



# What's New in HR Law

## Human Rights Tribunal of Ontario: No Absolute Right to Smoke Marijuana at Work

May 31, 2018

### **BOTTOM LINE**

An employee does not have an absolute right to smoke marijuana, medical or otherwise, in the workplace.

### **Facts: Employee smoked medical marijuana in the workplace because of disability**

From 2011 to 2015, Mr. Aitchison worked as a seasonal painter with L&L Painting and Decorating Ltd, a commercial contractor involved in the restoration of high-rise buildings. In his position, Mr. Aitchison was required to perform restoration and maintenance services on the exteriors of high-rise buildings.

Mr. Aitchison suffered from chronic back and neck pain caused by a prior injury. He began treating his symptoms with medical marijuana in 2015 and would take breaks from his work to smoke the marijuana.

In June 2015, Mr. Aitchison was sent home after his site supervisor observed him smoking marijuana on a swing stage suspended from the 37th floor of a building. Shortly after, the

employer terminated Mr. Aitchison's employment because of his use of marijuana in the workplace. Given the extremely safety-sensitive nature of the job, the use of illegal drugs, alcohol, or prescription drugs that may cause impairment in the workplace was entirely prohibited by the employer's "zero tolerance" policy.

Mr. Aitchison filed a complaint with the Human Rights Tribunal of Ontario (the "Tribunal") alleging that his employer discriminated against him due to his disability and failed to accommodate his disability.

### **Accommodation, discrimination, and dismissal: Did the employer have grounds to terminate Mr. Aitchison's employment?**

Mr. Aitchison did not deny his use of marijuana in the workplace; rather, he argued that his supervisor had previously condoned his use of marijuana. The supervisor testified that he had no knowledge of Mr. Aitchison's use of marijuana in the workplace before the incident that led to his termination. Mr. Aitchison had not asked for accommodation for his disability before his termination.

While the Tribunal found that Mr. Aitchison had a disability that was protected by the Ontario *Human Rights Code*, it held that the employer did not discriminate against or fail to accommodate Mr. Aitchison's disability. The Tribunal ultimately concluded that Mr. Aitchison's actions had provided the employer with grounds to terminate his employment.

In reaching this conclusion, the Tribunal noted that the employer had no knowledge of Mr. Aitchison's marijuana use in the workplace before the incident that led to his termination. Accordingly, the Tribunal found that "it is difficult to conclude that the respondent failed to accommodate a request that was never made."

However, even if Mr. Aitchison had requested accommodation prior to the incident, the Tribunal noted that there was no obligation to accommodate Mr. Aitchison in a manner that would amount to undue hardship. The Tribunal concluded that Mr. Aitchison's preferred accommodation of an unlimited right to smoke marijuana in the workplace amounted to undue hardship in light of the health and safety concerns related to this particular workplace.

Since Mr. Aitchison had already committed a serious health and safety breach before the employer was ever made aware of any accommodation needs, the employer was under no obligation to consider whether it could reasonably accommodate Mr. Aitchison after the fact.

The Tribunal also disagreed with Mr. Aitchison's position that the employer's "zero tolerance" policy was discriminatory. The Tribunal held that the policy was non-discriminatory because it did not impose automatic termination for breaches and, instead, gave the employer flexibility when considering requests for accommodation.

### **Check the Box**

This decision confirms that an employee does not have an absolute right to smoke marijuana, medical or otherwise, in the workplace. Having said that, employers should consider the following:

- A “zero tolerance” policy does not automatically justify termination of employment in every case. Recall that the Tribunal relied on the flexibility of the policy in determining that it was non-discriminatory.
- Employees need to be aware of any workplace policies. Consider requiring employees to annually sign forms confirming their awareness.
- Employers with safety-sensitive positions may need to give extra consideration as to how to facilitate requests for accommodation related to the use of medical marijuana.

**Date:** February 28, 2018

**Forum:** Human Rights Tribunal of Ontario

**Citation:** *Aitchison v L&L Painting and Decorating Ltd*, 2018 HRTO 238

### Need more information?

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