



2008 ALBERTA CHAMBERS OF COMMERCE RESOLUTION

Reconciling legislative ambiguities with respect to employer alcohol and drug policies

Issue

Alberta's Occupational Health and Safety Act (OHSA) places a heavy onus on employers to mitigate the risk of substance abuse and safety in the workplace. However, significant protection is afforded against employment discrimination on the basis of physical or mental disability in the province's Human Rights, Citizenship and Multiculturalism Act, combined with the protection of personal information afforded in the Personal Information Protection Act (PIPA). These competing legislative objectives often create ambiguities that leave employers in an uncertain legal position and exposed to or immersed in lengthy and costly legal proceedings, especially with respect to drug and alcohol policies that include pre-employment, site access and random alcohol and drug testing.

The tensions between safety and human rights came to the fore in Alberta (Human Rights and Citizenship Commission) v. Kellogg Brown & Root (Canada) Company (KBR), recently decided at the Alberta Court of Appeals.¹ This decision provides a framework under which government can reconcile the conflicts that exist within the various pieces of legislation.

Discussion

The case on which the appeal was launched involves an admitted casual user of marijuana being terminated from his employment after failing a pre-employment drug and alcohol test. Mr. Chiasson was hired by KBR on the condition that he pass a drug and alcohol test. After failing the test, Mr. Chiasson admitted smoking marijuana five days before he was tested and was subsequently fired.

The Court of Appeal unanimously upheld the original decision made by an Alberta Human Rights hearing panel that Mr. Chiasson was a self-admitted recreational user of marijuana, that he was not suffering from a drug addiction, and therefore did not fit into the disabled class of persons in the Human Rights Act. Furthermore, the court decided that, although discrimination based upon perceptions can be a violation of human rights legislation, Mr. Chiasson's termination was not based on the perception by the employer that he was drug-addicted and, because there was no perception by the employer that Mr. Chiasson was drug-addicted, there was clearly no basis to assert discrimination on the basis of a perceived disability.²

¹ Alberta Court of Appeal. 2007. *Alberta (Human Rights and Citizenship Commission) v. Kellogg Root & Brown (Canada) Company*. ABCA 426.

² The preceding discussion borrows from Ford and Papero 2008. *New Ruling Assists Alberta Employers in Defending Challenges to Pre-Employment Alcohol and Drug Testing*. Available at



Alberta v. KBR is a clear example of the continuing legislative ambiguity plaguing employers, but the decision offers a fair solution to these issues. In the decision, the court held that, “Extending human rights protections to situations resulting in placing the lives of others at risk flies in the face of logic.” The current legislative framework however, allows for, and even encourages, such thinking. An alternative approach to the issue is the risk management approach recognized by the court: “In this case KBR’s policy does not perceive Chiasson to be an addict. Rather it perceives that persons who use drugs at all are a safety risk in an already dangerous workplace.” This line of thinking effectively manages the competing considerations involved in employer drug and alcohol policies and human rights legislation and should be more explicitly integrated into relevant legislation to protect employers who take responsibility for worksite safety. In May 2008, the Supreme Court rejected an application for leave to appeal the decision.

The Alberta Chambers of Commerce recommends the Government of Alberta:

1. Reconcile the conflict between the Occupational Health and Safety Act and the Human Rights, Citizenship and Multiculturalism Act and Personal Information Protection Act informed by the Alberta Court of Appeal Chiasson decision.