Disability, Accommodation & Marijuana in the Workplace: The Legal Perspective

Denis Mahoney

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Topics

- Human rights legislation
- What is the duty to accommodate?
- Undue hardship
- Medical marijuana - duty to accommodate
- Take aways
Human Rights Legislation

• Seeks to prevent discrimination with respect to:
  – Goods, services, accommodation or facilities customarily offered to the public...

• Prohibited or “prescribed” grounds of discrimination are:

  race, colour, nationality, ethnic origin, social origin, religious creed, religion, age, disability, disfigurement, sex, sexual orientation, gender identity, gender expression, marital status, family status, source of income and political opinion
Human Rights Legislation

- Legislation in NL is the *Human Rights Act, 2010*

- All Canadian human rights legislation protects an employee from discrimination on the basis of disability and impose an obligation on an employer to accommodate

- Reflects the public policy to “recognize the dignity and worth of every person [and] to provide for equal rights and opportunities without discrimination that is contrary to law…”
Human Rights Legislation

• What is a “disability”?  
• HRA s. 2(c): "disability" means one or more of the following conditions:
  
  i. a degree of physical disability,  
  ii. a condition of mental impairment or a developmental disability,  
  iii. a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or language, and  
  iv. a mental disorder;  

• Similar definitions in other jurisdictions
Employee Disabilities

Disability includes protection on the basis that he or she

(a) has or had disability;

(b) believed to have / had disability; or

(c) has / believed to have predisposition to developing disability.
No, being "motivationally challenged" doesn't qualify as a disability.
What is the Duty to Accommodate?
What is the Duty to Accommodate?

- Legal duty imposed by human rights legislation
- Arises when there is a conflict between a protected ground and a work requirement
- Assessed on an individual, case by case basis
- Must accommodate up to point of *Undue Hardship*
What is the Scope of the Duty to Accommodate?

• “Undue hardship” implies **some hardship**
What is meant by “Undue Hardship”? 

- Onerous standard 
- Onus on employer 
- Must demonstrate efforts 
- Ongoing obligation 
- Within a reasonable timeframe 
- Covers new hires, probationary and regular
Undue Hardship

- May be difficult to know when reached the point of “undue hardship”
- Different factors considered such that each situation is different:
  - Safety, considering the magnitude of the risk and who bears it
  - Interchangeability of workforce and facilities
  - Financial cost
  - Disruption of a collective agreement
  - Problems of morale of other employees
Examples of Workplace Accommodation

• Options to consider:
  – Ergonomic Intervention (job matching to re-design)
  – Mechanical aids
  – Bundling tasks
    ▪ Productive work – essential duties
    ▪ Eliminate rotations by assigning specific tasks
  – No obligation to create work
  – Modify hours
    ▪ Part time
    ▪ Full time
  – Extend LOA’s, sick leave
What are the Limits of Undue Hardship?

• No duty to tolerate unproductive position or substandard work

• No obligation to accommodate permanent inability to work (but must accommodate temporary absences)

• Don’t “rush” to accommodate

• Not required to offer a return to work program if employee refuses or is incapable of performing core duties
“We could try a larger monitor with an ergonomic glare filter...but you’re still going to get headaches if you keep banging your head against the screen.”
Exploring Accommodation Options

• Start with *current* job
  – Physical changes to furniture, equipment, layout or worksite
  – Flexible work hours / scheduling
  – Modified communication / reporting
  – Minor alterations to job
  – Temporary replacement/ assistance from other employees
  – New policies, procedures or systems

• If current job *can’t* be accommodated:
  – displacement or transfer
  – trial periods
  – sick leave / leave of absence (*note*: there are limits)
  – additional training
  – major renovation to worksite
  – bundling tasks
  – productive & essential duties only
  – no obligation to create work or provide ‘busy work’
Responding to Accommodation Request

- Communicate
- Document
- Be flexible and reasonable with time
- Formality is important
  - ask for more information before acting
  - ask for the request in writing
  - ask for a physician’s statement or specialist’s report
- Investigate your options
Obtaining Medical Information

- Employees’ duty to provide medical information (low standard)
- Employers’ obligation to set out the medical information they need
- Employer may have duty to inquire
- Employers’ do not need to accept doctors notes at first blush
"Here's my doctor's note, sir. It turns out I have 'long-lunch syndrome.'"
Physician’s Role

• “Advocacy” role by employee physicians
  – *CUPE, Local 831 v. Brampton (City) (Brand Grievance)*, [2008] O.L.A.A. No. 359 (MacDowell);

• “Agent” role by employer occupational physicians
Obtaining Medical Information

**Acceptable** – a note that says “Mr. Smith can stand for a maximum of 30 minutes at a time and must take hourly breaks”

**Unacceptable** – “Mr. Smith must come off the line and work in the accounting department.”
Employers are entitled to:

- Prognosis
- Nature, degree & duration of limitations
- Estimated timeline for return/recovery
- Confirmation employee saw physician
- Proof that Dr. had accurate info about job requirements
- Effect of treatment and medication on the workplace
- Details of improvement/deterioration of condition
Obtaining Medical Information

- Employers are not entitled to:
  - Diagnosis - unless necessary for accommodation
  - Treatment details
  - Medications - unless for safety reasons
  - Direct contact with treating physician - absent consent
"I'm sorry about your injury. I brought you some work to make you feel better."
Accommodation: A Tripartite Inquiry

• Accommodation is a “tripartite inquiry”:
  • Employee
    – Request accommodation, provide all documentation to define restrictions
    – Duty to Cooperate in process and assessments
    – **Not entitled** to perfect or preferred accommodation
  • Employer
    – Proactive
    – Initiate discussions – obvious cases
    – Identify options
  • Union
    – Duty to Cooperate
    – Meaningful discussions
What are the Employee’s Duties?

- Raise issue (exception “constructive notice” for addictions/mental illness)
- Provide relevant info. & supporting documentation
- Keep employer abreast of changes
- Facilitate search of options
- Accept reasonable accommodation
- Facilitate implementation / minimize disruption
- Self-help duty (reasonable treatment)
Summary: Duty to Accommodate

• Employers have a legal obligation to accommodate employee disabilities in the workplace

• Disability includes both physical and mental conditions

• “Tripartite” process – employer, employee, union

• Employer must accommodate to point of undue hardship

• Burden is on the employer to show undue hardship

• Employer has a right to medical information to verify the nature of the disability and its impact on the employee’s ability to perform work

• Case-by-case assessment
Medical Marijuana in the Workplace

"Join us. There's a talk on medical marijuana and a pot-luck dinner afterward."
Challenging & Burgeoning Area

- Increased public awareness (July 1 2018)
- Increased access to medical marijuana
- Evolving medical understanding
  - Health Canada statement (2016)
  - Impairment and fatigue
  - THC levels don’t reliably indicate impairment
- Testing for cannabis impairment is complex
- Workplace safety obligations v. privacy
Duty to Accommodate: Marijuana

- Drug and/or alcohol addiction is considered a disability
- Medical marijuana as a prescribed course of treatment for a disability is protected
- Employers have an obligation to accommodate such employees to the point of undue hardship
Duty to Accommodate: Marijuana as Addiction

• Duty to accommodate
  – Applies to dependency on drugs, whether legal or illegal, as it does to alcoholism
  – May apply to medical marijuana use
    ▪ Dependency on the medication
    ▪ The underlying medical condition being treated
  – No duty to accommodate “recreational alcohol use” (ie: no dependency), or “recreational marijuana use”
Employer Fears

Employees of the Month

Getting “High” at Work
The Reality

“Prescribed” by a Dr.

(Hopefully not this guy)
Employee prescribed marijuana for pain and anxiety

Major construction project – safety sensitive worksite

Lived in “dry camp” with strict safety rules and a zero tolerance policy for drug use and possession

Employee did not disclose his marijuana prescription

Kept drugs hidden in a ditch near the highway

Consumed “one or two joints per day” while offsite

When caught by employer, employee informed them of his medical marijuana prescription
Arbitration: 2016 CanLII 33981 (James Oakley)

- Employer argued it had just cause to dismiss:
  - Failure to disclose use and possession in violation of policy
  - Impaired on the job (abuse)
  - Using marijuana in company vehicle
  - Safety sensitive work
  - Dishonest about marijuana use after caught
- Union argued that:
  - Employee was legally entitled to possess and use marijuana
  - Employer’s policies were discriminatory
Arbitration

- Arbitrator found:
  - Employee intentionally refused to disclose use of medical marijuana, in violation of employer policy which required reporting of any medication being taken
  - Employee deliberately concealed his possession and use of marijuana while at camp
  - Potential unsafe side effects for employee’s dosage, particularly with respect to driving after consumption
  - Employer policies found to be a *bona fide* occupational requirement
  - Dismissal upheld
Arbitration: Duty to Accommodate?

- Union / Grievor did not seek accommodation
  - No disclosure of medical marijuana card
  - No request made for accommodation in workplace
- Employer “had not refused to consider accommodation for anyone who is a medical marijuana user”
- Drug & Alcohol Standard is a good faith occupational requirement
- Discipline does not violate human rights legislation
Union appealed to Supreme Court of NL

Union argued arbitrator was *unreasonable* in 6 ways:

- Failure to consider “change in legislative and regulatory landscape”
- Failed to find discrimination due to disability
- Failed to find that a “zero tolerance policy” was discriminatory
- Found that grievor had duty to disclose his prescription use (in breach of his privacy rights)
- Found that grievor violated various employer policies re: use/possession
- Penalty of termination too severe
Judicial Review: 2016 NLTD(G) 192

- Supreme Court of NL found:
  - Arbitrator was reasonable in all but one way – the penalty (termination)
  - Arbitrator failed to consider whether some other/lesser penalty could have been appropriate
  - Case remitted to arbitrator
Stay Tuned!
- Written submissions provided to arbitrator last month
- Awaiting decision

Takeaways:
- Employer’s requirement to disclose medical marijuana prescription upheld
- Zero tolerance policy not in violation of duty to accommodate
French v. Selkin Logging, 2015 BCHRT 101

- Cancer survivor
- Self medicated
- Complained his employer would not allow him to take time off to attend medical appointments
- Smoked “six to eight joints per day”
French v. Selkin Logging, 2015 BCHRT 101

- Alleged he was terminated due to disability

- Employer argued he quit, and in any event did not have license to possess marijuana.
French v. Selkin Logging

• Tribunal found:
  – Employer gave employee time off for his appointments
  – Employee did not have a marijuana prescription, and was not told by his physicians to smoke marijuana as part of his treatment
  – Employee did not have a license
French v. Selkin Logging Ltd.

- Yes, Drug-Free Workplace Policy was discriminatory on its face
  - French was disabled, used marijuana to manage pain, and was expressly terminated for using marijuana
- BUT, is the Policy justified anyway?
  - Yes. It stemmed from a *bona fide* occupational requirement (i.e. safety), and was therefore excusable
City of Calgary v. Canadian Union of Public Employees, Local 37 (Hanmore), 2015 CanLII 61756

- Heavy equipment operator (road grader)
- Long-term employee
- Workplace injury – degenerative neck disease
- Chronic Pain
- Medical declaration – needed to obtain permit to possess and use marijuana
- Informed supervisors he was a regular user
- Only consumed at night
- Operated machinery for three years without incident
Other managers became aware of marijuana use
- Removed from safety sensitive position
- Accommodated in a non-safety sensitive position after conducting IME
- 9-month investigation
- IME report based on skewed info provided by City and without info from employee’s Dr.
- Employee filed grievance seeking reinstatement to previous position, with back pay
IME conclusion:

“...marijuana dependence secondary to a general medical condition, chronic pain. However, if he had in the past been using marijuana on a regular basis for 15 years approximately prior to medical prescription, marijuana dependence could be a primary disorder.”
City’s conclusion:

The IME “strongly indicate[s] that you have a dependency”. As such, return to safety sensitive work would be unjustifiable risk to him, coworkers, public.
City of Calgary (Hanmore Griev.)

- Evidence in hearing showed that City had preconceived notions of marijuana use.
- Concerns about dependency not substantiated by evidence
“There was no evidence whatsoever presented during the arbitration hearings that the grievor in anyway, at any point was in violation of the employer’s policy on substance use. Notwithstanding the employer’s concerns over unresolved dependency and the safety of employees, the employer had apparently and continually allowed the grievor to simply work, period, in violation of its own policy.”
City of Calgary (Hanmore Grev.)

- Arbitration Board found:
  - IME based on inaccurate information from the employer
  - No evidence of substance abuse or impairment at work
  - Employer ordered to reinstate the grievor to his former position with back pay

“The Board finds that the employer fundamentally created the ‘dependency’ issue. The argument has no merit.”
City of Calgary (Hanmore Griev.)

- **Result**: grievor unjustly held from his position for almost 4 years.
- Reinstated with lost wages, overtime, pension benefits.
- Subject to certain conditions, i.e., random testing, reduction in monthly marijuana limits, etc.
Employee with chronic pain had medical marijuana prescription
Smoked marijuana daily before bed
Passed pre-employment test
Told provider he had a medical marijuana prescription
Did not inform employer – assumed provider would tell employer
Brown v. Bechtel Canada

- Employee never hid marijuana use
- Performed without limitation or incident
- Caught consuming marijuana
- Terminated for:
  - Consumption in the workplace
  - Failing to disclose
Employee alleged discrimination in employment on the basis of physical disability contrary to s. 13 of the British Columbia Human Rights Code

Employer made application for summary dismissal

Employer argued no reasonable prospect of proving the employee disclosed enough info to the employer to trigger its obligation to make meaningful inquiries into whether his use of marijuana was related to disability
Employer’s application to dismiss was denied
Reasonable prospect of demonstrating employer had a duty to inquire
“To dismiss complaint based on bona fide occupational requirement, employer obliged to bring evidence that it took all reasonable and practical steps to accommodate, including considering approaches alternative to ending his employment.”
• Employee used medicinal marijuana as treatment for medical condition

• Early in employment, employer was aware employee had medical issues for which she consumed medical marijuana

• Employee passed probation, good performance

• Employer received complaints that employee was under influence of marijuana at work

• Employee denied being under influence at work
Employee was suspended

Employer refused to allow employee to return to work if she continued to use medicinal marijuana

Employee alleged discriminated on the basis of physical and mental disability, contrary to s. 13 of the BC Human Rights Code

Employer applied for summary dismissal

Application to dismiss denied
Employer showed no evidence that it considered accommodation

Employer showed no evidence that employee was impaired at work

Medical evidence did not appear to conclude that the employee’s work was compromised by her use of medical marijuana

Employee therefore put forward evidence supporting the elements of a *prima facie* case of discrimination
Managing Positive Tests

- Consider accommodation
- Get medical information
- Get expert advice
- Implement terms and conditions
Policy Should Require Positive Disclosure

- Substance abuse policy should require the employee to positively disclose any prescription that could affect/impair performance

- Transmission Line (Uprichard Gr.)
  - Obligation on employee to notify supervisor and manager before starting work of any unsafe side effects
#1 – Is it a necessary medication?

- Medical marijuana is no different than many other prescriptions that you are commonly dealing with (i.e. Dilaudid, Oxycontin, etc.)
  - Are alternative treatments available
  - Has the nature of the work/workplace been considered
  - Not entitled to be impaired or smoke at work
  - Must be safe;
  - Apply regular steps used in investigating accommodations
## #2 – Interim Safety Measures

- Is the employee in an “safety-sensitive” position?

- Might you need to remove the employee from the “safety-sensitive” position during your investigation?
#3 – Homework

- Get information from the employee, with focus on balancing (1) safety, and (2) accommodation
  - Medical documentation
  - Is there a dependency
  - When they use it, how much, etc…
  - Write to their doctor, with consent
#4 – Consider Terms and Conditions

- Strict prohibition on attending workplace impaired/unfit for duty
  - More important for safety sensitive positions
  - May also be important for judgment/customer service oriented positions

- In consultation with physicians, set usage parameters:
  - Explore alternative treatments
  - Adherence to dosage
  - Adherence to recommended schedule
#4 – Consider Terms and Conditions

- Positive obligation on employee to report (a) any dosage change, (b) any additional medications
- Place positive obligation on employee to advise of any breach of schedule or need for medication prior to or during shift
- Manage expectation that in such circumstances could be moved to less safety-sensitive position or remove from duty temporarily
#4 – Consider Terms and Conditions

• Advise employee that employer will follow-up periodically with employee/physician for future monitoring of dosages/medications;

• Advise that violation of terms could result in removal from workplace/discipline.
Smile for the Day

St. John's

Where I Wants to Live

Where Mudder Thinks I Lives

Where the B'ys Thinks I Lives

Where Mainlanders Thinks I Lives

Where Americans Thinks I Lives

Where I Actually Lives
Questions?

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