On April 30, 2018, an Arbitrator in Newfoundland and Labrador decided that because employers can’t measure residual impairment caused by cannabis use, they can’t manage the safety risk – and in a safety-sensitive position, that amounts to undue hardship for the employer. ([**Re Lower Churchill Transmission Construction Employers’ Assn. Inc. and IBEW, Local 1620 (Tizzard)**](https://www.mcinnescooper.com/wp-content/uploads/2018/06/International-Brotherhood-Lower-Churchill-Transmission-Construction-Employers%E2%80%99-Assn.-Inc.-and-IBEW-Local-1620-Tizzard-Re.pdf)**).**  This Comment reviews some of the highlights of the decision in regard to the accommodation of medically-authorized marijuana in the workplace. This case may be of particular interest to those involved with student transportation.

**The Arbitration Decision**

The Grievor was diagnosed with Crohn’s disease and osteoarthritis. After several unsuccessful attempts to alleviate the resulting pain with conventional medications, his physician issued him a Medical Authorization for cannabis. The Grievor said he ingested the marijuana every evening but didn’t feel impairment of function during daytime working hours. He subsequently applied for two labourer positions on one of the Lower Churchill Projects, and the employer hired him – subject to the pre-employment drug and alcohol screening tests. The Grievor disclosed his medical marijuana use to the Union before the testing and to the sample collection technician at the time of testing, which he failed. After obtaining and reviewing a significant amount of medical information, the employer ultimately refused to hire the Grievor.

The Union grieved alleging the employer failed to accommodate the Grievor’s disability. The employer argued that given the inability to test for cannabis impairment and the safety sensitive nature of the positions accommodation of the Grievor would amount to undue hardship. The arbitrator, John Roil, QC, after thorough review and analysis, agreed:

“The [e]mployer did not place the Grievor in employment at the [p]roject because of the Grievor’s authorized use of medical cannabis as directed by his physician [evening use of up to 1.5 grams of medical marijuana with THC levels up to 22% ingested by vaporization]. This use created a risk of the Grievor’s impairment on the jobsite. The [e]mployer was unable to readily measure impairment from cannabis, based on currently available technology and resources. Consequently, the inability to measure and manage that risk of harm constitutes undue hardship for the [e]mployer.”

**Key Highlights**

Here are five key highlights of the decision in regard to the accommodation of medically-authorized marijuana in the workplace:

1. **The duty to accommodate disability to the point of undue hardship extends to accommodation of medically-authorized cannabis use.**

All Canadian human rights laws prohibit discrimination based on physical disability. Embedded in this discrimination prohibition is the employer’s duty to accommodate an employee’s (or applicant’s) protected personal characteristic to the point of undue hardship - to take steps to offset the discriminatory impact of a workplace rule, policy, requirement or practice by adjusting, revising, or eliminating it.

This duty to accommodate disability includes the duty to accommodate medically-authorized marijuana used as a treatment for a disability. In his decision, the Arbitrator accepted with little discussion that the Grievor’s disability was both his medical condition and its treatment by use of medical cannabis. The dispute between the parties centered on the employer’s ability to accommodate the effects of the chosen treatment (medically-authorized marijuana) for those symptoms.

1. **The duty to accommodate applies to safety-sensitive positions – but not every position in a safety-sensitive enterprise is safety-sensitive.**

A safety-sensitive position is one in which the employee has a key and direct role in an operation where performance affected by substance use could result in a significant incident, near miss, or failure to adequately respond to a significant incident and detrimentally affect any of the health, safety or security of the employee, other people, property, the environment or the employer’s reputation. In our view, the operator of a school bus is in a “safety sensitive position”.

1. **Residual cannabis impairment might last for more than 24 hours – and right now, employers can’t measure it.**

The Arbitrator accepted without hesitation that THC (delta-9-tetrahydrocannabinol, which has therapeutic effects but is primarily responsible for cannabis’s psychoactive effects), causes impairment. The major question was how long this impairment might last and how to accurately measure it. On these points there is still uncertainty in the medical and scientific communities. The Arbitrator’s conclusions on this point are significant and clear; and while the Arbitrator appears to limit the conclusions to “medically authorized cannabis products”, it would seem they are equally applicable to recreational cannabis use:

* + Residual impairment from cannabis use can last more than 24 hours.
  + There is no impairment testing method readily available for employers.
  + Users’ self-reports of impairment from cannabis are not reliable.

The Arbitrator effectively concluded that even if a worker who uses cannabis says they don’t feel high and believes they aren’t impaired, they might in fact still be impaired. A consequence of the cannabis use itself can be lack of awareness about their own functional impairment.

1. **Employers’ inability to measure impairment makes them unable to manage safety risks – and that is undue hardship.**

This case was all about safety risks: if the employer can’t measure cannabis impairment, then it can’t manage the risk of harm arising from it. The Arbitrator accepted that with current technology and resources, an employer can’t accurately measure impairment from cannabis. This inability to measure impairment created a risk of harm the employer couldn’t readily mitigate – and this unacceptable increased safety risk amounted to undue hardship on the employer.

1. **Complete – and specialized – medical information is a must to accommodate medically-authorized marijuana use.**

**Safety-sensitive designation helps define the medical information to which the employer is entitled.** More than a brief Medical Authorization for medical marijuana written on a prescription pad is required to determine whether an employee can perform the jobs for which he applied in a safe manner (the BFOR in this case).

**Specialized training is required to understand work restrictions due to cannabis impairment.** The Arbitrator expressly concluded that a full understanding of the interaction between marijuana impairment and appropriate work restrictions in a particular case requires specialized training – and a general practitioner can’t determine the safety issues in a hazardous workplace based only on examining the patient and a basic understanding of their work.

As noted, this case is especially relevant to student transportation and the “safety sensitive” positions associated with it. This will become all the more the case with the legalization of marijuana for recreational use in October of this year.

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