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EMPLOYEE DISMISSED FOR VAPING CANNABIS AND DRIVING EMPLOYER'S CAR

By Barry W. Kwasniewski*

A. INTRODUCTION

On April 18, 2018, a labour arbitration board in Saskatchewan (the "Board") released its decision in *The Town of Kindersley v Canadian Union of Public Employees Local 2740*[1] in which the Board upheld an employer's decision to dismiss a unionized employee for improper use of his medically prescribed cannabis. This decision is a reminder to charities and not-for-profits that the accommodation of an employee's needs with respect to medical cannabis does not give an employee licence to use the substance in whichever way the employee sees fit. Rather, employees are expected to abide by company policies, rules, and workplace accommodation agreements and also conduct themselves responsibly in their use of the substance. While this decision was released in 2018, the principles relating to workplace accommodation and the use of medically prescribed cannabis are important, especially in light of the recent legalization of recreational cannabis in Canada in October 2018, and the potential of the increased use of both medical and recreational use of cannabis across Canada as discussed in *Charity & NFP Law Bulletin No. 431*.[2]

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[1] *The Town of Kindersley v Canadian Union of Public Employees, Local 2740,* 2018 CanLII 35597 (SKLA) [*Kindersley*].
[2] Barry W Kwasniewski, "Managing Cannabis in the Workplace in Ontario" (23 October 2018) *Charity & NFP Law Bulletin No. 431* online (pdf): *Carters* www.carters.ca/pub/bulletin/charity/2018/chylb431.pdf.

B. BACKGROUND

The grievor, Jesse Desjarlais, was employed in 2015 as a Recreation Labourer with the Town of Kindersley where his responsibilities included ice maintenance and operation of the Zamboni at the town's arena. Mr. Desjarlais had a prescription to vape cannabis for medical purposes during the work day, although his prescription restricted him from operating a Zamboni, forklift, or lawn mower within a 20 to 30 minute period after consuming the drug. Upon comments from patrons of the facility that Mr. Desjarlais smelled of cannabis and was vaping the substance while operating the Zamboni, the employer placed him on administrative leave to investigate the concerns. After analyzing the medical letters, the employer noted issues with Mr. Desjarlais' medical documentation in that the physician providing the letter was not a registered physician in Saskatchewan, and that the letter did not include specific information required under federal regulations that were in force at the time, the *Marihuana for Medical Purposes Regulations*.[3] The employer also found that the safety-sensitive nature of Mr. Desjarlais' position was a concern with respect to his consumption of medical cannabis.

Nevertheless, with the consent of the employee and his union, the employer accommodated Mr. Desjarlais by moving him to the Department of Parks and Recreation, which would provide him with a less stressful working environment. Further, the change in position also required less interaction with the public and minimized the safety concerns with respect to his position at the arena. The employer also permitted Mr. Desjarlais to vape medical cannabis three times a day, provided that Mr. Desjarlais refrained from operating equipment "like a large tractor, backhoe, pay loader or riding mower" for an hour after use. Mr. Desjarlais appeared to be doing well in this new position; his employer verified that Mr. Desjarlais was a good worker and in compliance with his "medication parameters."

However, following a work trip to Humboldt with two co-workers, the co-workers brought to the attention of the employer that Mr. Desjarlais had been vaping cannabis while driving the Town vehicle to and from Humboldt, as a passenger in the vehicle, as well as throughout the entire trip. At one point, co-worker testimony stated that Mr. Desjarlais had even been "vaping in the back seat while playing his guitar." The employer opened up an investigation. Despite the fact that Mr. Desjarlais had not been previously disciplined and that the collective agreement had a progressive discipline policy, the employer proceeded

[3] *Marihuana for Medical Purposes Regulations*, SOR/2013-119. These regulations were repealed on August 24, 2016.

to terminate Mr. Desjarlais on May 10, 2016 with cause, effective immediately. Mr. Desjarlais' union brought a grievance to the Board.

C. ANALYSIS AND DECISION

The Board, which dismissed the grievance filed by the union, dealt with two issues: 1) whether the grievor had been given just and reasonable cause for some form of discipline by the employer, and 2) whether the termination was excessive considering the circumstances.

1. Just and Reasonable Cause for Discipline

In holding that there were just and reasonable grounds for the employer to discipline Mr. Desjarlais, the Board examined whether Mr. Desjarlais was impaired while "in the care and control of and/or operating the Town vehicle during the trips to and from Humboldt," which was the primary reason for termination provided in the termination letter, and whether Mr. Desjarlais had consumed cannabis while on the work trip. Interestingly, although the Board acknowledged that the employer had "no evidentiary basis" to support a finding that Mr. Desjarlais had been "impaired in the operation or care and control of the Town vehicle," the Board emphasized that the substance of the facts surrounding the context of termination mattered more than the form of the termination letter in determining whether discipline by the employer had been fair:

> 165. We could conclude, at this point, that the decision to discipline the Grievor was predicated on what the Employer has failed to prove and leave it at that.
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> 166. In our view, this would be putting blinders on as to whether the Grievor engaged in conduct that is deserving of some form of discipline. It would be unfair to punish the Employer for the form of the termination letter and ignore the substance of the factual matrix in which the Employer decided to impose discipline.

The Board accordingly turned its attention from the issue of impairment to whether Mr. Desjarlais had been vaping cannabis during the work trip. After assessing the evidence, the Board found that Mr. Desjarlais had "more likely than not" been vaping cannabis while driving and also vaped cannabis and then drove without waiting the required 20 to 30 minutes. In this regard, Mr. Desjarlais' conduct was in violation of the employer's Vehicle Usage Policy, which provides that "all drivers

shall comply with all rules, regulations and laws of operating a motor vehicle," failure of which would "result in discipline… up to and including dismissal."

The Board also found that Mr. Desjarlais' conduct violated the accommodation agreement between Mr. Desjarlais and the employer, which required Mr. Deslarlais to wait 20 to 30 minutes after vaping cannabis before operating a motorized vehicle. Further, the Board commented that there was a safety issue with respect to consuming cannabis while driving, and that Mr. Desjarlais' failure to wait 20 to 30 minutes before operating a vehicle as well as vaping while driving exposed his co-workers to a safety risk. In light of these reasons, the Board found that there were "just and reasonable grounds to sanction the conduct of the grievor for his use of cannabis on the Humboldt trip and impose discipline."

2. Is Discharge Excessive Considering All of the Circumstances?

The Board found that the immediate termination of Mr. Desjarlais was not excessive in the circumstances of the case. While the collective agreement with respect to Mr. Desjarlais generally mandated a progressive disciplinary process, a provision in the agreement stated that "some serious major offences will result directly in dismissal."[4] The Board held that Mr. Desjarlais' use of cannabis on the work trip was severe or serious enough to justify the employer's decision to bypass such progressive discipline. Factors that influenced the Board's decision included: the fact that Mr. Desjarlais had been accommodated for his use of cannabis and that his conduct was viewed by the Board as "taking unfair advantage" of this accommodation; Mr. Desjarlais' disregard to his own safety and the safety and concerns of his co-workers; the fact that Mr. Desjarlais' conduct occurred while he was using a Town vehicle that was "fully decked out and labelled"; and that vaping cannabis while driving the vehicle was an "egregious violation" of the employer's Vehicle Usage Policy.

With respect to Mr. Desjarlais' use of cannabis for medical purposes, the Board acknowledged that the employer had an obligation to reasonably accommodate Mr. Desjarlais. However the accommodation agreement did not allow him to use cannabis while operating motorized equipment,

[4] *Kindersley*, *supra* note 1, para 177.

and it was this "mixing of the use of cannabis with the operation of the Town vehicle that is the misconduct leading to termination." The Board also commented that there was no evidence indicating that Mr. Desjarlais needed to use cannabis while driving, nor any reason why he could not have used the substance "more discreetly" as opposed to using it in the presence of his co-workers, in the vehicle, and when operating the vehicle.

As such, the Board dismissed the grievance, finding that Mr. Desjarlais' conduct regarding the use of cannabis and the Town vehicle during his work trip to Humboldt merited discipline by the employer, and that the employer's dismissal of Mr. Desjarlais as a result of such conduct was not excessive in the circumstances.

Finally, it is important to note that the Board did not endorse the restriction of 20 to 30 minutes as an acceptable waiting period before it was safe to operate equipment, which was agreed by the parties as part of the grievor's accommodation. Given amendments to the *Criminal Code of Canada*[5] with respect to impaired driving, the application of that short waiting period may be problematic, depending on the type and dose of cannabis prescribed, and the resulting duration of any impairment.

D. CONCLUSION

Employers are obligated to accommodate an employee with a disability under their respective provincial or territorial human rights legislation, which in some cases may include allowing an employee to use medical cannabis. However, the obligation to accommodate the disability of an employee does not mean that the employee has free reign to use the substance in violation of employer policies, rules, and workplace accommodation agreements. It also does not permit the employee to use the substance recklessly so as to endanger his or her own safety or the safety of others. The reckless use of cannabis in this decision, albeit a drug that was prescribed and accommodated by an employer, was considered serious or severe enough to justify the employer's decision to bypass a mandated progressive disciplinary process and terminate the employee with cause, effective immediately.

[5] *Criminal Code,* RSC 1985 c C-46.

With the legalization of recreational cannabis, and the continued legality of medically prescribed cannabis, charities and not-for-profits should ensure that general workplace policies, such as vehicle use policies and fitness to work policies properly address the use of and restrictions on the use of cannabis in the workplace.[6]

[6] For more information, see Kwasniewski, *supra* note 2.