



NEWSLETTER – JANUARY AND FEBRUARY 2008

CASUAL OR OCCASIONAL DRUG USERS AND PRE-EMPLOYMENT DRUG TESTING

This newsletter focuses on the recent decision of the Alberta Court of Appeal in *Alberta (Human Rights and Citizenship Commission) v. Kellogg Brown & Root (Canada) Company*, 2007 ABCA 426, a case involving a casual or occasional drug user who lost his job, shortly after he started work, because he failed a pre-employment drug test.

Although the case was decided in another province, it was decided by an appellate court. It is accordingly persuasive authority in British Columbia, and should be given serious consideration in cases involving a similar fact pattern.¹

Background

Kellogg Brown & Root (Canada) Company (“KBR”) is a construction company that operates in Alberta.

In the summer of 2002, KBR assisted with a certain plant expansion project in the Fort

McMurray area of Alberta. The project was a large one. Several thousand workers worked at and around the site, with “construction at many levels ... integrated with production at many levels”.

The accident risk at the site was high. Any accident had the potential to impact workers, the plant and the environment.

Before being hired by KBR, all prospective non-unionized employees were required to take and pass a “post-offer/pre-employment” drug test. Any prospective employee who failed the test would not be hired. However, he or she would be eligible for consideration six months after the date of the failed test. The intent of KBR’s policy was “to prohibit impairment from the use of alcohol, controlled or prohibited substances by Company Employees or Contractors while they [were] engaged in Company activities, and to prohibit the possession and sale of prohibited or controlled substances”.

On June 24, 2002, one of KBR’s recruiting specialists contacted John Chiasson (“Chiasson”) regarding a position as receiving inspector at the expansion project.

¹ The Alberta Court of Appeal’s decision could well end up being reviewed by the Supreme Court of Canada. As we understand it, the Alberta Human Rights and Citizenship Commission is presently putting together an application for leave to appeal.

On June 25, 2002, Chiasson was informed of the requirement that he take and pass a pre-employment drug test. The next day, KBR offered Chiasson the receiving inspector position for a fixed term of 21 months beginning July 8, 2002. The offer was subject to the “results from [his] pre-employment medical and drug screen”.

On June 28, 2002, Chiasson took the pre-employment drug test and, on July 8, 2002, he started working for KBR.

Chiasson had smoked marijuana on June 22, 2002. However, he “did not tell anyone at KBR that he had done so and did not ask that the test be delayed to a later date, assuming the marijuana would have cleared his system by June 28, 2002”.

On July 17, 2002, KBR received Chiasson’s test results. KBR’s medical director informed him that he had failed the test. Chiasson then admitted to using marijuana five days before his test.

KBR directed Chiasson to leave the work site, and proceeded to terminate his employment because he tested positive on the pre-employment drug test.

On October 22, 2002, Chiasson filed a complaint with the Alberta Human Rights and Citizenship Commission. He alleged employment discrimination on the basis of physical and mental disability.

Human Rights Panel

At a hearing before a human rights panel, Chiasson testified that he was only a casual

or occasional user of marijuana and was not addicted to it.²

Witnesses for KBR, who at one time or another had dealings with Chiasson, testified that they did not consider him to be addicted to marijuana.

In light of the foregoing, the human rights panel held that “no actual disability due to drug addiction was demonstrated”.

The panel also held that “because Chiasson was employed in a safety sensitive position at a hazardous work site, there was ... no perceived disability” at issue. The panel reasoned that had KBR perceived Chiasson to suffer from drug addiction, it would not have assigned him to safety-sensitive work.

Alberta Court of Queen’s Bench

On judicial review, Madam Justice Martin of the Alberta Court of Queen’s Bench set aside the human rights panel’s decision that Chiasson had not been subjected to prohibited discrimination.

Madam Justice Martin held that the panel was correct in its decision regarding actual disability. However, in the chambers judge’s view, the panel “erred with respect to the issue of perceived disability”.

The chambers judge ruled that the effect of KBR’s drug testing policy was to exclude Chiasson from employment on the basis of

² This was a critical piece of evidence. Had Chiasson alleged that he suffered from any kind of drug addiction, the result in *Alberta (Human Rights and Citizenship Commission) v. Kellogg Brown & Root (Canada) Company* would have been different. KBR’s policy of automatic termination for a positive drug test result would not have withstood scrutiny as it totally failed to accommodate disability.

perceived disability. She stated that:

- (a) “the effect of the KBR policy was to treat recreational cannabis users as if they were addicted to cannabis”; and
- (b) “Chiasson had been the victim of discrimination based on KBR’s perception that he suffered from drug addiction”.

The chambers judge reasoned as follows:

“The perceptions of an employer can create a class of persons, as it did here: all persons who test positive on the pre-employment urine test are deemed not fit for work. Such employees are kept from the workforce because the employer believes they will be unable to do their job because of their physical condition. This is not simply different treatment because the grounds for differentiation involve physical attributes and the motivating perception is linked to an assessment of the ability of the employee to do the job. The perception and assumption is tied to illness, drug use and incapacity. The penalty attached is also relevant to whether or not the employer perceives a disability and in the case at bar a person is precluded from employment. This sends the clear message that such prospective employees are not wanted

The urinalysis in the case at bar was used to terminate an employee on the basis of a perceived and general statistical risk that he may be impaired on the job sometime in the future. The Courts need to be concerned with the extent to which employers will be

permitted to segregate out classes of people based on their perceptions of a physical condition which may or may not limit workplace capacity

In summary the effect of the KBR Policy on pre-employment drug testing is to exclude addicted individuals on the basis of actual disability and non-addicted and non-impaired employees from employment based on perceived disability ...”³

Alberta Court of Appeal

The Alberta Court of Appeal granted KBR’s appeal, setting aside Madam Justice Martin’s decision and restoring the human rights panel’s decision.

The Court of Appeal concluded that the chambers judge “erred in law and made a palpable and overriding error in finding that KBR perceived Chiasson to suffer from drug addiction”.

The Court of Appeal stated the law as follows:

“The [*Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 2000, c. H-14] prohibits certain, but not all, treatment based on human characteristics as discriminatory. The jurisprudence has extended the prohibited grounds to include instances where an employer incorrectly perceives that an employee has a prescribed disability.”

³ *Alberta (Human Rights and Citizenship Commission) v. Kellogg Brown & Root (Canada) Company*, 2006 ABQB 302 (CanLII) at paras. 89, 98 and 101.

The Court of Appeal highlighted that, on all of the evidence, “Chiasson [was] not in fact drug addicted” and the termination of Chiasson’s employment was not “based on the perception by any KBR employees that he [was] drug addicted”.

In the view of the Court of Appeal, “KBR’s policy [did] not perceive Chiasson to be an addict”. Rather, the policy “perceive[d] that persons who use drugs at all are a safety risk in an already dangerous workplace”.

Considerations of workplace safety factored heavily into the Court of Appeal’s decision.

The purpose of KBR’s policy, as noted by the Court of Appeal, was “to reduce workplace accidents by prohibiting workplace impairment”. According to the Court of Appeal, it would “fl[y] in the face of logic” to “[e]xtend ... human rights protections to situations resulting in placing the lives of others at risk”.

The Court of Appeal drew an analogy between KBR’s policy and the policy of a trucking or taxi company “requiring its employees to refrain from the use of alcohol for some time before the employee drives one of the employer’s vehicles”. As stated by the Court of Appeal:

“Such a policy does not mean that the company perceives all its drivers to be alcoholics. Rather, assuming it is aimed at safety, the policy perceives that any level of alcohol in a driver’s blood reduces his or her ability to operate the employer’s vehicles safely. This is a legitimate presumption. Its goal is laudable since carnage on the highways is a leading, but often ignored, cause of death nearing epidemic proportions ...”

The Court of Appeal ruled that “the policy’s effects [were] not misdirected in their application to Chiasson”.

The Court of Appeal observed that the effects of casual or occasional marijuana use “sometimes linger for several days after ... use” because the “concentration of active ingredients is now many times higher than it was in the past” and, additionally, that those lingering effects “raise concerns regarding the user’s ability to function in a safety challenged environment”.

The Court of Appeal also noted that Chiasson “did not at any time suggest that he would cease his recreational use of drugs while employed by KBR”. To the contrary, he “testified that what he did on his own time was his business”.

Word of Warning to Employers

In *Alberta (Human Rights and Citizenship Commission) v. Kellogg Brown & Root (Canada) Company*, the Alberta Court of Appeal did not rule out the possibility of employers running afoul of human rights legislation by subjecting an employee who fails a pre-employment drug test to “restrictions, penalties, or differential treatment”. In fact, the Court of Appeal made the following statement:

“[T]he only basis on which the KBR policy would be discriminatory against casual marijuana users, such as Chiasson, would be if, as the chambers judge concluded, the effect of the policy is to perceive anybody testing positive as drug addicted and therefore disabled, and to impose restrictions, penalties, or differential treatment on those persons based on the perceived disability.”



Complaints of employment discrimination on the basis of perceived disability may thus still be tenable or supportable.

when dealing with a casual or occasional drug user who has tested positive on a pre-employment drug test.

Employers are best advised to tread carefully, and perhaps seek legal advice,

If you have questions regarding the issues raised in this newsletter and how they may affect you or your company, please do not hesitate to contact any lawyer at our firm.

Lawyer contact information can be obtained by contacting us at (604) 806-0922 or visiting our website at www.ropergreyell.com.

* Every effort has been made to ensure accuracy in respect of this newsletter. The comments, however, are necessarily of a general nature. Clients and other interested parties are urged to seek specific advice on matters of concern and not to rely solely on the text of this newsletter. *