NO FREE ACCIDENTS: SUPREME COURT OF CANADA UPHOLDS TERMINATION OF DRUG DEPENDENT EMPLOYEE

Posted on June 22, 2017

Categories: Insights, Publications

On June 15, 2017, the Supreme Court of Canada in *Stewart v Elk Valley Coal Corp.*[1] ("*Elk Valley*") confronted the "uneasy fit of drug addiction and drug testing policies in the human rights arena"[2]. *Elk Valley* addresses an employer's decision to terminate an employee involved in a workplace incident while under the influence of drugs and the employee's allegation that his termination constituted unlawful discrimination under Alberta's human rights legislation.

While there is no dispute that drug dependence is a protected ground of discrimination in human rights law, navigating employee drug use poses many challenges for employers. The difficult landscape encountered by employers is underscored by the three significantly different conclusions reached by the nine judges of the Supreme Court of Canada in *Elk Valley*. While the six judge majority found that the employer's drug policy was not *prima facie* discrimination, the dissenting judge found that not only was it discriminatory but the employer also failed to discharge its duty to accommodate to the point of undue hardship. The two minority judges fell in the middle – they viewed the employer's policy as *prima facie* discrimination but found that the employer met its obligation to accommodate the employee.

The Facts

Mr. Stewart worked in a safety-sensitive environment – driving a loader at a mine operated by Elk Valley Coal Corporation. The employer implemented a drug policy aimed at ensuring workplace safety. Under the policy, employees who disclosed a drug addiction before a drug-related incident occurred would not be terminated and would be offered treatment. However, if an employee failed to disclose an addiction and was subsequently involved in a drug-related incident, the employee would be terminated. As Mr. Stewart would learn, it was a "no free accident" rule.

Mr. Stewart regularly used cocaine on his days off, but did not disclose this to his employer. After Mr. Stewart's loader was involved in an onsite work accident, he tested positive for drugs. Following the positive drug test, he told his employer he thought he was addicted to cocaine. The employer nevertheless terminated him in accordance with its "no free accident" rule. Mr. Stewart was, however, told that he could reapply for

employment in six months provided he completed a rehabilitation program, which the employer offered to partially subsidize.

A complaint was filed with the Alberta Human Rights Commission alleging that Mr. Stewart was terminated for his addiction and that his termination constituted discrimination under Alberta's human rights legislation.

Is it Discrimination?

In a 6-2-1 split, the Supreme Court of Canada upheld Mr. Stewart's termination. The majority found that Mr. Stewart was terminated not because of his addiction, but because he contravened his employer's drug policy. The court rejected Mr. Stewart's argument that, because denial was a symptom of addiction, firing him for failing to disclose his addiction was, in essence, firing him because of his disability.

On this point, the majority ruled that whether addiction interferes with a person's ability to comply with rules cannot be assumed. It must be assessed on a case by case basis. Because the evidence suggested that Mr. Stewart was fully capable of disclosing his drug use to his employer, the majority found that he did not experience an adverse impact.

Since the majority found that a *prima facie* case of discrimination had not been made out, it did not need to consider whether the employer reasonably accommodated Mr. Stewart.

Justice Gascon's Dissent

In dissent, Justice Gascon found that the employer's actions constituted *prima facie* discrimination and the employer failed to show that it provided reasonable accommodation.

Justice Gascon held that the Alberta Human Rights Commission only considered discriminatory intent and not discriminatory effects in determining whether *prima facie* discrimination had occurred. Even though the evidence suggested no discriminatory intent, the effect of the termination was that Mr. Stewart was being fired for his drug use. As such, the termination had a discriminatory effect and should be considered *prima facie* discrimination.

With regards to reasonable accommodation, Justice Gascon held that the reasonable accommodation provided by the policy was inaccessible to Mr. Stewart because he was unaware of his drug dependence, a symptom of his disability. Justice Gascon concluded that accommodation has to assist employees during the course of their employment and merely asking a former employee to reapply for the job cannot be considered reasonable accommodation.

The Minority Decision

Justices Moldaver and Wagner agreed with Justice Gascon on the issue of *prima facie* discrimination and found that there was *prima facie* discrimination. However, they disagreed with him on the issue of reasonable accommodation. They held that given the safety objectives of the policy, imposing a more lenient consequence on Mr. Stewart would undermine the policy's objectives and result in undue hardship for the employer.

Takeaways

Elk Valley is a clear statement by the Supreme Court of Canada in support of workplace policies that deter drug usage and contribute to a safe workplace.

The decision further provides support for how a carefully designed and implemented drug policy can sustain scrutiny from a human rights perspective. The employer in *Elk Valley* did many things right that led the court to uphold the immediate termination of Mr. Stewart:

- the employer's policy was clear that there were "no free accidents";
- the employee received training on the policy and signed an acknowledgment that he understood the policy;
- the policy provided that employees who disclosed an addiction in advance would receive treatment;
- the letter terminating the employee was unequivocal that it was the violation of the policy and not the employee's addiction that was the reason for termination; and
- even though the employee was immediately terminated, he was still offered accommodation in the form of an invitation to reapply for employment after completing a rehabilitation program that the employer offered to partially fund.

However, despite the Supreme Court of Canada's majority decision, the minority and dissent reasons call attention to the reality faced by employers in Canada - even with a well-designed policy, there continues to be an uneasy fit between human rights legislation, addiction, and drug policies.

by Melanie Harmer, Paul Boshyk, Natalie Cuthill and Colin Cheng, Temporary Articled Student

[1] *Stewart v Elk Valley Coal Corp.*, 2017 SCC 30 ("*Elk Valley*").

[2] *Elk Valley* at para. 58, Gascon J., dissenting.

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

© McMillan LLP 2017