Cassels

A Rare Win for an Employer's Ability to Drug Test

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As Canadian employers and U.S. employers with Canadian subsidiaries well know, the climate in Canada has never been favourable to drug and alcohol testing. Earlier this month, however, the Supreme Court of Canada endorsed an employer's decision to terminate the employment of an employee who, post-accident, tested positive for drugs – even after he disclosed that he thought he was addicted to cocaine. The case is *Stewart v. Elk Valley Coal Corp*., 2017 SCC 30.

The employer's operation – a coal mine – was unquestionably dangerous and, therefore, safety sensitive. To ensure safety, the employer implemented an "Alcohol, Illegal Drugs & Medication Policy" which required employees to disclose any dependence or addiction issues before an incident occurred and to receive treatment. The policy further provided that if an employee failed to disclose and was involved in an accident and tested positive for drugs, their employment would be terminated. This zero tolerance aspect of the policy was called the "no free accident" rule. The employer provided training when it implemented the policy and required all employees to acknowledge receipt of the policy.

At the end of a 12-hour shift, the employee in question was involved in an accident with a loader he was driving. No one was injured and no property was damaged. The employee tested positive for drugs. When he met with his employer to discuss the accident and positive drug test, he said that he thought he was addicted to cocaine. Nine days later, his employment terminated based on the "no free accident" rule.

At first instance, the Alberta Human Rights Tribunal found that the termination was due to the breach of the policy (failure to disclose his addiction before the accident occurred), not because of his addiction. Accordingly, he failed to prove a prima facie case of discrimination. In the alternative, the Tribunal found that, if a prima facie case of discrimination has been proven, the employer had accommodated the employee to the point of undue hardship. On this point, importantly, the Tribunal held that something less than termination: an assessment, support through treatment and reinstatement, would dilute the purpose of the policy and that the policy's offer of support to employees who disclosed constituted appropriate accommodation.

The Alberta Court of Queen's Bench and the Alberta Court of Appeal dismissed the employee's appeals and upheld the Tribunal's decision – as did the Supreme Court of Canada. All three courts found they should defer to the Tribunal on its factual findings and the inferences it drew from them and found those findings to be reasonable. In particular, the Supreme Court of Canada referenced the termination letter that specifically cited the policy, not the employee's addiction, as the factor leading to termination. The Supreme Court of Canada also noted that it could not be assumed that the employee's addiction diminished his

ability to comply with the terms of the policy. While in some cases an addiction might deprive an employee of the capacity to comply, this was not one of those cases. There was no evidence before the Tribunal to suggest the employee was not capable of complying with workplace rules.

It is important to note that this decision does not change the law that a protected ground or characteristic need only be “a factor”, not a “significant factor” or a “material factor” in the decision to find discrimination. The decision also does not endorse pre-employment or random drug and alcohol testing. What the decision does do is permit employers in genuinely safety-sensitive workplaces who are prepared to accommodate addictions that are disclosed before an accident occurs, to test post-accident and not be forced to accommodate based on a positive drug test at that time. It is a welcome decision for these employers.
