January 12th, 2008

Court of Appeal Sends Court of Queen's Bench Decision to Rehab

By Linda McKay-Panos

Cases Considered:

Alberta (Human Rights and Citizenship Commission) v. Kellogg Brown & Root (Canada) Company, 2007 ABCA 426, overruling *Alberta (Human Rights and Citizenship Commission) v. Kellogg Brown & Root (Canada) Company*, 2006 ABQB 302, which overruled *John Chiasson v. Kellogg, Brown & Root (Canada) Company (Halliburton Group Canada Inc.)* (February 14, 15, 16 and March 1, 2005; Colonel (Ret'd) Delano W. Tolley, Panel Chair)

In December 2007, the Court of Appeal of Alberta overturned a detailed Court of Queen's Bench decision on pre-employment drug testing. The case originated in the Alberta Human Rights and Citizenship Commission ("AHRCC"). Mr. Chaisson, the complainant, was offered a position as a receiving inspector with Kellogg Brown & Root ("KBR") 's oil sands project, but was required to undergo a pre-employment medical and drug test, as a condition of his employment. Two weeks after commencing employment, the complainant's results came back, indicating that he had tested positive for the presence of marijuana. Consequently, the complainant was terminated. The AHRCC's Human Rights Panel dismissed Chaisson's complaint on the basis that there was no evidence that the complainant suffered from a real or perceived disability, as he was only a recreational drug user, and thus was unable to substantiate a case of prima facie discrimination on the basis of physical disability. The Panel held that drug impairment of any kind would impact the complainant's performance, and as such the pre-employment drug test was a reasonable requirement for the position for which the complainant was applying.

On appeal, the Court of Queen's Bench (per Justice Sheilah Martin) held that while Mr. Chiasson did not suffer from a real disability, as in the case of a drug addiction, he did suffer from a perceived disability, and was in fact discriminated against on this basis. Justice Martin looked at the case of *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City)*; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)*, [2000] 1 S.C.R. 665, which suggested that the definition of handicap, or in this case, disability, should be interpreted broadly to also include protection for those who are perceived as having a disability and discriminated against on that basis. The Court of Queen's Bench ruled that Mr. Chiasson had in fact suffered discrimination on the basis of perceived disability. KBR's policy imposed a pre-employment barrier to employment for both recreational users of controlled substances, and substance abusers, and was in effect discriminatory on the basis of disability.

The Court then addressed the question of whether the pre-employment drug testing policy was justified as a bona fide occupational requirement using the test set out in *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (B.C.G.S.E.U.)*, [1999] 3 S.C.R. 3 ("Meiorin"). The Meiorin test requires the employer to show:

1. It adopted the standard for a purpose rationally connected to the job – the court looks at the general purpose.
2. It adopted the standard in an honest and good faith belief that it was necessary for the fulfillment of the legitimate work-related purpose.
3. The standard is reasonably necessary for the fulfillment of the legitimate work-related purpose. To show that it is reasonably necessary, the employer must show it is impossible to accommodate individual employees without imposing undue hardship upon the employer.

Justice Martin agreed that the rational connection aspect of the test was met because there was a need to ensure workplace safety and the policy was applied in good faith to address the employer's concerns around impairment on the job. However, she held that the pre-employment policy failed under the accommodation aspect of the test as the policy automatically terminated any employee who tested positive and failed to take into consideration the employee's actual circumstances. The appellant's employment was immediately terminated upon his positive test and no accommodations were provided. There was evidence to suggest that there were several ways the respondent could have accommodated the appellant because there was no evidence that he was impaired on the job. Also, he was an excellent employee, he was permitted to work before the results of the test (which brings to question the necessity of the test) and he could have been treated as an existing employee so that he could be provided with assistance. Further, there was evidence that there were more accurate drug testing methods the respondent could have used and a more tailored and fair drug testing policy could have been adopted to ensure nonimpairment at work. There was also no evidence presented that the pre-employment drug test was an accurate indicator of impairment on the job, of job performance or that the uniform standard for drug testing was necessary for all positions, regardless of any safety component. As a result, there was no evidence that the respondent accommodated the appellant to the point of undue hardship.

In the end, Justice Martin held that the pre-employment drug testing did not meet the Meiorin test. She ordered the respondent to rectify the current contravention of the Act and to prevent any future contraventions from occurring again. The appropriate remedy was to return before the Court if an agreement could not be reached.

The Alberta Court of Appeal (per Justices Elizabeth McFadyen, Keith Ritter and Jack Watson) overturned the Court of Queen's Bench decision and reinstated the Panel's decision. The Court of Appeal noted that Mr. Chaisson was not drug addicted and that his termination was not based on the perception that he was. The court conc luded that the purpose of KBR's policy was to reduce workplace accidents by prohibiting workplace impairment. It was directed at actual effects suffered by recreational cannabis users and not perceived effects. The Court also declined to follow the Ontario Court of Appeal case of *Entrop v. Imperial Oil Ltd.* (2000), 50 O.R. (3d) 18. In the Entrop case, the Ontario Court of Appeal ruled that random blanket drug testing of employees or prospective employees, even for safety-sensitive positions, is discriminatory because drug testing does not reflect actual or future impairment on the job.

In Chaisson, because the court concluded that the policy itself was not discriminatory, it did not need to address whether it was a bona fide occupational requirement.

This decision is very important for employers with safety-based drug and alcohol policies. Employers do not have to accommodate employees who are casual users only. However, employers can discriminate against casual users even when they have not established that the

casual use affects the ability to perform the job. This certainly sounds like a perceived disability. As noted by the Supreme Court of Canada in Boisbriand and summarized in the headnote:

> A handicap may be real or perceived, and a person may have no limitations in everyday activities other than those created by prejudice and stereotypes. Courts will, therefore, have to consider not only an individual's biomedical condition, but also the circumstances in which a distinction is made. A 'handicap' may exist even without proof of physical limitations or other ailments. The emphasis is on the effects of the distinction, exclusion or preference rather than the precise cause or origin of the handicap.

Mr. Chaisson was terminated because his employer determined that casual cannabis use would affect the ability to perform his job safely. The employer has assumed that because the potential employee has tested positive for drug use, he will be unable to perform his job. Is this not a perceived disability? The case is significant to employers and employees, and because of the conflicting jurisprudence in Ontario, it is likely that it will be appealed to the Supreme Court of Canada.

CC BY NC ND