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Employer did not Discriminate against Cocaine Addict Who was dismissed for Cause

By: Norm Keith, LL.M., CRSP[1]

In perhaps the most important human rights decision to date dealing with drugs in the workplace, the Supreme Court of Canada recently ruled that an employer may terminate a worker for just cause when he violated a Fitness for Duty Policy by attending work under the influence of drugs. In a landmark human rights decision the Supreme Court ultimately upheld the ruling of the Alberta Human Rights Tribunal that the employer did not unlawfully discriminate when a worker's employment was terminated. The decision, included a provocative dissent, is reviewed and discussed below.

Mr. Stewart ("S") worked in a mine operated by the Elk Valley Coal Corporation, driving a loader. The mine operations were dangerous, and maintaining a safe worksite was a matter of great importance to the employer and employees. To ensure safety, the employer implemented a policy requiring that employees disclose any dependence or addiction issues before any drug-related incident occurred. If they did, they would be offered treatment. However, if they failed to disclose and were involved in an incident and tested positive for drugs, they would be a risk of having their employment terminated.

S used cocaine on his days off. He did not tell his employer that he was using drugs. When his loader was involved in a workplace accident, he tested positive for drugs and later said, after talking to his union, that he thought he was addicted to cocaine. His employer terminated his employment. S argued that he was terminated for addiction and that this constitutes discrimination under s. 7 of the Alberta *Human Rights, Citizenship and Multiculturalism Act.*

The Alberta Human Rights Tribunal held that S was terminated for breaching the Fitness

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for Duty Policy, not because of his addiction. Its decision was affirmed by the Alberta Court of Queen's Bench and by the Alberta Court of Appeal. The S.C.C. held (8:1) that the appeal is dismissed.

Chief Justice McLachlin wrote (Abella, Karakatsanis, Côté, Brown and Rowe JJ. concurring) as follows (at paras. 5, 23-28, 40):

"*Like the majority of the Court of Appeal, I find no basis for interfering with the decision of the Tribunal. The main issue is whether the employer terminated Mr. Stewart because of his addiction (raising a* prima facie *case of discrimination), or whether the employer terminated him for breach of the Policy prohibiting drug use unrelated to his addiction because he had the capacity to comply with those terms (not raising a* prima facie *case of discrimination). This is essentially a question of fact, for the Tribunal to determine. After a thorough review of all the evidence, the Tribunal concluded that the employer had terminated Mr. Stewart's employment for breach of its Policy. The Tribunal's conclusion was reasonable.*

Was the Tribunal Unreasonable in Finding That Prima Facie Discrimination Was Not Established?

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.*

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":* Moore, *at para. 33. Discrimination can take many forms, including "'indirect' discrimination", where otherwise neutral policies may have an adverse effect on certain groups:* Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center), *2015 SCC 39, [2015] 2 S.C.R. 789, at para. 32. Discriminatory intent on behalf of an employer is not required to demonstrate* prima facie *discrimination:* Bombardier, *at para. 40.*

It is conceded that the first two elements of a prima facie *case of discrimination are established in this case. The only dispute is on the third requirement — whether Mr. Stewart's addiction was a factor in his termination.*

The Tribunal cited the proper legal test and noted, at para. 117, that it was "not necessary that discriminatory considerations be the sole reason for the impugned actions in order for there to be a contravention of the Act". After a detailed review of the evidence, it concluded that Mr. Stewart's addiction was not a factor in his termination for two related reasons. In the Tribunal's view, Mr. Stewart was fired not because he was addicted, but because he had failed to comply with the terms of the Policy, and for no other reason. The Tribunal also concluded that Mr. Stewart was not adversely impacted by the Policy because he had the capacity to comply with its terms.

The only question for a reviewing court is whether this conclusion is unreasonable. Deference requires respectful attention to the Tribunal's reasoning process. A reviewing court must ensure that it does not only pay "lip service" to deferential review while substituting its own views: Dunsmuir v. New Brunswick, *2008 SCC 9, [2008] 1 S.C.R. 190, at para. 48. If the decision is within a "range of possible, acceptable outcomes" which are defensible in respect of the evidence and the law, it is reasonable:* Dunsmuir, *at para. 47; see also* Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board), *2011 SCC 62, [2011] 3 S.C.R. 708, at para. 16.*

I am satisfied that the Tribunal's conclusion that addiction was not a factor in the termination of Mr. Stewart's employment is reasonable.

It was the Tribunal's task to determine whether the reason for the termination of employment or the impact of the Policy on Mr. Stewart established a prima facie *case of discrimination. There is ample evidence to support the Tribunal's conclusion that there was no* prima facie *case and, therefore, no basis to overturn it.*"

Justices Moldaver and Wagner wrote (joint reasons concurring in the result) as follows (at para. 48):

"*We are of the view that the appeal should be dismissed. While we concur with the Chief Justice in the result, we agree with Gascon J. that the test for* prima facie *discrimination was met in this case. The Tribunal's conclusion that Mr. Stewart's drug dependency was not a "factor" in his termination was unreasonable. Where we part company with Gascon J. is with respect to reasonable accommodation. In our view, the Tribunal reasonably held that the employer met its obligation to accommodate Mr. Stewart to the point of undue hardship. Therefore, we accept the Tribunal's conclusion that Mr. Stewart's employer did not discriminate against him on the ground of his drug*

dependency."

Justice Gascon (in dissent) wrote as follows (at para. 145):

"*Elk Valley* prima facie *discriminated against Mr. Stewart. He was drug-dependent, and he was terminated for giving in to that dependence, an undeniable symptom of his disability. Further, Elk Valley did not reasonably accommodate Mr. Stewart. Its only accommodation during employment was letting him voluntarily disclose his disability without discipline. But he could not access this accommodation because he appears to have been unaware of his addiction; again, a symptom of his disability. As the Tribunal's decision to the contrary on both issues was, in my assessment, unreasonable, I would have allowed the appeal*."

This decision has important implications for employers in at least three areas:

1. The importance of having a well drafted Fitness for Duty Policy;
2. The need for a proper Alcohol & Drug Testing Policy in place in dangerous workplaces;
3. The need to get legal advice before deciding to terminate workers for substance use.

For more information on this case, or assistance in drafting and implementing of a Fitness for Duty Policy, please feel free to contact **Norm Keith** at 416-868-7824 or at nkeith@fasken.com.