MANAGEMENT COUNSEL
Employment and Labour Law Update

Taking the "High" Road - Alberta Court of Appeal Clarifies Enforcement of Drug and Alcohol Policies

There's no doubt about it. Addiction to drugs and alcohol is a recognized disability and an employer has a duty to accommodate an employee who has such a disability.

This raises complex issues for an employer that has found an employee impaired in a way that negatively impacts the workplace. A common scenario employers face is an employee who claims the protection of an addiction-based disability only after discipline (or termination) for breach of a drug and alcohol policy.

This issue was addressed in a recent decision of the Court of Appeal for Alberta, *Stewart v. Elk Valley Coal Corporation* ("*Stewart*"), in which the appeal court upheld a termination of a drug-dependant employee for breach of a drug and alcohol policy. The importance of the decision is the court's assessment of the policy, and its finding there was a breach sufficient to terminate an employee for cause despite the employee's claim to have an addition-based disability.

The Supreme Court of Canada has granted leave to appeal and is expected to hear this case in December of this year. The decision will be important for employers across Canada.

What happened?

Ian Stewart worked as a haul truck operator at a coal mine. His job involved the operation of 170 tonne and 260 tonne trucks. It was a safety-sensitive operation and Mr. Stewart performed a safety-sensitive job.

Mr. Stewart's employment was terminated after he drove his truck into another truck at the mine and thereafter tested positive for cocaine. Mr. Stewart admitted he had used cocaine the night before and this had made him sleepy. However, Mr. Stewart only disclosed his drug use to his employer after he had been terminated. He claimed he did not know he was drug-dependent until after the incident which led to his termination.

The drug and alcohol policy

Mr. Stewart's employer had a drug and alcohol policy which allowed an employee to self-disclose a dependency without fear of discipline or termination. The policy also stated the employer would support and assist an employee to rehabilitate if the employee proactively reached

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out for assistance. However, if an employee came forward only after an incident, the employee would not be shielded from discipline or termination. Mr. Stewart had attended a training session on the employer's drug and alcohol policy and signed an acknowledgement confirming he had read and understood the policy.

Mr. Stewart's employment was terminated two weeks after the incident, for violating the disclosure requirement of the drug and alcohol policy. In the termination letter, Mr. Stewart was offered an opportunity to be reinstated in six months, with proof of successful completion of a rehabilitation program, 50% of the cost of which the employer offered to cover.

Mr. Stewart chose to sue his employer for wrongful dismissal and discrimination on the basis of a disability. He lost at the initial adjudication and appealed to the Court of Appeal for Alberta.

Decision of the Court of Appeal

In a 2-1 decision, the appeal court found Mr. Stewart was not subject to discrimination on the basis of disability. The court applied the following three-part test:

1. Does the employee have a characteristic protected from discrimination?
2. Has the employee experienced an adverse impact?
3. Was the protected characteristic a *factor* in the adverse impact?

Only the third part of the test was in dispute - whether Mr. Stewart's disability was a factor in the decision to terminate his employment. Mr. Stewart's principal argument was that since he was influenced by his drug-dependency at the time of the incident, his disability was the reason he breached the disclosure requirement of the policy. As such, he claimed, his termination was discriminatory.

The appeal court rejected the argument on the basis of two related findings. First, expert evidence had established Mr. Stewart had control over his drug use and an ability to disclose. Second, his failure to disclose under the employer's drug and alcohol policy was a conscious choice. Accordingly, the court held there was culpable conduct in Mr. Stewart's violation of the disclosure requirement, and the employer was justified in relying on this as cause for his discharge.

Lessons for employers

The *Stewart* decision demonstrates the impact a well-designed drug and alcohol policy can have on court review. A policy which offers immunity for proactive self-disclosure, and access to treatment, can increase the likelihood discipline for a violation of the policy will be upheld.

Elk Valley's policy did not contain a zero-tolerance standard with harsh and immediate consequences for a violation. Rather, it offered support for an employee on the condition of self-reporting. By designing the policy this way, the onus was put back on Mr. Stewart to justify his decision to not disclose a dependency prior to the incident. As he failed to offer a persuasive justification, the court upheld his termination for cause.

A drug and alcohol policy should have purposes beyond the mere stigmatization of drug and alcohol use.

While this decision is potentially helpful to employers, caution is urged as the decision will soon be reviewed by Canada's highest court, and it appears to contradict a core principle that has governed the law of addiction for years– that 'denial' is part of the disease. We therefore expect the impact of 'denial' to be front and centre before the Supreme Court of Canada. Until then, there are two principal takeaways for employers:

1. A drug and alcohol policy should have purposes beyond the mere stigmatization of drug and alcohol use. These purposes – accident prevention, absenteeism reduction, employee well-being – should be addressed in the policy and reflected in how it operates and is applied.
2. An employee's claim to be drug or alcohol dependent does not automatically convert culpable conduct into non-culpable conduct. An employer should review all relevant circumstances before concluding the employee's misconduct was truly disability-related.

For more information on drug and alcohol policies or for assistance designing or re-designing your workplace policy, contract the employment law experts at Sherrard Kuzz LLP.

DID YOU KNOW?

The Ontario E*mployment Standards Act, 2000* includes a provision that adjusts minimum wage annually based on the prior year's inflation rate. As a result, effective October 1, 2016, minimum wage for most (but not all) Ontario workers will increase to $11.40 per hour.

To learn more, contact the employment law experts at Sherrard Kuzz LLP.

Employment Practices Liability Insurance – *What's it all about?*

Increasing workplace regulation and heightened employee awareness of workplace rights has exposed employers to an explosion of employment-related liability. Whether related to recruiting practices, employment contracts, human rights, employment standards, class action, privacy, wrongful dismissal, pay equity, workplace compensation, occupational health and safety or labour relations - the list continues to grow.

The most effective way to minimize an employer's risk is to have tailored and effective employment agreements, and policies and practices, administered by top notch human resources professionals. However, while good human resources can go a long way to mitigate risk, it cannot eliminate it, nor can there be any guarantee a current, former or prospective employee will not launch a claim to which an employer must respond.

To help further mitigate against the potential for financial risk an employer may look to purchase **Employment Practices Liability** ("EPL") insurance.

What types of claims are covered?

As a general rule, coverage includes legal costs and damages arising out of an employment-related claim for harassment, wrongful termination, breach of contract and vicarious liability. Negligent pension or benefits administration may also be covered under more comprehensive plans. However, union issues or regulatory proceedings relating to occupational health and safety are not typically covered.

What costs are covered?

Generally speaking an EPL policy covers damage awards as well as the legal costs incurred or owing to another party. It is possible to purchase insurance for legal costs only (not damages), which may provide leverage to withstand pressure to settle for 'business reasons'.

Who is covered?

Coverage may extend to the actions of an insured individual or, to a proceeding in which an organization is implicated either directly or through the action of an employee (vicarious liability).

Who makes key decisions?

The insurer - as the ultimate payer of a claim - retains the right to steer the response including to decide which counsel to appoint, what investigations to conduct and whether to litigate or settle. Some policies allow the insured to select counsel from a pre-approved roster or to recommend counsel for approval.

When does EPL make sense?

An organization with a high frequency of employment-related claims, whether because of industry norm, size or peculiarities related to the organization's business model, may consider EPL a good investment to help defray the bureaucratic costs associated with claims management. A smaller organization may look to EPL as a hedge against the risk of a complex or expensive claim which can cause unsustainable damage (*e.g.*, class action or large wrongful dismissal).

An organization with relatively few internal resources or where there is a high ratio of front-line to managerial employees (*e.g.*, common in retail and hospitality) may not be sufficiently resourced to address workplace issues as they arise, thus EPL coverage may be just the right kind of 'back-stop' should matters go awry.

Best practices to reduce workplace risk!

Regardless whether an organization purchases EPL coverage, many employment-related risks can be reduced by implementing strong human resources practices and strategies, including the following:

Written employment contracts

The relationship between an employer and employee is a contractual one even in the absence of written terms (or if the written terms are unenforceable). In that case, our courts impute contractual terms through legal precedent known as common law. For example, absent 'just cause for termination' a court will require an employer to provide an employee with 'reasonable notice' of termination of employment. Reasonable notice will almost always far exceed whatever minimum notice is required under employment standards legislation. A savvy employer will therefore utilize an employment contract to significantly reduce employment-related risks and achieve important business objectives.

Although a termination clause may be the principal reason for using an employment contract, it is not the only reason. A written employment contract will also clarify obligations and entitlements *during* the course of the employment relationship including remuneration, duties of employment, hours of work, vacation, and confidentiality obligations, *etc*. It may also address post-employment covenants such as a restriction on the solicitation of customers.

An employer that does not already have written contracts in place should not despair. An enforceable employment contract can be introduced into an *existing* employment relationship under the right conditions and with the assistance of experienced employment counsel.

Workplace violence and harrassment policy

Every organization is required to establish, implement and train employees on workplace violence and harassment to comply with occupational health and safety and human rights law. An organization with an up-to-date, and well-written and implemented policy will be better prepared to prevent and respond to a claim of workplace abuse, and avoid expensive and potentially embarrassing litigation.

Employee handbook

In the interest of consistency across an organization, some employers will have an 'employee handbook' to address various aspects of the employment relationship such as: core values, workplace rules and practices, hours of work, leaves, social media, use of confidential information, and workplace conflict resolution, to name a few. A handbook should create clear and express expectations with the effect of minimizing any misunderstanding or disagreement leading to claims.

For assistance and to learn more, contact the employment law experts at Sherrard Kuzz LLP.

HReview Seminar Series

Please join us at our next HReview Breakfast Seminar:

Group Insurance Benefits

Avoid Dangerous Employer Liability Traps!

Join us to enhance your knowledge in this often misunderstood area of human resources law, and avoid unintended liability for your organization. Learn about:

- Extending benefits of employment post-termination.
- Continuing health and dental benefits for an employee on leave: How long?
- Potential LTD risks when terminating employment and how to avoid those risks.
- Compensating for loss of benefits when paying severance compensation.
- Working with an LTD insurer in response to a request for modified duties.
- Responding to a dubious employee request for LTD benefits.
- Enrolment of an independent contractor into a group benefits plan.
- Enrolment of a contract employee into a group benefits plan.
- The importance of timely enrolment into a group benefits plan.
- Changing the terms of a benefit plan and constructive dismissal.
- Taxation issues related to LTD benefits.

DATE: **Wednesday September 28, 2016; 7:30 – 9:30 a.m.** (breakfast at 7:30 a.m.; program at 8:00 a.m.)

VENUE: **Hilton Garden Inn Toronto Vaughan** - 3201 Hwy 7 West, Vaughan ON

COST: Complimentary

RSVP: **By Friday September 16, 2016 at www.sherrardkuzz.com/seminars.php**

Law Society of Upper Canada CPD Hours: This seminar may be applied toward general CPD hours.

HRPA CHRP designated members should inquire at www.hrpa.ca for eligibility guidelines regarding this *HReview Seminar*.

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Jean Cumming Lexpert® Editor-in-Chief

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