in favour of the respondent's case:

- The owner was not aware of Mr. Aitchison's marijuana use prior to the events that led to Mr. Aitchison's termination;
- The doctor who prescribed Mr. Aitchison's medical marijuana had not understood the nature of Mr. Aitchison's work as a high-rise building painter and "would have never authorized the applicant to medicate at work in these circumstances;"³
- The respondent was not obliged to accommodate employee preferences if those preferences would amount to an undue hardship or if those fell short of alternative reasonable accommodations proposed by the employer. The Tribunal held that it would have no difficulty in concluding that Mr. Aitchison's

² *Human Rights Code*, RSO 1990, c H 19.

³ *Aitchison* at para 51.

preferred accommodation presented an undue hardship in light of the health and safety concerns of the workplace;⁴

- Mr. Aitchison had already committed a serious health and safety breach that was in violation of the respondent's zero tolerance policy prior to the respondent being made aware of any accommodation needs. Accordingly, the respondent was under no obligation to consider whether it could reasonably accommodate Mr. Aitchison after he provided the grounds for his own termination;⁵
- There was no evidence to suggest that Mr. Aitchison suffered from any addiction with respect to his marijuana use;
- Mr. Aitchison would have been familiar with the respondent's "zero tolerance" policy;
- The respondent's "zero tolerance" policy was reasonably necessary to accomplish its purpose, to protect the health and safety of the worker and the public. The policy was not discriminatory as the policy itself did not impose automatic termination as a condition, and provided some flexibility to the employer to consider requests from those who need accommodation; and
- The right to smoke marijuana at work, medicinal or otherwise, is not absolute.

Importance for Employers

The key take-away from this decision is that employees do not have an absolute right to smoke marijuana, including medical marijuana, at the workplace. Although having a "zero tolerance" policy does not provide, in every case, a right to terminate for a breach of the policy, having a policy set out the employer's expectation for employees, and, in this case, it was relied on by the employer and by the Tribunal in its reasons for upholding the employer's termination as

⁴ *Aitchison* at para 158.

⁵ *Aitchison* at para 160.

not being discriminatory. Ensuring that employees are reminded of policies at least yearly, and requiring them to sign a form acknowledging that they are aware of the employer's policies, are ways to ensure that employees cannot later assert that they are not aware of the workplace policies. This decision from the Tribunal should also provide employers with some assurance regarding the upcoming legalization of marijuana that employers continue to have a right to manage their workplaces to ensure the health and safety of their workers and the public.

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[a cautionary note](#)

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