

FTR Now

Supreme Court of Canada Confirms Termination of Disabled Employee Not a Breach of Human Rights

Date: June 15, 2017

In [Stewart v. Elk Valley Coal Corp.](#), the Supreme Court of Canada has upheld a decision of the Alberta Human Rights Tribunal (Tribunal) which concluded that an employee who had a cocaine addiction was not dismissed because of that addiction; rather, he was dismissed for breaching his employer's Alcohol, Illegal Drugs & Medical Policy (Policy). No *prima facie* discrimination was found and the decision of the Tribunal dismissing the employee's complaint was therefore reasonable. In this *FTR Now*, we review this important decision and its implications for employers.

Background

Elk Valley Coal Corporation operates a mine in Alberta. It implemented the Policy "to ensure safety by encouraging employees with substance abuse problems to come forward and obtain treatment before their problems compromised safety." Specifically, the Policy required employees to disclose any issues of dependence or addictions to the employer, *before* the occurrence of any drug-related incident. If the employee disclosed their disability, they would be offered appropriate treatment. If an employee did not disclose and an accident occurred in which they tested positive for drugs, their employment would be terminated.

The employee drove a loader in the mine. He used cocaine on his days off but did not disclose his drug use to his employer. He was involved in an accident in his loader, was tested for drug use in accordance with the Policy and tested positive for drugs. After the positive test he indicated to his employer he "thought he was addicted to cocaine." Pursuant to the Policy, his employment was terminated.

The employee brought a complaint before the Tribunal alleging that his employer discriminated against him by terminating his employment because of his disability. The Tribunal dismissed the complaint. It found that the reason for the termination was not the disability but the failure to disclose the disability (addiction), in breach of the Policy. Consequently, the Tribunal found that no *prima facie* discrimination was established by the employee. The decision was affirmed by the Alberta Court of Queen's Bench and by the Court of Appeal.

The Supreme Court of Canada Decision

Writing for the majority, Chief Justice McLachlin upheld the Tribunal's decision that the reason for the employee's termination of employment was not the disability *per se*, but breach of the disclosure requirement of the Policy. In her reasoning, Chief Justice McLachlin reiterated the test for *prima facie* discrimination:

[23] To make a claim for discrimination under the Act, the employee must establish a *prima facie* case of discrimination. If this is established, the onus then shifts to the employer to show that it accommodated the employee to the point of undue hard-ship.

[24] To make a case of *prima facie* discrimination, "complainants are required to show that they have a characteristic protected from discrimination under the Code; that they experienced adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact": [citation omitted]

The majority agreed that the first two elements of establishing a case of *prima facie* discrimination were met: the employee had a characteristic (disability) that was protected by the human rights legislation; and, he experienced an adverse impact with respect to his employment (termination).

The key issue for determination was whether the adverse impact was a result of the disability, i.e. was the disability a factor in the termination. The majority of the Court concluded that it was not. It found that the evidence before the Tribunal clearly established that the employee had the capacity to comply with the terms of the Policy, but failed to do so. Accordingly, he would have been terminated whether he was an addict or a casual user. Consequently, the Court concluded that the Tribunal's decision was reasonable. The majority did not address the issue of whether the employee was reasonably accommodated because a *prima facie* case of discrimination was not made out.

Justices Moldaver and Wagner, in concurring reasons, agreed with the majority in the result. However, they differed on whether the test for *prima facie* discrimination was met and found that the employee's drug dependency was a factor in the termination of his employment. To prove *prima facie* discrimination, the Justices held that the employee was not required to show that the termination was caused solely or primarily by his drug dependency. Instead, he was only required to show that there was a connection between the protected ground – the drug addiction – and the adverse effect (the termination). Justices Moldaver and Wagner concluded that while the employee's exercise of control over his drug use reduced the extent to which his dependency contributed to the termination, it did not eliminate the disability as a factor in the termination. Notwithstanding this disagreement with the majority, Justices Moldaver and Wagner agreed that the employer had met its obligation to accommodate the employee to the point of undue hardship because failing to impose the serious and immediate consequence of termination would have undermined the Policy's deterrent effect and the employer's safety objectives.

In his dissent, Justice Gascon stated that a drug policy which automatically terminates employees

who use drugs constitutes *prima facie* discrimination against individuals burdened by drug dependence. In this instance, the employee's drug dependence was "a factor" in his drug use (the basis for this termination) and, therefore, the Policy under which his employment was terminated was *prima facie* discriminatory. Justice Gascon also held that a "policy that "accommodates" employees through mechanisms which are either inaccessible by the employee due to their disability or only applicable to the employee post-termination cannot justify *prima facie* discrimination" [para. 61]. Here, the employee could not avail himself of the lenient treatment offered by the Policy by disclosing his dependence prior to an accident, because he was unaware of that dependence due to his disability. Similarly, Justice Gascon rejected the claim that the employee was accommodated by being given the prospect of reapplying for his position on the basis that any accommodation must be provided during the course of employment – not following a termination.

Implications for Employers

The decision by the Supreme Court of Canada emphasizes that the interpretation of human rights protections in Canada remains an area of significant debate and dispute, as highlighted by the three sets of reasons in *Elk Valley*.

However, the decision highlights three key factors for employers to consider when balancing the rights of employees with employer obligations:

1. **Safety Matters.** Both the majority and the concurring reasons make clear that the safety of the workplace and other employees is a valid objective for employers and will be given considerable deference by adjudicators when reviewing the actions of employers.
2. **Policies Matter.** The Policy relied upon by the employer was clear and well-known. The employees were trained on the Policy and signed acknowledgements of their awareness of its terms. It is important that workplace rules not only exist, but they are known to employees.
3. **Clarity Matters.** The majority relied heavily on the clear language of the termination letter in upholding the termination and the decision of the Tribunal. Termination letters and any reasons specified in those letters should be succinct and accurate, to avoid confusion at a later date.

Should you have any questions or require further information, please contact [Shivani Chopra](#) at [416.864.7310](tel:416.864.7310), [Kathryn Bird](#) at [416.864.7353](tel:416.864.7353) or [your regular Hicks Morley lawyer](#).

The article in this Client Update provides general information and should not be relied on as legal advice or opinion. This publication is copyrighted by Hicks Morley Hamilton Stewart Storie LLP and may not be photocopied or reproduced in any form, in whole or in part, without the express



permission of Hicks Morley Hamilton Stewart Storie LLP. ©