No Free Accidents for Drug Users

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On June 15, 2017, the Supreme Court of Canada released its decision in *Stewart v Elk Valley Coal Corp.*, and in so doing, made it easier for employers to terminate drug users who violate workplace drug and alcohol policies.

The employer, Elk Valley Coal Corporation, operated an open pit coal mine near Hinton, Alberta. To ensure a safe workplace, the employer introduced an Alcohol, Illegal Drugs and Medication Policy (the "**Policy**"). The purpose of the Policy was to encourage employees who were using illegal drugs to stop, and to remove that safety risk from the workplace by motivating employees to change their behaviour before an accident occurred. The Policy did so through a "No Free Accident" rule: employees were expected to disclose dependence or addiction issues before an incident occurred, and if they did, were offered treatment. However, if an employee did not disclose a drug dependency prior to an accident occurring and the employee subsequently tested positive for drugs, such employee would be terminated.

Prior to the implementation of the Policy, the employer held training sessions for employees where the Policy was reviewed and explained, and had all employees sign acknowledgement forms to indicate they understood the Policy.

The employee in this case, Ian Stewart, worked in the mine as a loader driver. He had attended the training session in which the Policy was introduced, and signed the acknowledgment form indicating that he understood and agreed to comply with the Policy. However, Mr. Stewart took cocaine on his days off, and did not disclose this usage to his employer. Six months after the implementation of the Policy, Mr. Stewart was involved in a workplace accident. As part of the investigation into the accident, he was required to undergo a "post-incident" drug test, where he tested positive for cocaine. During the investigation Mr. Stewart stated he was addicted to cocaine. Nine days later, the employer terminated Mr. Stewart's employment for violating the Policy.

Mr. Stewart filed a complaint with the Alberta Human Rights Commission alleging discrimination on the ground of physical disability (drug addiction) contrary to Alberta's *Human Rights, Citizenship and Multiculturalism Act* (the "**Act**") (now the *Alberta Human Rights Act*).

As is the case for all claims of discrimination under the Act, a complainant must establish a *prima facie* case of discrimination by showing:

1. a disability which is protected under the Act;
2. adverse treatment with regard to the complainant's employment or a term of that employment; and
3. that the disability was a factor in the adverse treatment.

If a complainant can successfully establish a *prima facie* case of discrimination, then the employer is required to demonstrate that the discriminatory conduct was in fact reasonably necessary, and that it would not be possible to accommodate the individual without imposing an undue hardship on the employer.

In this case, only the third factor was at issue, namely, whether Mr. Stewart's addiction was a factor in the termination of his employment. The Tribunal held that Mr. Stewart was not terminated because of his addiction, but rather, because he failed to comply with the Policy. The Supreme Court of Canada (and two reviewing Alberta courts) agreed.

Mr. Stewart's counsel argued that his failure to comply with the Policy (i.e., failure to disclose his disability) was the result of a symptom of his addiction, and therefore, a termination resulting from a violation of the Policy would be contrary to the Act. While the Supreme Court agreed that in some cases it is possible that an addiction can diminish the ability of an employee to comply with workplace rules, in this case the Court found that Mr. Stewart had both the ability to not take drugs, and the capacity to disclose his drug use, as per the Policy. As such, Mr. Stewart was not able to establish a*prima facie* case of discrimination.

Since the Court found that there was no *prima facie* case of discrimination, it was not necessary to consider whether accommodating Mr. Stewart would impose an undue hardship on the employer. However, it is notable that Justice Moldaver and Justice Wagner, in reasons that concurred with the majority decision, indicated that imposing a lesser penalty (such as an unpaid suspension) would have undermined the Policy's deterrent effect. This would have compromised the employer's valid objective: to prevent employees from using drugs in a way that could cause serious harm in its workplace. In other words, any consequence short of termination would have undermined the Policy's effectiveness, and so their decision held that Mr. Stewart's continued employment in these circumstances would have amounted to an undue hardship to the employer.

Ultimately, this decision is a clear win for employers that seek to ensure their workplaces are safe, and a win for employees as well, ensuring their safety in the workplace.

Our View

This decision by the Supreme Court of Canada is in line with other recent decisions that appear to prioritize safety and deterrence, such as the Ontario Superior Court of Justice in *Amalgamated Transit Union, Local 113 v Toronto Transit Commission*. In that decision, The Ontario Superior Court refused to grant injunctive relief to the Amalgamated Transit Union and permitted the TTC to continue with random testing until an arbitrator had a chance to decide the reasonableness of TTC's Policy. The reasons for doing so included:

After considering all the evidence, including the evidence to which I have referred, I am satisfied that, if random testing proceeds, it will increase the likelihood that an employee in a safety critical position, who is prone to using drugs or alcohol too close in time to coming to work, will either be ultimately detected when the test result is known or deterred by the prospect of being randomly tested.

Ultimately both decisions confirm that where safety is of paramount importance in a workplace, the rights of employers to maintain that safety using a properly implemented drug and alcohol policy will be protected, as long as the policy is reasonably tailored to the purpose of safety, and any resulting consequence is based on a breach of the policy, rather than any disclosed dependence issue.

Key Takeaways

This decision stands for the proposition that where the cause of an employee's termination of employment is a breach of a workplace policy, such as a drug and alcohol policy, the mere existence of an addiction

does not necessarily amount to discrimination under human rights legislation. More specifically, employers should take note of the following:

- Employers can manage safety risks in the workplace by implementing and enforcing a drug and alcohol policy that requires employees to proactively disclose their drug and alcohol addiction;
- In drafting drug and alcohol policies, including accommodations for addiction can help ensure that employees are incentivized to disclose drug dependency before risky behavior takes place in a safety-sensitive workplace;
- In order to successfully implement an effective drug and alcohol policy, employers should ensure that adequate training is provided to employees, and that such employees expressly acknowledge their understanding of the policy.
- In the context of a safety-sensitive environment, employers can take a “zero-tolerance” approach to unfitness for duty due to drug and alcohol use, subject to the wording of the drug and alcohol policy.

Should you require assistance in drafting an effective drug and alcohol policy and providing training programs to ensure compliance, please contact our Labour and Employment group.