The Supreme Court of Canada Examines the Discriminatory Nature of an Alcohol, Illegal Drugs and Medication Policy

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In June 2017, the Supreme Court of Canada in the matter of *Stewart* v. *Elk Valley Coal Corp*, 2017 CSC 30, rendered an important decision with respect to workplace policies concerning the consumption of drugs and alcohol. The Supreme Court held that it was reasonable for the Alberta Human Rights Commission to conclude that the dismissal of an employee who tested positive for drugs was not discriminatory as it resulted from the application of a policy that offered the possibility to employees of being accommodated if they revealed their dependency to the employer. In this particular case, the reason for the employee's termination was not addiction but breach of the policy.

The Facts

Mr. Stewart worked in a mine operated by the Elk Valley Coal Corporation (the "Employer") where he drove a loader. The mine operations were dangerous, and maintaining a safe worksite was a matter of great importance to the Employer and employees. In order to ensure safety in the mine, the Employer implemented an alcohol, illegal drugs and medication policy (the "Policy").

Pursuant to the Policy, employees were expected to disclose any dependence or addiction issues before any drug-related incident occurred in the workplace. 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 dismissed. The aim of the Policy was to ensure safety by encouraging employees with substance abuse problems to come forward and obtain treatment before their problems compromised safety. Mr. Stewart attended a training session at which the Policy was reviewed and explained. In addition, Mr. Stewart signed a form acknowledging receipt and understanding of the Policy.

Mr. Stewart used cocaine on his days off. He never disclosed to the Employer that he was using drugs. One day, Mr. Stewart's loader was involved in an accident near the

end of his shift. Although no one was injured, Mr. Stewart tested positive for drugs. Following the positive drug test, in a meeting with the Employer, Mr. Stewart said that he thought he was addicted to cocaine. Subsequently, in accordance with the Policy, the Employer dismissed Mr. Stewart who at the time of his termination of employment was credited with nine years of service.

History of Proceedings

Mr. Stewart claimed that he was dismissed as a result of his addiction and, as a consequence, his dismissal constituted discrimination under Alberta's *Human Rights, Citizenship and Multiculturalism Act*, where addiction is a recognized disability.

In first instance, the Alberta Human Rights Tribunal[1] (the "Tribunal") concluded that Mr. Stewart was not dismissed as a result of his addiction but rather because he breached the Policy by not revealing his addiction before an accident occurred.

The decision of the Tribunal was affirmed by the Alberta Court of Queen's Bench[2] and by the Alberta Court of Appeal[3].

The Decision of the Supreme Court of Canada

On appeal before the country's highest court, the decision of the Tribunal once again was confirmed. Madam Chief Justice McLachlin, with whom Justices Abella, Karakatsanis, Côté, Brown and Rowe concurred, held as reasonable the Tribunal's conclusion that the reason for Mr. Stewart's dismissal was not addiction but breach of the Policy.

Relying on expert evidence, the Tribunal concluded that Mr. Stewart was addicted to drugs (even though he did not recognize his addiction at the time) and that this addiction constituted a disability protected under Alberta's *Human Rights, Citizenship and Multiculturalism Act*.

However, the Tribunal concluded that the addiction did not constitute a factor in Mr. Stewart's dismissal. In the Tribunal's view, Mr. Stewart was dismissed for failing to comply with the Policy which required him to disclose his drug use prior to the accident.

Mr. Stewart had the capacity to comply with the terms of the Policy and he would have been dismissed for breach of Policy whether he was an addict or a casual user. While Mr. Stewart may have been in denial about his addiction, he knew the Policy prohibited taking drugs before working and he had the ability to decide not to take them, as well as the capacity to disclose his drug use to his employer. According to expert evidence, Mr. Stewart's addiction did not diminish his capacity to comply with the terms of the Policy. As a consequence, the Tribunal was founded in concluding that the employee's dismissal was not discriminatory in nature.

Mr. Justice Gascon dissented and held that a drug policy that automatically terminates employees who use drugs *prima fascie* discriminates against individuals burdened by a drug dependence.

Conclusion

Where a termination of employment is based on the breach of a workplace policy or some other conduct attracting discipline, the mere existence of addiction does not establish *prima facie* discrimination.

It goes without saying that the drafting of the policy in question is critical. The expectations of the employer must be clearly set out. In addition, the policy must clearly and explicitly outline for the employees the consequence resulting from their omission to denounce their addiction, namely, dismissal.

Lastly, where such is the case, the dismissal letter must be carefully drafted in order to make sure that there is no ambiguity with respect to the reason for the dismissal. The disciplinary measure must be imposed as a result of the violation of the policy, rather than as a result of an addiction.

[1] *Bish v. Elk Valley Corp*., 2012 AHRC 7

[2] *Bish* v. *Elk Valley Corp*., 2013 ABQB 756

[3] *Stewart* v. *Elk Valley Coal Corporation*, 2015 ABCA 225

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