The case for capacity: Supreme Court of Canada upholds employee’s termination based on breach of “no free accident rule” in workplace drug and alcohol policy

CANADIAN EMPLOYMENT NEWS SERIES
Employment Alert

3 OCT 2017
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Managing employee drug and alcohol addictions has long been a thorny issue for employers. Because addiction is accepted as a mental disability, it is a delicate balancing act to ensure employee privacy and human rights are respected while fulfilling an employer’s obligations pursuant to occupational health and safety laws. However, the Supreme Court of Canada (SCC)’s decision in Stewart v. Elk Valley Coal Corporation may have smoothed the way for employers to discipline employees who break workplace drug and alcohol policies, addiction notwithstanding.

Mr. Stewart was employed by Elk Valley Coal Corporation (“Elk Valley”) as a loader driver for Elk Valley’s mining operations. Elk Valley established an “Alcohol, Illegal Drugs & Medication Policy” (the “Policy”), which, among other things, required employees to disclose dependency and addiction issues to the employer. Employees who did so would be offered treatment without discipline. However, if an employee did not disclose dependency and addiction issues in accordance with the Policy, and was involved in an incident and tested positive for drugs, their employment would be...
Mr. Stewart attended a training session with respect to the Policy, and confirmed in writing that he had received and understood the Policy. Nevertheless, he used cocaine when he was not at work.

Mr. Stewart was involved in a workplace accident, and post-accident testing revealed cocaine in his system. At the time, Mr. Stewart disclosed a cocaine addiction that he stated he had been previously unaware of. Elk Valley terminated his employment nine days later.

Mr. Stewart’s union representative filed a complaint alleging discrimination in employment contrary to the Human Rights, Citizenship and Multiculturalism Act. The complaint was not successful; the Alberta Human Rights Tribunal found that Mr. Stewart had not established a case of prima facie discrimination because he was terminated only for violating the Policy and that his disability was not a factor in his termination. And, alternatively, if there was prima facie discrimination, Elk Valley had reasonably accommodated his disability.

On June 15, 2017, a majority of the SCC confirmed the Tribunal’s decision.

The test for prima facie discrimination in the workplace and the undue hardship threshold

An employee who files a complaint of discrimination in employment under provincial or federal human rights legislation bears the burden of demonstrating that:

1. the individual has a characteristic protected from discrimination under the legislation;
2. the individual experienced an adverse impact with respect to the individual’s employment; and
3. the protected characteristic was a factor in the adverse impact.

With respect to the third element, discrimination may be direct (based on stereotypes, for example) or indirect (such as a supposed neutral policy that has an adverse effect on individuals with certain characteristics). The employer’s intent to discriminate is irrelevant.

Where an employee is able to demonstrate prima facie discrimination, the onus shifts to the employer to demonstrate that it accommodated the employee to the point of undue hardship. In the case of a bona fide occupational requirement, an employer must demonstrate that:

1. the employer adopted the standard for a purpose rationally connected to the performance of the job;
2. the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
3. the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose.

To show that the standard is reasonably necessary, it must be demonstrated that the employer cannot change working conditions to allow the employee to continue to do his or her work without causing undue hardship to the employer.

The test as applied to Stewart: addiction and capacity are not mutually exclusive

In Stewart, the Alberta Human Rights Tribunal reviewed the evidence and concluded that Mr. Stewart did suffer from a mental disability (drug addiction) and that he was in denial about that disability prior to the termination of his employment. However, on the evidence (including expert evidence), the Tribunal found that Mr. Stewart’s disability did not rob him of the capacity to make choices about his drug use. In particular, the Tribunal found that Mr. Stewart was capable of deciding to use, or not use, cocaine prior to work, and was capable of deciding to disclose or not disclose his cocaine use as required by the Policy.

On this basis, the Tribunal held that Mr. Stewart had failed to establish a case of prima facie discrimination. While Mr. Stewart clearly had a characteristic that protected him from discrimination under the Code (addiction), and while he clearly had experienced an adverse impact with respect to his employment (termination), there was no nexus between his
addiction and the termination. Mr. Stewart was terminated for violating the Policy. And, because the evidence demonstrated that his addiction did not rob him of the capacity to comply with the Policy, his disability was not a factor in the termination of his employment.

The Tribunal further held that in the event it was incorrect, Elk Valley had nevertheless accommodated Mr. Stewart to the point of undue hardship. The Policy was adopted in good faith for a job-related purpose, and substituting less-serious consequences for violating the Policy would lessen its effect as a deterrent, creating a hardship for an organization with a dangerous workplace.

The Tribunal’s decision was upheld upon judicial review and by a majority of the Alberta Court of Appeal. Similarly, at the SCC, the majority held that the Tribunal’s decision was within the range of possible and defensible outcomes.

At the SCC, Mr. Stewart argued that there was necessarily a nexus between his addiction disability and the termination of his employment because denial, which is a recognized feature of addiction, prevented him from disclosing his cocaine use to his employer. In dismissing the appeal, the SCC rejected this argument, favouring an evidence-based approach instead:

It cannot be assumed that Mr. Stewart’s addiction diminished his ability to comply with the terms of the Policy. In some cases, a person with an addiction may be fully capable of complying with workplace rules. In others, the addiction may effectively deprive a person of the capacity to comply, and the breach of the rule will be inextricably connected with the addiction. Many cases may exist somewhere between these two extremes. Whether a protected characteristic is a factor in the adverse impact will depend on the facts and must be assessed on a case-by-case basis. The connection between an addiction and adverse treatment cannot be assumed and must be based on evidence.\(^7\)

The majority also rejected the premise that suffering from an addiction alone is sufficient to establish \textit{prima facie} discrimination where an employee suffers an adverse impact in employment:

… [T]he mere existence of an addiction does not establish \textit{prima facie} discrimination. If an employee fails to comply with a workplace policy for a reason related to addiction, the employer would be unable to sanction him in any way, without potentially violating human rights legislation. Again, to take an example given by the majority of the Court of Appeal, if a nicotine-addicted employee violates a workplace policy forbidding smoking in the workplace, no sanction would be possible without discrimination regardless of whether or not that employee had the capacity to comply with the policy.\(^8\)

On the whole, the matter was one of evidence of the effects of the disability, and every case will turn on its own particular facts. Finding that the Tribunal’s decision that there was no \textit{prima facie} case of discrimination reasonable in this case, the SCC dismissed the appeal and declined to consider whether Elk Valley had accommodated Mr. Stewart to the point of undue hardship.

\textbf{Takeaways for employers}

Managing drug and alcohol use in the workplace is a perennial issue for safety-sensitive employers. The bar for random drug and alcohol testing is high, and will only be justified where:

1. the workplace is dangerous;
2. there is evidence of prior substance abuse;
3. there is evidence that other methods of detecting substance abuse have failed; and
4. the proposed drug testing proves impairment rather than just prior use.\(^9\)

Employers who cannot establish that their workplace meets this criteria often struggle to find a way to balance the competing issues in the workplace.

\textit{Stewart} did turn on the Tribunal’s assessment of the evidence in that particular case, and the SCC confirmed that there may be scenarios where an individual’s addiction may rob them of the capacity to comply with the workplace rule in
question. However, Stewart nevertheless stands for the proposition that in certain circumstances, carefully drafted policies such as the “no free accident rule” employed by Elk Valley can assist employers in maintaining safe workplaces and in avoiding potentially catastrophic accidents.

Stewart is also instructive in dealing with other types of employee misconduct. On the basis that addiction alone is not sufficient to trigger a prima facie case of discrimination where an employee is sanctioned for misconduct, unless the evidence demonstrates that the addiction diminished or eliminated the employee’s capacity to comply with the workplace rule, the employer may be justified in sanctioning the employee for breach, disability notwithstanding.10

Provided that an employer’s policies are drafted in a careful manner that takes into account the employer’s duty to accommodate disabilities such as addiction to the point of undue hardship, such policies can be useful tools in what will undoubtedly continue to be a delicate balancing act.

[1] See, for example, Workers Compensation Act, RSBC 1996, c 492 at section 115; Occupational Health And Safety Regulation, BC Reg. 296/97 at section 4.20.


[8] At para 42.


[10] See British Columbia (Public Service Agency) v British Columbia Government and Service Employees Union, 2008 BCCA 357 for an example of where alcohol dependency was rejected being a factor in the termination of an employee for theft.

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