HUMAN RIGHTS TRIBUNAL OF ONTARIO

B E T W E E N:

James Aitchison

Applicant

-and-

L & L Painting and Decorating Ltd.

Respondent

DECISION

Adjudicator: Colin Johnston

Date: February 28, 2018

File Number: 2015-22122-I

Citation: 2018 HRTO 238

Indexed as: **Aitchison v. L & L Painting and Decorating Ltd.**

APPEARANCES

James Aitchison, Applicant	)	Janina Fogels, Counsel
L & L Painting and Decorating Ltd., Respondent	)	Clive Preddie, Representative

INTRODUCTION

[1] This Application alleges discrimination with respect to employment because of disability contrary to the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the "*Code*").

[2] The respondent is a commercial contractor involved in the restoration of high-rise buildings. The applicant was employed by the respondent as a seasonal painter from 2011 to 2015. The work season generally ran from May to October each year. During that period, the applicant like other employees worked twelve hours a day, six days a week.

[3] The applicant was terminated on July 6, 2015. The respondent asserts that the applicant was terminated for smoking marijuana at work. The applicant does not deny that he smoked marijuana on his work breaks; but states that he uses it for medicinal purposes and that his supervisor was fully aware and condoned his use. The applicant asserts that the real reason he was terminated was because he requested an accommodation to limit his use of an electric sander. At the time of his termination, the applicant had no discipline on his record.

[4] The applicant suffers from degenerative disc disease which causes chronic pain in both his back and neck. The applicant's condition is the result of a workplace accident he suffered 20 years prior to the events in this case. The applicant began using medical marijuana in March 2015 to treat his chronic pain. Prior to that he self-medicated with his own marijuana.

[5] I heard evidence from five witnesses: the applicant; Dr. Price, a pain specialist; Radim Raskin, the owner of the respondent company; Peter Ujka, the site supervisor; Igor Gerzon, the ground supervisor; and Bruce Bolduc, a health and safety consultant.

[6] The applicant has worked as a painter for over 30 years. He began working for the respondent in 2011. His job duties included priming, painting, sanding, cleaning and scraping rust off the exterior of buildings.

[7] His work was performed on a swing stage that was suspended on the outside of the building, 37 floors above the ground. I heard evidence that there are a number of swing stages that ring the building and can move from one floor the next. Workers are partnered so there are at least two employees on each swing stage. The employees use a number of small tools to perform their work including: paint brushes, rollers, pails, hand scraper, sandpaper and an electric hand grinder. Most of this equipment is tied to either the stage or the individual worker. The workers themselves wear a harness that is connected to the swing stage.

[8] The respondent employed approximately twelve employees on the job-site in 2015. I heard evidence that there are a number of other trades that also work on the site for other subcontractors including: electricians, glazers, tilers, scaffold producers, among other trades. The General Contractor employs a Superintendent who inspects the site every day. It is her job to inspect the work and ensure that the subcontractor's work in compliance with the General Contractor's health and safety policies.

Accommodation re: Electric Sander

[9] According to the applicant, the dispute which ultimately lead to his termination, involved his use of an electric sander and his request to be accommodated from using the sander for prolonged periods.

[10] The electric sander is a small tool that is used to remove rust from the side of the building. It weighs between two and three pounds and oscillates at a high speed. The applicant complained that the vibration from the tool aggravated his back condition.

[11] The electric sander was first introduced on the worksite in 2014. The applicant testified that when the sander was first introduced he was in favour of using it. He recalled it was only used briefly in 2014 but was reintroduced in the 2015 season.

[12] When it was reintroduced in 2015 he began to experience pain after prolonged use. The applicant testified that by mid-June 2015 the pain was overwhelming.

[13] He spoke to both his supervisor, Mr. Ujka and the owner of the company, Mr. Raskin and asked to limit his use to less than one hour per day. Initially, the respondent agreed to the accommodation but this changed when co-workers began to complain that the applicant was receiving special treatment. To that end, the applicant recalled a conversation with the owner who made reference to the discontent among the other staff, stating "*I cannot have this type of anarchy on my crew*!" The applicant testified that his supervisor soon began giving him the cold shoulder.

[14] The applicant decided to go to his family doctor on June 14, 2015 to obtain a doctor's note to support his request for accommodation. He explained that his motivation for getting the note was to ease the tension in the workplace. The doctor's note itself, makes no reference to restricting his use to one hour per day, but simply states that the applicant is "*known to have back and neck pain for which he is unable to hold heavy machine like a grinder for long time and work constantly with such machine. He is still able to sand with hand tools*."

[15] The applicant testified that he provided a copy of the doctor's note to his supervisor the next day (June 15). He was not certain whether he provided a copy of the note to the owner.

[16] The applicant asserts that despite providing the doctor's note, his supervisor chose to ignore his restrictions. On the morning of June 17, Mr. Ujka inspected the applicant's work and unsatisfied, ordered him to continue to use the sander beyond his one hour restriction. This ultimately caused the applicant to injure himself and he left work early to go back to his family doctor.

[17] He obtained a second note on June 17, 2015 which read, "*The above person is known with Degenerative disc disease and arthritis of the back and neck for multiple years. Using vibrating or oscillating machines will flare up his pain."* The applicant clarified that his goal in obtaining the note was not to be moved off the grinder entirely, but again to simply limit his use to one hour per day.

[18] There was some uncertainty in the evidence as to whether the applicant provided a copy of the second doctor's note to his supervisor. The applicant initially testified that he provided a copy to his supervisor on June 18. He later wavered in his evidence conceding that he was not certain whether he provided a copy of the doctor's note to Mr. Ujka or not.

[19] In his witness statement, he asserted that he tried to provide a copy of the note to his supervisor on the morning of June 18 but he refused to accept it and sent him home early that day.

[20] In his testimony, the applicant told a different story claiming that he worked his full shift on June 18 and was texting the owner hoping that he would come onto the worksite so he could share his medical information.

[21] Mr. Ujka's recollection of the events was very different. He denied that the applicant raised any medical issues with him or requested any type of accommodation regarding the use of the sander. He also denied the applicant's claim that he provided or attempted to provide him medical notes.

[22] Mr. Raskin provided similar evidence stating that the first time these medical issues were raised with him is when he returned from vacation and reviewed the medical information that the applicant sent to his office.

[23] The evidence provided by Messrs. Ujka and Raskin appear to contradict the submissions made in the Response itself. In the Response, the respondent asserted that it had in fact, accommodated the applicant's request to use the electric sander less

than one hour per day. The respondent's witnesses could not explain why their testimony contradicted the Response except to say that they were not the authors of that document. It was drafted by the respondent's representative.

[24] Mr. Raskin's testimony also contradicts a number of text messages that were put into evidence. The text messages, which were shared between the applicant and Mr. Raskin on June 17 and 18, 2015, clearly identify the applicant requesting to limit his use of the sander. The texts also make reference to the applicant having medical notes to support his request for accommodation. The respondent did not dispute the accuracy of the texts.

[25] Regardless, the respondent's witnesses testified that there was no need to change its work practice to accommodate the applicant's request, as there was already a practice in place on the worksite to limit grinding to one hour per day. This practice had nothing to do with the applicant's request for accommodation. Rather, it was introduced at the direction of the General Contractor, after noise complaints were made by tenants of the building regarding the use of the sanders. In response to those complaints, a protocol was put in place to limit using the sanders to between 7am and 8am, before the tenants arrived in the building.

[26] The respondent put into evidence documents showing the work assignments for various dates including June 17 and 18, 2015. The assignment sheets indicated employees were paired together and which swing stage they were assigned to work on. The assignment sheets also showed whether the pair were assigned sanders to perform their work.

[27] What is noteworthy is that the assignment sheets show that the sanders were assigned on both the morning and afternoon shifts. This contradicts the respondent's claim that the sander was only used in the morning. When asked about this discrepancy the respondent's witnesses sought to clarify that the restriction on grinding did not apply to Saturdays. However, the documentation appeared to show that the sanders were also used on weekday afternoons.

[28] In the end, I accept that the applicant raised concerns about his use of the sander and asked that he restrict his use to one hour per day. I also accept the respondent's evidence that there was a protocol in place to restrict grinding in the morning but that the protocol was not always followed. Given the protocol, it would not have been difficult for the respondent to accommodate the applicant as requested.

[29] What is less clear is whether the applicant provided sufficient medical information to support his request for accommodation. The first doctor's note he provided mischaracterizes the sander as a heavy piece of equipment and says nothing about restrictions. The second doctor's note suggests that the applicant should not be using the grinder at all. This note was only obtained after the incident with Mr. Ujka on the morning of June 17. The issue of whether Mr. Ujka ignored the applicant's restrictions will be discussed further, in detail below.

Use of Marijuana at Work

[30] The applicant does not dispute that he used marijuana at work but rather asserts that he did so for medicinal purposes and with the full knowledge and consent of his supervisor.

[31] According to the applicant, he began using marijuana for medicinal purposes back in 2012. This was initially done without a prescription. In late 2014, his family doctor referred him to a pain specialist, Dr. Price who assessed the applicant and prescribed him medical marijuana as part of a program for pain control. The applicant began using medical marijuana in March 2015.

[32] The applicant kept a log of his marijuana use from March to May 2015. The log showed that he used a combination of both his own marijuana and medical marijuana obtained through his prescription.

[33] The applicant's prescription for medical marijuana permitted him to use up to five grams per day. The applicant confirmed that at the time of these events he was

utilizing his full script. He smoked five marijuana cigarettes ("joints") each day; two of which would have been smoked on his work breaks.

[34] According to the applicant, he began using marijuana at work in 2014. The applicant maintained that during the 2014 season he approached Mr. Ujka and asked that he be allowed to medicate on his breaks to control his pain. He testified that Mr. Ujka did not have a problem with his request but asked that he smoke on the ground floor. This arrangement continued through the remainder of the 2014 season.

[35] The applicant recalled that at the beginning of the 2015 season he approached Mr. Ujka to reaffirm their understanding that he could medicate at work. He recalled telling Mr. Ujka that he had a prescription for medical marijuana in the form of a card (which was referred to as the Maricann card) and offered to show it to him. Mr. Ujka was not interested in seeing the prescription and simply waved him off, stating he did not need to see the card.

[36] The applicant explained that in 2015 he worked on the 37th floor and there was little time for him to go down to the ground floor to medicate on his breaks. The applicant asserted that he had an understanding with his supervisor that he could medicate in a designated spot on the floor away from the crew. This meant that he would go out onto the swing stage by himself at the beginning of his break to smoke.

[37] The applicant explained that there was an understanding that if the representative for the General Contractor came on site, Mr. Ujka would warn him and he would go down to the ground floor to medicate. The applicant acknowledged that if General Contractor ever caught him smoking marijuana on the work-site there would be serious consequences.

[38] The applicant explained his routine in May and June 2015. When he went on break, he would return to home base, take off his gear, get washed, put his harness back on, and then go out the designated window onto the swing stage to medicate. He

usually had two joints on him, one for each break. After he finished smoking he would come back through the window, take off gear and go eat his lunch.

[39] The applicant was adamant that Mr. Ujka condoned this arrangement. He described an instance sometime in 2015 when Mr. Ujka joined him on the stage while he was medicating. He described how Mr. Ujka sat beside him on the stage while he smoked and asked to see the joint, commenting on how small it was in size.

[40] The applicant did not dispute that there was a zero tolerance policy in place for the use of intoxicating drugs and alcohol on the worksite. He further acknowledged that at the beginning of each work season he and the other employees were required to watch a training video which described the General Contractor's zero tolerance policy. The applicant recalled watching the training video but did not recall the details of the video. He did recall that the issue of alcohol and drug use was discussed in the video and it was a big "no".

[41] As part of the training, the applicant was also required to complete a health and safety questionnaire which included questions on drug and alcohol use. The applicant conceded that his answer was "yes" to the question that "intoxicating beverages and drugs [were] not allowed on premise".

[42] In his testimony, Mr. Ujka vehemently denied any knowledge that the applicant used marijuana at work, prior to the incident which took place on June 18, 2015. Mr. Ujka was emphatic that he would have never condoned the use of marijuana at work, as it was clearly a breach of the company's health and safety policy. Like the applicant, he watched the training videos and completed the questionnaire each season, which acknowledged the zero tolerance policy for drugs and alcohol on the work site.

[43] Like the applicant, Mr. Ujka was also of the opinion that if the site supervisor for the General Contractor had ever caught someone smoking marijuana on the worksite there would be serious consequences for that individual and for the respondent company.

Dr. Price's Testimony

[44] I heard evidence from Dr. Ira Price who operates a pain management clinic. The applicant was referred to Dr. Price's clinic by his family doctor for chronic neck and back pain.

[45] During his testimony, Dr. Price reviewed a number of medical documents which confirmed that the applicant suffered from degenerative disk disease. The medical marijuana was prescribed to assist the applicant with his chronic pain. Dr. Price explained that the marijuana was meant to assist the applicant with pain relief, reduce inflammation, improve sleep, and help advance muscle recovery.

[46] The applicant was approved for treatment with medical cannabis on March 9, 2015. His prescription for the drug came in the form of a Medical Document completed by Dr. Price which authorized a three month supply of cannabis for medicinal purposes.

[47] The respondent challenged the validity of the applicant's prescription claiming it expired on June 9, 2015 and was, therefore, not valid at the time he was caught smoking marijuana on June 18. Dr. Price spoke to this issue by explaining that the reference to June 9 on his prescription referred to the date that the applicant had to fill the prescription. It did not signify that the prescription expired after that date. I accept that explanation.

[48] Dr. Price explained that he has a standard discussion with each patient about the use of marijuana. He instructed his patients not to operate heavy machinery or perform any work that required a quick reaction time.

[49] When asked about the applicant using his own supply of marijuana, Dr. Price commented that he would not have told him to stop using his own supply marijuana; but would have encouraged him to restrict his use of cannabis to medical marijuana because he could not regulate the level of THC in cannabis that the applicant supplied himself.

[50] The applicant acknowledged that he had no discussion with Dr. Price as to whether he could use marijuana at work. He recalled Dr. Price discussed driving and told him that he should wait two hours before driving after marijuana use. In his testimony, Dr. Price explained the reasons for this restriction are based on the euphoric effect that marijuana has on the user and its impact on slowing one's motor skills and response time. That is why patients are cautioned not to drive or operate heavy equipment within two hours of use.

[51] It was also clear from his evidence that Dr. Price did not know the true nature of the applicant's work. He assumed that when the applicant mentioned his profession as a painter, he meant an interior house painter, not someone who worked on the outside of high-rise buildings. When confronted with the evidence that the applicant worked on the outside of a high-rise building, Dr. Price conceded that he would have never authorized the applicant to medicate at work in these circumstances.

Workplace Injury

[52] According to the applicant, on the morning of June 17, 2015 he was using the electric sander for just over an hour when Mr. Ujka came down to inspect his work. Mr. Ujka complained that the work was not good enough and instructed him to continue sanding. The applicant protested because he had already been grinding for just over an hour and therefore, would be working beyond his restrictions. The supervisor ignored his plea and ordered him to continue. Mr. Ujka then left the stage. The applicant complied with the order but shortly, thereafter, his back seized up and he fell to the floor of the swing stage screaming in pain.

[53] The applicant stated that Mr. Ujka must have heard his screams because he returned to the edge of swing stage and asked him to come over. The applicant was in too much pain and remained curled up on the floor. The applicant asked Mr. Ujka to contact the General Contractor and notify them of the injury. He refused to do so. At that point, the applicant decided to leave the work site early and seek medical attention. He saw his family doctor later that day.

[54] As to the date of the injury, the applicant's testimony wavered between the dates June 17 and 18. This was true of much of the applicant's evidence. His recollection of dates and the order of events was somewhat hazy. He admitted that his memory of the events was poor and possibly affected by recent medical issues that affected his memory.

[55] The WSIB forms that the applicant completed at the time of the events, identified the accident date as June 18. Although the applicant went to his doctor on June 17, the WSIB forms were not completed on that date but sometime later.

[56] The actual claim for WSIB benefits was ultimately denied on the basis that there was insufficient evidence to support that the injury was work-related and not simply the result of a pre-existing condition. The denial letter also cites June 18 as the injury date in the narrative portion of the decision.

[57] The text messages that were put into evidence in fact, support the applicant's claim that the injury took place on June 17. The exchange of messages show that the applicant texted Mr. Raskin on the morning of June 17 stating that he asked Mr. Ujka to report an injury to the General Contractor but he refused to do so. He then went on to text that he was leaving the workplace that morning to see his family doctor.

[58] There is no question that the applicant saw his family doctor on June 17, as he was able to produce a doctor's note confirming the same. The note however, makes no reference to a workplace injury. The applicant also put into evidence a personal calendar that he kept which diarized the events. The calendar indicates that he injured himself on June 18.

[59] According to the respondent, the accident described by the applicant occurred on June 18, not June 17 as claimed by the applicant. Mr. Ujka recounted that the applicant was assigned to work on the swing stage with two other employees on the morning of June 18. The applicant was using the sander. The workday started at 7am. At around 7:15am, Mr. Ujka heard a loud scream from the swing stage. He saw the applicant

laying down on the stage. He went to go speak to him. The applicant did not respond, at first, but eventually told him that he felt pain in his back.

[60] According to Mr. Ujka, he offered to take the applicant to the hospital but he declined and said that he was okay and wanted to go back to work. He did not get up right away but continued laying on the stage for another 10-15 minutes before he got up and went back to work.

[61] Mr. Ujka denied the applicant's claim that he ordered him to continue using the sander that morning. He recalled another incident when he inspected the applicant's work and instructed him to continue grinding but that was on a different day and the applicant had not been grinding for over an hour.

[62] He also denied the applicant's claim that he refused to report the accident to the General Contractor. When asked whether he filled out an accident report following the incident on June 18, Mr. Ujka explained that he did not think it was necessary because the applicant returned to work and there was no loss of time. I find this response somewhat puzzling. It is not clear to me why Mr. Ujka would not consider this a workplace injury, given that even on his own evidence it was clear that the applicant had fallen to the floor in pain.

[63] According to Mr. Ujka, he was certain that the incident took place on June 18 because it was the same day that he witnessed the applicant smoking marijuana at work and sent him home.

[64] I heard evidence from Igor Gerzon who held the position of ground foreman. Mr. Gerzon testified that on June 17, the applicant came to him around 11am and told him that he had a doctor's appointment that day and had to leave early. There was no mention of a workplace accident or request to report an injury. His records show that the applicant worked and was paid for four hours that day.

Was the Applicant Caught Using Marijuana at Work

[65] Three witnesses testified on this point. On behalf of the respondent, I heard the evidence from Messrs. Gerzon and Ujka. According to Mr. Ujka, on the morning of June 18 he observed the applicant come off work on his first break, take off his work clothes, and put his harness back on.

[66] Puzzled by what he saw, he asked the ground foreman, Mr. Gerzon if he instructed the applicant to go back outside and perform some work. Mr. Gerzon said that he did not. The two then observed the applicant walk over to the west side of the building and exit onto the swing stage alone. The two followed him. When they got to the window, Mr. Ujka could see the applicant smoking what appeared to be a joint on the swing stage. He was not tethered to the stage and not wearing his hard hat.

[67] When Mr. Ujka opened the window he could smell marijuana. He asked the applicant what he was doing. He responded that he was relaxing. He asked if he was smoking marijuana and he said “no”. The applicant then took two further puffs and threw the joint onto the swing stage.

[68] According to Mr. Ujka, he then called the owner, Mr. Raskin and told him what had happened. Mr. Raskin instructed him to send the applicant home and not to let him back on site until the owner returned from vacation.

[69] After he got off the phone, he spoke to the applicant and told him to go home. According to Mr. Ujka, the applicant became angry and threw his hardhat to the ground and kicked over a tool box. He then left the premises.

[70] I also heard the evidence of Mr. Gerzon. Mr. Gerzon testified that he was present with Mr. Ujka on first break, when they observed the applicant go onto the swing stage by himself and found him smoking marijuana. His recollection of the incident was very similar to that of Mr. Ujka that the applicant was observed smoking marijuana on the swing stage and was not tethered to the structure.

[71] As stated previously, the applicant does not dispute using marijuana at work. What the applicant disputes is the respondent's account that he was caught using marijuana by Messrs. Ujka and Gerzon on June 18 and sent home. According to his testimony he was never confronted by these supervisors about his cannabis use.

[72] He recalled coming to work with a copy of the doctor's note dated June 17. He attempted to give Mr. Ujka a copy of the note but he refused to accept it. He felt that his supervisor was giving him the cold shoulder because of his request for accommodation. He then texted Mr. Raskin and asked him to come to the worksite.

[73] The applicant testified that he worked his entire shift on June 18 without incident. He texted the owner throughout the day hoping that he would come to the worksite so he could share his medical information.

[74] The applicant's witness statement tells a different story. In the statement, the applicant claims that he arrived at work on June 18 and tried to give a copy of his doctor's note to Mr. Ujka. His supervisor refused to accept the note and instead sent him home that morning.

[75] According to the texts that were exchanged that day, it appears that the applicant came to work that morning with the intention of sharing medical information with the respondent. At 10:12 a.m. the applicant texted Mr. Raskin and asked if he was coming to the worksite. Mr. Raskin texted back at 10:16 am stating he was on his way.

[76] During his testimony, Mr. Raskin admitted that the texts he sent to the applicant that day were not truthful. According to Mr. Raskin, he was out of the country on vacation at the time. His claim that he was on his way to the worksite was false. He had no intention or ability to come to the worksite on that day.

[77] Asked why he had lied in the text message, Mr. Raskin claimed that he did not want to get into any confrontation with the applicant while he was on vacation. Instead, he wanted to leave it to Mr. Ujka to deal with the situation. I find this explanation to

make little sense. Why would Mr. Raskin give the applicant false hope that he was coming to the worksite when he could have simply told him that he was on vacation and would deal with the matter upon his return.

[78] The text messages go on to further undermine the narrative provided by the respondent's witnesses. According to the respondent, the applicant was sent home on the morning of June 18 on the instructions of Mr. Raskin. However, at 2:26pm that day, Mr. Raskin sent a text to the applicant stating that he spoke to Mr. Ujka and that "*he is ok he will not be giving you a hard time anymore. Just do your job and don't worry about what other people say or do*." Again it makes little sense that Mr. Raskin would tell the applicant that everything was okay and to go back to work, if he instructed Mr. Ujka to send him home earlier that day.

[79] There is no question that the text exchange between the applicant and Mr. Raskin support the applicant's narrative of the events. However, I do not think the text messages tell the entire story of what was going on in the workplace. The text messages make no reference to marijuana use. This appears to agree with the applicant's narrative of events that he was never confronted about his marijuana use. However, I find this narrative difficult to believe in light of other evidence that was presented at the hearing.

[80] Although the timing is somewhat murky, there is no dispute on the evidence that the applicant faxed a copy of his Maricann card along with other medical documentation to the respondent's office before July 6. The applicant claimed that this was done sometime around June 20 or 22. The applicant's witness statement suggests that the Maricann card may have been sent as early as June 18.

[81] The fact that the applicant felt compelled to send a copy of his Maricann card sometime prior to July 6 suggests to me that he was aware that his use of marijuana at work was an issue. There is no other reason why he would send the Maricann card to the owner. The card itself provides no medical information to support his WSIB claim or

his request for accommodation. I can only surmise that he sent the card because the issue of his marijuana use had been raised some time prior to July 6.

[82] In the end, I accept the evidence of Messrs. Ujka and Gerzon that the applicant was confronted with using marijuana at work. The precise time and date of when this occurred is unclear but must have taken place sometime on or before June 20 when the applicant was told that he was not allowed back on the job site until the owner returned.

Termination of Employment

[83] The applicant was ultimately terminated on July 6 following a telephone call with the owner. It was on July 6 that the owner returned from vacation and made contact with the applicant. According to Mr. Raskin, when he arrived at work that morning he reviewed the material that the applicant had faxed over to his office including the medical notes, the WSIB forms and the Maricann card.

[84] He then called the applicant and spoke to him over the phone. It is common ground between the parties that the phone call itself was very brief. According to Mr. Raskin, he asked if the applicant had smoke marijuana at work and he confirmed the same.

[85] He described the applicant's tone as being defiant, stating that it was his right to smoke medical marijuana. He said that the applicant then told him to get a lawyer, swore and then hung up the phone. At no point during the conversation did the applicant claim that he needed to use marijuana at work as part of an accommodation.

[86] Mr. Raskin explained that after the applicant hung up the phone, he decided to terminate his employment. As the owner of the company, it was his decision to make. He did not consult with Mr. Ujka or anyone else before making the decision. In his mind, it was clear that he had cause to terminate the applicant's employment; and based on how the phone call ended, it appeared that the applicant himself was not interested in coming back to work.

[87] In terms of the rationale for terminating the applicant, Mr. Raskin acknowledged that he relied on his company's zero tolerance policy. To that end, he spoke of the health and safety concerns in allowing someone impaired on the worksite. The applicant worked on the outside of a high rise building. There were pedestrians who walked underneath the jobsite. If anything fell it could have fatal consequences.

[88] According to the owner, it would be reckless for him to allow the applicant to work on site in a potentially intoxicated state. Moreover, the applicant was on the swing stage by himself when he was caught smoking. Employees are not allowed out on the swing stage alone. If the stage were to malfunction it required two employees to stop the motor at each end of the stage.

[89] Mr. Raskin also considered the possibility that if the General Contractor came onto the site and observed the applicant smoking marijuana, his company could potentially lose the contract putting everyone out of work. In the end, he was not willing to take that risk.

[90] The applicant's recollection of the July 6 phone call was somewhat different. He agreed that the conversation was short and was somewhat heated. He recalled that the owner confronted him about his marijuana use at work. When the applicant acknowledged that he had used marijuana at work, Mr. Raskin became angry claiming that his actions were equivalent to "spitting in his face". It was in response to that comment that the applicant stated it was his "*civil right to smoke marijuana at work*" or words to that affect. As the applicant recalled it, it was Mr. Raskin who told him he needed to get a lawyer and it was he who hung up the phone.

[91] The applicant admitted that he never raised the issue of accommodation during the phone call. Nor did he raise, at that time, the fact that Mr. Ujka had condoned his behaviour. That allegation was first raised in the Application itself.

Impact of the Termination

[92] As to the effect the termination had on the applicant, I heard evidence that after losing his job, the applicant fell into a major depression. He was referred to a psychiatrist in 2016 for an assessment and was diagnosed with a major depressive episode but was not referred for any psychiatrist treatment. The applicant put into evidence a psychiatric report supporting this aspect of the claim.

[93] In terms of finding work, the applicant explained that he began assisting his wife's with her cleaning business but did not earn any income for this work. As a result, he became financially dependent on his wife and his son.

[94] The applicant also described how he began abusing alcohol. He felt worthless having lost his job and remaining unemployed. This also had an impact on him physically. He had problems sleeping and lost a lot of weight. It also placed a strain on his family life. His wife eventually left him in 2016 because he was becoming increasingly difficult to live with. The applicant explained that he eventually stopped drinking in the fall of 2016 and has been able to maintain sobriety since that time.

[95] He eventually found work, doing small painting jobs for pay, mainly for members of his church. But he has been unable to find full time work.

Zero Tolerance Policy

[96] There is no question that the respondent relied on a zero tolerance policy to terminate the applicant's employment. There was some dispute, however, as to the precise document that described the policy. The respondent put into evidence various copies of its own policies and the policies of the General Contractor which it claimed it was equally bound to follow.

[97] According to the respondent's witnesses, the use of zero tolerance policies, were fairly standard in the construction industry. I heard evidence that the policy on zero

tolerance for the use of drugs and alcohol on the worksite was set by the General Contractor and that the subcontractors were contractually obliged to adopt this policy or not work on the site. The respondent claimed that it developed its own zero tolerance policy but was unable to point to any policy document that was particular to the respondent.

[98] The parties put into evidence a copy of the General Contractor's zero tolerance policy which simply states, "*The bringing of, or the consumption of alcohol or non-prescribed drugs on the job or working while under the influence of such will not be tolerated. Any worker found to be under the influence of alcohol or non-prescribed drugs will be removed from the projec*t."

[99] The respondent put into evidence a copy of zero tolerance policy developed by L&L Painting and Decorating Ltd. that was prepared for a different worksite. That document described the policy as follows: *"Misuse of illegal or legal drugs will not be tolerated on site as there is a zero tolerance policy on this site due [sic] the danger of working at heights, and endangering the public below. Please speak with your supervisor if you have to be on any mind altering medications and proper procedure will be followed to find alternative work."* There is no evidence to suggest that the applicant was ever made aware of this specific policy.

[100] During the course of the evidence, I had the opportunity to review a health and safety video that was watched by the respondent's employees at the beginning of each work season. The video itself was prepared by the General Contractor and was meant to be viewed by all staff including the staff of the subcontractors.

[101] The video made reference to "*inappropriate use of drugs will not be tolerate*d." The video confirms that there was a "zero tolerance" policy in place for both illegal and legal drugs that were impairing and that discipline could result and the employer reserved the right to terminate. The video went on to state that there was zero tolerance for certain conduct including use of any illegal drugs or alcohol on the job site.

[102] I also heard evidence from Bruce Bolduc a safety consultant and trainer who has offered his services to the respondent in the past. Mr. Bolduc's evidence was relevant in that it confirmed that he provided health and safety training to the applicant over multiple seasons and would reviewed the company's zero tolerance policy during those training sessions. He testified that he recalled the applicant as being someone who was quite knowledgeable about the industry and understood the health and safety risks involved with the worksite.

[103] There was no dispute that the applicant was aware that the General Contractor had a zero tolerance policy in place. The respondent put into evidence the questionnaire that the applicant filled out. In answering the questions, he confirms that there is a zero tolerance policy in place for the: "*use of illegal drugs, alcohol on the jobsites, or taking prescription drugs that could cause impairment while working*."

[104] The applicant would have last watched the video and completed the questionnaire at the end of April 2015 some six weeks prior to the events which lead to his termination.

Position of the Applicant

[105] The applicant argued that the respondent denied him both his procedural and substantive right to accommodation with respect to his existing back condition and his use of medical marijuana for chronic pain.

[106] He submitted that his disability was a factor in the decision to terminate his employment. He further argued that the respondent's zero tolerance policy on the use of drugs and alcohol in the workplace was discriminatory. The applicant contends that by relying on its zero tolerance policy, the respondent failed to take an individualized approach to considering his accommodation needs.

[107] He further contends that the respondent falsely assumed that he was using illegal drugs on the worksite and its decision to terminate his employment was coloured by that misperception and the stigma that is still attached to marijuana use.

[108] To that end, the applicant maintained that there were other job sites where he could work and be accommodated including interior painting and a project that was ongoing at Billy Bishop Airport.

[109] Had he been given such an opportunity, he would have agreed to change the dosage of medical marijuana or abstain from using marijuana altogether while at work. But he was never given that chance.

[110] The applicant also refuted the notion that his use of medical marijuana represented a health and safety risk in the workplace, as there was simply no evidence to support the conclusion that he was impaired at work.

[111] Rather than terminate the applicant, the respondent should have made inquiries as to why he was using marijuana at work, whether it was for medical purposes or possibly as part of an addiction. Once it had this information, it should have applied an individualized approach to determine whether it could accommodate him or not. Instead it applied a mechanical approach by simply relying on its zero tolerance policy. In the end, the applicant submitted that there were steps short of termination that the respondent could have taken to address the situation.

[112] The applicant argued that the respondent must demonstrate that its zero tolerance policy meets the three step test set out by the Supreme Court of Canada in *Meoirin*, that is, the rule must be adopted for rational reasons, it must be adopted in good faith, and the rule must be reasonably necessary to meet the *bona fide* objectives to the point of undue hardship.

[113] The applicant asserted that his supervisor, Peter Ujka was fully aware of his marijuana use at work and consented to this use. It is only when the applicant began to

complain about the use of the sander that his supervisor turned on him and reported his use of marijuana at work to the owner.

[114] The applicant claimed lost wages for the remainder of the 2015 season. He also claimed general damages in the amount of $25,000 taking into consideration the impact that the job loss had on his life including, his marriage breakdown, his diagnosis of major depressive episode, and his relapse into alcohol abuse. In addition, the applicant seeks an order for future compliance that the respondent be required to amend its zero tolerance policy and introduce a specific policy on accommodation in the workplace.

Position of the Respondent

[115] The respondent submitted that the applicant was terminated for two reasons. First, his use of marijuana at work and second, his confrontational response to Mr. Raskin on July 6, when he was questioned about the issue.

[116] The respondent asserted that its zero tolerance policy on drugs and alcohol in the workplace was standard for the construction industry, given the inherent health and safety risks in that sector. As a subcontractor it was required to adopt a policy similar to that of the General Contractor. Had it not done so it would not be permitted to work on the site.

[117] The respondent challenged the notion that there was some ambiguity in its zero tolerance policy. The video and questionnaire spell out in no uncertain terms the expectation that the employees are not permitted to consume alcohol or impairing drugs (legal or otherwise) in the workplace. There was no question that the applicant watched the video and completed the questionnaire as recent as April 2015 some six weeks prior to his termination.

[118] The respondent submitted that credibility was an important factor in this case and that any inconsistencies in the applicant's evidence should not simply be attributed to his poor memory.

[119] The respondent asked that I draw an adverse inference against the applicant for not calling his co-workers as witnesses to support his claim that he regularly used marijuana at work to self-medicate.

[120] The respondent challenged the applicant's claim that he had a license to legally use marijuana for medicinal purpose. To that end, the respondent claimed that the applicant's authorization to use marijuana expired on June 9, 2015 and was not renewed until July 2015. This lapse presented, in the respondent's view, a gap in time whereby the applicant was not authorized to lawfully use marijuana for medical purposes.

[121] The respondent also pointed to the fact that in the period leading up to June 2015, the applicant was using a combination of the medicinal marijuana and his own personal stash which was illegal. Moreover, if the applicant was using marijuana at work back in 2014 as he claimed, he was using a substance that was unlawfully obtained.

[122] The respondent relied on the evidence of Dr. Price as proof that the applicant was never medically authorized to use marijuana at work.

[123] As to the applicant's request that he be accommodated with respect to the use of the sander, the respondent submitted that it met that accommodation need. The practice on the site was to grind for no more than one hour in the morning before tenants in the building arrived at work.

[124] The respondent pointed to the fact that nowhere in the applicant's medical information was there a claim that he was restricted from grinding less than an hour per day. The fact that the applicant used medical marijuana to control pain was not, in the respondent's view, proof of disability.

[125] The respondent submitted that even if the applicant were disabled he did not request any accommodation from the respondent regarding his marijuana use. There

was no evidence that the respondent denied any request for accommodation because none was made. If a request were made than it was clearly an undue hardship to suggest that the applicant was permitted to smoke marijuana at work when he worked on the outside of high rise building, 37 floors above the ground.

[126] As to the application of the three part test in *Meorin*, the respondent submitted that the policy was grounded in the rationale of health and safety, that the policy was adopted in good faith and that given the consequences of an accident in the workplace, it could not accommodate the use of marijuana in this workplace.

Analysis

Does the Applicant have a disability under the *Code*?

[127] The applicant put into evidence a number of medical documents which supported his claim that he suffered from a degenerative disc condition that caused him chronic pain. Dr. Price confirmed this diagnosis in his review of the medical evidence.

[128] The respondent asserts that the applicant's use of medical marijuana is not in itself proof of disability. I agree with that assertion. However, the evidence to support the existence of a disability was not simply his use of medical marijuana but the medical documentation which supports the claim. I am satisfied based on that evidence that the applicant has a disability within the meaning of the *Code*.

Assessment of Credibility

[129] Overall, I found the applicant's evidence to be difficult to follow and at times contradictory. He had a difficult time recalling the sequence of events and key dates. There were instances where his testimony contradicted the facts plead in the Application, his witness statement and other documentary evidence. For example, the applicant testified that he remained at work for the entire shift on June 18 and attempted to text the owner during this period. The applicant's witness statement, however,

suggests that he arrived at work on June 18 and was sent home by his supervisor that morning.

[130] The applicant conceded that his ability to remember dates and precise events was challenged and may have been affected by recent medical issues that impairs his memory.

[131] In contrast, the testimony of the respondent's witnesses was much more consistent. The narrative offered by the respondent's key witnesses was more fluid and internally consistent. The applicant suggested that this was evidence of collusion among the respondent's witnesses. I disagree. The evidence of Messrs. Ujka, Gerzon and Raskin was not replicate, it too was inconsistent at times and contradicted the facts plead in the Response and the witness statements submitted on their behalf. Most notable, was the fact that the timeline of the respondent's narrative contradicted the text messages that were put into evidence.

[132] In that sense, the reliability of the evidence provided by all of the key witnesses on both sides have been called into question. In the end, however, the onus rests with the applicant to establish the factual basis to prove discrimination.

Did Mr. Ujka condone the Applicant's marijuana use?

[133] The issue of whether Mr. Ujka condoned the applicant's marijuana use at work is vital to a determination of this case. If he condoned this behaviour then it suggests that his reporting the applicant to the owner may have been retribution for the applicant seeking to enforce his right to accommodation. If he did not condone this behaviour then his reporting of the event was simply incidental to his discovering the applicant smoking marijuana in breach of the company's policy.

[134] As there are no corroborating witnesses or evidence to support either side's claim, the dispute in this case comes down to a determination of credibility. In

determining credibility, I follow the Tribunal's usual practice of relying on the test set out in *Faryna v. Chorny*, 1951 CanLII 252 (BCCA), [1952] 2 DLR 354 (BCCA):

> The credibility of interested witnesses, particularly in cases of conflict of evidence cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of the witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize is reasonable in that place and in those conditions…

[135] If I were to adopt the applicant's version of events then I am accepting that his supervisor was okay with the applicant smoking cannabis on a swing stage by himself on the outside of a high rise building, some 37 floors above the ground. Does this seem reasonable in the context of this workplace? The evidence that this is a safety sensitive work site is overwhelming. The applicant's job was to perform work on the outside of a high-rise building with pedestrian traffic passing below the work site. Any accident involving equipment dropping from the swing stage could result in catastrophic consequences.

[136] It is difficult for me to believe that in these circumstances, Mr. Ujka would have condoned drug use on site. It seems inconceivable that a supervisor would flaunt health and safety rules for the sake of the applicant. Moreover, the applicant asserts that Mr. Ujka condoned this behaviour as early as 2014, before the applicant had a legal right to use medical marijuana.

[137] If the owner learned that Mr. Ujka condoned this behaviour it is reasonable to assume that he too could risk losing his job. Again, it seems incredible to me that Mr. Ujka would put his own job in jeopardy for the sake of the applicant.

[138] I heard undisputed evidence that in addition to the respondent's employees there were other trades on the work site. It makes little sense that the applicant would be

permitted to smoke at work, at risk that anyone could have reported him to the General Contractor.

[139] The applicant's account that he and Mr. Ujka had an arrangement whereby he would go out onto the swing stage alone to smoke also flies in the face of the health and safety protocols that were in place. I heard evidence from the respondent's witnesses, including Mr. Bolduc that employees were not permitted onto the swing stage alone due to safety concerns. If the stage were to malfunction and drop it would require two persons to move the stage back in place. I accept that evidence. It seems unlikely that Mr. Ujka would flaunt this protocol for the benefit of the applicant.

[140] In the absence of any corroborating evidence, the applicant's claim that his supervisor was aware and condoned his marijuana use is simply unreasonable given these circumstances.

Owner Not Aware of Applicant's Marijuana Use

[141] Even if I were to accept that Mr. Ujka condoned such use, there is no evidence to suggest that the owner was ever made aware of the applicant's marijuana use prior to the events that led to his termination.

[142] I accept Mr. Raskin's evidence that the decision to termination the applicant was solely his own and was made after their telephone conversation on July 6. Mr. Ujka had no input into this decision.

[143] In his testimony, the applicant tried to suggest that in the past Mr. Raskin condoned the use of drugs so long as it was done off site. He recalled an incident back in 2011 or 2012 when he was working at a job site in St. Catharines and the owner came onto the work site and warned staff not to smoke marijuana or drink alcohol on site. He recalled Mr. Raskin specifically told staff that if they were going to smoke pot or drink to do it off-site. The applicant felt that these comments were directed at him because the owner was staring in his direction when he raised the issue.

[144] Mr. Raskin had no recollection of this discussion and strongly denied the assertion he would condone employees coming to work intoxicated.

[145] I do not accept the applicant's evidence on this point. As the owner of the respondent business, Mr. Raskin would have been responsible for implementing the company's zero tolerance policy. I accept his evidence that it was an expectation of the General Contractor that its subcontractors comply with the zero tolerance policy. It is difficult to accept that Mr. Raskin would risk his own business by permitting employees to come to work intoxicated, so long as their drug or alcohol use was done off property.

Was the Applicant caught smoking marijuana at work?

[146] Although the applicant concedes that he regularly smoked marijuana on his breaks, there is a factual dispute as to whether he was caught doing so by Messrs. Ujka and Gerzon on June 18.

[147] What is difficult to square in this case is the respondent's timeline of events and the text messages that were put into evidence. According to the respondent's witnesses, the applicant was caught smoking marijuana on the morning of June 18 and was sent home. Mr. Ujka's evidence on that point was that he told the applicant to go home on the instruction of the owner, Mr. Raskin.

[148] The text messages that were exchanged between the applicant and Mr. Raskin on that day tell a different story. There is no reference to the applicant being caught with marijuana. There is no reference to the applicant being sent home that morning. To the contrary, the text messages reveal that Mr. Raskin wrote to the applicant on the afternoon of June 18 and told him that he spoke to Mr. Ujka and everything was okay and to just go back to work.

[149] This statement contradicts the timeline offered up by the respondent's witnesses as to when the applicant was caught smoking on the morning of June 18 and was told to go home at the direction of Mr. Raskin. That does not mean that the events did not

occur. As I have stated previously, I do not think the text messages tell the entire story of what took place.

[150] According to the applicant, he was not confronted with any allegation regarding marijuana until he spoke to the owner on July 6. However, in his evidence he testified that he sent a copy of his Maricann card to Mr. Raskin's office before July 6. In his witness statement, the applicant claimed that the Maricann card was faxed along with other medical information to the owner on June 18.

[151] The card itself provides no information about the applicant's medical restrictions but simply lends support to the fact that he was medically authorized to use marijuana. It seems paradoxical that the applicant would forward this card to the respondent if the issue of marijuana use was not raised prior to July 6. I can only conclude from this evidence that the applicant was confronted about his marijuana use at some point prior to July 6.

[152] This may not have occurred according to the timeline provided by the respondent's witnesses, but it occurred nonetheless. In the end, I accept the respondent's evidence that the applicant was confronted by his supervisor about his marijuana use at work.

Did the Respondent Fail to Accommodate the Applicant re: Use of Electric Sander

[153] According to the applicant, the respondent agreed at first to accommodate his restrictions (to use the sander for less than one hour) but shortly thereafter, Mr. Ujka violated his restrictions on June 17 when he forced him to sand beyond an hour.

[154] The applicant put into evidence doctor's noted dated June 14 and 17, 2015 in support of his request for accommodation. The June 14 note says nothing about time restrictions on sanding and mischaracterizes the sander as a heavy piece of equipment. The June 17 note also says nothing about time restrictions and in fact implies that the applicant should not be using the sander at all. The second note was only obtained

after the applicant claims that Mr. Ujka ordered him to grind beyond an hour. It is unclear on the evidence whether Mr. Ujka was ever given a copy of this doctor's note.

[155] Given these circumstances, I am unable to conclude that the applicant presented clear medical evidence to support his claim that he was medically restricted from sanding beyond an hour per day. Therefore, even if it were true that Mr. Ujka ordered the applicant to grind beyond an hour, there is insufficient evidence to support the claim that this was beyond the applicant's medical restrictions.

Did the Respondent Fail to Accommodate the Applicant re: Use of Medical Marijuana

[156] There is no evidence that the applicant requested an accommodation with respect to his marijuana use. As stated previously, I do not accept the applicant's claim that his supervisor was aware of his marijuana use and condoned it. Instead, the applicant took it upon himself to unilaterally use marijuana at work without authorization from either his employer or his treating physician. It is difficult to conclude that the respondent failed to accommodate a request that was never made.

[157] Dr. Price testified that had he known the applicant's job involved working on the outside of a high rise building, he would have discussed refraining from medicating at work. It was the applicant's preference to self-accommodate by medicating on his breaks. The applicant simply chose to do it in breach of a policy that he was aware of and without seeking prior approval. Even if the respondent had been made aware of the applicant's chronic pain disability and been approached by the applicant seeking accommodation with respect to the zero tolerance policy, I would not have found that the applicant's preference for medicating at work was part of any reasonable accommodation.

[158] Moreover, the respondent is not obliged to accommodate preferences if those would amount to an undue hardship, or, for that matter if those fall short of a reasonable alternative accommodation proposed by the respondent: see *Central Okanagan School*

District No. 23 v. Renaud, 1992 CanLII 81 (SCC), [1992] 2 SCR 970. I would have no difficulty in concluding that the applicant's preferred accommodation presented an undue hardship in light of the health and safety concerns particular to this workplace.

[159] I find that the applicant has failed to make out a breach of the duty to accommodate with respect to his marijuana use.

[160] The applicant submitted that the respondent breached its procedural duty to investigate the possibility of accommodating his marijuana use before it terminated his employment. I respectfully disagree. The applicant had already committed a serious health and safety breach that was in violation of the zero tolerance policy before the respondent was ever made aware of any accommodation needs. The respondent was under no obligation to consider whether it could reasonably accommodate the applicant after the fact, that is after he provided the grounds for his own termination.

[161] The applicant further submitted that the respondent breached its procedural duty when it failed to consider whether the applicant suffered from an addiction before it took steps to terminate him.

[162] There is no evidence to suggest that the applicant suffered from any addiction with respect to his marijuana use. To the contrary, as per the testimony of Dr. Price, he would have never prescribed the applicant medical marijuana if there was evidence of an ongoing addiction. Dr. Price testified that he was aware that the applicant had a history of drug and alcohol abuse, but that had long been in remission and he felt that he was not at risk of recidivism.

[163] At the time the applicant was terminated, Mr. Raskin was presented with the evidence that the applicant was using marijuana for medicinal purposes. During their discussion on July 6, the applicant claimed it was his right to smoke marijuana at work. There was no suggestion that the applicant was abusing the substance.

[164] I think it would be reasonable in the circumstances for the respondent to conclude that addiction was not an issue. I see no reason why it would be compelled to confirm this point as a procedural obligation, in light of the facts.

Did Respondent Discriminate Against the Applicant When it Terminated His Employment for Smoking Marijuana at Work?

[165] The applicant does not have an absolute right to smoke marijuana at work regardless of whether it is used for medicinal purposes. The evidence of Dr. Price was that he would have never counselled the applicant to smoke at work given the nature of his job. Had the applicant made the effort to ask Dr. Price whether he should medicate at work or not, he would have instructed him not to. Instead, the applicant unilaterally chose to smoke marijuana at work without authorization.

[166] His actions represented a genuine health and safety risk given the safety sensitive nature of the job site. At risk of repeating myself, I cannot emphasize enough that the applicant worked on the 37th floor of an office tower on the outside of the building. If the applicant was impaired even in the slightest and it resulted in an accident, such as him dropping a tool, the consequences would be catastrophic.

[167] If the General Contractor became aware that a supervisor of the company allowed an employee to smoke marijuana at work it would have put the contract in jeopardy. This could mean the loss of the contract, putting the applicant and everyone else employed by the respondent on the site, out of work.

[168] I do not accept the applicant's claim that there must be actual evidence of impairment before the respondent can take action. By his own admission, the applicant smoked two grams of cannabis throughout the workday. According to Dr. Price, patients are instructed not to drive a vehicle for at least two after medicating, due to the euphoric effects of the drug and the impairment to the users' motor skills and response time.

[169] It would be unreasonable to expect that the respondent would have to formally test the applicant for his level of impairment, before it could raise health and safety concerns.

[170] The fact that the respondent relied on a zero tolerance policy to support its termination does not equate to discrimination under the *Code* in the circumstances of this case. There must be some evidence that the applicant's disability was a factor in his termination: see *Stewart v. Elk Valley Coal Corp.*, 2017 SCC 30. The applicant's decision to use marijuana at work was his own. It was not an act of compulsion and the employer had no opportunity to consider whether it might have been part of some reasonable accommodation plan. Given the health and safety risks inherent to this worksite, I accept that the applicant was dismissed for a serious health and safety violation. For these reasons, I conclude that there is simply no evidence to support the claim that the applicant's disability was a factor in his termination.

Did the Respondent's Zero Tolerance Policy Violate the Three Part Test in Meorin?

[171] It is the applicant's submission that the respondent's zero tolerance policy was discriminatory as it violated the three part test set out by the Supreme Court of Canada in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, 1999 CanLII 652 (SCC), [1999] 3 SCR 3 ("*Meoirin").* To establish that its zero tolerance policy was a *bona fide* requirement of the job, the respondent would need to establish that:

a. it adopted a zero tolerance policy for purposes rationally connected to legitimate health and safety on the job site;

b. that its policy was adopted with an honest and good faith belief that it was necessary to the fulfillment of that purpose; and

c. that the conditions imposed by the policy were reasonably necessary to the accomplishment of this purpose, in that it is impossible to accommodate the individual without imposing undue hardship.

[172] There was some issue between the parties as to which document precisely described the policy itself. There is no clear document which describes the respondent's actual policy. It appears that the policy that was followed was a combination of the General Contractor's written policy, the video which described the policy, and the questionnaire that the applicant completed at the beginning of each work season. The applicant would have been most familiar with the video and questionnaire which read, "*the use of illegal drugs, alcohol on the jobsites, or taking prescription drugs that could cause impairment while working.*" Taking that as the policy understood by the applicant at the time of these events, I will apply it to the three step analysis set out in *Meiorin*.

[173] As to the first step in the *Meiorin*, I accept that this policy is reasonably related to the objective of health and safety. The evidence is overwhelming that this is a safety sensitive workplace. Prohibiting the use of impairing drugs seems more than reasonable in the context of this job site and the risks involved in any workplace errors.

[174] It is important to note that none of the documents referencing the zero tolerance policy mention termination of employment, but rather they state that employees will be removed from the job site. Moreover, the policy as described in the questionnaire does not specifically target illegal drugs but makes reference to alcohol, non-prescribed drugs and prescribed drugs that cause impairment.

[175] This reinforces the notion that the purpose of the policy was to focus on the intoxicating effect of the drug and not whether it was illegal or not. There is nothing to suggest that this policy stigmatizes the use of marijuana simply because of its history as an illegal substance.

[176] At the second stage, the Tribunal must determine whether the employer adopted the standard with an honest and good faith belief that it was necessary to the accomplishment of its purpose, with no intention of discriminating against the applicant. I heard evidence that the respondent was required to adopt the policy due to its

contractual obligations with the General Contractor. With that said, there were clear health and safety rationale behind the policy.

[177] I accept the evidence of both Mr. Raskin and Mr. Bolduc that zero tolerance policies are commonly used in the construction industry given the safety risks inherent in that industry. As to this particular job site, I accept that the respondent adopted the policy in an honest belief that allowing someone intoxicated onto the worksite posed a serious risk to both the individual and the public who walked underneath the site.

[178] As to the third step of the test, I accept that the condition imposed by the zero tolerance policy is reasonably necessary to accomplish its purpose, to protect the health and safety of the worker and the public. The policy itself does not impose automatic termination as a condition. It imposes removing the employee from the job site if he or she is intoxicated.

[179] On that point, I heard evidence of two prior instances where employees came to work intoxicated and were sent home by Mr. Ujka. Neither employee was terminated. The applicant pointed to these two examples to support his claim that the respondent had an option not to terminate his employment. That may be true, but the applicant was also sent home and not immediately terminated. In that regard, this evidence undermines the applicant's claim that the respondent had mechanically applied its zero tolerance policy. The evidence also supports the respondent's claim that it would never knowingly allow intoxicated employees onto the job site.

[180] The policy itself does not close the door to accommodating employees who use medical marijuana but may restrict such accommodation to a non-safety sensitive job. The fact that the policy does not prescribe automatic termination provides some flexibility to the employer to consider requests from those who need accommodation.

[181] For these reasons, I find that the zero tolerance policy adopted by the respondent meets the standards set out in *Meiorin* and was not discriminatory.

SUMMARY

[182] After hearing all of the evidence, I am satisfied that the applicant, through his own actions, provided the respondent grounds to terminate his employment. There is no evidence to support his claim that the respondent's actions were discriminatory in any way.

[183] Accordingly, for all of these reasons the Application is dismissed.

Dated at Toronto, this 28th day of February, 2018.
"Signed by"

_____
Colin Johnston
Member