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More Uncertainty on the Test for Discrimination under Human Rights Legislation

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Case commented on: *Bish v Elk Valley Coal Corporation*, 2013 ABQB 756

I have written previous posts on ABlawg critiquing the influence of section 15 of the *Charter* in creating an overly onerous approach to the test for discrimination under human rights legislation in Alberta (see here and here). In late December, another human rights decision showing this influence was released in *Bish v Elk Valley Coal Corporation.* Unfortunately, Justice Peter Michalyshyn of the Alberta Court of Queen's Bench gave short shrift to recent developments out of the Supreme Court of Canada on the appropriate test for discrimination. He also declined to follow the Supreme Court's recent pronouncements on the appropriate standard of review in this context. The *Bish* case is now under appeal, and one has to hope that the Alberta Court of Appeal will provide some consistency with recent Supreme Court decisions in its appeal decision.

Like the *Wright* case that was the subject of one of my earlier posts in this area (*Wright v College and Association of Registered Nurses of Alberta (Appeals Committee)*, 2012 ABCA 267), *Bish* is a case involving a claim of discrimination on the basis of an addiction-related disability in a unionized workplace. Ian Stewart was an employee at Elk Valley Coal Corporation. Elk Valley had an Alcohol and Drug Policy which provided that employees "with a dependency or addiction" could proactively seek rehabilitation without disciplinary consequences; however if they did not do so and had a workplace accident related to drug or alcohol use they could not escape discipline or termination. Stewart was involved in a workplace accident when the loader truck he was operating hit another vehicle. His drug test came back positive for cocaine, and he admitted to using the drug on his days off. He told Elk Valley that he did not believe he had a problem with drugs until after the accident; he then realized he was addicted to cocaine. Stewart's employment was terminated, and his union filed a human rights complaint arguing a breach of section 7 of the *Alberta Human Rights Act (AHRA)*, RSA 2000, c A-25.5, which protects against discrimination in the employment context on a number of grounds, including disability.

At the Alberta Human Rights Tribunal, expert evidence was called by both the union and employer on the scope of Stewart's addiction. According to Justice Michalyshyn's summary of that evidence (at para 59), "Both experts … agreed Stewart was to some extent in denial (although of what there appeared to be some disagreement – Stewart's expert suggested he was squarely in denial of his addiction, whereas Elk Valley's expert appeared to allow only that he was in denial of the effects of drug use on his job-related performance…). In any event, on the evidence the Tribunal concluded that to "some degree" Stewart may have been in denial."

The Tribunal accepted that Stewart had an addiction-related disability. However, it concluded that Stewart "was not fired because of his disability, but rather because of his failure to stop using drugs, failure to stop being impaired in the workplace and failing to disclose his drug use" (*Bish v Elk Valley Coal Corporation*, 2012 AHRC 7 at para 120). The Tribunal found that there was no causal connection between the termination and Stewart's disability, and that there was no evidence of stereotyping or arbitrary treatment of Stewart. In the alternative, even if the termination was discriminatory, the employer's conduct was justified in that it could not accommodate Stewart's disability without undermining the deterrent effect of the Alcohol and Drug Policy (see 2013 ABQB 756 at paras 8-9).

The union's appeal focused on two grounds: the Tribunal's definition and application of the test for discrimination, and the Tribunal's erroneous legal and factual findings concerning accommodation. The union argued that the standard of review for both questions was correctness, while Elk Valley and the Human Rights Commission (which appeared only on the standard of review issue) argued reasonableness.

Justice Michalyshyn cited (at para 14) a number of authorities which held that the question of whether a policy is discriminatory is a question of law requiring a correctness standard of review: *Alberta (Minister of Human Resources and Employment) v Weller*, 2006 ABCA 235 at para 20; *Lockerbie & Hole Industrial Inc. v Alberta (Human Rights and Citizenship Commission, Director)*, 2011 ABCA 3 at paras 8-10; and *Alberta (Human Rights and Citizenship Commission) v Kellogg Brown & Root (Canada) Company*, 2007 ABCA 426 at paras 16-28. He acknowledged that in a more recent decision of the Supreme Court, *Canada (Canadian Human Rights Commission) v Canada (Attorney General) ("Mowat")*, 2011 SCC 53 at paras 23-24, the Court indicated that "not all questions of general law entrusted to the Tribunal rise to the level of issues of central importance to the legal system or fall outside the adjudicator's specialized area of expertise" and that "if the issue relates to the interpretation and application of its own statute, is within its expertise and does not raise issues of general legal importance, the standard of reasonableness will generally apply and the Tribunal will be entitled to deference." In *Mowat* the Court held that the question of whether legal costs may be awarded under the *Canadian Human Rights Act* should be reviewed on a standard of reasonableness. Similarly, in *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11, the Court applied a standard of reasonableness when reviewing the decision of a human rights tribunal on a question related to the interpretation of a substantive provision of its home statute.

In spite of the decisions in *Mowat* and *Whatcott*, Justice Michalyshyn found that correctness was the applicable standard of review for the question regarding the definition and application of the test for discrimination (at para 23). He relied on the fact that in cases decided after *Mowat*, the Alberta Court of Appeal continued to hold that a correctness standard was appropriate for questions about the test for discrimination and its application (see *Lund v Boissoin*, 2012 ABCA 300 and *Lethbridge Regional Police Service v Lethbridge Police Assn*, 2013 ABCA 47). The Court rejected the Commission's arguments that those cases should be distinguished because they involved different sections of the *AHRA* (*Lund*) and an arbitration decision rather than a decision of the Alberta Human Rights Tribunal (*Lethbridge Police Assn*). The Court also decided, without giving reasons, not to place weight on an even more recent decision, *Walsh v. Mobil Oil Canada*, 2013 ABCA 238, where the Court of Appeal held that questions concerning damages under the *AHRA* should be reviewed on a standard of reasonableness. Justice Michalyshyn seemed particularly persuaded by the Court of Appeal's reliance on *Rogers Communications Inc. v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35 in *Lethbridge Police Assn* for the point "that human rights issues may be decided by a number of tribunals and that where a number of tribunals have concurrent jurisdiction over an issue, consistency requires that review be conducted on a correctness standard" (*Bish* at para 20, citing *Lethbridge Police Assn* at para 28).

Although the finding that correctness was the appropriate standard of review for the test for discrimination favoured the union's position, the application of that standard did not. Justice Michalyshyn found that the Tribunal did not err in its articulation or application of the test for discrimination.

The union made several arguments here (at para 27):

a. The Tribunal applied an incorrect legal test to the Appellant's addiction disability
b. The Tribunal failed to find a causal connection or nexus between the Appellant's disability and termination
c. The Tribunal incorrectly inferred that Elk Valley's lack of intention to discriminate was relevant
d. The Tribunal considered risk to safety at the *prima facie* discrimination stage
e. The Tribunal failed to recognize a "clear case" of adverse effect discrimination.

Though the test for discrimination is never clearly articulated in Justice Michalyshyn's decision, there is some reference to a three element test (at para 29), suggesting that the basic test the Court had in mind was as follows:

> (1) does the complainant have a characteristic protected from discrimination; (2) did the complainant experience an adverse impact with respect to their employment; and (3) was the protected characteristic a factor in the adverse impact?
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> (see e.g. *Moore v British Columbia (Education)*, 2012 SCC 61 (CanLII), [2012] 3 SCR 360 at para 33).

The union's first argument focused on the misapplication of the third element of the test, where it alleged that the Tribunal imposed too rigorous a burden for employees with addiction-related disabilities. Justice Michalyshyn rejected this argument, noting that the Tribunal's references to addictions were simply its characterization of the relevant disability (at para 30).

The Court also dismissed the union's second argument that the Tribunal's rejection of a causal connection between Stewart's disability and his termination was incorrect. The Court declined to accept the union's argument that "*any* connection between the disability and the adverse treatment is sufficient for a finding of *prima facie* discrimination", preferring the employer's position that "the test for *prima facie* discrimination includes some consideration of whether that adverse treatment was based on stereotypical or arbitrary assumptions" (at paras 36, 38). The Court relied on the *Wright* case as support for this approach, noting that in turn, the Court of Appeal in *Wright* had followed the Supreme Court decisions in *McGill University Health Centre (Montreal General Hospital) v Syndicat des employes de l'Hopital General de Montreal*, 2007 SCC 4 and *Honda Canada Inc. v Keays*, 2008 SCC 39. As for the union's argument that the Supreme Court's more recent decision in *Moore* did not support a reliance on stereotyping and arbitrariness, Justice Michalyshyn noted that "Moore does not mention *McGill* or *Keays* ... There is no debate in *Moore* around arbitrary or stereotypical assumptions forming part of the *prima facie* discrimination stage of the analysis" (at para 47). Furthermore, "Coming after *Moore* is *Quebec (Attorney General) v. A.* 2013 SCC 5…, a decision more in line with Elk Valley's position, and one which fails to mention *Moore* at all" (at para 47).

This is another aspect of the *Bish* decision that I take issue with. I have expressed regret in past posts that the Supreme Court did not explicitly acknowledge the uncertainties about the proper approach to discrimination in *Moore* and tackle the debate head on (see e.g. here). Nevertheless, the Court did apply the traditional *prima facie* test for discrimination in *Moore* and did not seem to require proof of stereotyping or arbitrariness (though it did make a few offhand references to "arbitrary discrimination", which I have critiqued elsewhere). Appellate courts in other jurisdictions have taken *Moore* to signal a return to the traditional *prima facie* approach to discrimination, free from considerations of stereotyping and arbitrariness (see e.g. *Peel Law Association v Pieters*, 2013 ONCA 396 at para 55).

Proof of stereotypical or arbitrary assumptions is especially difficult to show in cases involving adverse effects discrimination, where the employer's rules or policies are neutral on their face but have an adverse impact on particular employees in ways that are connected to, for example, their disabilities. This is evident from the facts of *Bish*, where the Court noted that Stewart's addiction had not been recognized by anyone at the time of the accident (at para 45). Stereotyping and arbitrariness were virtually impossible to prove in that context. But if the employer's Alcohol and Drug Policy nevertheless had an adverse impact

on Stewart in a way that had some connection to his disability, that should have been sufficient to meet the *prima facie* test for discrimination. The Tribunal's decision was arguably incorrect on this basis.

The Court's brief mention of *Quebec v A* in *Bish* is also problematic. *Quebec v A* was a case involving equality rights under section 15 of the *Charter*, not human rights legislation. The uncertainties about the proper test for discrimination in the human rights context flow in large part from debate about the extent to which the *Charter* should influence that context, so it is inappropriate to simply rely on a *Charter* case without some analysis. Moreover, five out of nine justices in *Quebec v A* – the majority on the section 15 issue – indicated that stereotyping (and its counterpart, prejudice) were not required elements under the *Charter* test for discrimination (see 2013 SCC 5 at paras 327 (Abella J), 385 (Deschamps J), and 418 (McLachlin CJ), though see also here, where Jonnette Watson Hamilton and I note some ambiguity in McLachlin CJ's reasons). The section 15 majority justices relied in part on the fact that stereotyping and prejudice reflect intentional attitudes, whereas the *Charter* protects against both intentional and unintentional discrimination (as does human rights legislation – see *Ont. Human Rights Comm. v Simpsons-Sears*, [1985] 2 SCR 536 ("*O'Malley*")). Contrary to Justice Michalyshyn's statement about the implications of the case, *Quebec v A* could therefore be seen to support the union's argument that the Tribunal applied an incorrect test for discrimination in *Bish*.

A related issue was raised in the union's third argument – that the Tribunal seemed to infer that intent to discriminate was a necessary element of the test. The Court also dismissed this argument, stating that it was "unable to agree that the Tribunal was preoccupied with intent at all, or to the exclusion of adverse effects" (at para 48).

The union's fourth argument, that the Tribunal incorrectly considered safety issues at the discrimination stage rather than at the justification stage, was similarly rejected. According to Justice Michalyshyn, "it was appropriate for the Tribunal to consider, at the *prima facie* discrimination stage of the analysis, the drug policy context of the appellant's employment, why for example such concerns may be rationally connected to the impugned treatment in question, and therefore not arbitrary or based on stereotypes" (at para 50). This conclusion does follow from the finding that stereotyping and arbitrariness are properly part of the discrimination analysis, but it also shows the problems with that finding – complainants must answer justificatory types of arguments at the discrimination stage, which is a far cry from a *prima facie* approach to discrimination (see e.g. *Lincoln v. Bay Ferries Ltd.*, 2004 FCA 204 at para 22). A majority of the Supreme Court in *Quebec v A* similarly found that consideration of the government's objectives should not be imported into the discrimination analysis under the *Charter* (see 2013 SCC 5 at paras 334-337 (Abella J), 384 (Deschamps J) and 429-431 (McLachlin CJ)).

As for the union's fifth argument, Justice Michalyshyn found that he had already dealt with the "adverse effects" point elsewhere (at para 51). Overall, the union's arguments regarding the test for discrimination were all rejected, even though a correctness standard was said to apply.

On the second ground of appeal, concerning the justification stage of analysis, the Court found that reasonableness was the appropriate standard of review, since this ground involved questions of mixed fact and law (at paras 24-25). Interestingly though, while this standard should have favoured the employer, the Court held that the Tribunal's approach to accommodation was not reasonable.

The burden at the justification stage of analysis is on the employer, who must prove:

> (1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;
> (2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
> (3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that

> it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.
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> (*British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Service Employees' Union (B.C.G.S.E.U.) (Meiorin Grievance)*, 1999 CanLII 652 (SCC), [1999] 3 SCR 3 at para 54).

The union took issue with the Tribunal's approach to the third stage of this inquiry, arguing that it was unreasonable to find that the employer had shown accommodation of Stewart would create undue hardship. The employer argued that nothing except termination following a workplace accident would fulfill the deterrent effect of the Alcohol and Drug Policy, and that employees with addiction-related disabilities were "amply accommodated" by the provision of assistance if they sought help (at para 57). According to Justice Michalyshyn, "The flaw in the argument … is the absence of any evidence that Stewart knew, on or before the date of the accident in question, that he needed treatment under the Policy. Evidence of his addiction came only after the fact" (at para 58). Stewart thus had no basis for requesting accommodation before the accident. As noted by the Court, "The ameliorative provisions relied on by the employer do little if anything for … drug *users* who only later come to realize they were addicted to drugs" (at para 61, emphasis in original). Nor could the Policy have a deterrent effect on individuals such as Stewart who were unaware of their addictions (at para 63). The Tribunal thus erred in finding that "Stewart had the capacity to request accommodation during his employment and chose not to do so" (at para 65).

The Court's holding on the accommodation issue creates an incoherence (if not a Catch 22) with its finding on the discrimination issue. How can it be that addiction was not a factor in the adverse treatment received by Stewart – i.e. his termination was essentially the result of his choice to use drugs – yet he could not seek accommodation because of his lack of awareness of what was later shown to be an addiction? This incoherence is further proof of the problems with an approach to discrimination that places a burden on the complainant to prove stereotyping or arbitrariness on the part of the employer, even in adverse effects cases. If the evidence establishes that the employer did not fulfill its duty to accommodate the employee, it is contrary to the remedial purpose of human rights legislation to use a test for discrimination that prevents that finding from carrying the day. That is the whole point of adopting a *prima facie* approach to discrimination, which the Supreme Court did back in the 1980s in *O'Malley* and recently reaffirmed (albeit implicitly) in *Moore*. Let us hope that the Court of Appeal reaffirms that approach in Alberta when the *Bish* case comes before it.