HRTO Finds Denial of Coverage For Medical Cannabis Under Employer's Benefit Plan Non-discriminatory

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In a case before the Human Rights Tribunal of Ontario (HRTO), an applicant alleged that an employee benefits administrator's decision to deny her coverage for medically-prescribed cannabis was discriminatory. The Tribunal found that such a denial does not constitute discrimination under the Ontario Human Rights Code (Code) when the decision to deny coverage is unrelated to an applicant's disability or another enumerated protected ground.

Background

In the October 2018 decision,[1] the self-represented applicant was a dependant of an employee of the Corporation of the County of Essex (Essex), who relied on medically-prescribed cannabis treatments to control the symptoms of her disability. The Applicant named Green Shield Canada Inc. (Green Shield), a company who contracts with employers such as Essex to administer health and dental care plans for employees, as the respondent.

At issue in the summary hearing was whether the decision to deny the Applicant coverage for her medically-prescribed cannabis was discriminatory, or whether this application had no reasonable prospect of success.

The Applicant believed that her employer (and its benefits plan administrator) had refused to reimburse the costs of her cannabis-related treatment due to an inherent "bias against cannabis use", which resulted in an alleged discrimination in the provision of services on the basis of her disability.[2]

Essex denied any discriminatory action, responding that its decision to deny coverage to the applicant was a technical one that was in no way connected to the applicant's disability. The company explained that its employee benefits plan stipulated that, in order for a drug to be covered, it must have a Drug Identification Number (DIN) assigned by Health Canada. At this point in time, medical cannabis does not have a DIN, and Essex stated that, on this basis alone, it denied coverage. In support of this point, counsel for Essex relied on the Tribunal's decision in Kueber v. Ontario (Attorney

General),[3] in which it was held that a decision to deny coverage for the cost of medical marijuana under the Ontario Drug Benefit program because it was not approved by Health Canada was not a breach of the applicant's Code rights, since the decision was not based on any Code-related reason.

The Tribunal 's Decision

The HRTO held that Essex's denial of coverage was not discriminatory in nature. In fact, the Tribunal stated that, even if Essex had denied coverage because of a bias against cannabis use, it would not amount to a breach of the Applicant's Code rights. As stated by the Tribunal:

"The fact that a person who has been prescribed medical cannabis also has a disability does not establish the connection between the decision to deny the coverage and that person's disability. The connection in that instance is between the type of drug and the decision."[4]

In arriving at its decision, the HRTO referred to a case from Nova Scotia, Canadian Elevator Industry Welfare Trust Fund v. Skinner,[5] in which an appeal court overturned a 2017 decision which had found that a man had been discriminated against because the union welfare plan refused to cover prescription drugs not approved by Health Canada, including cannabis. In overturning the lower court decision, the Nova Scotia Court of Appeal found that a denial of coverage for a specific drug or medical substance based on a contractual term was not discriminatory, and that such a denial was not automatically made on the basis of an applicant's disability.

In finding that the Applicant's claim had no reasonable prospect of success, the Tribunal stated that "decisions on what is included in a benefits plan can be based on a number of factors that are unrelated to claimant's disability,"[6] and that, as stated in El Jamal v. Minister of Long-Term Care,[7] "the purpose of the Code is not to define the appropriate scope of a benefit plan without regard to the underlying purpose of the plan or to require that benefits be made available to individuals simply because they identify with a Code-related factor".

Comment

While societal stigma related to the medical use of cannabis slowly continues to ebb away, this decision from the HRTO, and its corresponding extra-provincial sister decision, indicate that this shift has not impacted the contractual interpretation of employee benefit contracts.

Employers and employees alike should heed this decision when making the choice to turn to cannabis-based medical treatments, as many employers and insurers adhere to Health Canada's strict DIN-based coverage system in constructing their contracts. Some insurers have begun to offer coverage for medical cannabis as a medical service, rather than as a drug benefit, as pressure increases to offer these treatments for ailments such as types of cancer or Crohn's disease. Employees should be sure to assess how their prescribed cannabis treatment will be classified (or excluded) under their benefits plan before committing to a new, costly course of treatment.

Going forward, health practitioners will continue to prescribe cannabis regardless of their patients' coverage options. Employers should monitor Health Canada's classification of cannabis to ensure they stay aware of how the provisions of their employment benefits contracts will be interpreted. While we may see cannabis achieve Health Canada's DIN status in the near future, for now employers and employees should keep in mind that, when it comes to medical benefits coverage in employment contracts, the terms of the contract will reign supreme.

1 *Rivard v. Essex (County),* 2018 HRTO 1535 (*Rivard*).

2 *Ibid* at para 30.

3 *Kueber v Ontario (Attorney General),* 2014 HRTO 769 (CanLII) (*Kueber*).

4 *Ibid*.

5 *Canadian Elevator Industry Welfare Trust Fund v. Skinner*, 2018 NSCA 31.

6 *Rivard*, *supra* note 1 at para 32.

7 *El Jamal v. Minister of Long-Term Care,* 2011 HRTO 1952 (CanLII).

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