Current Workplace Issues

Drug Testing and Duty to Accommodate
Ask Me No Questions; I Will Tell You No Lies

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Three recent Alberta cases discuss the issues surrounding drug testing and the duty to accommodate. In *Chiasson vs. Kellogg, Brown & Root (Canada) Company*, a human rights tribunal dealt with a complaint of discrimination based on physical and mental disability contrary to section 7(1) of the *Human Rights Citizenship and Multiculturalism Act*. This case involved pre-employment drug testing pursuant to a policy that required medical and drug screening over a 90 day probation period. The complainant was terminated one month into his employment after a negative test came back from the pre-employment drug screen. The position he was terminated from was as receiving inspector for a Syncrude upgrader in Fort McMurray. It was a safety sensitive position.

In *Suncor Energy Inc. and Communications, Energy and Paperworks Union, Local 707*, a unionized employee was dismissed for a positive drug test. This employee worked in the Drainage Section of Mine Operations and operated a variety of heavy duty equipment including backhoes, cats and loaders and was considered a safety sensitive position. After being charged with possession of marijuana, the employee along with others had been suspended without pay. After a grievance and a mediated settlement, the employee agreed thereafter for a two year period to "incident-based drug and alcohol testing during the two year period." Several months later while backing up a light truck into a parking stall, his truck clipped an adjoining vehicle. Although he showed no signs of impairment, he was sent for a drug and alcohol test and tested positive for marijuana.

Employee Evidence

In the *Chiasson* case, the complainant testified he was a recreational user of cannabis. At the hearing there was no evidence of serious drug use or work impairment. The panel concluded there was no disability or perceived disability.

In the *Suncor* case, Arbitrator Jones noted the following evidence in his decision,

"Mr. Pearson asserts that he is not addicted to marijuana and does not have a substance abuse problem. The issue therefore is not one of discrimination because of an actual or perceived handicap or disability but rather when the employer had just cause to terminate the grievor's employment in the circumstances of this case."

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The Grievor also gave evidence in this case that he puffs two or three joints a day on his days off and has been doing so for many years.

Significantly then in both of these cases, the adjudicating tribunal refused to find a real or perceived disability, based on the employee's own evidence.

A more problematic case recently for employers is *Halter v. Ceda-Reactor Limited*. This is a human rights' panel decision from May of 2005. Here the panel noted, at page 22,

"[128] In this case, the Panel has no evidence that Ceda took any steps to determine Mr. Halter's level of dependency. Further, the complainant has produced no evidence from either a psychologist or doctor, which would determine whether Mr. Halter was a chronic user of cannabis, or a casual user. Mr. Halter himself has not indicated to anyone that he has a substance abuse problem. Consequently, the Panel finds that the complainant has not established that his drug use constituted a drug dependency and qualifies for protection within the meaning of physical or mental disability under the Act."

Notwithstanding this finding, the panel later concludes at paragraph 139,

"[139] It is the finding of this Panel that Ceda perceived Mr. Halter to be disabled when they administered the random blanket drug test. After testing positive, Mr. Halter was further perceived to be a substance abuser and was terminated on the assumption that he was likely to be impaired on the job and not fit for work."

Why this result? Mr. Halter was a member of a crew of 14 employees employed by Ceda in Fort McMurray. After a drug test of the 14 members, seven tested positive for illicit drugs. After this test, on December 23, 2002, a second test was administered on January 16, 2003. Mr. Halter failed this test as well. As part of its case the employer, Ceda, called Dr. Lynch, who testified that to determine the level of dependency an employee would have to be interviewed by a psychologist or doctor. The medical professional would have to determine if there was a substance dependency or if the employee was a casual user.

In this case the panel concluded that the employer was acting on a perceived disability and that there had not been accommodation to the point of undue hardship.

These three cases are illustrative of how adjudicators are dealing with actual or perceived disabilities based on the evidence presented them. They are illustrative of the problems that arise on an evidentiary basis. Further, the Chiasson and Suncor cases are good examples of an employer proving no disability or perceived disability exists. Finally the Halter case illustrates how the employers actions coupled with a lack of knowledge of the dependency level can work against the employer.

** Note that decision in *Chiasson* has been appealed to the Alberta Court of Queen's Bench.