

This past June, the Supreme Court of Canada in *Stewart v. Elk Valley Coal Corp.*, 2017 CSC 30, made an important decision with respect to workplace policies concerning the consumption of drugs and alcohol. This was not a case about the validity of the Elk Valley Coal Corporation's drug and alcohol policy. Rather, this was a case about whether an employee who had a substance abuse disability must be accommodated or whether they could be terminated without accommodation based upon a properly implemented policy.

## Time for employers to update their drug and alcohol testing policies?

In Ontario, drug and alcohol testing will generally be found to be unreasonable because of the related human rights concerns, unless certain requirements are met.

Although the circumstances in which testing may be permitted are far from straightforward, reasonable testing has been broadly categorized under two approaches: (i) random testing of all employees in safety-sensitive positions; and (ii) reasonable grounds and post-incident testing of certain individual employees in safety-sensitive positions.

Where a drug and alcohol testing policy results (directly or indirectly) in an "adverse effect" on an employee because of an addiction or perceived addiction, employers must show that there is a legitimate and bona fide need to impose the policy to avoid a finding that it is discriminatory and improper.

Specifically, employers must be able to demonstrate the following:

1. The policy was adopted for a purpose that is rationally connected to performing the job;

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2. The policy was adopted in an honest and good faith belief that it was necessary to fulfilling that legitimate work-related purpose; and
3. The policy is reasonably necessary to accomplish that legitimate work-related purpose, and it is impossible to accommodate individuals without imposing undue hardship upon the employer.<sup>1</sup>

With respect to the third requirement, up to now it was generally understood that if an employee tested positive for a substance and was suffering from an addiction, individualized accommodation had to be offered before imposing discipline unless doing so would cause undue hardship to the employer. Policies that resulted in an “adverse effect” on an employee (e.g. automatic job loss, reassignment or inflexible reinstatement conditions), without regard for the employee’s individual circumstances, would have been found to be unlikely to meet this requirement.

In *Stewart v. Elk Valley Coal Corp.*, the Supreme Court of Canada held that it was reasonable for the Alberta Human Rights Tribunal (the “Tribunal”) to conclude that the dismissal of an employee, who tested positive for drugs and who had a drug addiction, was not discriminatory because the decision was based upon the application of a policy that offered employees the possibility of being accommodated if they revealed their dependency to the employer prior to any drug-related incident occurring. In this specific case, the Supreme Court agreed that the reason for the employee’s termination was not addiction. Rather, the reason for termination was breach of the policy.

### What Happened

Mr. Stewart drove a loader in a mine operated by the Elk Valley Coal Corporation (the “Employer”) for nine years. The employees were engaged in safety sensitive positions since the mine operations were dangerous. As a result, the Employer implemented an alcohol, illegal drugs and medication policy (the “Policy”).

<sup>1</sup> *British Columbia (Public Service Employee Relations Commission) v. B.C.G.E.U.*, [1999] 3 S.C.R. 3 (S.C.C.) (“Meiorin”)



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The Policy's goal was to ensure safety by encouraging employees with substance abuse problems to come forward and obtain treatment before their problems compromised safety. To achieve that goal, the provisions of the Policy included a requirement that employees disclose any dependence or addiction issues before any drug-related incident occurred in the workplace. If they did, they would be offered treatment/accommodation. However, the Policy provided that if they did not disclose a dependence or addiction and were involved in an incident and tested positive for drugs, they would be dismissed.

Mr. Stewart attended a training session during which the Policy was reviewed with the employees and explained to them. In addition, Mr. Stewart signed a form acknowledging receipt and understanding of the Policy prior to its implementation.

Mr. Stewart used cocaine on his days off and contrary to the Policy, he did not disclose to the Employer that he was using drugs. Subsequent to the implementation of the Policy, when Mr. Stewart was operating a loader, he was involved in an accident near the end of his shift which did not result in any injuries. However, Mr. Stewart tested positive for drugs. In a meeting with the Employer after the positive drug test results were revealed, Mr. Stewart said that he thought he was addicted to cocaine. Subsequently, in accordance with the Policy, the Employer dismissed Mr. Stewart on the basis of his breach of the Policy.

## History of Court Decisions

Mr. Stewart claimed that he was dismissed due to his addiction and that he should have been accommodated. As a consequence he argued that his dismissal constituted discrimination under Alberta's *Human Rights, Citizenship and Multiculturalism Act*, where addiction is a recognized disability.

The Tribunal had concluded that Mr. Stewart was addicted to drugs (even though he did not recognize his addiction at the time) based

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upon expert testimony. It also concluded that this addiction constituted a disability protected under Alberta's *Human Rights, Citizenship and Multiculturalism Act*.

However, 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.<sup>2</sup>

The decision of the Tribunal was affirmed by the Alberta Court of Queen's Bench<sup>3</sup> and by the Alberta Court of Appeal<sup>4</sup>.

## The Decision of the Supreme Court of Canada

Madam Chief Justice McLachlin, with whom Justices Abella, Karakatsanis, Côté, Brown and Rowe concurred, upheld the Tribunal's conclusion that the reason for Mr. Stewart's dismissal was not addiction but rather breach of the Policy.

The Supreme Court of Canada relied upon the factual findings that Mr. Stewart had the capacity to comply with the terms of the Policy and he would have been dismissed for breach of the Policy whether he was an addict or a casual user. Mr. Stewart 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, despite his denial of the addiction. According to expert evidence, Mr. Stewart's addiction did not make him incapable of complying with the terms of the Policy. As a result, the Supreme Court of Canada determined that the Tribunal was correct in concluding that Mr. Stewart'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 facie* discriminates against individuals burdened by drug dependence.

<sup>2</sup> *Bish v. Elk Valley Corp.*, 2012 AHRC 7

<sup>3</sup> *Bish v. Elk Valley Corp.*, 2013 ABQB 756

<sup>4</sup> *Stewart v. Elk Valley Coal Corporation*, 2015 ABCA 225

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### RT Takeaways

1. Termination of an employee with a substance abuse addiction based upon breach of a properly drafted and implemented policy will not be discriminatory.
2. The policy must be clearly drafted so that the expectations of the employer are clearly set out. In this case, those expectations included that employees disclose an addiction prior to an incident taking place.
3. The policy should include that accommodation will be provided to those employees who self disclose in advance of a drug-related incident taking place.
4. The policy must clearly and specifically outline for the employees the consequence resulting from their failure to comply with the policy, namely, dismissal.
5. The policy must be properly implemented. It must meet the three-part test set out above; it must have been properly explained to employees; and the employer must have evidence that the employees were provided with the policy, read it, and understood it. The best form of such evidence is a signed acknowledgement form and signed employee attendance sheets for any training sessions attended.
6. 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 letter should make it clear that the dismissal was imposed as a result of the violation of the policy, (rather than as a result of an addiction). 

By Patrizia Piccolo, Partner and Employment Law Group Practice Leader

## The Essential Human Rights Primer

December 5, 2017  
in Toronto

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