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By Margaret Truesdale, Research Director

Supreme Court of Canada upholds “one strike, you’re out” drug policy

In *Stewart v. Elk Valley Coal Corp.*¹ [Elk Valley], the Supreme Court of Canada upheld the dismissal of an employee for a breach of a policy relating to the use of drugs. The factual situation involved a coal mining operation, which was a highly safety-sensitive environment.

The employer had a drug policy with zero tolerance for drug use that would impact safety in the workplace. The policy required employees to disclose any drug dependency to the employer without waiting for a workplace incident to occur. Once disclosed, the employer would accommodate the employee with treatment programs and modified work. Although, technically speaking, the policy indicated that if there was an incident of drug use at work, all surrounding circumstances would be considered when determining the outcome, it appeared to be well-recognized that the employer had a “no free accident” policy. If an employee’s drug use contributed to a workplace incident, the standard response of the employer was to terminate the employee.

The employee involved in *Elk Valley* used cocaine regularly on his days off. The employee was involved in an accident at work and, although no one was hurt, the employee tested positive for drugs. In a meeting with the employer, the employee said that he thought that he was addicted to cocaine. The employee was terminated.

The Alberta Human Rights Tribunal (the “Tribunal”) held that the employee was not terminated because of his addiction but, rather, was terminated for breaching the policy which required him to disclose an addiction or dependency before an accident occurred. The main point in contention at the Supreme Court of Canada was whether or not the Tribunal erred in holding that the employee did not prove a *prima facie* case of discrimination.

The Tribunal relied on expert evidence to find that the employee was addicted to drugs and, therefore, had a recognized disability. The Tribunal also accepted that the employee’s termination was an adverse effect. However, the Tribunal found that the employee’s disability was not “a factor” in the termination. The Tribunal approached this issue by considering whether the employee’s breach of the policy was connected to his dependency. The Tribunal held that the employee was terminated for a breach of the policy, and that his drug dependency was not a factor in the decision to terminate.

The Tribunal also went on to consider whether the “no free accident” rule amounted to a *bona fide* occupational requirement, and found that it did. The only real question in this analysis was whether the employer could have continued to employ the employee without undue hardship. The Tribunal found that offering an alternative to termination



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would substantially dilute the deterrent effect of the policy and this would amount to undue hardship.

At the Supreme Court of Canada, the majority upheld the Tribunal's decision. Writing for the majority, McLachlin C.J. noted that substantial deference should be given to a human rights tribunal when applying settled principles to a particular factual situation. A court should only intervene under these circumstances if the findings of a tribunal were unreasonable.

With respect to the finding of *prima facie* discrimination, the Court adopted a well-recognized approach from earlier case law requiring:

- a characteristic protected from discrimination;
- an adverse impact; and,
- the protected characteristic was factor in the adverse impact.

The majority noted that the real question in *Elk Valley* was whether the employee's addiction was a factor in the termination. The majority noted that the Tribunal had made clear findings of fact that termination was not connected with the disability. The Tribunal held that the employee was able to comply with the policy. Despite the fact that he had a drug dependency, he had the capacity to comply with the terms of the policy. The majority noted that the Tribunal had expert evidence demonstrating that the employee's addiction did not diminish his capacity to comply with the terms of the policy.

The majority held that the mere fact of a drug addiction could not lead to the conclusion that a person was deprived of the capacity to comply with a policy. There must be a fact-specific analysis, and the connection between an addiction and an adverse treatment must be based on evidence. The majority noted that the Tribunal had discussed this issue in detail and made clear findings of fact that the employee's breach of the policy was not connected to his drug dependency. The majority determined that because the Tribunal's holding that there was no connection between the disability and the termination was reasonable, there was no need to determine whether reasonable accommodation was provided by the employer.

There was both a concurring opinion and a dissent in *Elk Valley*. The concurring justices, Moldaver and Wagner, J.J., agreed with the lone dissenting justice, Gascon J., that the Tribunal should have found a *prima facie* case of discrimination.

With respect to the issue of *prima facie* discrimination, Gascon suggested that the Tribunal incorrectly looked for discriminatory intent, rather than discriminatory effect. He suggested that only under the circumstances where a person's drug dependency had "no impact" on a person's ability to comply with a policy could it be said that there was no connection between the disability and the adverse impact.

The concurring and dissenting judgments differed on the issue of accommodation to the point of undue hardship. The concurring opinion upheld the finding that an individualized approach would unduly undermine the deterrent effect of the policy. Gascon opined that an individualized approach would not have amounted to undue hardship.

All the justices in *Elk Valley* characterized the Tribunal's decision as applying well-established principles of discrimination to a particular factual situation. It appears that the disagreement between the justices with respect to the *prima facie* case test related

to whether or not they were prepared to defer to the Tribunal's factual findings. The majority held that the Tribunal applied the proper principles to its factual analysis, while the dissent held that the Tribunal erred in its application of the principles relating to a *prima facie* case test.

The benefit of *Elk Valley* going forward will be the confirmation by the majority that the mere fact that a drug dependency exists is not enough to prove a connection between a disability and an adverse impact. Although it has long been recognized that the fact that a protected ground exists is not, in and of itself, sufficient to demonstrate a connection with an adverse inference, this concept has been particularly difficult to deal with in the context of drug dependency, where there are often issues related to volition and capacity. It is also important to recognize that this case arose in the context of a highly safety-sensitive place of employment.

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