

Each year at OJEN's Toronto Summer Law Institute, former Ontario Court of Appeal judge Stephen Goudge presents his selection of the top five cases from the previous year that are of significance in an educational setting. This case summary and related questions, based on his comments and observations, is appropriate for discussion and debate in the classroom.

STEWART v ELK VALLEY COAL CORP 2017 SCC 30

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<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/16679/index.do>

Facts

Mr. Ian Stewart was employed by Elk Valley Coal Corporation as a loader driver in a mine. A loader is a heavy, construction-type vehicle used for clearing debris. Elk Valley had a strict drug policy. Employees were required to disclose any drug addiction issues before any drug-related incident occurred. If they disclosed, they would be offered treatment. If an employee did not disclose and was then involved in an incident related to their drug use they would be fired. Mr. Stewart used cocaine and did not tell his employer. Subsequently his loader was involved in a workplace accident and he tested positive for drugs. Mr. Stewart then said he thought he was addicted to cocaine, but Elk Valley terminated his job.

Mr. Stewart argued that he was fired because of his addiction and that this was discrimination under s.7 of the *Alberta Human Rights, Citizenship and Multiculturalism Act* (now called the *Alberta Human Rights Act*). Addiction is a recognized disability under the *Act*.

Procedural History

The case was heard by the Alberta Human Rights Tribunal and, while it affirmed that firing an employee on the ground of an addiction is

discrimination, the tribunal held that Mr. Stewart was not fired because of his cocaine addiction. Rather, he was fired because he breached the company's policy requiring disclosure of any drug addictions. The Alberta Court of Appeal upheld the tribunal's decision. Mr. Stewart appealed to the Supreme Court of Canada (SCC).

Alberta Human Rights Act Discrimination re employment practices

7 (1) No employer shall

- (a) refuse to employ or refuse to continue to employ any person, or
- b) discriminate against any person with regard to employment or any term or condition of employment,

because of the race, religious beliefs, colour, gender, gender identity, gender expression, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status or sexual orientation of that person or of any other person.

Issues

1. Was Mr. Stewart fired because of his addiction or because he violated company policy?
2. Is Elk Valley's company policy that requires an employee to disclose his or her drug use valid?
3. Was the Human Rights Tribunal's decision reasonable?

Decision

The appeal was dismissed, and the tribunal ruling upheld. The SCC ruled 8-1 that Elk Valley did not discriminate against him because of his addiction. Two of the majority judges wrote a concurring opinion, deciding that although Mr. Stewart's addiction was a factor in his termination, Elk Valley had met its obligation to accommodate Mr. Stewart to the point of undue hardship (on the company.)

Ratio

An employee who makes a claim of discrimination must establish a *prima facie* (a first impression) case of discrimination. To make a *prima facie* discrimination case the employee must establish all of the following: they have a protected characteristic under discrimination legislation; their job was negatively affected; and the protected characteristic was a factor in the negative effect. The Court held that the existence of addiction, by itself, does not automatically establish *prima facie* discrimination. In this case, the tribunal's finding that Mr. Stewart was terminated for breaching the company policy (and not for his addiction) was reasonable, as he was capable of complying with the company's disclosure policy and failed to do so.

Reasons

The SCC held that this case was about applying principles of discrimination law to the specific facts of the situation. They looked to determine if Mr. Stewart had established a *prima facie* case for discrimination based on his addiction. There are three parts to a *prima facie* discrimination case and Mr. Stewart easily satisfied the first two.

First, Mr. Stewart had to show that he had a **characteristic that was protected by legislation from discrimination**. Drug addiction is a protected ground in the *Act*, meaning that it is illegal to discriminate against someone because of their addiction. Second, Mr. Stewart had to show that **his employment was negatively affected**. Mr. Stewart's termination of employment was the negative affect he experienced. Third, Mr. Stewart had to show that his **protected characteristic was a factor in the negative impact**. He had to prove that his addiction was a reason he was fired.

Five judges in the majority held that Mr. Stewart had not satisfied the third requirement of the *prima facie* discrimination case because his addiction did not diminish his ability to comply with Elk Valley's workplace drug-use disclosure policy. While they noted that there could be some instances of addiction which would prevent an employee from complying with a disclosure policy, this was not true in Mr. Stewart's case. Therefore, the court reasoned, Mr. Stewart would have been fired if he was an addict or if he was a casual user, and thus his addiction (the protected ground) was not a factor in his termination – the only factor in his termination was his breach of Elk Valley's policy of disclosure.

Two of the majority (Moldaver and Wagner JJ.) held that Mr. Stewart's addiction was a factor in his firing and that the tribunal's decision on this point was unreasonable. They held, however,

that although a connection existed between Mr. Stewart's addiction and the adverse effect (his termination), the company was justified in carrying out its termination policy. In the particular context of Elk Valley's dangerous workplace and the potential for devastating consequences, deterring employees from drug use was crucial. Requiring the employer to accommodate a drug-using employee in any other way would result in undue hardship to the employer.

Dissent (Gascon J)

Justice Gascon disagreed with the majority of the Court and held that Elk Valley had discriminated against Mr. Stewart. He found that any drug policy that results in the automatic firing of an employee who uses drugs *was* an example of *prima facie* discrimination against drug addicts based on their addiction. In Justice Gascon's opinion, the protected ground only needs to be one of the factors in an employee's termination, rather than the *only* factor. He found that Mr. Stewart's drug dependency *was* a factor in his termination.

Further, Gascon J. found that the Human Rights Tribunal's finding that no connection existed between Mr. Stewart's drug addiction and his firing was based on four conceptual errors: (1) it required the drug addict to make prudent choices to avoid discrimination, placing an improper burden on complainants, among other problematic effects; (2) it relied on principles of "formal" rather than "substantive" equality, wrongly equating casual drug users with addicts, as addicts would have unique challenges in complying with the disclosure policy; (3) it included certain legal tests that should not be part of the low threshold for establishing a case; and (4) Mr. Stewart had to prove a causal connection between his drug addiction and his termination, rather than simply proving his addiction was a factor.

DISCUSSION

1. Why might Elk Valley have created its drug-use policy?
2. In your opinion, would most drug users choose to disclose their drug use or keep it private even if they knew it could cost them their job?
3. Would the risks of disclosing be the same for addicts as for casual drug users? Why?

4. Is the general public perception of discrimination against drug users similar to the general public perception of discrimination against other characteristics noted in the law, like race or gender? How so?
5. This case hinged on whether or not Mr. Stewart was fired because of his addiction. Note the three different ways in which the judges of the Court responded to this question. Whose reasons make the most sense to you?