

WEEKLY

# LAW BRIEF

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## STEWART V. ELK VALLEY COAL CORP., 2017 SCC 30

Human rights — Discriminatory practices — Discrimination based on mental or physical disability — Drug dependency — Employer's policy aimed at ensuring safety required employees to disclose dependence or addiction issues before drug-related incident

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 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 an accident, he tested positive for drugs and later said that he thought he was addicted to cocaine. His employer terminated his employment. S, through his union representative, argues 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 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.

Held: The appeal should be dismissed.

Per McLachlin C.J. and Abella, Karakatsanis, Côté, Brown and Rowe JJ.: This case involves the application of

settled principles on workplace disability discrimination to a particular fact situation. The nature of the particular disability at issue does not change the legal principles to be applied. These issues were within the purview of the Tribunal, and attract deference. The only question is whether the Tribunal's decision is reasonable. 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.

It is clear that there was evidence capable of supporting the Tribunal's conclusion that the reason for the termination was not addiction, but breach of the policy. On the facts of this case, the Tribunal concluded that S had the capacity to comply with the terms of the policy and that he would have been fired whether he was an addict or a casual user. It was therefore not unreasonable for the Tribunal to conclude that there was no prima facie discrimination. Although it is open to a tribunal to find that an addiction was a factor in an adverse distinction where the evidence supports such a finding, this was clearly not the finding of the Tribunal. It unequivocally and repeatedly stated that addiction was not a factor in the decision to terminate. It also rejected the argument that denial prevented S from disclosing his addiction prior to the accident. While S may have been in denial about his addiction, he knew he should not take drugs before working and had the ability to decide not to take them, as well as the capacity to disclose his drug use to his employer. Denial about his addiction was thus irrelevant in this case. Finally, a finding of stereotypical or arbitrary decision-making is not a stand-alone requirement for proving prima facie discrimination, and there is no need to alter the settled view that the protected ground or characteristic need only be a factor in the decision.

Since the Tribunal's decision that prima facie discrimination was not established was reasonable, it is unnecessary to consider whether S was reasonably accommodated.

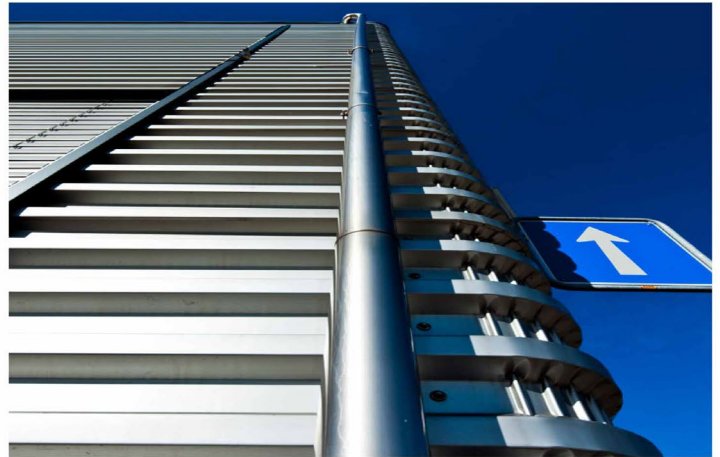
Per Moldaver and Wagner JJ.: The Tribunal's conclusion that S's drug dependency was not a factor in his termination was unreasonable. To prove prima facie discrimination, S is not required to show that his termination was caused solely or even primarily by his drug dependency. Rather, he must only show that there is a connection between the protected ground — his drug dependency — and the adverse effect. His exercise of some control over his drug use merely reduced the extent to which his dependency contributed to his termination — it did not eliminate it as a factor in his termination.

However, the Tribunal reasonably held that the employer had met its obligation to accommodate S to the point of undue hardship. Given the employer's safety objectives and responsibilities at the coal

mine, it was crucial to deter employees from using drugs in a manner that could negatively affect their work performance and potentially lead to devastating consequences. Subjecting S to an individual assessment or imposing an unpaid suspension for a limited period as a disciplinary measure instead of

imposing the serious and immediate consequence of termination would have undermined the policy's deterrent effect. Therefore, the Tribunal reasonably concluded that incorporating these aspects of individual accommodation would result in undue hardship.

Per Gascon J. (dissenting): Although



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drug dependence is a protected ground of discrimination in human rights law, stigmas surrounding drug dependence — like the belief that individuals suffering from it are the authors of their own misfortune or that their concerns are less credible than those of people suffering from other forms of disability — sometimes impair the ability of courts and society to objectively assess the merits of their discrimination claims. These stigmas contribute to the uneasy fit of drug addiction and drug testing policies in the human rights arena. The improper considerations relied on by the Tribunal effectively excluded S from the scope of human rights protections.

A drug policy that automatically terminates employees who use drugs prima facie discriminates against individuals burdened by drug dependence. The legal threshold for prima facie discrimination is whether the complainant's protected ground is a factor in the harm they suffer (also called "contribution"). Here, drug dependence was a factor in S's drug use, so the policy under which S was terminated for using drugs is prima facie discriminatory. The Tribunal's analysis was unreasonable because it misunderstood the legal principles informing discrimination law, and was unsupported by its factual findings.

The analysis of prima facie discrimination, and, in particular, contribution, is concerned with discriminatory effect, not discriminatory intent. Contribution addresses the relationship between an employee's protected ground and harm, not between the ground and the intent to harm that employee. A ground need only be at least one of the factors linked to the employee's harm. The Tribunal did not follow this established approach. Instead, it unreasonably held that S's addiction did not contribute to his termination based on four conceptual errors.

First, it required S to make prudent choices to avoid discrimination. Requiring that complainants be prudent in avoiding discrimination amounts to a sort of contributory fault defence in discrimination cases, which (1) places a burden on complainants to avoid discrimination, rather than on employers not to discriminate; (2) is irreconcilable with recently recognized statutory grounds that arguably implicate a complainant's choices that are significant to their identity; (3) generally contradicts the Court's rejection of drawing superficial distinctions between protected grounds and conduct inextricably linked to those grounds; (4) specifically contradicts the Court's rejection of the view that choice makes drug users responsible for the harms of their drug use; (5) reinforces stigma by blaming marginalized communities for their choices; and (6) substitutes the proper inquiry (whether drug-dependent individuals are adversely impacted

by the policy) with an improper inquiry (whether drug-dependent individuals are so overwhelmingly impacted by their addictions that any discrimination they experience is caused exclusively by their addictions).

Second, the Tribunal limited S's protections to an assurance of formal equality. While both dependent and recreational drug users will receive similar treatment for violating the policy, only drug-dependent persons will uniquely and disproportionately struggle in complying with the terms of the policy.

Third, the Tribunal required S to prove that he was treated arbitrarily or stereotypically, importing substantive considerations into the settled and low threshold for prima facie discrimination and shifting a justificatory burden from the employer onto the complainant.

Finally, the Tribunal required S to prove a causal relationship between his ground and harm, a higher bar than the mere "factor" threshold repeatedly adopted by the Court. Prima facie discrimination should not be narrowly construed to preserve the enforceability of drug and alcohol policies. Doing so imports justificatory considerations into the prima facie discrimination analysis and exaggerates the implication of finding such policies prima facie discriminatory when they would simply need to be justified as relating to bona fide occupational requirements. It also narrows the Court's recent jurisprudence, which holds that terminating an employee for a reason related to addiction is precisely what it means for that addiction to be a factor in the employee's harm.

As such, while the Tribunal cited the proper legal test for prima facie discrimination, the manner in which it applied that test and the lack of an evidentiary foundation for its findings demonstrate that its holding on contribution was unreasonable and thus unworthy of deference. Although it repeatedly stated that S's addiction was not a factor in his termination, its reasons suggest that it meant that S's addiction was not a factor in the employer's decision to terminate him. That was the wrong legal test. Under the proper test, the evidence before the Tribunal could not support its conclusion that S's drug dependence did not contribute to his termination. His residual control over his choices merely diminishes the extent to which his dependence contributed to his harm, it does not eliminate it as a factor. The Tribunal avoided this argument by considering discriminatory intent, not adverse effect, and by improperly requiring absolute incapacity to ground a claim relating to discrimination based on addiction. Consequently, the termination of S was prima facie discriminatory.


With respect to justification, a policy that accommodates employees through mechanisms which are either

inaccessible by the employee due to their disability or only applicable to the employee post-termination cannot justify prima facie discrimination. Reasonable accommodation requires that the employer arrange the employee's workplace or duties to enable the employee to do his or her work, if it can do so without undue hardship. To determine what reasonable or practical alternatives are available, an employer must engage in an individualized analysis of the employee based on the employee's individual differences and capabilities. Therefore, any predetermined or blanket approach to sanctions imposed on employees for disability-related conduct will struggle to fulfill an employer's individualized duty to accommodate.

Here, the text of the impugned policy provides for individualized post-incident accommodation: disciplinary action against an employee who tests positive for drugs is to be based on all relevant circumstances, including the employee's employment record, the circumstances surrounding the positive test, the employee's stated pattern of usage, the likelihood that the employee's work performance has been or may be adversely affected, and the importance of deterring such behaviour. However, the policy was implemented, contrary to its express terms, with no consideration of S's circumstances. In the human rights context, it is not appropriate for the employer to forego individual

assessment in the interest of deterrence, even in the safety-sensitive environment of this workplace, and even though that environment motivates strict drug policies.

None of the employer's efforts at accommodation provided S with accessible accommodation during his employment, and those efforts failed to consider his individual circumstances in a dignified manner, so the employer cannot be said to have discharged its duty to accommodate him as an employee up to the point of undue hardship and the Tribunal's findings to the contrary were unreasonable. Before termination, S was purportedly accommodated by the offer of lenient treatment if he voluntarily disclosed his drug dependence. But that accommodation was inaccessible by him because he appeared to have been unaware of his dependence, a symptom of his disability. After termination, he was allegedly accommodated by being given the prospect of reapplying for his position. But accommodation assists employees in their sustained employment, not former employees who may, or may not, successfully reapply for the position they lost as a result of a prima facie discriminatory termination. Given that all of the purported accommodations provided by the employer could not qualify as accommodation in law, the Tribunal's holding that those accommodations constituted appropriate accommodation was open to intervention.



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