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When is an Employee's Disability a Factor in his Dismissal?

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On June 30, 2015, the Court of Appeal of Alberta released its decision in *Stewart v Elk Valley Coal Corporation*, 2015 ABCA 225 ("*Stewart*") and clarifying what constitutes discrimination.

In *Stewart*, the employer terminated an employee following a vehicle collision on the work site where the employee struck another truck with a loader truck he was operating. The employee tested positive for consumption of cocaine after the collision.

The employer had an Alcohol, Illegal Drugs & Medications Policy (the "Policy") which stated that if an employee reported drug use *before* an event, he or she could seek rehabilitation without discipline or termination. The Policy also stated that discipline or termination could not be avoided if an employee sought assistance with their addition only *after* an event. Here, the employee had failed to inform the employer of his cocaine use prior to the incident. After the incident, Mr. Stewart's employment was terminated.

Following his termination, the employee filed a complaint under the *Alberta Human Rights Act*, stating that his employer had discriminated against him on the grounds of physical disability, being the employee's cocaine addiction or dependency.

The Alberta Human Rights Tribunal ("Tribunal") found that the employee was not terminated because of his addiction or dependency but rather for breaching the Policy; as such, there was no discrimination. The Tribunal was also satisfied that the Policy and practice of the employer were both *bona fide* occupational requirements.

On appeal to the Alberta Court of Queen's Bench, the chambers judge agreed with the Tribunal's conclusions on discrimination, but held that the accommodation offered in the Policy—no-risk self-reporting—was inadequate. Both issues were appealed to the Alberta Court of Appeal. In particular, the question of whether the Tribunal applied the proper test for *prima facie* discrimination was hotly contested.

Alberta's highest court confirmed that in establishing that there has been discrimination in breach of the *Alberta Human Rights Act*, a complainant must satisfy the Human Rights Tribunal that there is a *prima facie* case of discrimination by meeting the test set out by the the Supreme Court of Canada in *Moore v British Columbia (Education)*, 2012 SCC 61 ("*Moore*"):

> […]to demonstrate *prima facie* discrimination, complainants are required to show that they have a characteristic protected from discrimination under the *Code*; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact.[1]

The burden of proof rests with the complainant to establish *prima facie* discrimination.

The majority of the Court of Appeal went on to provide additional clarity on the application of the *Moore* test, particularly with respect to the third element of the test: whether the employee's disability was a factor in his dismissal.

In particular, the majority expressed concern about applying this third factor too broadly noting the fear that there could almost always be a finding of *prima facie* discrimination, which would then require the respondent employer to prove accommodation up to undue hardship.[2] The majority addressed these concerns in stating that "the test in *Moore* clearly contemplates that the [protected characteristic] be a real factor in the adverse impact and not just part of the necessary background [emphasis added]."[3]

Thus the fact that a protected characteristic may be linked to the factors in an adverse impact is insufficient on its own; such linkage must be shown "to rise to the level of being a factor in the adverse impact."[4] In other words, to satisfy the third element of the *Moore* test, a real connection between the adverse impact and the disability itself must be present.[5]

With respect to accommodation, the majority reminded litigants that "[t]he objective of the accommodation obligation is to remove the barriers of arbitrariness or stereotypical assumptions or attitudes about disability and to replace them with a mindset of inclusion."[6] The Court further reminds us that the question of undue hardship is contextual and that the obligation to accommodate is not absolute.[7]

In addressing the issue of accommodation in the case before them, the majority insisted that "to say that, instead of discipline, accommodation is demanded after a serious incident at a dangerous workplace would not engender confidence in co-workers about their safety."[8]

* * *

This complex and probing case will have far-reaching ramifications for all employers, those with safety-sensitive work areas and those without, since all employers who must ensure compliance with the *Alberta Human Rights Act*. It suggests the thorny issues of disability in general and addiction in particular can be properly managed through a robust approach so long as it is fair and reasonable. We recommend advice should be sought as to how this decision affects your workplace. The lawyers in Field Law's Labour and Employment Group are here to assist you and your organization with all matters arising from human rights issues in the workplace.

[1] *Moore*, para 33.

[2] *Stewart*, para 64.

[3] *Ibid,* para 63.

[4] *Ibid,* para 75; see also *Wright v College and Assn. of Registered Nurses of Alberta*, 2012 ABCA 267 (CanLII), at para 67: "[t]he fact that the appellants' conduct was motivated or caused at some level by the [protected characteristic] does not raise the […] proceedings to the level of discrimination in law."

[5] *Stewart*, *supra* note 2, para 76.

[6] *Ibid*, para 84.

[7] *Ibid*, para 90.

[8] *Ibid*, para 85.

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