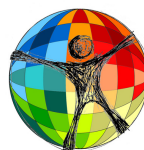


VOL. 9 | NO. 1 | SUMMER 2020

Stewart and the Struggle to Assess Complaints of Workplace Discrimination Against Persons with Addictions

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ABSTRACT

The purpose of this paper is to shed light on the uneasy challenge faced by decision-makers assessing addiction discrimination complaints in workplaces with safety-related drug policies. In order to explore the apparent incongruence between the protection of the rights of persons with addictions and the implementation of efficient workplace drug policies, this paper will examine the Stewart decision. In particular, it will examine Stewart's response to the particular health and social complexities of drug and alcohol addiction and its implications in the context of Canadian human rights law as it pertains to discrimination. Ultimately, this paper will reflect on how existing human rights laws can support the creation of workplace drug policies that offer more meaningful protections for persons with addictions while also allowing employers to ensure worksite safety.

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Introduction

“The uneasy fit of drug addiction and drug testing policies in the human rights arena”¹

Substance use disorders are pervasive issues across the world. According to the 2018 World Drug Report that was published by the UN Office on Drugs and Crime, globally, around 31 million of the 275 million people who use drugs suffer from drug use disorders.² In Canada, it is estimated that around 21% of the population will experience addiction at some point in their lives.³ Persons with substance use disorders issues face various physical, psychological and social challenges. This can be particularly consequential in the employment context, where both employers and employees are vulnerable to the consequences that flow from addiction.⁴ Employers seeking to implement alcohol and drug policies in the workplace are faced with the difficult task of creating policies that not only ensure workplace safety, but also are not discriminatory towards persons with addictions. It follows that courts examining discrimination complaints pertaining workplace drug policies face a similar challenge as they must balance employers’ aim to ensure workplace safety with individuals’ human rights.

The seminal 2017 Supreme Court of Canada case *Stewart v Elk Valley Corporation*⁵ offers meaningful insight on how current Canadian human rights law engages with complaints of employment discrimination against those with addiction and substance use disorders. Central to this case was a workplace drug policy that required employees to disclose any substance use disorders before the occurrence of a drug or alcohol-related accident.⁶ Those who failed to do so – and tested positive for drugs or alcohol following an accident

¹ *Stewart v Elk Valley Corporation*, 2015 ABCA 225 at para 153.

² See *Global Overview of Drug Demand and Supply*, UNODC, 2018 at 6.

³ See Hermina Hoskins, “Statistics on Addiction in Canada” (12 August, 20109), online: *Calgary Dream Centre* <calgarydreamcentre.com/statistics-on-addiction-in-canada/>.

⁴ See Atlantic Canada Council on Addiction, “Problematic Substance Use That Impacts the Workplace” at 21, online (pdf): <www.gov.nl.ca/hcs/files/publications-addiction-substance-abuse-workplace-toolkit.pdf>.

⁵ *Stewart v Elk Valley Corporation*, 2017 SCC 30 [Stewart].

⁶ See *ibid* at para 1.

— would be terminated from employment.⁷ The purpose of the policy was to ensure worksite safety.⁸ The issue in this case was whether the application of such a policy could amount to discrimination against an employee with an addiction.⁹ In this decision, the majority and dissenting opinions offered strikingly different analyses — where the former found discrimination and the latter did not. The contrasting opinions exemplify the law’s struggle to properly account for the particular health and social nuances of addiction, while also considering the duty of employers to ensure worksite safety.

The purpose of this paper is to shed light on the uneasy challenge faced by decision-makers assessing addiction discrimination complaints in workplaces with safety-related drug policies. In order to explore the apparent incongruence between the protection of the rights of persons with addictions and the implementation of efficient workplace drug policies, this paper will examine the *Stewart* decision. In particular, it will examine *Stewart*’s response to the particular health and social complexities of drug and alcohol addiction and its implications in the context of Canadian human rights law as it pertains to discrimination. Ultimately, this paper will reflect on how existing human rights laws can support the creation of workplace drug policies that offer more meaningful protections for persons with addictions while also allowing employers to ensure worksite safety.

This paper will proceed as follows: Section 1 will provide an overview of the *Stewart* case, including the factual circumstances as well as the majority and dissenting opinions’ contrasting analyses. Section 2 will examine some of the biological and social complexities of addiction that were considered in *Stewart*. Section 3 will investigate the aftermath of the case and examine how tribunals and arbitration boards used *Stewart* to guide and inform their subsequent decisions. Section 4 will seek to understand drug addiction in the context of existing Canadian drug policies. Finally, section 5 will provide reflections on how workplace drug policies can be inclusive of persons with addictions.

⁷ See *ibid.*

⁸ See *ibid.*

⁹ See *ibid* at para 5.

Overview of *Stewart v Elk Valley*

Stewart examined whether the termination of an employee can amount to discrimination where the termination is pursuant to a zero-tolerance – or a “no free accident” – drug policy that requires the disclosure of addiction issues prior to any drug-related accidents in the workplace.¹⁰ Central to this inquiry was whether the dismissal of an employee under such grounds was in contravention of s. 7(1)(b) of Alberta’s *Human Rights, Citizenship and Multiculturalism Act* (“the Act”), which prohibits discrimination “against any person with regards to employment...because of physical...[and/or] mental disability”.¹¹ Addiction is a recognized disability under the Act.¹²

Factual Foundations

Elk Valley Coal Corporation (“Elk Valley”) operated a mining site and in order to ensure worksite safety, it implemented the Alcohol, Illegal Drugs and Medications Policy (“the policy”) – also called the “no free accident” policy.¹³ The policy offered treatment for employees that disclosed any addiction issues.¹⁴ However, the policy also stipulated that employees who failed to do so and subsequently tested positive for drugs after being involved in a drug-related accident would be terminated.¹⁵ Ian Stewart, who did not disclose to his employer that he consumed cocaine, was involved in an incident and subsequently tested positive for cocaine.¹⁶ Following the drug test, Mr. Stewart told his employer that he thought he was addicted to cocaine.¹⁷ Several days later, Mr. Stewart’s employer terminated his employment contract in accordance with the policy.¹⁸

¹⁰ See *ibid* at para 1.

¹¹ See *Human Rights, Citizenship and Multiculturalism Act*, RSA 2000, c A-25.5, s 7(1)(b).

¹² See *Stewart*, *supra* note 5 at para 3.

¹³ See *ibid* at para 1.

¹⁴ See *ibid*.

¹⁵ See *ibid*.

¹⁶ See *ibid* at para 2.

¹⁷ See *ibid*.

¹⁸ See *ibid*.

Administrative Decision: Alberta Human Rights Tribunal

Through his union representative, Mr. Stewart brought forth a complaint to the Alberta Human Rights Commission (“the Tribunal”), arguing that his dismissal was in contravention of s. 7(1)(b) of the Act.¹⁹ The Tribunal ultimately found that there was no discrimination in this case and dismissed Mr. Stewart’s complaint.²⁰ In its analysis, the Tribunal applied the established two-step legal analysis for workplace discrimination claims. For the purposes of this paper, the test is stated in the table below:

Figure 1. Discrimination Test for Workplace Discrimination

Step 1: The individual submitting the complaint must prove <i>prima facie</i> discrimination. ²¹	Factor 1: The individual has a characteristic protected from discrimination (as per the relevant human rights legislation).
	Factor 2: The individual experienced an adverse impact .
	Factor 3: The protected characteristic was a factor in the adverse impact.
Step 2: If <i>prima facie</i> discrimination is proved, the employer can argue that the policy/standard is a <i>bona fide occupational requirement</i>. ²²	Factor 1: The employer adopted the standard/policy for a purpose rationally connected to the performance of the job (“organizational goal”).
	Factor 2: The standard/policy was adopted in a good faith belief that it was necessary to fulfill that legitimate work-related purpose.
	Factor 3: The standard/policy is reasonably necessary to the accomplishment of that legitimate work-related purpose.

¹⁹ See *Bish v Elk Valley Corporation*, 2012 AHRC 7 at para 1 [Stewart AHRC].

²⁰ See *ibid* at para 154.

²¹ See *Moore v British Columbia (Education)*, 2012 SCC 61 at para 33.

²² See *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR at para 54 [Meiorin].

	<ul style="list-style-type: none"> • In other words, is it impossible to accommodate the individual employee without imposing undue hardship on the employer?
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First, the Tribunal assessed whether there was *prima facie* discrimination. Following the three-factor test for establishing *prima facie* discrimination, the Tribunal found that: (1) Mr. Stewart had established that he had a disability protected under the Act (i.e., his addiction) and (2) he had experienced adverse treatment while employed at Elk Valley (i.e., his termination), but (3) he was unable to establish that his disability was a factor in the adverse treatment.²³ The Tribunal found that though denial is a part of a drug addiction disability, Mr. Stewart was still able to choose when and where he used drugs and that he had the capacity to disclose his drug use.²⁴ As such, the Tribunal found that Mr. Stewart faced adverse treatment not because of “denial through drug impairment” but because he chose not to cease his or disclose his drug use.²⁵ Therefore, the Tribunal found no *prima facie* discrimination.²⁶

Next, though the Tribunal did not find *prima facie* discrimination, it nevertheless considered the second step of the discrimination analysis – which moves the onus onto the employer to justify that the *prima facie* discriminatory policy is a *bona fide* occupational requirement.²⁷ In other words, the employer must show that even though a policy or standard is discriminatory, it is reasonably necessary to accomplish the employer’s organizational goals and it would be impossible to accommodate for the employee in a different manner without causing undue hardship for the employer.²⁸ In this case, the Tribunal held that Elk Valley would have been able to establish that it had accommodated Mr. Stewart to the point of undue hardship.²⁹ Following the three-factor test for establishing the

²³ See *Stewart AHRC*, *supra* note 19 at paras 118, 120.

²⁴ See *ibid* at para 120.

²⁵ See *ibid* at para 122.

²⁶ See *ibid* at para 154.

²⁷ See *ibid* at para 130.

²⁸ See *Meiorin*, *supra* note 22 at para 54.

²⁹ See *Stewart AHRC*, *supra* note 19 at 155.

bona fide occupational requirement, the Tribunal accepted that (1) Elk Valley’s policy was adopted for a goal that was rationally connected to the job (i.e., ensuring worksite safety), (2) the policy was adopted in a good faith belief and (3) the policy’s harsh sanction was reasonably necessary to “provide a deterrent effect to drug users and drug addicts” and ultimately ensure a safe workplace.³⁰ In the Tribunal’s opinion, offering an accommodation – other than the opportunity to disclose addiction issues prior to an incident – would dilute the purpose of the policy and cause undue hardship for Elk Valley.³¹ Further, the Tribunal held that while there is a general human rights obligation for employers to inquire and request medical information from an employee with a suspected disability, the employee also has a duty to request accommodation when they have the capacity to do so.³² Therefore, the Tribunal found that Elk Valley’s policy was a *bona fide* occupational requirement and offering other accommodations for Mr. Stewart would have caused undue hardship for his employer.³³

Overall, the Tribunal’s judgement reflects the decision-maker’s struggle to balance the protection of individual human rights with employers’ moral and legal obligations to maintain a safe workplace, especially in dangerous contexts. At the first step (*prima facie* discrimination), the decision-maker’s focus on Mr. Stewart’s capacity to comply with the policy and their belief – albeit based on contradicting expert evidence from both parties³⁴ – that Mr. Stewart was able to choose when and where he used drugs had important implications in the legal analysis. Indeed, the decision-maker’s determination that Mr. Stewart had the capacity to make rational decisions regarding his drug use was essential in the Tribunal’s conclusion that his addiction was not a factor in his termination.³⁵ This sheds light on the consequential nature of decision-makers’ understanding of the complexities of addiction when analysing employment discrimination claims. At the second step (*bona fide* occupational requirement), the acceptance of and focus on Elk Valley’s organizational goal of ensuring worksite safety (i.e., factor #1) rendered it difficult for the Tribunal to find an

³⁰ See *ibid* at para 149.

³¹ See *ibid* at para 150.

³² See *ibid* at para 149.

³³ See *ibid* at para 153.

³⁴ See *ibid* at paras 118, 121.

³⁵ See *ibid* at para 121.

accommodation for Mr. Stewart that would not cause undue hardship for the employer (i.e., factor #3). This portion of the analysis brings forth concerns of how individual rights can be protected when balanced with safety-related organizational goals. The Tribunal's conclusion seemingly restricted the forms of accommodations that could be available to Mr. Stewart, given its acceptance and prioritization of Elk Valley's safety goals. Some of these reflections were considered in the subsequent appellate decisions. Nonetheless, the Tribunal's decision was affirmed by the Alberta Court of Queen's Bench and by the Alberta Court of Appeal. Ultimately, the decision was appealed to the Supreme Court.

Supreme Court of Canada's Analysis of the Tribunal Decision

Understanding Choice and Capacity to Comply

In a split decision with contrasting majority and minority opinions, the Supreme Court upheld the Tribunal's decision.³⁶ In order to understand the Supreme Court's judgement, it is important to note that the initial *Stewart* tribunal decision was an administrative law decision. Unlike in other fields of law, the principles of Canadian administrative law require reviewing courts – like the Supreme Court – to approach the decisions of administrative decision-makers – like the Tribunal – with considerable deference.³⁷ As such, unlike in other appellate decisions where the Supreme Court would use the standard of correctness or the standard of palpable and overriding error to review a lower court's judgement, in this case, the Supreme Court applied the standard of reasonableness to review the Tribunal's decision.³⁸ In other words, the Supreme Court asked: Was the Tribunal's decision reasonable? The final Supreme Court judgement consisted of majority and minority opinions that presented differing views of how the Act and the relevant discrimination law principles should be interpreted and applied within the factual circumstances of this case. Notably, the majority and minority opinions grappled with the same themes that emerged in the Tribunal decision. In doing so, the

³⁶ See *Stewart*, *supra* note 5 at para 57.

³⁷ See *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 25.

³⁸ See *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 25; *Stewart*, *supra* note 5 at paras 20–22.

contrasting sides demonstrated vastly different understandings of the role of choice in addiction and the extent to which persons with addictions may have the capacity to comply with policies like the one implemented by Elk Valley.

The majority opinion clearly reflects the Supreme Court's desire to show deference to the Tribunal. Upon considering the requirements of s. 7(1)(b) of the Act, the underlying principles of discrimination law and the Tribunal's application of the law to the facts of the case, the majority opinion found that the Tribunal was *not* unreasonable in finding that there was no *prima facie* discrimination in this case.³⁹ Therefore, while the majority opinion did not necessarily concede that the Tribunal's decision was correct, it found that the Tribunal's decision was one of the possible reasonable conclusions that could have been gleaned from the evidence.⁴⁰ Nonetheless, it is noteworthy that the majority echoed similar sentiments to those expressed in the Tribunal decision with regards to Mr. Stewart's ability to make rational choices pertaining to his drug use and his ability to comply with the policy.⁴¹ For example, the majority stated that though Mr. Stewart may have been in denial about his addiction, it could not be assumed that Mr. Stewart's addiction diminished his capacity to comply with the terms of the policy.⁴² Mr. Stewart knew he should not have been taking drugs before working and he had the ability to decide not to take them.⁴³

In contrast, the minority opinion – written by Justice Gascon – presented a vehement opposition to the majority's holding, concluding that the Tribunal's analysis and ultimate decision misunderstood the legal principles informing discrimination law and were unsupported by its factual findings, and therefore was unreasonable.⁴⁴ Importantly, Justice Gascon began with a different – and perhaps more nuanced – understanding of the addiction experience. He acknowledged that persons with addictions represent a marginalized group that is "easily caught in the majoritarian blind spot in discrimination discourse".⁴⁵ Further, he recognized that there is stigma

³⁹ See *Stewart*, *supra* note 5 at para 47.

⁴⁰ See *ibid* at paras 40.

⁴¹ See *ibid* at paras 38–40.

⁴² See *ibid* at paras 38–39.

⁴³ See *ibid* at para 38.

⁴⁴ See *ibid* at para 145.

⁴⁵ See *ibid* at para 59.

surrounding addiction, which can “sometimes impair the ability of courts and society to objectively assess the merits of [persons with addictions’] discrimination claims”.⁴⁶

At the first step (*prima facie* discrimination), Justice Gascon found that the automatic termination of an employee in breach of a drug policy places a disproportionate burden on persons suffering with addictions and is *prima facie* discriminatory.⁴⁷ Justice Gascon pointed out that the Tribunal’s determination that Mr. Stewart had some control over his choice to use drugs and that Elk Valley’s policy essentially treats persons with addictions and those using recreational drugs the same is an inappropriate reliance on formal equality principles.⁴⁸ Indeed, Canadian courts have shifted the discrimination analysis from a focus on formal equality – i.e., the view that treating everyone through “neutral” policies avoids discrimination – to a focus on substantive equality.⁴⁹ The principles of substantive equality understand that in order to achieve true equality, policies need to accommodate for the unique needs of individuals who may be disproportionately burdened by “neutral” policies.⁵⁰ Justice Gascon also criticized the Tribunal’s assessment of Mr. Stewart’s capacity to comply with the policy and its determination that his addiction was not a factor in his termination (i.e., factor #3 of the *prima facie* discrimination step).⁵¹ It is accepted that to some extent, addiction can impact an individual’s capacity to control their choices.⁵² Acknowledging that Mr. Stewart had an addiction – and therefore had impaired control of his drug use – is irreconcilable with the determination that it had no impact on his ability to comply with the policy.⁵³ Even if Mr. Stewart was not wholly incapacitated by his addiction and maintained some control over his choices, Mr. Stewart’s addiction was still – to some extent – a factor in his termination.⁵⁴

⁴⁶ See *ibid* at para 58.

⁴⁷ See *ibid* at para 60.

⁴⁸ See *ibid* at para 103.

⁴⁹ See e.g. *R v Kapp*, 2008 SCC 41.

⁵⁰ See “Jordan’s Principle” (12 December, 2019), online: Government of Canada <www.sac-isc.gc.ca/eng/1583698429175/1583698455266>.

⁵¹ See *Stewart*, *supra* note 5 at para 60.

⁵² See *ibid* at para 89.

⁵³ See *ibid*.

⁵⁴ See *ibid* at para 118.

Next, Justice Gascon considered the Tribunal's reasoning at the second step of the analysis (*bona fide* occupational requirement) and found that Elk Valley did not provide sufficient accommodation for Mr. Stewart.⁵⁵ Elk Valley's duty to accommodate included "examining alternative approaches which have less discriminatory effect".⁵⁶ To some extent, the Tribunal had discharged Elk Valley's duty to consider an individualized accommodation for Mr. Stewart because he had failed to disclose his addiction and seek the accommodations available to him prior to the incident.⁵⁷ Justice Gascon rejected this discharge, emphasizing that the Elk Valley's policy was not accessible to Mr. Stewart because he was unaware of his drug dependence.⁵⁸ Further, Elk Valley submitted that the purpose of its policy was to deter unsafe behaviour at the worksite (i.e., factor #1 of the *bona fide* occupation requirement step).⁵⁹ However, Elk Valley did not show any evidence proving that no other punishment could have accomplished this goal (i.e., factor #3 of the *bona fide* occupation requirement step).⁶⁰ While it was within Elk Valley's purview to achieve an organizational goal through a stringent standard or policy like a "no free accident" policy, the standard must still be justifiable under human rights law and must accommodate the "unique capabilities and inherent worth and dignity" of the individual, up to the point of undue hardship.⁶¹ As Elk Valley was not able to show that alternative forms of accommodation were not possible, Justice Gascon found that it did not prove that its current policy was reasonably necessary for the furtherance of its organizational goals.⁶²

Overall, the contrast in both opinions reveal the competing interests that challenge decision-makers and judges when adjudicating cases involving discrimination against persons with addictions in the workplace. Perhaps the most striking difference between the majority and minority opinions was their understandings of addiction and how it could impact an individual's experience in the workplace. The following section

⁵⁵ See *ibid* at para 61.

⁵⁶ *Stewart AHRC*, *supra* note 19 at para 150.

⁵⁷ See *ibid* at para 149.

⁵⁸ See *Stewart*, *supra* note 5 at para 61.

⁵⁹ See *Stewart AHRC*, *supra* note 19 at paras 70–71.

⁶⁰ See *Stewart*, *supra* note 5 at para 143.

⁶¹ *Meiorin*, *supra* note 22 at para 62.

⁶² See *Stewart*, *supra* note 5 at para 145.

will examine some of the physical, psychological and social complexities of addiction and reflect on how they can inform decision-makers' analyses in similar complaints.

Understanding the Biological and Social Complexities of Addiction

This section seeks to build on some of the aspects of the addiction experience that were discussed in the Tribunal and Supreme Court *Stewart* decisions. Notably, there will be a focus on the role of choice in addiction as well as denial and stigma. The purpose of this section is to demonstrate that these concepts are complex. While they should be considered in discrimination complaints, judges and decision-makers should be conscientious when integrating these concepts in their analyses.

Biological Underpinnings of Addiction and Addictive Behaviour and the Role of Choice

Scientific research examining addiction and addictive behaviour is ever-growing. As researchers continue to understand different aspects of addiction, the roles of choice and complicity in addictive behaviour become increasingly difficult to discern. Drug addiction is defined as a "chronic relapsing disorder" that is characterized by "compulsive drug-seeking and drug-taking behaviour despite negative consequences".⁶³ The compulsive nature of drug addiction has been attributed to several theories. Early theories of addiction postulated that when an individual consumes a substance, dependence will develop if the substance produces a pleasurable effect.⁶⁴ This is based on the idea of positive reinforcement. In the alternative, some view addiction as an avoidance of the adverse psychological and physiological consequences that result from ceasing drug use, which is based on the idea of negative reinforcement.⁶⁵ While both theories offer explanations for some aspects of the addiction experience, they are incomplete. For example, these theories do not fully explain why some individuals resume drug use following a prolonged period of abstinence (i.e. relapse),

⁶³ See MW Feltenstein & RE See, "The Neurocircuitry of Addiction: An Overview" (2008) 154 Br J Pharmacol 261 at 262.

⁶⁴ See *ibid.*

⁶⁵ See *ibid.*

even after withdrawal symptoms have ceased to manifest.⁶⁶ In recent years, researchers have focused on theories examining the particular neuroadaptations that can occur after prolonged drug use that may specifically explain the persistence of drug addictions.⁶⁷ While researchers have been able to identify specific neural changes, it is important to note that drugs of abuse are classified into a variety of categories, all of which have diverse behaviour and neuropharmacological properties.⁶⁸

Denial of Addiction

One facet of addiction that was discussed by both the majority and dissenting opinions in *Stewart* was denial. Denial is a common aspect of addiction.⁶⁹ Put simply, denial in drug addiction is an emotional rejection of the truth and a form of self-deception.⁷⁰ It refers to an individual's lack of awareness regarding the extent of their drug abuse—a clouded perception of the consequences of their drug use and/or a tendency to overestimate their ability to control consumption or to quit without assistance.⁷¹ It can also be understood as an ego defence mechanism.⁷² From a psychological perspective, denial appears to be two-pronged: it includes (1) denial of the fact that consumption could carry health risks for the user and those around them and (2) denial that even if generalizations regarding the consequences of drug use are in fact true, they do not apply to the individual themselves.⁷³ The latter refers to a reckless belief in one's own exceptionalism and invulnerability.⁷⁴ This leads to the question, Why would acknowledging the negative consequences of one's drug use cause psychological distress? For some, the consequences of addiction are

⁶⁶ See *ibid.*

⁶⁷ See *ibid.*

⁶⁸ See *ibid* at 263.

⁶⁹ See William Ren et al, "Addictive Denial and Cognitive Dysfunction: A Preliminary Investigation" (2002) 14:1 J Neuropsychiatry Clin Neurosci 52 at 52.

⁷⁰ See *ibid* at 52; Antonio Verdejo-García & Miguel Pérez- García, "Substance Abusers' Self-Awareness of the Neurobehavioral Consequences of Addiction" (2008) 158:2 Psychiatry Res 172 at 172; Hannah Pickard, "Denial in Addiction" (2016) 31:3 *Mind & Language* 277 at 279.

⁷¹ See Verdejo-García & Pérez- García, *supra* note 70 at 173.

⁷² See Ren et al, *supra* note 69 at 53.

⁷³ See Pickard, *supra* note 70 at 285.

⁷⁴ See *ibid.*

frightening.⁷⁵ There can also be shame associated with acknowledging the harm caused by the individual's behaviour.⁷⁶ Sometimes the psychological distress is not directly related to the negative consequences of addiction but instead, is related to the demands that naturally flow from acknowledging the addiction (e.g., the realization that the individual will need to stop using drugs).⁷⁷ It is also important to note that for many people, drugs can bring a level of pleasure. Therefore, some individuals may be in denial because of the distress that could result from quitting consumption.⁷⁸

The psychology underlying denial in drug use is valuable in understanding why zero-tolerance drug policies – like the one implemented by Elk Valley – may not act as a deterrent. Indeed, some argue that if an individual is in denial that their drug use could result in negative consequences, then the disincentive that this knowledge offers is effectively removed and cannot guide decision-making.⁷⁹ In other words, if someone like Mr. Stewart is in denial, then they are not able to acknowledge that continued drug use could result in the breach of a policy that could have negative consequences for them.

Furthermore, while denial is a notorious and prominent aspect of addiction, it is often discussed outside the parameters of addictive behaviour.⁸⁰ This is because denial has long been understood as purely a philosophical and psychodynamic process,⁸¹ which some attribute – perhaps incorrectly – to the aspects of addiction that individuals can control. Understanding the role of choice in psychological processes is not within the scope of this paper and is a difficult inquiry given the complexities and the interdisciplinary nature of the field. However, it is important to note that there has been a growing line of neuro-scientific studies that have identified the underlying physiological changes that can be attributed to denial.⁸² Indeed, some studies have found that substance abuse is associated with neural alterations in the frontostriatal system of the brain, which

⁷⁵ See *ibid* at 290.

⁷⁶ See *ibid*.

⁷⁷ See *ibid*.

⁷⁸ See *ibid*.

⁷⁹ See *ibid*.

⁸⁰ See *ibid* at 278.

⁸¹ See Ren at al, *supra* note 69 at 52.

⁸² See Verdejo-García & Pérez- García, *supra* note 70 at 173.

is involved in executive functions, emotional regulation, motivation and self-awareness.⁸³ In the same vein, other research has revealed that persons with addictions show abnormalities in the rostral anterior cingulate cortex, which is implicated in the processing of personally relevant information.⁸⁴ In one study, individuals with cocaine addictions displayed greater insensitivity to both predicted and unpredicted losses in laboratory gambling tasks compared to the control subjects.⁸⁵ This research speculates that persons with addictions may continue to consume in the face of negative consequences because they are unable to process the personal relevance of those consequences.⁸⁶

These perspectives of denial in addiction point to the difficulty in properly ascertaining an individual's capacity to comply with policies like the one in *Stewart*. While it is true that the legal inquiry is not the same as the scientific inquiry, it could be argued that a more nuanced approach is necessary in the human rights context, where individual rights are at stake.

Stigma Surrounding Addiction

The stigma surrounding addiction was discussed in Justice Gascon's dissenting opinion. Justice Gascon identified stigma as another reason why someone may choose not to disclose their disability. Despite the pervasiveness of this public health problem, people with addictions face moral judgement from society.⁸⁷ According to the World Health Organization, addiction to illicit drugs is one of the most stigmatized conditions.⁸⁸ This is in part due to a misinformed belief that addiction is a moral failing on the part of the individual rather than a health issue – these individuals are deemed flawed and at fault.⁸⁹ Stigma, in turn, can lead to prejudice, stereotyping and discrimination, especially in the work context.⁹⁰ The stigma

⁸³ See *ibid.*

⁸⁴ See Pickard, *supra* note 70 at 293.

⁸⁵ See *ibid.*

⁸⁶ See *ibid.*

⁸⁷ See "Stigmatization of People with Substance Use Disorders" at 1, online (pdf): Dianova <www.dianova.org/wp-content/uploads/2019/07/QuitStigma-Recommendations-Workplace-en.pdf>.

⁸⁸ See *ibid.*

⁸⁹ See Roche et al, "The Stigma of Addiction in the Workplace" in Jonathan D Avery & Joseph J Avery, eds, *The Stigma of Addiction: An Essential Guide* (Springer, 2019) 167 at 169.

⁹⁰ See *ibid* at 168.

associated with addiction can be highly distressing and can result in individuals feeling shame, guilt, anger, rejection, a sense of worthlessness and of hopelessness – which can trigger further drug or alcohol use and other risky behaviours.⁹¹

The stigma faced in the work context is particularly acute, especially since performance and productivity is often prioritized by employers.⁹² Indeed, the consequences of long-term substance use can have negative effects on functioning in the workplace, including tardiness; sleeping on the job; withdrawal symptoms; impairment of judgement, concentration, alertness, perception, motor coordination; loss in efficacy and productivity.⁹³ Stigma at work can manifest in a variety of ways. For example, stigma against persons with addictions can result in discriminatory practices in hiring and promoting.⁹⁴ It can also result in inequity in workplace social interactions and policies.⁹⁵ When persons with addictions face stigma in the workplace, this can negatively impact their performance, mental health and career progression.⁹⁶ While it is difficult to determine the extent to which stigma will prevent someone like Mr. Stewart from disclosing his addiction, it is clear nonetheless that workplace stigma is deterrent and should be considered in human rights claims.

Ultimately, it is not clear how and to what extent decision-makers and judges should integrate concepts like the capacity to comply, denial and stigma into their legal analyses. Perhaps it is dependent on the particular factual circumstances of a case. The contrasting opinions in *Stewart* show that different understandings of these concepts can lead to strikingly different conclusions.

Some may say that the majority opinion in *Stewart* favours a view of addiction that is incomplete and an understanding of the concepts of denial, stigma and choice that lacks nuance. The following section will examine the aftermath of

⁹¹ See Stigmatization of People with Substance Use Disorders, *supra* note 87 at 1.

⁹² See *ibid* at 3.

⁹³ See *ibid* at 2.

⁹⁴ See Roche et al, *supra* note 89 at 172.

⁹⁵ See *ibid*.

⁹⁶ See *ibid* at 173.

Stewart and how subsequent administrative decision-makers' understanding of addiction guided their analyses.

Aftermath and Implications of *Stewart v Elk Valley*

The potential implications of the *Stewart* decision have fostered debate among the legal community. While some believe the practical effect of *Stewart* is to deprive employees with addictions of human rights protections in the workplace, others argue that highly dangerous workplaces can benefit from this decision.⁹⁷ Still, others are not able to properly ascertain the true implications of *Stewart*.⁹⁸ Indeed, some commentators have noted the limited applicability of the *Stewart* judgement.⁹⁹ The Supreme Court's reasoning was unique to the safety-sensitive context and it is unclear whether this case could offer guidance for employers in other domains.¹⁰⁰

Another reason why there is uncertainty regarding the ramifications of *Stewart* is the fact that it is a review of an administrative decision. When considering the implications of *Stewart* on subsequent administrative decisions, it is also worthwhile to consider another unique aspect of Canadian administrative law, which is the limited binding value of preceding cases. As a general rule, the law gives administrative decision-makers the flexibility to respond to changes in their respective regulatory contexts.¹⁰¹ Hence, they are not strictly bound to previous decisions. Though Supreme Court decisions do hold more weight, this is perhaps a unique circumstance as the majority opinion did not change the legal regime for employment discrimination claims, nor did it offer novel clarification on the interpretation of the relevant laws. Therefore, while administrative decision-makers may identify what the Supreme Court considers a reasonable application of the two-step employment discrimination test, they still have the discretion

⁹⁷ See Jenny Wang, "Stewart v Elk Valley Corp., 2017 SCC 30" (29 November 2017), online: *McGill Journal of Law and Health* <mjlh.mcgill.ca/2017/11/29/stewart-v-elk-valley-coal-corp-2017-scc-30/>.

⁹⁸ See Faisal Bhabha, "Stewart v Elk Valley: The Case of the Cocaine-Using Coal Miner" (2018) *All Papers* 323 at 21.

⁹⁹ See *ibid.*

¹⁰⁰ See *ibid.*

¹⁰¹ See Paul Daly, "The Principle of *Stare Decisis* in Canadian Administrative Law" (2016) *Revue Juridique Thémis* 757 at 763.

to apply the law to a particular set of facts in the way they see fit.

As *Stewart* is a recent decision, it is difficult to properly ascertain the true consequences for subsequent cases. The jurisprudence reveals that administrative decision-makers adjudicating on cases of workplace discrimination against persons with addictions do to some extent use the principles enounced in *Stewart*. However, in cases where the factual circumstances do not match those in *Stewart*, the implications are seemingly not determinative. This is especially true since the majority opinion reclarified already established principles of discrimination law, even if some – like the dissenting opinion – do not believe the Tribunal applied those principles in a “reasonable manner”.

The existing post-*Stewart* jurisprudence reveals varying uses of the decision. Generally, decision-makers have seemingly viewed the contrasting majority, concurring and minority opinions in *Stewart* as reason to adopt a careful, contextualized approach when applying the law. Other decision-makers, while not completely rejecting the majority decision, have drawn inspiration from Justice Gascon’s dissent. The following three cases exemplify the varying ways in which *Stewart* has been used.

In *Humber River Hospital v Ontario Nurses’ Association*, the complainant was an emergency department nurse that worked at a hospital.¹⁰² She was terminated from her employment when she was discovered stealing and using narcotics at work.¹⁰³ The complainant brought forth a grievance to the Ontario Labour Arbitration Board, alleging that her behaviour was the consequence of an addiction and that her termination was discriminatory.¹⁰⁴ She argued that the hospital failed to meet its duty to accommodate.¹⁰⁵ In turn, the hospital argued that while the complainant’s misconduct may have been influenced by her decision, it does not follow that the hospital’s decision to dismiss her was motivated by her addiction.¹⁰⁶ Moreover, the hospital argued that the mere existence of an

¹⁰² 2018 ONLA 115718 at para 1 [*Humber River*].

¹⁰³ See *ibid* at para 1.

¹⁰⁴ See *ibid*.

¹⁰⁵ See *ibid*.

¹⁰⁶ See *ibid* at para 88.

addiction issue should not insulate an employee from disciplinary actions taken against them.¹⁰⁷

In this case, the arbitrator relied on both the majority and minority opinions in *Stewart* but did not arrive at the same final conclusion as the Supreme Court. In his analysis, the arbitrator pointed to the fact-specific nature of the majority opinion.¹⁰⁸ In *Stewart*, the majority emphasized that though it did not find *prima facie* discrimination in Mr. Stewart's case in particular, under different circumstances, it would still be possible to prove that an employee's addiction was a factor in their inability to comply with a workplace policy.¹⁰⁹ Applying the test to the particular factual circumstances of *Humber River*, the arbitrator found that there was *prima facie* discrimination.¹¹⁰ Further, at the second step of the analysis, the arbitrator echoed the minority opinion in *Stewart* and acknowledged the particular social challenges of experiencing addiction at work. Indeed, the arbitrator emphasized that "denial and the willingness to risk loss of employment in service of [an] addiction" is a common.¹¹¹ As such, it is not uncommon that an employer discovers their employee's addiction issues after an incident. In the arbitrator's view, the failure to disclose addiction issues should not preclude an employer from the duty to accommodate.¹¹²

A similarly addiction-conscious analytical approach was adopted in *Regional Municipality of Waterloo (Sunnyside Home) v Ontario Nurses*.¹¹³ Similar to *Humber River*, this case involved a registered nurse who was terminated from employment for stealing narcotics.¹¹⁴ In this case, the employer relied on *Stewart* to argue that there was no *prima facie* discrimination. Like Elk Valley did in *Stewart*, the employer in this case argued that the third factor had not been established – because the complainant did not disclose her addiction until after her conduct was discovered, her addiction was not a factor in the decision to dismiss her.¹¹⁵ The employer's submission was

¹⁰⁷ See *ibid.*

¹⁰⁸ See *ibid* at para 106.

¹⁰⁹ See *Stewart*, *supra* note 5 at para 39.

¹¹⁰ See *Humber River*, *supra* note 102 at para 130.

¹¹¹ *Ibid* at para 131.

¹¹² See *ibid.*

¹¹³ 2019 ONLA 433 [*Sunnyside*].

¹¹⁴ See *ibid* at para 1.

¹¹⁵ See *ibid* at para 102.

rejected and instead, like in *Humber River*, the arbitrator relied on similar principles from *Stewart* to conclude that the nurse's addiction was a factor in her inability to comply with the workplace policy.¹¹⁶ This case also offers insight on the extent to which some administrative decision-makers may expect employers to accommodate for employees with addictions. In this case, the arbitrator found that the employer violated their duty to accommodate by failing to consider any accommodation issues.¹¹⁷ Furthermore, the arbitrator found that based on how the work was organized and implemented, it would be possible to accommodate for the complainant.¹¹⁸ The latter finding is noteworthy as the adjudicator considered how the place of employment operated and rejected the employer's submission that accommodating for the nurse would not be possible given the requirements for her position.¹¹⁹ Instead, the adjudicator found that it would be possible for the employer to reach its objectives while also accommodating for the complainant and adapting her role.¹²⁰ This case offers guidance on how adjudicators can assess the undue hardship aspect of the *bona fide* occupational requirement test.

Interestingly, at face value, the facts in both these arbitration cases are not dissimilar to *Stewart* and notably, like *Stewart*, these cases take place at safety-sensitive worksites. Further, the arguments put forth by the employers were also all similar. In all of these cases, the employers accepted that the complainants had addictions and that they had experienced adverse treatment at work. However, they submitted that the employees' addictions were not a factor in their decision to terminate the employees. While the *Stewart* decision did not find *prima facie* discrimination, the arbitrators did find *prima facie* discrimination in *Humber River* and in *Sunnyside*. This speaks to the fact-specific reasoning in *Stewart*, as well as the level of deference that the majority gave to the original tribunal decision. Still, the majority reclarified established discrimination law principles. For example, the majority reaffirmed that in cases of indirect discrimination, the focus of the analysis should be on the effect of the disability on the employee's ability to comply with a policy, and not on the extent to which the addiction was a factor

¹¹⁶ See *ibid* at para 176.

¹¹⁷ See *ibid* at para 188.

¹¹⁸ See *ibid* at para 189.

¹¹⁹ See e.g. *ibid* at paras 204–214.

¹²⁰ See *ibid* at paras 221–222.

in the employer's decision to take disciplinary action for breach of the policy.¹²¹ It is possible that this clarification is what allowed the adjudicators in *Humber River* and in *Sunnyside* to decide differently on a similar set of facts.

In *Canadian Pacific Railway v Teamsters Canadian Rail Conference*, the arbitrator requested that the parties provide supplemental submissions focusing on the principles arising from *Stewart*.¹²² Similar to in *Sunnyside* and *Humber River*, the arbitrator in this case did not arrive at the same conclusion as *Stewart*, despite relying on the principles enounced by the Supreme Court. This case concerned a locomotive engineer who was terminated after being involved in an unavoidable collision while operating a train.¹²³ Following an investigation, it was discovered that the engineer had consumed alcohol while working.¹²⁴ He was terminated pursuant to his employer's policy on alcohol and drug use.¹²⁵ The engineer's union brought forth a complaint to the Canadian Labour Arbitration Board, alleging that he suffered from an alcohol addiction and that his dismissal was discriminatory.¹²⁶ In making his decision, the arbitrator referred to *Stewart* but recognized that the decision contained three differing opinions on how the discrimination test should have been applied to the same set of facts.¹²⁷ At the *prima facie* discrimination stage, the arbitrator stated that the case law does not support the suggestion that *prima facie* discrimination can never arise if an employee only discloses their addiction after an incident.¹²⁸ While the arbitrator acknowledged that this was examined in *Stewart*, he distinguished the factual circumstances of that case from those in *Canadian Pacific Railway*.

In these aforementioned cases, it is noteworthy that both the employers and the complainants relied on *Stewart* in their submissions. This is revealing of the varied ways through which administrative decision-makers, complainants and respondents can rely on *Stewart*. The Supreme Court was only reviewing the reasonableness of the original tribunal decision and as

¹²¹ See *Stewart*, *supra* note 5 at paras 39–46.

¹²² See 2019 CALA 8545 at para 2 [*Canadian Pacific Railway*].

¹²³ See *ibid* at para 1

¹²⁴ See *ibid*.

¹²⁵ See *ibid* at para 14.

¹²⁶ See *ibid* at para 2.

¹²⁷ See *ibid* at para 43.

¹²⁸ See *ibid*.

previously discussed, its holding was the result of fact-specific reasoning. Therefore, due to the nature of the case and the principles administration law, the practical effects of *Stewart* are perhaps not as consequential as commentators suggested initially. Nevertheless, for Canadian employers, the administrative decisions following the release of *Stewart* adds to the existing patchwork of jurisprudence that guide the creation of workplace drug policies. The following section will examine the existing Canadian workplace drug policy landscape.

Canadian Workplace Drug Policy Landscape

In Canada, employers are not offered extensive guidance on how to implement both effective and legally sound, non-discriminatory drug policies. Currently, there is no specific provision in the Canada Labour Code addressing the use of drugs and alcohol in the workplace.¹²⁹ However, the Code does require employers to implement “Hazard Prevention Programs” to protect employees from workplace hazards, which could include policies regarding impairment from the use of drugs and alcohol.¹³⁰ Moreover, drug testing in federally regulated workplaces is currently guided by jurisprudence from labour arbitration boards, human rights tribunals and courts.¹³¹ The crux of this jurisprudence involves the balancing of two competing objectives: preserving individuals’ human rights and privacy rights and ensuring safety for employees and the public.¹³² Therefore, a case like *Stewart* can serve as a source of guidance for employers.

Another tool that is available to employers is a document published by the Canadian Human Rights Commission (“the Commission”) entitled “Impaired at Work – A guide to accommodating substance dependence”.¹³³ This document offers step-by-step guidance on accommodating for substance

¹²⁹ See “Workplace impairment questions and answers” (last modified on 20 June 2019), online: Government of Canada <www.canada.ca/en/employment-social-development/services/health-safety/cannabis-workplace/questions-answers.html#h2.2-h3.1>.

¹³⁰ See *ibid.* See also Canada Labour Code, RSC 1985, c L-2, s 125(z.03).

¹³¹ See Workplace impairment questions, *supra* note 129.

¹³² See *ibid.*

¹³³ Canada Human Rights Commission, “Impaired at Work – A guide to accommodating substance dependence” (2017), online (pdf): <www.chrc-ccdp.gc.ca/eng/content/impaired-work-guide-accommodating-substance-dependence>.

dependence in the workplace. The purpose of the guide is to help federally-regulate employers implement drug policies and “address substance abuse in the workplace in a way that is in harmony with human rights legislation”.¹³⁴ The document was published in 2018 after the release of the *Stewart* decision and while it does not refer directly to *Stewart*, it does offer some guidance that would be useful in similar factual circumstances.

For example, the Commission asks employees to make a concerted effort to recognize the signs of addiction, emphasizing that individuals with addictions may not recognize nor admit they have a disability (i.e., denial).¹³⁵ As well, stigma or fear of losing a job can prevent individuals from disclosing to their employers.¹³⁶ When an employer observes changes in their employee’s behaviour that may indicate substance abuse, the employer’s duty to inquire is triggered.¹³⁷ The Commission describes the duty to inquire as the beginning of the duty to accommodate.¹³⁸ There is considerable jurisprudence on the duty to inquire as an aspect of the duty to accommodate. For example, in *Gardiner v Ministry of Attorney General*, the tribunal held that where an employer has reason to believe that a medical condition is impacting the employee’s ability to work, a failure to make inquiries regarding the employee’s health prior to taking any disciplinary action can constitute discrimination.¹³⁹ The Commission states that in safety-sensitive workplaces, this duty will be triggered upon receipt of a positive drug test.¹⁴⁰

The Commission also recommends an individualized approach to accommodation. When considering the various options for accommodation, employers should work with the employee and try to be as creative, open and flexible as possible.¹⁴¹ As relapse is an aspect substance abuse, the Commission recommends that employers be prepared to accommodate for their employee on multiple occasions.¹⁴² The Commission admits that accommodation may not always be

¹³⁴ See *ibid.*

¹³⁵ See *ibid* at 5.

¹³⁶ See *ibid* at 2.

¹³⁷ See e.g. *Hammell v Corporation of Delta and another*, 2017 BCHRT 246.

¹³⁸ See Canadian Human Rights Commission, *supra* note 133 at 21.

¹³⁹ 2003 BCHRT 41.

¹⁴⁰ See Canadian Human Rights Commission, *supra* note 133 at 6.

¹⁴¹ See *ibid* at 11.

¹⁴² See *ibid.*

possible in safety-sensitive contexts.¹⁴³ In fact, safety is often raised as the basis for establishing undue hardship. However, the Commission also emphasizes that there is no standard formula for determining undue hardship and the point of undue hardship can vary for each employer and organization.¹⁴⁴ An organization with more resources may be more able to accommodate.¹⁴⁵ Employers must also consider the magnitude of the risk and whether it is possible to move the employee to a non-safety-sensitive position.¹⁴⁶ Documents like the guide published by the Commission are valuable resources for employers, offering streamlined and accessible advice put together from a cumulation of evolving jurisprudence.

In 2018, the Canadian Centre on Substance Use and Addiction conducted a review of workplace substance use policies in Canada.¹⁴⁷ The objective of the review was to develop an overview of the state of workplace policies on substance use in Canada and identify their common components and any gaps.¹⁴⁸ The review also included key informant interviews with individuals from safety-sensitive industries.¹⁴⁹ The review found that the most well-developed and comprehensive drug policies were implemented in typically larger and more safety-sensitive organizations.¹⁵⁰ Further, it found commonalities among the implemented policies. For example, most policies contained strategies to reduce and deter substance use.¹⁵¹ Many policies also contained return-to-work components, which can be seen as a component of the duty to accommodate.¹⁵² Since relapse is a part of the recovery process, these policies often incorporate relapse as a factor that can affect the return-to-work period and include general conditions under which employees can resume their work.¹⁵³ Finally, companies that did not have

¹⁴³ See *ibid* at 5.

¹⁴⁴ See *ibid* at 115.

¹⁴⁵ See *ibid*.

¹⁴⁶ See *ibid*.

¹⁴⁷ See Canadian Centre on Substance Use and Addiction, "A Review of Workplace Substance Use Policies in Canada" (2018), online (pdf): <www.ccsa.ca/sites/default/files/2019-04/CCSA-Workplace-Substance-Use-Policies-Canada-Report-2018-en_0.pdf>.

¹⁴⁸ See *ibid* at 1.

¹⁴⁹ See *ibid*.

¹⁵⁰ See *ibid* at 3.

¹⁵¹ See *ibid* at 19.

¹⁵² See *ibid* at 21–22.

¹⁵³ See *ibid*.

accommodation components to their policies usually stated that they did not have resources or means to implement comprehensive policies.¹⁵⁴

An important finding from the review was that many organizations lacked a support component to their policies. The report found that as it stands, there is an imbalance between the disciplinary measures and the supportive measures that are incorporated into existing Canadian workplace drug policies.¹⁵⁵ Research shows that supportive measures such as conducting general health checks and offering psychological counseling can have a favourable effect on employee substance use.¹⁵⁶ Additionally, the key informant interviews revealed that the success in employee compliance with drug policies was linked to a positive and supportive work environment.¹⁵⁷

The current landscape of Canadian workplace drug policies is guided by a combination of jurisprudence and information from the government and human rights tribunals. The fact-specific nature of the reasoning in tribunal decisions render it difficult – though not impossible – to ascertain what would be considered a legally non-discriminatory policy or what sorts of accommodations the law expects from employers. Indeed, the Canadian Centre on Substance Use and Addiction’s review shows that the variance in the comprehensiveness of the Canadian policies can be attributed to an organization’s resources and the type of work that is being done.¹⁵⁸ It is seemingly difficult – and perhaps impossible – to create perfect workplace drug policies that are wholly inclusive of persons with addictions but that also respect employers’ organizational goals and their duty to keep their worksite safe. Therefore, the next section will examine how workplace drug policies can be more inclusive of persons with addictions.

Addiction Inclusivity in Workplace Drug Policies

The creation of addiction-inclusive workplace drug policies is undoubtedly a difficult task. This is especially true

¹⁵⁴ See *ibid* at 62.

¹⁵⁵ See *ibid* at 60.

¹⁵⁶ See *ibid* at 21–22.

¹⁵⁷ See *ibid* at 60.

¹⁵⁸ See *ibid* at 62.

when balanced with employers' duty to keep their worksites safe. This section reflects on the ways in which workplace drug policies can become more inclusive and adaptive to the needs of persons with addictions, while also balancing competing interests.

To begin, it is important to note that this section does not intend to diminish the importance of workplace safety goals. As previously discussed, it is true that drug use by workers can have detrimental effects on occupational health and safety. Employers have a duty of care towards their employees and are obligated to provide a safe environment and to ensure that employees are fit for work.¹⁵⁹ In fact, some scholars do believe that in safety-sensitive contexts, strict zero-tolerance policies that call for the termination of employees are both appropriate and necessary.¹⁶⁰ Similarly, the Commission also suggests that the duty to accommodate will become restricted in safety-sensitive contexts. In fact, while the Commission states that there is a duty to inquire where it is discovered that an individual may have an addiction, it also concedes that it is not always possible to meet this duty in a safety-sensitive context where immediate termination may be necessary.¹⁶¹ Notwithstanding the constraints of implementing drug policies in dangerous work contexts, this section will reflect on how such policies can be made more inclusive and easier to adhere to.

First, workplace culture can have an important influence on the behaviour of employees with addictions. Research shows that the culture of organization can influence employees' consumption patterns.¹⁶² Certain working conditions are also conducive to higher rates of consumption, such as stressful or isolated environments, low levels of supervision and psychosocial factors like poor job satisfaction.¹⁶³ Furthermore, workplace culture can shape responses to drug use, including how employees with addiction are perceived by others. Employees with addictions may use their knowledge of the workplace culture to determine whether it is safe to disclose their use or ask for accommodations.¹⁶⁴ A number of factors can

¹⁵⁹ See Roche et al, *supra* note 89 at 179.

¹⁶⁰ See *ibid* at 180.

¹⁶¹ See Canadian Human Rights Commission, *supra* note 133 at 5.

¹⁶² See Roche et al, *supra* note 89 at 178.

¹⁶³ See *ibid*.

¹⁶⁴ See *ibid* at 179.

combine to shape workplace culture in regard to addiction-related stigma.¹⁶⁵ This can include the existence (or absence) of organizational structures for dealing with discrimination and employee health issues.¹⁶⁶ It can also include the degree of acceptance and valuing of diversity in the workplace.¹⁶⁷ Fostering a more supportive workplace culture can facilitate adherence to policies like the one in *Stewart*.

Second, while self-disclosure policies like the one in *Stewart* serve as a proactive intervention to protect the interests of both employees and employers, there is inevitably a tension between privacy and safety in such policies.¹⁶⁸ A way to encourage adherence to self-disclosure policies is to make concerted efforts to protect employee privacy in disclosure mechanisms.¹⁶⁹ For example, employers can allow disclosures to be made to designated medical authorities.¹⁷⁰ Employers should emphasize that confidentiality of self-disclosure will always be made.¹⁷¹

Third, like the Commission, some authors suggest that employers must be attentive to its employees' behaviour since it has a duty to provide support even if an employee does not openly disclose their addiction.¹⁷²

Fourth, the Canadian Centre on Substance Use and Addiction recommends that organizations practice continued review and evaluation of their policies. In order to ensure policies are "appropriate, foster improvement [and] encourage employee uptake and reduce stigma", the Centre recommends that the policy development and review processes should be both iterative and consultative.¹⁷³ Employers should speak with

¹⁶⁵ See *ibid* at 179.

¹⁶⁶ See *ibid* at 179.

¹⁶⁷ See *ibid* at 179.

¹⁶⁸ See Shana Volch et al, "Keep Calm and ... Understand Cannabis: What Employers in the Energy Sector Want to Know About Legalized Cannabis" (2018) 65:2 AB L Rev 337 at 362.

¹⁶⁹ See *ibid*.

¹⁷⁰ See *ibid*.

¹⁷¹ See *ibid*.

¹⁷² See Marie-Claude Chartier, "Human Rights and Return to Work: The State of the Issue" (2006), online (pdf): Canadian Human Rights Commission <www.chrc-ccdp.gc.ca/eng/file/1580/download?token=IND_s2g_>.

¹⁷³ See Canadian Centre on Substance Use and Addiction, *supra* note 147 at 22.

employees, unions, medical experts, legal counsel and other relevant individuals that can offer pertinent advice.¹⁷⁴ Without constant review, organizations can be under the false belief that they are operating with an appropriate and functional policy, and they can face issues if a policy is ever challenged.¹⁷⁵

Finally, in a paper examining current courts' interpretation of the two-step test for finding discrimination, Maryam Shahid offers reflections on how administrative decision-makers can encourage the creation of more inclusive and accommodating drug policies through their legal reasoning in discrimination complaints. Shahid argues that the test for the *bona fide* occupational requirement allows for employers to enounce overstated and broad workplace goals that preclude individual accommodation.¹⁷⁶ Shahid contends that when employers enounce broad workplace goals (i.e., factor #1) like maintaining safety and efficiency in a workplace, the third factor of the *bona fide* occupational requirement test becomes irrelevant.¹⁷⁷ It becomes impossible to really engage with the issues of reasonable necessity and individual accommodation when an employer is seeking to meet an overly broad goal.¹⁷⁸

Therefore, Shahid proposes that adjudicators should challenge employers and ask them to outline the parameters of their organizational goals.¹⁷⁹ Then, within the context of these highly-scrutinized goals, decision-makers should be able to embark on a more astute analysis of whether an individual can be accommodated for at that specific workplace. The *Sunnyside* case is one example of Shahid's proposed method. In that case, the decision-maker looked at the employer's organizational goals as well as their resources and work structures to determine what accommodations could be made possible for the employee. In doing so, *Sunnyside* offers some insight on how administrative decisions can encourage employees to take a more individualized approach when considering accommodation for persons with addictions.

¹⁷⁴ See *ibid.*

¹⁷⁵ See *ibid* at 62.

¹⁷⁶ Maryam Shahid, "How (Not) to Interpret Moore and Meiorin: Using Two Recent Arbitral Awards to Point the Way" (2020) 16:1 J of L and Equity 37 at 40.

¹⁷⁷ See *ibid.*

¹⁷⁸ See *ibid* at 61.

¹⁷⁹ See *ibid* at 48.

Conclusion

The *Stewart* decision sheds light on the challenges faced by decision-makers examining complaints of discrimination against persons with addictions in the context of safety-sensitive workplaces. The balancing of individual human rights with employers' duty to ensure a safe worksite is a difficult task. This is further complicated by the fact that the social and psychological complexities of addiction are difficult to understand and to properly integrate into decision-makers' analyses. This paper offers some insight on how employers can create addiction-inclusive drug policies and how administrative and judicial decision-makers can better scrutinize workplace policies and employers' organizational goals. Nevertheless, the assessment of such discrimination complaints will always be a contextual, fact-specific exercise.

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