

24-HOUR RULE: COURT CONFIRMS LIMITS OF MEDICALLY PRESCRIBED CANNABIS USE IN THE WORKPLACE

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The Supreme Court of Newfoundland and Labrador (“Supreme Court”) has issued an important decision about the limits of accommodating the use of medically prescribed cannabis by an employee working in a safety-sensitive position.

Background

The employee in *International Brotherhood of Electrical Workers, Local 1620 v. Lower Churchill Transmission Construction Employers' Association Inc.*^[1] suffered from pain and the associated consequences of Crohn’s disease and osteoarthritis. To manage the pain, he was authorized to ingest up to 1.5 grams of cannabis having THC levels of up to 22%, which he consumed through vaporization each evening following work hours. He did not consume cannabis in the morning before work or during work hours.

In 2016, the employee applied for a safety-sensitive position with a major contractor working on a hydroelectric generating facility and related infrastructure. The employee’s application was accepted by the employer, subject to a satisfactory drug test. The employee took the test, and was forthcoming about the fact that he used medically prescribed cannabis. However, the employee was never called-in to work and, eventually, was advised that he had been “red-flagged” because of his medically prescribed cannabis use. As a result, the union representing the employee filed a grievance asserting that the employer’s conduct amounted to discrimination and a failure to accommodate contrary to Newfoundland and Labrador’s *Human Rights Act*, 2010.^[2]

Arbitrator’s Decision

At arbitration, the employer argued that the safety risks caused by the employee’s use of medically prescribed cannabis gave rise to an undue hardship. In particular, the employer relied on a policy which said that a worker “should not be working in a safety-sensitive position for a minimum of 24 hours after the use of medical marijuana”. In support of its policy, the employer pointed to Health Canada report which found that the ability to perform activities requiring alertness may be impaired for up to 24 hours following a single consumption of cannabis.

The arbitrator sided with the employer and held that the safety risks that would be introduced into the workplace by residual impairment arising from the employee's daily evening use of cannabis would create an undue hardship. In doing so, the arbitrator made the following findings:

- cannabis use can impair the ability of a worker to function safely in a safety-sensitive workplace;
- residual cognitive impairment arising from cannabis use can last for up to 24 hours after use;
- such impairment may not be known to the worker; and
- there are currently no readily available testing resources to allow an employer to adequately and accurately measure current impairment arising from cannabis use.

Judicial Review

The union applied to the Supreme Court for judicial review of the arbitrator's decision. According to the union:

- the arbitrator erred in determining that the risk of impairment from cannabis use continued for a longer period of time than expected by the employee's treating physician (who gave evidence that the impairing effects lasted for just 4 hours);
- the arbitrator reversed the onus of proof in respect of accommodation and undue hardship by determining that employing the employee with a risk of impairment, rather than demonstrated impairment, constituted undue hardship; and
- the employer's actions, and the arbitrator's decision, perpetuated the stigma and stereotypes associated with cannabis users.

However, the Supreme Court disagreed with the union and held that the arbitrator's decision was reasonable.

In this case, the only possible outcomes would have been that the employer could have refused to employ the employee or hired him notwithstanding the significant (and unacceptable) safety risks. In the result, the Supreme Court dismissed the union's application and upheld the arbitrator's original decision.

Lessons for Employers

Employees who use medically prescribed cannabis, including employees who work in safety-sensitive positions, have to be accommodated to the point of undue hardship. For example, human rights law may require the employer to transfer the employee to a non safety-sensitive position in the workplace.^[3] Nevertheless, the Supreme Court's decision is a strong statement that employees do not have an absolute right to use medically prescribed cannabis in safety-sensitive positions.

While each case must always be considered on its own facts, as a general rule, we recommend that employers make it a violation for employees in safety-sensitive positions to:

- use cannabis, including medically prescribed cannabis, in the workplace; or
- report to work if the employee has used cannabis, including medically prescribed cannabis, in the preceding 24-hour period.

Regarding non safety-sensitive positions, the reality is that it may be very difficult for employers to establish that the use of medically prescribed cannabis gives rise to an undue hardship. However, an exception may exist where the employee demonstrates that he or she is unable to perform the essential duties and responsibilities of the non safety-sensitive position due to the cannabis use.

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[1] 2019 NLSC 48.[ps2id id='1' target='']

[2] *Human Rights Act*, 2010, SNL 2010, c H-13.1.[ps2id id='2' target='']

[3] This did not happen in the *Lower Churchill* case, as there was no evidence regarding the availability of non safety-sensitive positions.[ps2id id='3' target='']

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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