In the Court of Appeal of Alberta

Citation: Stewart v Elk Valley Coal Corporation, 2015 ABCA 225

Date: 20150630
Docket: 1403-0001-AC
Registry: Edmonton

Between:

Brent Bish on Behalf of Ian Stewart

Respondent on Cross-Appeal
Appellant on Appeal
(Appellant)

- and -

Elk Valley Coal Corporation, Cardinal River Operations

Appellants on Cross-Appeal
Respondent on Appeal
(Respondent)

- and -

The Alberta Human Rights Commission

Respondent by Order

The Court:

The Honourable Madam Justice Ellen Picard
The Honourable Mr. Justice Jack Watson
The Honourable Mr. Justice Brian O'Ferrall

Memorandum of Judgment of the Honourable Mr. Justice Watson
and the Honourable Madam Justice Picard

Dissenting Memorandum of Judgment of the Honourable Mr. Justice O'Ferrall

Appeal from the Judgment by
The Honourable Mr. Justice P. Michalyshyn
Dated the 23rd day of December, 2013
Filed on the 23rd day of December, 2013
(2013 ABQB 756, Docket: 1203 09671)

Memorandum of Judgment

The Majority:

I Introduction

[1] The appellant Brent Bish, a union official, appeals on behalf of Ian Stewart ("Stewart") from a decision of a chambers judge which dismissed an appeal from a decision of a human rights tribunal: 2013 ABQB 756, 581 AR 234. The Tribunal had dismissed a complaint filed by the union on behalf of Stewart: 2012 AHRC 7.

[2] That complaint under s 7(1)(a) of the *Alberta Human Rights Act*, RSA 2000, c A-25.5 ("AHRA") was that Stewart's employer, Elk Valley Coal Corporation ("Elk Valley"), had discriminated against him on the grounds of physical disability. The disability was Stewart's cocaine addiction or dependency. The *prima facie* discrimination was said to have occurred when Elk Valley "refuse[d] to continue to employ" Stewart following a collision between a vehicle Stewart was operating and another vehicle on the worksite in October 2005. Stewart's ability to operate the vehicle was affected by his drug use at the time.

[3] The chambers judge agreed with the Tribunal that the manner in which Elk Valley dealt with Stewart did not constitute discrimination. However, the chambers judge disagreed with the Tribunal as to whether, if there had been *prima facie* discrimination on the basis of disability, Elk Valley's response to Stewart's conduct involved enforcing a *bona fide* occupational requirement sufficient to satisfy step three of the test in ***British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Service Employees Union (Meiorin Grievance)***, [1999] 3 SCR 3 at para 54, 176 DLR (4th) 1 (accommodation of disability short of undue hardship).

[4] A right of appeal from the Tribunal to the chambers judge lay under s 37 of the *AHRA*. Appeals to this Court from the chambers judge's decision by either side arise under s 3 of the *Judicature Act*, RSA 2000, c J-2. Appeals have been taken not only by Bish on behalf of Stewart, but by Elk Valley on the issue of reasonable accommodation together with Elk Valley's contention that its Policy and practice set out *bona fide* occupational requirements.

[5] As regards the appellant's appeal, we affirm the decision of the chambers judge to dismiss the appeal from the Tribunal on the basis that Elk Valley's termination of Stewart's employment does not amount to discrimination on the grounds of disability contrary to the *AHRA*.

[6] The question whether the Tribunal applied the proper test for *prima facie* discrimination is hotly contested on appeal. In our respectful view, the Tribunal's legal analysis on that issue was consistent with the three part test in ***Moore v British Columbia (Education)***, 2012 SCC 61 at para 33, [2012] 3 SCR 360. We remain of this view even though ***Moore*** was decided several months after the

Tribunal's ruling and even though the Tribunal did make findings that referred to arbitrariness and stereotypes. We are not persuaded that the Tribunal imported into the test for discrimination a condition that the discrimination be *based* on arbitrariness or perpetuation of historical stereotypes inconsistent with our common right to equality. We do find arbitrariness or stereotypical reasoning to be relevant however. The Tribunal's assessment of the evidence on the underlying issues of fact on the subject of discrimination was reasonable.

[7] As regards Elk Valley's appeal, we respectfully disagree with the chambers judge on the issue of reasonable accommodation. The Tribunal's legal analysis as to the test for accommodation to the point of undue hardship was also consistent with the three part test in ***Meiorin***. The Tribunal's assessment of the evidence on the underlying issues of fact to that subject was also reasonable.

[8] Contrary to the chambers judge's conclusion on this point, we are persuaded that the Elk Valley Policy and practices thereunder addressed *bona fide* occupational requirements and that they constituted relevant reasonable accommodation for persons who are said to have a disability in the nature of an addiction or dependency with *a nexus* to those requirements. In our view, the objective of maintaining a safe working environment for all employees and the objective of deterring employees engaged in perilous work from (a) failing to address their addiction or dependency *and* (b) keeping those issues secret from the employer and co-workers are valid considerations in determining whether an employment policy is "reasonable". They are also relevant to deciding whether it would be "undue hardship" for the employer to accommodate in a manner which did not as effectively serve those objectives.

II Summary of the Circumstances

[9] Stewart was terminated by letter on November 3, 2005, when, following a vehicle collision on October 18, 2005, on the work site where he struck another truck with a loader truck he was operating, he tested positively for consumption of cocaine (AEKE at Tab 1; paras. 5-6). Stewart acknowledged that he was feeling sleepy at the time of the accident as a result of his consumption of cocaine the night before: compare ***R v Konkolus***, 1988 ABCA 127 at para 10, (1988) 86 AR 144. Dr. Mace Beckson (see below) opined that his ability to handle the vehicle was affected by his drug consumption. This incident occurred several months after Stewart attended a training session where Elk Valley officials explained an Alcohol and Drug Policy which Elk Valley was promulgating for their mining operation.

[10] It was admitted as fact for the proceedings that

> ..... The Respondent operated a coal mine. Mr. Stewart worked: operating a haul truck; operating a 170 ton truck; operating a 260 ton truck; as a wheel loader operator; and finally as a plant loader operator. The coal mine is a safety sensitive workplace, and Mr. Stewart's job was safety sensitive. (AEKE at Tab 1; para. 2)

[11] It was also admitted that, during a meeting with Elk Valley officials and with the Union represented by Bish and the Union President, Stewart made the following admissions:

> During the meeting, Mr. Stewart admitted to use of crack cocaine on his days off, as well as to prior use of both crystal methamphetamine and marijuana, both of which he said he ceased using some months prior to this incident. Mr. Stewart informed the Employer that prior to the incident on 18 October 2005 and the concomitant positive drug test he 'didn't think [he] had a problem' with drugs, but that after speaking with Psychologist Gary Last, he had come to realize: "'I do think I have a problem.' When asked if he thought he was addicted, Mr. Stewart answered "yes". A transcript of the meeting is appended as Exhibit '8'." (AEKE at Tab 1; para. 8)

[12] An earlier Alcohol and Drug policy had been agreed to by the Union and by the predecessor employer on October 23, 2000. That policy was, by its terms, "subject to ongoing review and may be modified from time to time". On May 2, 2005, the employer (unilaterally) used its management rights to implement an amended "Alcohol, Illegal Drugs & Medications Policy" (the "Policy").

[13] Amongst other things, the new Policy stated that employees "with a dependency or addiction" could, before the occurrence of a "Significant Event" (which included a work related incident such as occurred here) seek assistance with the employee's rehabilitation without fear of discipline including by involuntary termination. The Policy included the following significant wording:

> The Company will assist its employees with problems of abuse, dependency, or addiction associated with Alcohol, Illegal Drugs and Medications, with an aim to preventing these problems. The Company, through its Employee Assistance Program, will provide access to treatment resources to its employees and will encourage employee participation in effective prevention and rehabilitation programs where appropriate.
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> No employee with a dependency or addiction will be disciplined or involuntarily terminated because of the employee's involvement in a rehabilitation effort or for voluntarily requesting rehabilitative help in overcoming the problem. Involvement in a rehabilitative effort or seeking rehabilitative help for an abuse, dependency or addiction problem after a Significant Event has occurred, or after a demand is made for the employee to undergo testing for reasonable cause under this Policy, will not prevent an employee from being disciplined or terminated. An employee's use of the Employee Assistance Program or other rehabilitation efforts does not eliminate the requirement of meeting satisfactory performance levels or compliance with this Policy. (Policy Part, "Prevention"). [AEKE at Tab 5; A111]

[14] It is relevant to note that this "unilateral" new Policy more clearly provided for specific employer obligation to provide assistance in the case of employees with addiction or dependency. It

also elaborated on the protection for employees who self-report in a timely manner as compared to the earlier policy. The earlier policy said, *inter alia*:

> Employees who are concerned about their use of alcohol / drugs are encouraged to seek assistance voluntarily. The employee may contract the Employee and Family Assistance Program / Assessment and Referral Service (ARS) directly, or they may approach their Supervisor, a Manager, the Safety Chairman, the Safety Manager, an EFAP representative or a Union representative for assistance in accessing resources.
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> No employee will be disciplined for voluntarily requesting help in dealing with an alcohol / drug problem. However, the Company expects the employee to fully participate in any chosen treatment and aftercare activities. Voluntary participation in a rehabilitation program of any kind does not eliminate the need for the employee to maintain satisfactory job performance. [AEKE at Tab 4; A107]

[15] The Policy went on, however, to provide that the possibility of discipline or termination could not be avoided for "abuse, dependency or addiction" sought only *after* a "Significant Event". The Policy added that it did not apply to off duty conduct "where the circumstances do not reasonably support an inference that the employee's work performance has been or may be adversely affected" (Clause 7 [AEKE at Tab 5; A115]). By its language, the new Policy commits Elk Valley to "providing a safe work environment". Once harm or danger is made real and present by the conduct of the employee who failed to seek assistance, the foundation of an employment consequence shifts from mere drug use.

[16] Similarly, the mission statement of United Mine Workers Local 1656 at the front of the relevant Collective Agreement commits to "safe working conditions". Article 14 of the Collective Agreement sets out a variety of provisions aimed at avoidance of harm on the worksite. Article 14.03 entitles employees to refrain from doing "an unsafe act" contrary to safety regulations, and immunizes the employee from sanction for such refusal. Article 5.01 under the Collective Agreement relating to "Adjustment of Grievances" applies that part of the Collective Agreement to "..... any questions related to the wages, hours of work or other conditions of employment of any employee covered by this Agreement ....." [AEKE at Tab 3; A25]. Article 20 deals with discipline by the employer and the union's involvement. Article 3 recognizes that management of the operation is "vested in the Employer".

[17] Although the Policy does not exempt employees who do not reveal a dependency or addiction issue until *after* a Significant Event from discipline, Elk Valley does not automatically terminate the employee. The Policy says:

> 6(b) If an employee tests positive in a test administered under this Policy, or if the Company investigation otherwise determines conduct contrary to the Rules of Conduct of Employees, the Company will decide whether the employee will be

> terminated or continued in employment. This decision will be based on all relevant circumstances, including (but not limited to) the following: (i) the employment record of the employee; (ii) the circumstances surrounding the Positive Test; (iii) the employee's stated pattern of usage; (iv) the likelihood that the employee's work performance has been or may be adversely affected; and (v) the importance of deterrence of such behaviour by other employees.
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> If the Company determines that the employee's conduct will be addressed in a disciplinary manner, the Company will place primary importance upon deterring similar behaviour by other employees and will terminate the employee unless termination would be unjust in all of the circumstances.
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> If the Company decides to continue the employment of the employee, the Company will require the employee to undertake whatever steps are necessary or appropriate to avoid the risk of workplace impairment in the future. If reasonable in the circumstances, an employee may be required to undergo periodic and / or random testing. The pattern and duration of such testing will be determined by the Company on an individual basis, having regard to what is reasonable in the circumstances. [AEKE at Tab 5; A114-115].

[18] To this should be added that Elk Valley had a practice of allowing terminated employees to return to employment after a six month period if they followed a rehabilitative program. In the letter dated November 3, 2005, to Stewart advising him of his termination Elk Valley wrote:

> Notwithstanding our decision to terminate your employment, we are hopeful that you will find the personal resolve that is necessary to overcome an addiction. To encourage you in this regard, we are prepared to consider an application from you, for new employment, after a period of six months from the effective date of your termination, on the following conditions: (a) there must be a suitable vacancy with the Company; (b) you have successfully completed a rehabilitation program at a recognized rehabilitation facility; and (c) you agree to a 24-month 'Recovery Maintenance Agreement' with the Company that contains terms and conditions to monitor and ensure your commitment to a drug-free lifestyle. If you are successful in complying with the 24 month Recovery Agreement, the Company will reimburse you for 50% of your rehabilitation program facility cost. We will consider an extension to the six month period if you diligently pursue rehabilitation in a timely manner but, for reasons beyond your control, you cannot access or complete the recommended rehabilitation program within that period. [AEKE at Tab 9; A146]

[19] After the education session on May 2, 2005, Stewart signed a form indicating that he understood the Policy. Nonetheless, as he admitted, Stewart chose not to inform Elk Valley of his use

of cocaine as he did not think that he had a problem with drug use prior to the accident. He spoke to no one in either his union or with Elk Valley about the issue and sought no remedial assistance.

[20] When interviewed in July of 2006 by a psychiatrist (Dr. Mace Beckson), Stewart expressed his belief that his drug use had not affected his work performance, and he admitted that he intentionally withheld the information from his employer. On the other hand, on November 4, 2005, Elk Valley got a letter from Stewart saying he had "come to realize that I do have a problem for which I am currently seeking professional help" (AEKE at Tab 11; A148). The Union offered to help him with treatment at the Northern Addiction Centre in Grande Prairie but he did not follow up with that suggestion.

[21] The evidence before the tribunal included expert opinion reports of Dr. Charles Els and Dr. Mace Beckson, both individuals possessing impressive qualifications and substantial experience in relation to (a) drug addiction and dependency and (b) the content and operation of employment policies to address such issues and their implications for the employees and the workplace. The expert opinion evidence is comprehensively described in the Tribunal decision so it would be superfluous to repeat that description here.

III Decisions of the Tribunal and the Chambers Judge

[22] As noted above, the Tribunal found, and the chambers judge agreed, that Stewart was *not* terminated after the incident because of his addiction or dependency, but that he *was* terminated for breach of the Policy. Hence there was no discrimination. The Tribunal and the chambers judge differed, however, on reasonable accommodation. We summarize the reasons given on each issue separately.

[23] We observe, parenthetically, that Stewart filed a grievance concerning his termination under the Collective Agreement, after which judicial review and an appeal followed: see 2009 ABQB 2 and 2009 ABCA 407 (both available on CanLII). We are also told that Stewart has been employed elsewhere following rehabilitation efforts for quite some time now. The parties, however, do not ask the Court to treat the matter as moot. In the circumstances of this appeal, we would exercise jurisdiction because the decision of the Tribunal and the chambers judge are both material contributions to the law in this area.

The Issue of Discrimination

[24] As mentioned, the decision in ***Moore*** at para 33 sets out a three part test:

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

> Once a *prima facie* case has been established, the burden shifts to the respondent to justify the conduct or practice, within the framework of the exemptions available under human rights statutes. If it cannot be justified, discrimination will be found to occur.

[25] In ***Telecommunications Workers Union v Telus Communications Inc***., 2014 ABCA 154 at para 28, 95 Alta LR (5th) 285 this encapsulation was acknowledged. This Court added that, for adverse effect discrimination (of which this case is one since the Tribunal was not persuaded that Elk Valley intentionally discriminated against Stewart) there could be discrimination even if, as here, Elk Valley was unaware of Stewart's disability:

> Demonstrating an employer's knowledge of an employee's disability is unnecessary, in a case alleging adverse-effect discrimination. By definition, adverse-effect discrimination is the uniform application of a seemingly neutral employment policy to all employees, regardless of whether some employees have protected characteristics. The impugned policy applies to a disabled employee whether or not the employer knows about the disability. The basic three-part test is sufficient to accommodate cases where an employer's knowledge is relevant to a *prima facie* case, and thus "knowledge" should not be added as a fourth element of the *prima facie* case test. (Tribunal Reasons, para 29).

[26] The Tribunal found that Stewart had a cocaine addiction at the material time, although Stewart concealed his use of drugs (not just cocaine) from Elk Valley and although he told Dr. Mace Beckson in 2006 that he had control over his use of drugs. The Tribunal found the addiction constituted a disability under the *AHRA* although he did note evidence of Dr. Beckson that Stewart was "not 'disabled' from making choices with respect to his compliance with the Policy" (Tribunal Reasons at para 118). That said, the Tribunal concluded that the manner in which Elk Valley dealt with Stewart was not discrimination contrary to the *AHRA* in relation to that disability. The Tribunal found that "[t]he adverse effect of the Policy as applied to Mr. Stewart came about, not because of his disability, but because of his failure to stop using drugs and his failure to disclose": (Tribunal Reasons, para 121). The Tribunal added:

> The evidence supports that the termination in those circumstances was due to a breach of the Policy and that Mr. Stewart's disability was not a factor in the termination. The Policy as applied to Mr. Stewart which resulted in Mr. Stewart's termination was not applied due to his disability, but rather because of his failure to stop using drugs and failing to disclose his drug use prior to the accident." (Tribunal Reasons, para 125).

[27] On this point, the chambers judge agreed with the Tribunal's conclusion: Reasons at para 52.

[28] In relation to this, it is pertinent to note that, on appeal, Elk Valley concedes that "there was no dispute that the first two elements of the *prima facie* discrimination test had been established: Mr.

Stewart had a disability (addiction) and had suffered adverse treatment (termination of employment)." (Factum for Elk Valley at para 80). As noted, Elk Valley persuaded both the Tribunal and the chambers judge that there was not *prima facie* discrimination on the basis that the disability itself was not a factor leading to the adverse effect.

[29] The Tribunal accepted that an addiction disability could be a platform upon which a discrimination complaint could be mounted within the Act. The Tribunal wrote that the test for discrimination had three parts:

> 115 I accept, consistent with the jurisprudence, that to establish *prima facie* discrimination in the circumstances of this case, it must be shown that:
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> a) Mr. Stewart had a disability which is protected under the Act;
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> b) The Respondent refused to continue to employ Mr. Stewart or adversely treated Mr. Stewart with regard to his employment or a term of employment; and
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> c) It is reasonable to infer that Mr. Stewart's disability was a factor in the refusal to employ or the adverse treatment.
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> 116 See *Martin v. Carter Chevrolet Oldsmobile*, 2001 BCHRT 37 (B.C. Human Rights Trib.); *Kemess Mines Ltd. v. I.U.O.E., Local 115*, 2006 BCCA 58 (B.C. C.A.) at para. 44; leave to appeal to S.C.C. refused [2006] S.C.C.A. No. 140 (S.C.C.); *Health Employers Assn. of British Columbia v. B.C.N.U.*, 2006 BCCA 57, [2006] B.C.J. No. 262 (B.C. C.A.) at para. 38 (QL), cited in *Burgess v. Stephen W. Huk Professional Corp.*, 2010 ABQB 424, [2010] A.J. No. 756 (Alta. Q.B.) at para. 63 (QL).
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> 117 A more recent aspect of the prima facie discrimination analysis applied by a minority of the Court in *Syndicat des employés de l'Hôpital général de Montréal c. Sexton*, [2007] 1 S.C.R. 161 (S.C.C.) and seemingly adopted by the majority in *Honda Canada Inc. v. Keyes*, [2008] 2 S.C.R. 362 paragraph 71, emphasizes substantive equality, distinctions as opposed to discrimination, and examining whether the adverse action of the employer based on a prohibited ground is stereotypical or arbitrary. *However, proof of prejudice or stereotyping are not additional evidentiary requirements for the Complainant in proving prima facie discrimination. Once adverse treatment is shown on the basis of a prohibited ground, an inference of stereotyping, arbitrariness or perpetuation of disadvantage will usually be drawn.* See *Hendershott v. Ontario (Ministry of Community & Social Services)*, [2011] O.H.R.T.D. No. 478; *Ontario (Director of Disability Support Program) v. Tranchemontagne*, 2010 ONCA 593 (CanLII) and *R. v. Kapp*, 2008 SCC 41 (S.C.C.) (CanLII).

> The burden of proof rests with the Complainant to establish a *prima facie* case of discrimination. Once the *prima facie* case has been shown, the onus shifts to the Respondent to provide a justification (credible on all the evidence) for the impugned action. The "persuasive burden throughout the case is the balance of probabilities": *O'Malley v. Simpsons-Sears Ltd*. (1986), 7 C.H.R.R. D/3102 (S.C.C.) at D/3108. *It is not necessary that discriminatory considerations be the sole reason for the impugned actions in order for there to be a contravention of the Act*. [Emphasis added]

[30] The Tribunal also added the following:

> 126 Given my finding that Mr. Stewart's disability was not a factor in his termination there is no inference that the application of the Policy was arbitrary or perpetuated historical stereotypes. I accept the evidence of Dr. Beckson, and common sense, that drug users and drug addicted individuals can be dangerous in safety sensitive workplaces, and find that the termination and the Policy as applied to Mr. Stewart including its ameliorative disclosure provisions, was directed at accountability for an individual who had the capacity to make choices. *The termination, in this context, did not act, either through its intent or effect, to perpetuate stereotypes or disadvantage suffered by drug addicts.*
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> 127 I understand that there is stigma attached to drug addiction and that more emphasis on assessment and rehabilitation in the Policy, rather than punishment, would reinforce the view that drug addiction is a medical disability, rather than simply an undesirable condition brought about due to weakness of will. However, the Policy contained ameliorative provisions encouraging individuals who use drugs to come forward without fear of discipline, and the opportunity to access treatment as appropriate. The termination letter allowed Mr. Stewart to reapply for employment in 6 months time affirming that Mr. Stewart, without his drug dependence, was a valuable employee.
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> 128 Neither the application of the terms of the Policy inviting disclosure without disciplinary action, nor the invitation to be reemployed with the Respondent, perpetuated stigma towards drug addicted individuals in that they were less worthy as individuals or undesirable as employees, once they refrained from their drug use. The termination through the application of the Policy spoke to the consequences of workplace drug impairment and nondisclosure of drug use. The Policy applied to both casual users of drugs as well as those who were drug addicted or dependent. *The termination through the application of the Policy did not, either through intent or effect, perpetuate disadvantage or historical stereotype against employees suffering from drug addiction.* [Emphasis added]

[31] The appellant impugns this analysis, contending that it should be read to mean that, in the Tribunal's crucial opinion, the disability had to be more than a material consideration in the action of the employer and had to be the effectuation of arbitrariness or stereotypical thinking in order for the disability to be a "factor" in the "adverse effect". In other words, the appellant submits that the Tribunal erred in setting aside the disability as a "factor" on the thesis that Elk Valley was not motivated to terminate primarily because of the disability, but primarily because of how Stewart dealt with his disability. The appellant says that the disability was still a "factor" – in this case effectively suggesting it was a factor even if Elk Valley was not mainly concerned with his disability but was dominantly concerned with enforcement of Elk Valley's Policy and practices directly aimed at employee and worksite safety.

[32] For his part, on the subject of discrimination, the chambers judge adumbrated the matter somewhat differently from the Tribunal did. He wrote:

> 35 I agree with Elk Valley that the mere addiction to cocaine - taken together with the undisputed evidence that Stewart had ample control over the addiction - does not support the conclusion in fact or in law that the Appellant's disability was a factor in his termination.
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> 36 As noted by Elk Valley, the Appellant's argument hinges on the proposition that *any* connection between the disability and the adverse treatment is sufficient for a finding of *prima facie* discrimination. That proposition was correctly rejected by the Tribunal.
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> 37 Elk Valley relies on *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employes de l'Hopital General de Montreal* 2007 SCC 4, *Honda Canada Inc. v. Keays 2008 SCC 39, British Columbia (Public Service Agency) v. British Columbia Government and Service Employees Union* 2008 BCCA 357, leave to appeal refused [2008] SCCA No. 460 ("*Gooding*"), and *Wright v. College and Assn. of Registered Nurses of Alberta (Appeals Committee)* 2012 ABCA 267, leave to appeal refused [2012] SCCA No. 486.
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> 38 Taken together these authorities support the proposition that the test for *prima facie* discrimination includes some consideration of whether that adverse treatment was based on stereotypical or arbitrary assumptions.

[33] The chambers judge specifically addressed the appellant's argument that the Tribunal's approach contravened the test in ***Moore*** by converting the meaning "a factor" as a concept. He noted the test in ***Moore*** and as discussed in ***Wright***. ***Wright*** agreed with ***British Columbia (Public Service Agency) v British Columbia Government and Service Employees Union*** 2008 BCCA 357, 83 BCLR (4th) 299, leave refused [2008] SCCA No. 460 ("***Gooding***"). Both ***Wright*** and ***Gooding*** were cases where the drug addiction disability was a background to serious dishonesty in the workplace. ***Wright***

also cited ***Armstrong v British Columbia (Ministry of Health)***, 2010 BCCA 56, 2 BCLR (5th) 290, leave refused [2010] SCCA No. 128 and ***Ontario (Director, Disability Support Program) v Tranchemontagne***, 2010 ONCA 593, 324 DLR (4th) 87. ***Wright*** said (para 65):

> Appellants rely on *Armstrong v British Columbia (Ministry of Health),* 2010 BCCA 56 at para. 27, 2 BCLR (5th) 290, leave refused [2010] SCCA No. 128, [2010] 2 SCR v and *Ontario (Director, Disability Support Program) v Tranchemontagne*, 2010 ONCA 593 at paras. 101-4, 102 OR (3d) 97, which conclude that *McGill University* does not add a separate requirement of stereotypical or arbitrary treatment to the test for *prima facie* discrimination. However, both of those cases (*Armstrong* at para. 24 and *Tranchemontagne* at paras. 101-4) confirm the need for a link or nexus between the protected ground or characteristic and the adverse treatment. Those cases conclude that the required link or *nexus* is incorporated into the core test for *prima facie* discrimination. The strength or proximity of that link or *nexus* is a mixed question of fact and law, and an important component in the analysis is whether the treatment is in fact stereotypical or arbitrary, and whether it affronts concepts of human dignity. Not any *nexus* or connection, no matter how remote, is sufficient. The medical cause, while relevant, may not equate to a legally recognized cause.

[34] Based on this line the chambers judge added:

> 45 As to the appeal before me, the Tribunal was correct to find no causal connection or nexus between Stewart's disability and termination. To paraphrase from *Wright*, to the extent Stewart unsuccessfully alleged direct discrimination, the case before the Tribunal was dismissed on a factual basis; the evidence properly understood supported the conclusion that Stewart was terminated for his failure to stop using drugs and for his failure to disclose. As to alleged indirect discrimination, on the whole there was no serious dispute that Stewart did not believe he was addicted before the accident and was therefore in control of his drug use. That he may have been in denial and as such that his addiction was 'in play', in my view changes nothing. Stewart was treated not as a drug addict but as a drug user. As such, the Tribunal found, consistent with the evidence, that the decision to terminate was not based on arbitrary or preconceived stereotypes. In the circumstances the mere presence of an addiction which had not been identified by anyone at the time of the accident, fails to elevate the employer's decision to *prima facie* discrimination in law.
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> 46 Finally, the Appellant says *Moore v. British Columbia (Education)* 2012 SCC 61 at para. 33 supports Stewart's position that a finding of *prima facie* discrimination should be made free of any consideration of arbitrary or stereotypical assumptions. The Appellant says *Moore* trumps the *McGill/Keays* line of cases not to mention the *Gooding/Wright* line of cases in the provincial courts of appeal.

> 47 I am unable to agree that *Moore* supports the Appellant's cause. *Moore* does not mention *McGill* or *Keays* or for that matter *Gooding* or *Wright*. There is no debate in *Moore* around arbitrary or stereotypical assumptions forming part of the *prima facie* discrimination stage of the analysis. 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.

[35] To put this in perspective, we repeat that the Tribunal found that Stewart had the capacity to control his use of drugs. This conclusion was amply supported by the expert evidence before the Tribunal and even by Stewart's own perspective. Plainly, Stewart was not driven in some way to breach the Policy at work *because* of inability to control his drug use. His was an effort to conceal his drug use. He consciously gambled that he would not be found out as a user of drugs. The Tribunal more specifically found that Stewart had the capacity to exercise the remedial aspect of the Policy and to seek help for his use of drugs, but that he simply failed to stop using drugs, failed to inform his employer, and failed to stop being impaired in the workplace. In so saying, the tribunal accepted the diagnosis of Dr. Mace Beckson from July, 2006, that "while Mr. Stewart was addicted to cocaine during his employment at the mine, he did not lack the capacity to change his behaviour if he chose": (Tribunal Reasons, para 108). This is not at all like ***Central Alberta Dairy Pool v Alberta (Human Rights Commission),*** [1990] 2 SCR 489, 72 DLR (4th) 417, where the employee was fired due to religious belief and not fired for absenteeism, insubordination, breach of policy or other misconduct.

[36] We pause here to note that the appellant disputes Elk Valley's argument in particular for its reliance on comments of this Court in ***Wright v College and Assn. of Registered Nurses of Alberta***, 2012 ABCA 267 at paras 50 to 54, 536 AR 349 leave denied [2012] SCCA No 486 (QL). The appellant asserts that ***Wright*** was wrongly decided if it suggested that arbitrariness or stereotypical thinking was necessary for a finding of discrimination. ***Wright*** was also decided after the Tribunal decision here, so it could not skew the Tribunal's reasons whether incorrect or not (and it is not incorrect). We also note that leave to challenge the *ratio decidendi* in ***Wright*** was not sought nor granted in this case. We see no error in the decision in ***Wright*** in any event.

The Issue of Accommodation

[37] As noted, here the Tribunal and the chambers judge disagreed.

[38] The Supreme Court explained the language of "impossible to accommodate" - contained in that third strand of ***Meiorin*** - as "undue hardship". In ***Hydro-Québec v Syndicat des employée-s de techniques professionnelles et de bureau d'Hydro-Québec, Local 2000 (CUPE-FTQ)***, 2008 SCC 43 at paras 12 to 19, [2008] 2 SCR 561 notably at para 12, the Court stated: "What is really required is not proof that it is impossible to integrate an employee who does not meet a standard, but proof of undue hardship, which can take as many forms as there are circumstances."

[39] The appellant argued before the Tribunal that Elk Valley had "failed to accommodate Mr. Stewart to the point of undue hardship because the employer failed to do a review and medical assessment of Mr. Stewart, and because the employer rejected all 'viable other forms of accommodation'": Tribunal Reasons at para 138.

[40] Elk Valley replied that Stewart's conduct was in breach of *bona fide* occupational requirements set out in a Policy explained to him and Elk Valley's practice under that Policy, and the termination was not merely a response to drug use. Elk Valley said its regime reasonably accommodated persons with disabilities analogous to Stewart's situation.

[41] The Tribunal was satisfied that the Policy and practice of Elk Valley involved *bona fide* occupational requirements that satisfied the third strand of the ***Meiorin*** test which the Tribunal cited and quoted. That Policy included the pre-incident employee assistance plan and supplemented by Elk Valley's practice of giving even terminated employees a second chance if they successfully complete a suitable rehabilitative program. The Tribunal was satisfied that there was a rational connection between the Elk Valley Policy objectives and language and with the requirements of the specific workplace. It was also satisfied that the Policy was adopted in good faith with the objectives set out therein.

[42] The Tribunal set out the position on the third element of ***Meiorin*** thus:

> 149 Again, I accept Mr. Jones' evidence of the Policy in terms of how the Policy was formulated, and its philosophy and objective in terms of prevention and safety. I am satisfied that the termination of Mr. Stewart through the application of the Policy in this safety sensitive environment was reasonably necessary to provide a deterrent effect to drug users and drug addicts, ultimately resulting in a safer workplace. In terms of the procedural duty to accommodate, the Complainant's counsel is correct that there is a duty to inquire and that following up with questions or requests for medical information prior to taking adverse action against an employee when a disability is reasonably suspected, is part of the accommodation process in most human rights circumstances. See *A.T.U., Local 583 v. Calgary (City) (Carp Grievance)*, Alta. G.A.A. 2004-078, [2004] A.G.A.A. No. 75; and *Gardiner v. British Columbia (Attorney General)*, 2003 BCHRT 41, [2003] B.C.H.R.T.D. No. 40 at para. 163 (QL). However, there is also a duty of the individual with the disability to request accommodation for that disability where the individual, like Mr. Stewart, has the capacity to request accommodation: *Central Okanagan School District No. 23 v. Renaud* (1992), 16 C.H.R.R. D/425 (S.C.C.). Further, offering Mr. Stewart the opportunity for assessment, rather than the harsher and immediate consequence of termination, would undermine the deterrent effect of the Policy so important in this safety sensitive workplace.

> 150 I accept that, pursuant to *Meiorin*, examining alternative approaches which have less discriminatory effect, in furtherance of achieving the reasonable objective, is also part of the duty to accommodate. Continuing with the first policy is an alternative approach instead of proceeding to enforce the harsher consequences enunciated under the new Policy. However, again, in my view offering an assessment without termination to Mr. Stewart as a consequence, given that Mr. Stewart was able to make conscious choices regarding his drug use, would dilute the purpose of the Policy. I am also mindful of Dr. Beckson's evidence that failing to hold Mr. Stewart accountable through significant negative consequences typically only enables drug use, and would not provide Mr. Stewart with sufficient motivation to change his behaviour. With all due respect to the opinion of Dr. Els, while rehabilitation may be a disincentive to a drug dependent employee, in my view, termination of employment acts as a much greater deterrent to an employee like Mr. Stewart, who is capable of making choices about his behaviour. Similarly, a suspension as a disciplinary measure, as opposed to the harsher consequence of termination, is not of sufficient consequence to strengthen the deterrent effect of the Policy, decrease drug use and addiction affecting the workplace, and ultimately increase safety.
>
> 151 Additionally, allowing the employee who comes forward the opportunity to access treatment resources without fear of discipline, should be considered as part of the accommodation provided to Mr. Stewart and other employees with addiction disabilities. Offering the opportunity of reinstatement in 6 months under certain reasonable conditions, also contributes to accommodation responsibilities. The Respondent agreeing to pay 50% of the rehabilitation program facility cost, as set out in the termination letter, also provides accommodation for Mr. Stewart's disability.
>
> 152 The Respondent emphasized their safety responsibilities both from a moral and legal standpoint. The workplace was clearly safety sensitive as was Mr. Stewart's job within that workplace. I accept that the accommodation offered through the ameliorative disclosure provisions of the Policy, the 6 month offer of reinstatement and the offer to pay a portion of the rehabilitation costs as per the termination letter, constituted appropriate accommodation in the facts of this case, to the point of undue hardship. If the Respondent had to offer the opportunity for assessment to Mr. Stewart or replace the harsher and immediate effects of termination of employment with less serious consequences, the deterrent effect of the Policy would be significantly lessened, and constitute an undue hardship to the company, given the Respondent's safety responsibilities.

[43] The chambers judge, however, concluded that Elk Valley's Policy and practice was insufficient accommodation. The chambers judge did not suggest that a policy to prevent drug influenced employee vehicle or machine operation at this hazardous worksite was not a *bona fide*

occupational requirement. But he was not persuaded that the structure of Elk Valley's Policy and practice was accommodation to the point of undue hardship. [No one appears to have argued that a 'case-specific' exception arose by application of s 11 of the *AHRA* ("A contravention of this Act shall be deemed not to have occurred if the person who is alleged to have contravened the Act shows that the alleged contravention was reasonable and justifiable in the circumstances.")].

[44] We pause again to note at this point that the chambers judge found, at para 55, that the appellant had conceded the first two elements of the ***Meiorin*** test in argument before him stating: "the Appellant does not dispute that Elk Valley adopted the Policy for a purpose rationally connected to the performance of the job in question, and that it adopted that standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose." Curiously, this concession is not expressly repeated in the appellant's Factum to this Court. Indeed, Elk Valley accuses the appellant of raising new allegations of fact on appeal that are inconsistent with the agreed facts or findings of the Tribunal, and inconsistent with that concession (Elk Valley Factum at paras 137 to 138). This point can be briskly dealt with. There are unambiguous fact findings by the Tribunal on these points and no basis to consider them as being infected with palpable and overriding error.

[45] The chambers judge, for his part, opined that the decisive point for accommodation was that on the evidence, as he construed it, Stewart's state of denial about being an addict caused him to think he had nothing to report under the Policy. Therefore, Elk Valley's accommodative offering of no-risk self-reporting was inadequate. To escalate this reasoning to the general level necessary to characterize the matter as work site accommodation, the chambers judge wrote:

> 58 The flaw in the argument, and respectfully I find in the Tribunal's reasoning and findings, 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. No one disagreed that Stewart had no pre-accident awareness of it.
>
> 59 Both experts before the Tribunal 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, although in cross examination he appeared to allow that "... [Stewart was] in denial of the idea that he has a drug problem"). In any event, on the evidence the Tribunal concluded that to "some degree" Stewart may have been in denial.
>
> 60 The Tribunal went on to find (at the accommodation stage of its reasons, paras 149-150) that Stewart had a duty to request accommodation before the accident because he was an "... individual with the disability" and had the capacity to request accommodation.

> 61 On my reading of the evidence however Stewart only had capacity to control his drug use. Equally on the evidence, Stewart did not know he was an 'individual with a disability'. On the evidence, before the accident he was simply an individual who used drugs. The ameliorative provisions relied on by the employer do little if anything for such an individual. The Policy protects from discipline or involuntary termination only those individuals who have a "dependency or addiction" and who seek treatment before an accident. It does not apply to drug *users* who only later come to realize they were addicted to drugs.
>
> 62 Mindful of the reasonableness standard of review, I nevertheless respectfully find that the Tribunal thus erred when it found Stewart was in [sic] 'individual with a disability' who could reasonably be expected to comply with the Policy by seeking treatment before the accident.
>
> 63 I respectfully find that the error was repeated when the Tribunal found that the deterrent value of termination under the Policy was appropriate when dealing with an individual, like Stewart, "... who [was] capable of making choices about his behaviour" (at para. 150). Again, while Stewart was capable of choosing when and when not to use drugs, equally he was not "capable" of seeking treatment under the Policy by reason of a dependency or addiction he did not know he had.
>
> 64 I respectfully find the error yet further repeated, although earlier in the Tribunal's reasons, when it commented on the reasonableness of Elk Valley's policy as it required "... employees who use drugs, or who are drug addicts, to come forward without fear of disciplinary action, and disclose their drug use and access treatment, where appropriate". (at para. 124) Again, the ameliorative provisions of the Policy upon which Elk Valley relies do not apply to mere drug users.

[46] In the end, the chambers judge appears to have found the Policy to fall short of the line of undue hardship despite the impact on deterrence of allowing employees to come to grips with the implications of their drug use after an “incident”. The chambers judge did not factor into this decision the practice of allowing employees a chance to return to work after rehabilitation or treatment.

IV Standard of Review

[47] In our respectful view, the standard of review as to the extricable questions of law respecting the scope in law of the definition of discrimination set out in ***Moore*** and the definition of *bona fide* occupational requirement / accommodation set out in ***Meiorin*** must be correctness. These definitions are questions of law of fundamental significance to the Canadian legal system. They are concepts for which first instance assessment and application directly occurs in various tribunals and in proceedings before judges of superior courts.

[48] Oliver Wendell Holmes referred to the "interstitial" nature of judicial law making in ***Southern Pacific Co. v Jensen***, 244 US 205 at p 221 in 1926 saying:

> I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions. A common-law judge could not say I think the doctrine of consideration a bit of historical nonsense and shall not enforce it in my court.

His point was that courts must be careful and act incrementally -- not an unfamiliar refrain in Canada: see eg ***Bow Valley Husky (Bermuda) Ltd v Saint John Shipbuilding Ltd***, [1997] 3 SCR 1210, 153 DLR (4th) 385, per McLachlin J as she then was at p 1262.

[49] But making law remains the rule of law obligation of independent judicial courts. It is not the role of tribunals or state agents or officials who, in essence, are emanates of the executive branch of government doing the *practical* will of the executive and legislative branches. Judicial review exists to make sure the decisions and process of such tribunals or state agents conform with the rule of law in so doing. As pointed out in ***Lake v Canada (Minister of Justice)***, 2008 SCC 23 at para 41, [2008] 1 SCR 761, 2008 SCC 23, referring to the broad, even political discretion of the Minister of Justice on surrender of extradition subjects:

> ..... To apply this standard in the extradition context, a court must ask whether the Minister considered the relevant facts and reached a defensible conclusion based on those facts. I agree with Laskin J.A. that the Minister must, in reaching his decision, apply the correct legal test. The Minister's conclusion will not be rational or defensible if he has failed to carry out the proper analysis. .....

[50] There is no legal space for a multitude of inconsistent legal meanings to the constituent elements of the ***Meiorin*** or ***Moore*** definitions in our Constitutional order, notably as they are common law elaborations of statute. Multiple answers to those legal definitions could not be equally defensible or acceptable. The presumption of reasonableness to a tribunal's interpretation of terms of a 'home statute' is therefore rebutted in this specific respect.

[51] The Commission has intervened to advance a strong argument that it should get deference on *all* legal issues under its authorizing statute -- deference being appropriate on many procedural or evidential points.

[52] The tests in ***Meiorin*** and ***Moore*** may be changed by the Supreme Court of Canada over time, but as they are central pillars of the law of the people, their meaning cannot be variable depending on the composition or purpose of the tribunal. The policy rationale for this was elegantly expressed in quite a different context by Lord Shaw of Dunfermline when he said "[t]o remit the maintenance of constitutional right to the region of judicial discretion is to shift the foundations of freedom from the rock to the sand" (***Scott v Scott*** [1913] AC 417, p 477).

[53] On the other hand, it is conspicuously plain that the roles of tribunals, like those of courts, involve examination and assessment of evidence. The role of the tribunal will also involve the production of a decision which explains or at least demonstrates how the tribunal views that evidence (depending on how much the law might require as to reasons). Absent a specific statutory direction requiring otherwise, it is hard to envision why a presumption of reasonableness would not apply to such factual determinations. This is particularly so when many, if not most, enactments creating tribunals provide for great flexibility for the tribunals as to admissibility of evidence and procedure, meaning limits on process itself tend to be based primarily on considerations of fairness and what used to be called natural justice.

[54] To defer to tribunal fact findings and tribunal exercises of discretion, coupled with applying correctness to foundational law principles is not to replicate in these statutory appeals the scope of review of appeals in the ordinary courts. While adopting an analogous approach as between court appeals and administrative law judicial review might ultimately become a good idea for administrative law generally - now that judicial review is firmly entrenched in our Constitution - it is plain that, for now, the Supreme Court has established the view that the law of judicial review differs, and it operates with the presumption of reasonableness for what might be loosely characterized as the 'law of the tribunal': see ***Mouvement laïque québécois v Ville de Saguenay***, 2015 SCC 16, 382 DLR (4th) 385.

[55] In reaching our conclusion that correctness must apply to the interpretation in law made by this Tribunal as to the scope and meaning of the ***Meiorin*** and ***Moore*** tests, we had already written a longer version what follows before the recent decision in ***Saguenay***. In light of ***Saguenay*** we can now summarize the law before ***Saguenay*** in this way:

(a) ***McCormack v. Fasken Martineau DuMoulin LLP.***, 2014 SCC 39 at paras 16 to 19, [2014] 2 SCR 108 holds for correctness on foundational issues of a human rights code, albeit that as quasi-constitutional legislation it "attracts a generous interpretation to permit the achievement of its broad public purposes". The fact that the Court in ***Fasken***, like the Court in ***Moore***, was dealing with a statutory context in British Columbia which is somewhat different from Alberta's situation does not persuade us that correctness should not be the test. For this statute, there are no legislative signals favouring deference on those important legal questions. There is no privative clause and there is a comparatively broad right of appeal: see ***Tervita Corporation et al. v Canada (Commissioner of Competition)***, 2015 SCC 3 at paras 36 to 39, 380 DLR (4th) 381.

(b) In actuality, the *AHRA* gives at least two signals like ***Tervita*** rebutting a presumption of reasonableness for legal interpretations of ***Meiorin*** and ***Moore***. One is in s 37(4) of *AHRA* which provides that the appeal court (Court of Queen's Bench) may on appeal "..... confirm, reverse or vary the order of the human rights tribunal and make any order that the tribunal may make under section 32 .....". The other is in s 36 which provides that an order made by

a tribunal may be filed with the clerk of the Court of Queen's Bench and "enforceable in the same manner as an order of the Court of Queen's Bench". In other words, the Legislature has indicated that the Court and the Tribunal are dealing with 'rule of law' questions.

(c) Further, those fundamental legal definitions are not only at "home" in the statute of this tribunal exclusively. In ***Rogers Communications Inc. v Society of Composers, Authors and Music Publishers of Canada,*** 2012 SCC 35 at para 15, 347 DLR (4th) 235, it was pointed out that directly shared broad legal questions cannot be said to only be pieces of the "discrete ... administrative regime". Unlike the reference in ***Rogers Communication*** to the *Canadian Human Rights Act*, RSC 1985, c H-6, there is a shared primary jurisdiction between this tribunal and the Court of Queen's Bench, the latter reviewable in this Court. Moreover, it cannot be discerned why members of such tribunals would have an expertise advantage over superior court judges: see the discussion of 'rebuttal' of the presumption in ***Johnstone v Canada (Border Services),*** 2014 FCA 110 at paras 39 to 52, 459 NR 82.

(d) Further still, as pointed out in ***Canada (Canadian Human Rights Commission) v Canada (Attorney General)***, (***Mowat***) 2011 SCC 53 paras 21 to 24, [2011] 3 SCR 471 some questions of general import under human rights statutes call for correctness, while others, of less general import, do not. In the end, the scope of reasonableness may get down to a single acceptable and defensible answer. The nature of the "home statute" administered by a human rights tribunal makes the task of resolving the tension between law questions needing correctness review and those deserving reasonableness review a particularly delicate one. A key part of any human rights legislation in Canada consists of principles and rules designed to combat discrimination. But, these statutes also include a large number of provisions, addressing issues like questions of proof and procedure or the remedial authority of human rights tribunals or commissions. 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. Proper distinctions ought to be drawn, especially in respect of the issue that remains before our Court.

(e) In ***Lethbridge Regional Police Service v Lethbridge Police Association***, 2013 ABCA 47 at para 28, 542 AR 252, leave denied [2013] SCCA No 159 (QL), (albeit dealing with an arbitrator under a collective agreement) the standard of review on the key legal definition was correctness. See also ***Wright*** at para 34 (albeit for another different form of tribunal, namely a professional governance body); ***Lund v Boissoin***, 2012 ABCA 300 at paras 36 to 38, 536 AR 272, referring to ***Lockerbie & Hole Industrial Inc v Alberta (Human Rights and Citizenship Commission, Director)***, 2011 ABCA 3 at paras 8-10, 329 DLR (4th) 76; ***Alberta (Human Rights and Citizenship Commission) v Kellogg Brown & Root (Canada) Company***, 2007 ABCA 426 at paras 16 to 28, 425 AR 35; and ***McLean v British Columbia (Securities Commission)***, 2013 SCC 67 at paras 22 to 24, [2013] 3 SCR 895 which held that "correctness standard was appropriate because of a statutory scheme under which both

> an administrative tribunal and the courts had concurrent jurisdiction at first instance in interpreting the relevant statute". ***McLean*** did not apply the correctness standard in the circumstances which involved an issue about limitation periods stating at para 24: "This case is different ... [as] there is no possibility of conflicting interpretations ...".

[56] The intervener Human Rights Commission asserts expertise on this issue and, as a result, presses for a reasonableness standard to be applied to its tribunals respecting findings of *prima facie* discrimination citing, in particular, ***Saskatchewan (Human Rights Tribunal) v Whatcott***, 2013 SCC 11 at paras 166 to 168, [2013] 1 SCR 467. But the matter is now settled by ***Saguenay***. As mentioned above, the application of judicial review principles to statutory appeals was clearly affirmed by the Supreme Court. But the implications of doing so did not jettison the 'rule of law' role of courts under judicial review and the Supreme Court majority in ***Saguenay*** set out as follows:

> 46 Deference is in order where the Tribunal acts within its specialized area of expertise, interprets the *Quebec Charter* and applies that charter's provisions to the facts to determine whether a complainant has been discriminated against (*Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] 1 S.C.R. 467, at paras. 166-68; *Mowat*, at para. 24). In *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at paras. 30, 34 and 39, the Court noted that, on judicial review of a decision of a specialized administrative tribunal interpreting and applying its enabling statute, it should be presumed that the standard of review is reasonableness (C*anadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135, at para. 55; *Canadian Artists' Representation v. National Gallery of Canada*, 2014 SCC 42, [2014] 2 S.C.R. 197 ("NGC"), at para. 13; *Khosa*, at para. 25; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, at paras. 26 and 28; *Dunsmuir*, at para. 54). In such situations, deference should normally be shown, although this presumption can sometimes be rebutted. One case in which it can be rebutted is where a contextual analysis reveals that the legislature clearly intended not to protect the tribunal's jurisdiction in relation to certain matters; the existence of concurrent and non-exclusive jurisdiction on a given point of law is an important factor in this regard (*Tervita*, at paras. 35-36 and 38-39; *McLean*, at para. 22; *Rogers*, at para. 15).
>
> 47 Another such case is where general questions of law are raised that are of importance to the legal system and fall outside the specialized administrative tribunal's area of expertise (*Dunsmuir*, at paras. 55 and 60). Moldaver J. noted the following on this point in *McLean* (at para. 27):
>
> > The logic underlying the "general question" exception is simple. As Bastarache and LeBel JJ. explained in *Dunsmuir*, "[b]ecause of their impact on the administration of justice as a whole, such questions require uniform and

> consistent answers" (para. 60). Or, as LeBel and Cromwell JJ. put it in *Mowat*, correctness review for such questions "safeguard[s] a basic consistency in the fundamental legal order of our country" (para. 22).

48 As LeBel and Cromwell JJ. pointed out in *Mowat* (at para. 23), however, it is important to resist the temptation to apply the correctness standard to all questions of law of general interest that are brought before the Tribunal:

> There is no doubt that the human rights tribunals are often called upon to address issues of very broad import. But, the same questions may arise before other adjudicative bodies, particularly the courts. In respect of some of these questions, the application of the *Dunsmuir* standard of review analysis could well lead to the application of the standard of correctness. But, 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.

[57] In the result, correctness applies to the *legal* interpretation of the ***Meiorin*** and ***Moore*** standards by the Tribunal and for that matter to the decisions of the chambers judge and this Court on the same questions.

[58] Correctness would not apply to the underlying fact findings such as respecting what is; (a) the specific work environment; (b) the taxonomy of relevant and reasonable occupational requirements in that environment; (c) the reality of employer-employee relations in that environment; (d) the content of collective agreements or other arrangements involving the employer and employees, would deserve deference. Equally, matters such as the credibility of witnesses or the value of expert evidence and so on are matters of fact or are contributors to conclusions of mixed law and fact. For those things, a review standard of reasonableness is appropriate with the deference associated therewith being owed: ***Saguenay***.

[59] Before leaving the topic of standard of review, we would venture the further observation that the *cri de coeur* of this Court in ***Edmonton East (Capilano) Shopping Centres Ltd v Edmonton (City),*** 2015 ABCA 85, at paras 11 to 23, 382 DLR (4th) 85, under motion to SCC on File No. 36403 is not out of sync with what is said here. The conclusion in the case at bar is a product of the lines of analysis that have emerged since ***Dunsmuir***. With the Constitutionalization of judicial review as a central feature of the role of the superior courts in the guarantee and enforcement of the rule of law, it may be time for the legal evolution of judicial review / tribunal appeals to reach the stage of a comprehensive rationalization. It may be that due respect for legislative intent is reflected not in semantics or presumptions about what sort of review attends a question of law, but in realistically defining what is a question of law (as compared to exercise of discretion or mixed fact and law). We turn now to analyze the merits of the appellant's submissions on the appeal.

V Analysis

Discrimination on Disability

[60] The main submission for the appellant commences with the submission that "the test for discrimination under human rights legislation should remain the traditional *prima facie* approach, unencumbered by extra requirements that may be imported via section 15 of the *Charter*": (Appellant's Factum at para 30, citing an unpublished paper submitted to the Canadian Journal of Human Rights by Jennifer Koshan). The appellant's premise is, in effect, that the Tribunal inserted an "extra requirement" to the ***Moore*** test, namely that an addiction disability only qualifies as "a factor" in *prima facie* discrimination if there is arbitrariness or stereotypical thinking involved in the employer's response to the employee that constitutes the adverse impact upon the employee.

[61] Put another way, the appellant says that Stewart's disability was, on the evidence, a factor in his breach of the Policy because he was under the influence of drugs when on the job (in the opinion of Dr. Beckson) and when the incident of October 17, 2005 occurred. The appellant says that the "rigid and inflexible application of the Policy" by Elk Valley, therefore, necessarily is attributable to the disability at least in part. Indeed, the appellant goes on to contend that Elk Valley's position is that the disability would only be "a factor" in the application of Policy to Stewart if Stewart's disability was so disabling that he was incapable of complying with the Policy. The appellant's quotes from oral argument before the chambers judge by counsel for Elk Valley for this layer of Elk Valley's position.

[62] The appellant's position in this regard conflates the question of whether the disability was a factor in the breach of the Policy with the question whether the disability was a factor in the adverse impact. By blending the two points, the appellant's position substantially distorts what ***Moore*** is concerned with, namely the imposition by employers of "adverse" effects either wholly or in part on the basis of the disability suffered by the employee. Section 7 of the AHRA provides as follows:

> 7(1) No employer shall
>
> (a) refuse to employ or refuse to continue to employ any person, or
>
> (b) discriminate against any person with regard to employment or any term or condition of employment,
>
> because of the race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status or sexual orientation of that person or of any other person.
>
> (2) Subsection (1) as it relates to age and marital status does not affect the operation of any bona fide retirement or pension plan or the terms or conditions of any bona fide group or employee insurance plan.

> (3) Subsection (1) does not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.
>
> RSA 2000 cH-14 s7; 2009 c26 s6

[63] The relevant part of the test in ***Moore***, drawn from analogous legislation, is "that the protected characteristic was a factor in the adverse impact". Comparable to case law concerning reprisal against employees who complain about employer actions, the test in ***Moore*** clearly contemplates that the *disability* be a real factor in the adverse impact and not just part of the necessary background.

[64] To do as the appellant would have it -- namely to say Stewart's disability was a factor in the adverse impact because the adverse impact arose from the breach of Policy and the disability was a factor in the breach of the Policy -- is essentially to say that any adverse impact arising from any breach of the Policy is *prima facie* discrimination. In turn, therefore, it means that *any* employer resort to any such Policy that attempts to balance drug addiction / dependency and work place safety will necessarily *always* be *prima facie* discrimination. So by that theory, both the Policy and the employer reaction must be verified under the ***Meiorin*** test in every conceivable situation.

[65] The appellant's approach would amend the meaning of s 7 of the *AHRA*, notably the words "because of ... physical disability". As pointed out in ***Canada (Canadian Human Rights Commission) v Canada (Attorney General),*** 2011 SCC 53 at para 64, [2011] 3 SCR 471 ("***Mowat")*** it was not within the Tribunal's jurisdiction to apply "...what it considered to be a beneficial policy outcome rather than engage in an interpretive process taking account of the text, context and purpose of the provisions in issue." *A fortiori* it was not necessary for the Tribunal or the chambers judge to accede to the appellant's submission to that effect. Section 7 does not say "because of intentional breach of employer safety policies which address abuse of alcohol or drugs which abuse for some employees may be related to a physical disability". Cigarette smoking is largely regarded as an addiction. If there is a Policy that no one can smoke within certain zones of an employment environment, an employee can be disciplined for breach of that Policy without regard to their level of cigarette use, even if they just started.

[66] The Tribunal's decision does not affront the test in ***Moore***. In either of two ways that one can interpret the Tribunal's decision, the disability did not constitute a real factor in the adverse impact. In either case, the Policy did not distinguish between people with disability and people without. It distinguished between people who break the Policy and people who do not. As pointed out in ***NWT (WCB) v Mercer***, 2014 NWTCA 1 at para 31, 569 AR 153 quoting ***Tranchemontage*** at para 93: "not all distinctions which create a disadvantage are discriminatory".

[67] As to the first way of interpreting the Tribunal decision, the Tribunal only considered arbitrariness or stereotypical / discriminatory thinking as an alternative to the Tribunal's first conclusion, which was that the disability had nothing to do with the adverse impact.

[68] On this point of disability having nothing to do with the adverse impact, the Policy is broader than disability cases. Obviously Elk Valley or any employer would not want a person whose job is to operate loaders or 170 ton vehicles to be under the influence of alcohol at work, even if they have no problem with alcohol or drugs whatsoever. To the extent the Policy singles out the subset of employees who have or believe they may have alcohol or drug addiction or dependency, of whom perhaps a smaller subset are people who have such a disability, the Policy provides for a protected route to assistance, and not for "rigid and inflexible discipline".

[69] The Policy allows for disciplinary response (adverse impact) arising from a significant event or from a positive drug test done on sufficient grounds. In ***Kellogg Brown & Root***, referred to above, this Court accepted that there is risk to safety from mere use of drugs, so the fact that the person was refused employment as he was a 'recreational' marijuana user was not discrimination on grounds of disability.

[70] In other words, an employee with an addiction disability may be caught by the Policy, but so could people without any disability. The fact of disability or not is, at that stage, irrelevant as long as the material facts for the breach of the Policy are present. Further, since the disability would have been addressed *without* discipline risk had the employee come forward under the Policy *prior* to an incident or failed drug test; one can logically eliminate the fact of disability from the factors leading to the adverse impact. Disability revealed voluntarily would not have led to adverse impact. The breach of the Policy can happen without disability. Finally, as the Tribunal observed, there was no difficulty for Stewart complying with the Policy despite his disability. Disability was not a real factor in the enforcement of the Policy. It therefore was not a factor within the meaning of ***Kemess Mines Ltd. V International Union of Operating Engineers, Local 115***, 2006 BCCA 58 at para 30, 264 DLR (4th) 495 adopted by the dissenting opinion in ***Wright*** at para 121.

[71] By analogy one notes the decision in ***R v Chambers***, 2014 YKCA 13, 316 CCC (3rd) 44, motion to SCC lapsed by the death of applicant (2015) [2014] SCCA No 534 (QL). Chambers contended that the terms of s 719(3.1) of the *Criminal Code* would practically have a larger and disproportionate adverse effect upon aboriginal people in Canada than other people. Section 719(3.1) of the *Code* provides that, if an accused person is detained in custody arising from circumstances in ss 515(9.1), 524(4), or 524(8) of the *Code* (prior criminal record / breach of judicial interim release), then the credit for pre-trial custody to which the accused would be entitled when sentenced on conviction would be capped at one to one credit. In other words, the accused would be disqualified from enhanced credit under ***R v Summers***, 2014 SCC 26, [2014] 1 SCR 575. Chambers argued that aboriginal people would suffer the effect of this disqualification disproportionately because they were disproportionately the 'target population'. The Court of Appeal said that, assuming the premise that aboriginal people were predictably a comparatively larger part of the target population likely to be adversely affected by the provisions; the individuals in that cohort of affected people would not be suffering from inequality arising from their aboriginal status. Rather, the adverse impact is a

distinction that the *Code* creates on the basis of who breaks the law (or in that case, bail conditions). This was not a racial impact even if it might affect aboriginal people more in practical terms.

[72] The second way of interpreting the Tribunal's decision is to read into it that the Tribunal had regard to the lack of any colourable form of direct or indirect discrimination as an actuating factor in the *enforcement* of the Policy. While the Tribunal referred at para 126 of the reasons to there being "no inference that the Policy was arbitrary or perpetuated historical stereotypes", this use of language in the *Charter* s 15 case law did not mean he was using that language to modify the application of s 7 of the *AHRA*.

[73] Rather, the Tribunal was effectively saying that the application of the Policy was not a pretext for discriminatory action against Stewart arising from his disability. (Referring to the letter of termination, the appellant's Factum implies that there was a pretextual nature to the application of the Policy.) Further, the Tribunal was effectively saying that the application of the Policy was not shown to be "discriminat[ion] ... because of ... physical disability" because neither direct nor indirect discrimination as revealed by arbitrariness or stereotypical thinking was visible in the application of the Policy by Elk Valley. This approach is not inconsistent with ***Wright*** (even though ***Wright*** had not yet been decided) at para. 65: see quote thereof at para. [33] above.

[74] It is to be borne in mind that the goal of human rights legislation like this is to prevent disadvantages being unfairly inflicted on employees based upon attribution of stereotypical or arbitrarily selected characteristics: see eg ***McGill University Health Centre v Syndicat des employés de l'Hôpital Général de Montréal***, 2007 SCC 4 at paras 48 to 53 per Abella J concurring, [2007] 1 SCR 161. Where an actual protected characteristic enumerated in s 7 of *AHRA* exists and where *that characteristic* challenges job performance, employers can still insist on valid and *bona fide* occupational requirements being met, although an employer is to accommodate for the disability if the employer can do so without undue hardship. As reflected in ***Wright*** and in ***Lethbridge Police***, s 7 of the *AHRA* is not intended to require employers to keep people employed even if they cannot or will not perform the job according to its reasonable and non-discriminatory terms.

[75] In that light, it was not improper for the Tribunal, in addition to finding disability was not a real factor in the adverse impact, to say in effect that, to the extent that the disability may be linked to the factors in the adverse impact, such linkage was not shown to rise to the level of being a factor in the adverse impact by Elk Valley. He was not persuaded that Elk Valley's response was motivated by arbitrariness or stereotypical thinking or that the effect of what Elk Valley did was tantamount to the effect of arbitrariness or stereotypical thinking. The majority of this Court in ***Wright*** added as follows:

> 67 Whether a particular standard amounts to discrimination is a legal question that requires a consideration of a number of factors, within the context of the human rights legislation. As the Court stated in *Withler v. Canada (Attorney General),* 2011 SCC 12 at para. 54, [2011] 1 SCR 396:

> 54 In summary, the theme underlying virtually all of this Court's s. 15 decisions is that the Court in the final analysis must ask whether, having regard to all relevant contextual factors, including the nature and purpose of the impugned legislation in relation to the claimant's situation, the impugned distinction discriminates by perpetuating the group's disadvantage or by stereotyping the group.

While the appellants' addiction is something that distinguishes them from other members of the College who are subject to disciplinary proceedings, the distinction does not amount to discrimination. As it was put in *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27 at para. 165, [2007] 2 SCR 391: "... the differential treatment based on personal characteristics required to get a discrimination analysis off the ground is absent here." There are a great many addicts who do not commit criminal acts, and it is not discriminatory to hold those who do accountable for their actions. The decision to lay professional disciplinary charges, and the subsequent finding of misconduct, were not motivated by the appellants' addiction, but rather by their conduct. There may be a connection between the appellants' actions and their disability, but there is no sufficient connection to make the College's actions discriminatory. The fact that the appellants' conduct was motivated or caused at some level by the addiction does not raise the College's proceedings to the level of discrimination in law.

[76] Put another way, the Tribunal found no real *nexus* between the application of the employer's policy and the disability itself as alleged for Stewart. There was not shown to be direct discrimination, in the sense of the employer acting upon arbitrary or pre-conceived stereotypes when Stewart was let go. Nor was there shown to be indirect discrimination, in the sense of the employer having created a structure of employment policy whereby termination would effectively follow from a culture of discriminatory employment arrangements. Finally, and importantly to the Tribunal's decision, the *nexus* between the disability and the action of Elk Valley towards Stewart when he breached the terms of the Policy in at least two ways, was not such as to make his disability itself a "factor" in the action taken by Elk Valley.

[77] It follows that the appeal of the appellant fails on this ground.

Accommodation of Disability

[78] We turn now to the subject of accommodation, and Elk Valley's appeal. We open by noting that the chamber's judge's substitutive inference for that of the Tribunal - about whether Stewart (or a person in Stewart's position) would be 'capable' of taking advantage of the self-reporting feature under the Policy before the incident - did not show the required deference, notably as it parted company with the opinion evidence on which the Tribunal relied: see eg ***Saguenay***.

[79] This Court is “in the shoes” of the chambers judge – compare ***Agraira v Canada***, 2013 SCC 36 at para 45 to 46, [2013] 2 SCR 559. Accordingly, we likewise can consider the reasonableness of the tribunal’s underlying fact findings. In our respectful view, the Tribunal’s finding deserved deference. Where fact findings lead to a single conclusion under the proper test, the range of reasonableness may even narrow down to a single answer: ***McLean***, at para 38.

[80] The chambers judge found that the question of whether, on the specific facts, there was a reasonable accommodation given to employees such as Stewart was a matter of mixed fact and law and subject to a reasonableness standard of review: see eg ***Tolko Industries Limited v Industrial, Wood and Allied Workers of Canada, (Local 1-207),*** 2014 ABCA 236 at para 16, 577 AR 346. ***Tolko Industries***, at paras 34-42, provides a summary of what “reasonable accommodation” means, stating at paras 34-35:

> 34 "Accommodation" means providing equal access to employment where an employee would otherwise experience barriers or hardship to continued employment in the workplace: Ronald M Snyder, Collective Agreement Arbitration in Canada, 4th ed (Markham, Ontario: LexisNexis Canada Inc, 2009) at 8.5. The purpose of accommodation is "to ensure that an employee who is able to work can do so" and that "persons who are otherwise fit to work are not unfairly excluded where working conditions can be adjusted without undue hardship": *Hydro-Québec v Syndicat des employées de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ),* 2008 SCC 43, [2008] 2 SCR 561at para 14.
>
> 35 That said, the duty to accommodate is not without limitation. Rather, an employer has a duty to accommodate an employee to the point of undue hardship: *Renauld* at para 16. This limitation stems from s 7(3) of the *Alberta Human Rights Act*, which provides that s 7(1) does not apply "with respect to a refusal, limitation, specification or preference based on a *bona fide* occupational requirement". As such, if an employer wishes to terminate the employment of an employee due to poor attendance, and the poor attendance arises from an illness or injury falling within the statutory definition of a "physical disability" or "mental disability", the employer must first take reasonable measures short of undue hardship to attempt to accommodate the disabled employee's situation: ibid; see also Brown and Beatty, *Canadian Labour Arbitration*, 4th ed (Aurora, Ontario: The Cartwright Group Ltd, 2010) at 7:6120. What constitutes "undue hardship" is highly fact dependant and individualized, and will vary between situations: *Renauld* at para 19; *Hydro-Québec* at paras 12-13, 17.

[81] As noted, the chambers judge found the Tribunal’s decision to be unreasonable on this issue. His reasoning was that, even if the employer policy was accommodative of employees with drug dependencies, the specific employee must appreciate he has such a drug dependency in order to take advantage of that ameliorative and remedial aspect of the policy. Since Stewart subjectively opined in

2006 that he did not think he was subject to such a dependency (although he sees to have said something different in his letter shortly after being terminated), that ameliorative aspect of the policy was not realistically open to him due to denial and he would not therefore be accommodated by it.

[82] The chambers judge did not address in detail whether, even if Stewart's attitude was that he felt he had no drug problem, such a perspective was neglectful by Stewart towards his employment duties, and voluntarily so, inasmuch as the Policy was clearly aimed at workplace safety and addressing addiction or dependency was just part of it. What the chambers judge appears to have done was to agree with the appellant's argument for a purely subjective approach to accommodation in relation to the disability of addiction or dependency.

[83] With respect, the chambers judge's conclusion casts aside the Tribunal's view that a subjective approach undermines the efficacy of the Policy by casting on the employer a duty of omniscience respecting Stewart's (or any employee's) addiction or dependency by characterizing Stewart's (or any employee's) choice to not inform his union or employer and to show up for work under some influence of his drug use as being a matter of his not being "capable" of seeking treatment. As such, the chambers judge's decision overran the Tribunal's fact findings that Stewart's conduct was volitional.

[84] The logic of accommodation is that it is the counterweight to discrimination. The objective of the accommodation obligation is to remove the barriers of arbitrariness or stereotypical assumptions or attitudes about disability and to replace them with a mindset of inclusion. Employers are encouraged - and compelled - to proceed proactively to habilitate the disabled worker by methods of accommodation whereby the disabled worker is able to participate meaningfully in the work force like non-disabled persons. The aim of accommodation is quite idealistic, in other words, but in more than one way. It tries to achieve a win-win-win (employee, employer, society). It seeks to engage employers in the process of enabling their employees to perform the jobs that they are given in a manner which benefits the employer's operation while treating the disabled employee as equally entitled to the full measure of respect (and in that regard the full measure of self-respect and personal responsibility) of other employees.

[85] To accept, as the appellant submits, an onus on employers to wait for a flagrant demonstration of an addiction disability on the part of employees - to which an accommodate response is mandated - cannot be reconciled with such a philosophy. The appellant presumably is not advocating the establishment of intrusive workplace rules to sniff out potential addictions or dependencies in order to 'accommodate' them. Some addictions or dependencies may not have any implications whatsoever for the specific function being performed by a given employee. Moreover, to say that, instead of discipline, accommodation is demanded *after* a serious incident at a dangerous workplace would not engender confidence in co-workers about their safety. Indeed, it would create almost a perverse incentive for disregard of policies. Reporting for work in a hazardous work site should not involve a suspicion lottery by each worker about the possible condition of co-workers.

[86] The Tribunal's determination of the factual issues related to the topic of accommodation deserves deference. He did not err in his interpretation or application of the principles in ***Hydro-Québec*** when he wrote what he did at paras 149 to 152, quoted in para 42 above. He then added this:

> 153 I acknowledge the uneasy fit of drug addiction and drug testing policies in the human rights arena. While drug addiction is a disability and adverse treatment or termination of employees with drug addictions should attract human rights scrutiny, the procedural and substantive duties associated with the duty to accommodate to the point of undue hardship, must consider the particular and at times unique challenges faced by employers addressing drug use in a safety sensitive workplace.

[87] The suggestion that Stewart was in 'denial' does not convert the reasonableness of the accommodation steps of Elk Valley into something else. Indeed, the opinion evidence on which the Tribunal relied suggests that to accede under the Policy to the possibility of denial would not even address the problem of denial itself. Creating a situation where, post-incident, claims of denial might be treated as a potential vaccine against discipline hardly advances the effort to create and maintain a safe workplace.

[88] There is a convolution of logic in using 'denial' as a basis for excusing the employee who needs accommodation from bringing that up to the employer as other persons are expected to do. The movement towards treating drug addiction or dependency as a physical disability was grounded in the recognition that there were stereotypical attitudes about the capacity of people to control their addictions. Denial, indeed, is arguably part of that phenomenon. To use denial as a basis for excusing the need to make the employer aware of the need for accommodation would in a sense give drug addiction or dependency a sort of 'most favoured nation' status for an employee subject to *that* form of disability. There are many forms of disability. None should be trivialized.

[89] The appellant's approach amounts to a suggestion that even an employee in a highly safety sensitive position who knows precisely what he is doing can unilaterally and in a secretive manner disregard the profound safety obligations of his employment not only to the employer but to his co-workers. The absolution for doing so is said to arise from error or misconception on the part of that employee - namely denial. In our view, legitimizing such a subjective manner of defining one's safety-related employment duties in hazardous work environments loses touch with the test in ***Meiorin***, and with the objectives of anti-discrimination laws.

[90] This brings us to the topic of undue hardship. In our respectful view, undue hardship relates to the negative effect on the operations of the employer arising from the effort to accommodate. The question of undue hardship is contextual, so it is a mixed fact and law question if not a pure fact question. The obligation to accommodate is not absolute: see eg ***Telus Communications Inc***, 2014 ABCA 154 at paras 40 to 48, 95 Alta LR (5th) 285. The Tribunal clearly sought to weigh and balance the options for Elk Valley in the context here. We cannot say that the Tribunal reached an

unreasonable conclusion in connection with the topic. The chambers judge erred in either applying correctness or in finding unreasonableness as he did. The cross-appeal must be allowed.

VI Conclusion

[91] The appeal of the appellant is dismissed. The appeal of Elk Valley is allowed, although no consequential relief appears to be necessary.

Appeal heard on October 28, 2014

Memorandum filed at Edmonton, Alberta
this 30th day of June, 2015

Authorized to sign for: Picard J.A.

Watson J.A.

O'Ferrall J.A. (dissenting):

I. Introduction

[92] I have read the reasons of the majority and I respectfully disagree with some of the conclusions they have come to. In my view, both the Tribunal and the reviewing judge erred in finding that a *prima facie* case of discrimination had not been made out. Furthermore, I find the Tribunal erred in finding the employer had accommodated the complainant to the point of undue hardship. Put simply, there were other ways the employer could meet its goal of general deterrence without having to terminate the complainant.

II. Background

[93] My colleagues have already set out the relevant facts and the essential parts of the decisions below. I would add however, that the "vehicle collision" described in the majority's judgment apparently involved a collision between the loader the complainant was operating and a stationary 170-ton truck during the 11th hour of a 12-hour shift. The only damage was to a mirror on the truck.

III. Standard of Review

[94] I agree whole-heartedly with the comments of my colleagues in their standard of review analysis (paragraphs 47 to 59). Thus, the standard of review with regard to the test for *prima facie* discrimination and the interpretation of the test for accommodation found in *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3, 1999 CanLII 652 [*Meiorin*], is correctness.

[95] Furthermore, in *Lund v Boisson*, 2012 ABCA 300, 536 AR 272, a case involving an appeal via Queen's Bench from a decision of an Alberta Human Rights Tribunal, this court noted, at paragraph 35:

> It must first be determined whether the reviewing judge chose and applied the correct standard of review. If he did, then this court must consider whether he applied it correctly. If he did not, the tribunal's decision must be reviewed applying the correct standard: *Dr Q v College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 SCR 226, at para 43. The practical effect of these obligations, in this case, is that this court is entitled to determine the appropriate standard of review to apply to the panel and then apply it.

IV. Issue One – Was there a *prima facie* case of discrimination?

[96] The appellant submits the appellate judge erred by upholding the decision of the Human Rights Tribunal with respect to the test for a *prima facie* case of discrimination. He submits that both

the Tribunal and the appellate judge erred by finding that to demonstrate a *prima facie* case of discrimination the appellant was required to show the employer's decision to terminate was tainted by arbitrariness or stereotypical thinking.

A. The applicable test

[97] The parties agree that the test for demonstrating whether a *prima facie* case of discrimination has been made out was described by the Supreme Court in *Moore v British Columbia (Education)*, 2012 SCC 61, [2012] 3 SCR 360. Abella J observed at paragraph 33:

> As the Tribunal properly recognized, to demonstrate *prima facie* discrimination, complainants are required to show that they have a characteristic protected from discrimination under the *Code*; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact. Once a *prima facie* case has been established, the burden shifts to the respondent to justify the conduct or practice, within the framework of the exemptions available under human rights statutes.

[98] The Tribunal found, and no one now disputes, that the first two parts of this test were met on the facts of this case. It was conceded that Mr. Stewart had an addiction to drugs that amounted to a physical disability under section 7(1) of the *Alberta Human Rights Act*, RSA 2000, c A-25.5 (*Human Rights Act*). He was also terminated from his employment, which constituted an adverse effect. The parties disagree, however, over whether the employee's disability was a factor in his dismissal. This disagreement stems from a dispute about the meaning of "factor" in the third branch of the test, or as the majority correctly points out over the meaning of the words in section 7 of the *Human Rights Act*, "because of...physical disability, mental disability," etc.

[99] The appellant submits that to be a factor, the protected characteristic need only be part of the causal chain leading to the adverse impact. His position is set out in the Ontario Court of Appeal's recent decision in *Peel Law Association v Pieters*, 2013 ONCA 396, 116 OR (3d) 81. Relying on *Moore*, Juriansz JA held, at paragraph 59:

> All that is required is that there be a "connection" between the adverse treatment and the ground of discrimination. The ground of discrimination must somehow be a "factor" in the adverse treatment.

[100] The respondent, on the other hand, submits that to demonstrate the protected characteristic is a factor, a complainant must prove it is more likely than not that there is a connection between the adverse treatment received and "stereotypical assumptions" or "arbitrary impacts stemming from the applicable prohibited ground" [Respondent's factum at para 102]. This latter submission is based upon the dissenting reasons of Abella J in *McGill University Health Centre (Montreal General Hospital) v Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4, [2007] 1 SCR 161,

at para 49, cited by the majority in *Honda Canada Inc v Keays*, 2008 SCC 39, [2008] 2 SCR 362, at para 71. This test was referred to by this court in *Wright v College and Association of Registered Nurses of Alberta (Appeals Committee)*, 2012 ABCA 267, 355 DLR (4th) 197, although *Wright* preceded *Moore*.

[101] In my view, the appellant's position is the correct one. I come to this conclusion for several reasons. First, it is consistent with the actual wording of the test in *Moore*. Describing the test for a *prima facie* case in *Moore*, Justice Abella did not refer to the need to introduce evidence of arbitrary or stereotypical behaviour, even though she was the one who first raised this issue in her earlier dissent in *McGill*. As for the suggestion that this dissent now represents the majority view of the Supreme Court, due to its decision in *Honda*, I note that the majority of the Court in that case was not examining the *prima facie* test when it referred to Abella J's dissent in *McGill*. It was referring to the ultimate requirements for discrimination in the context of a discussion regarding damages for wrongful dismissal.

[102] Second, the concepts of arbitrariness and stereotypical behaviour arise from litigation under section 15 of the *Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. The concepts of arbitrariness and stereotyping exist, in that context, as a means of distinguishing between actionable discrimination, which may result in the striking down of a law, and a mere distinction. In the area of human rights law, however, the Supreme Court has already developed a paradigm for assessing an employer's *bone fides* in an employment decision. In *Meiorin*, the Court held that once a *prima facie* case of discrimination has been shown, an evidentiary burden falls on the respondent to justify its actions on the basis of a three-part test. It is at this point, therefore, that a respondent's motives are to be scrutinized. Furthermore, there is a good reason to place the evidentiary burden on the respondent to demonstrate its *bone fides*. The complainant has no way of knowing an employer's real motive in imposing discipline or a work rule, but that is often what is needed to show the respondent has been guilty of arbitrary or stereotypical behaviour. As the Ontario Court of Appeal observed in *Pieters* at paragraph 72:

> The question whether a prohibited ground is a factor in the adverse treatment is a difficult one for the applicant. Respondents are uniquely positioned to know why they refused an application for a job or asked a person for identification. In race cases especially, the outcome depends on the respondents' state of mind, which cannot be directly observed and must almost always be inferred from circumstantial evidence. The respondents' evidence is often essential to accurately determining what happened and what the reasons for a decision or action were.

[103] The third reason why the appellant's interpretation of *Moore* is to be preferred is because otherwise, in cases of adverse effect discrimination, it will be virtually impossible for the complainant to demonstrate arbitrary or stereotypical attitudes or consequences. Adverse effect discrimination

concerns neutral rules that have the unexpected or unintended consequence of discriminating against an individual on the basis of a prohibited ground. The proof of actual discrimination, therefore, lies not in the actions of the respondent in the first instance, as in direct discrimination, but in the respondent's ultimate response once the relevant distinction has been objected to by the complainant. That is why there is a burden in such cases for the respondent to show accommodation to the point of undue hardship. But if the complainant is obliged to show a significant element of arbitrariness or stereotypical behaviour, before the onus shifts to the respondent to demonstrate efforts to accommodate, most cases of adverse effect discrimination will not get off the ground.

[104] To demonstrate this point, it is worth considering the Supreme Court's decision in *Central Alberta Dairy Pool v Alberta (Human Rights Commission)*, [1990] 2 SCR 489, 1990 CanLII 76, one of the early cases dealing with adverse effect discrimination, to see how it would fare under the strict interpretation of "factor" suggested by the respondent. In that case, the issue was the effect of a neutral work rule requiring all employees to work Monday, the day when milk was delivered to the plant. This had an adverse effect the complainant who was a member of the Worldwide Church of God and whose religious beliefs prohibited him from working Easter Monday. He sought accommodation and was refused. When he failed to show up for work on Easter Monday he was fired.

[105] The Court found that the requirement to work Monday was rationally connected to the job. It was a rule, therefore, that was neither arbitrary nor based on stereotypical assumptions. Had the inquiry stopped at this point, due to a failure on the complainant's part to show a *prima facie* case, there would have been no relief for the complainant. Yet the Supreme Court went on to hold that the employer was required to show it had made efforts to accommodate the affected employees to the point of undue hardship or risk being found to have discriminated against the complainant. In the end, the Court found this test had not been met, and it upheld an award of damages in favour of the complainant. While the Supreme Court subsequently merged the tests for direct and adverse effect discrimination in *Meiorin*, there is no indication in *Meiorin*, or any subsequent case law, that the Supreme Court intended to direct courts and tribunals to take a new and more limited approach to the issue of adverse effect discrimination that would call for a different result in cases like *Dairy Pool*.

[106] Finally, the weight of recent authority favours the more relaxed interpretation of "factor" advocated by the appellant. As I have already suggested, the Supreme Court's most recent pronouncement on the subject in *Moore* refers to "factor" without suggesting it also requires evidence of arbitrary consequences, or stereotypical thinking. In *Pieters*, the Ontario Court of Appeal interpreted *Moore* as requiring nothing more than a need to show a "connection" between the adverse effect and the protected characteristic. In *Health Employers Assn of BC v BC Nurses' Union*, 2006 BCCA 57, 264 DLR (4th) 478, leave to appeal to SCC refused, 31417 (24 August 2006), a case decided before *Moore*, the British Columbia Court of Appeal adopted a similar approach. In *Armstrong v British Columbia (Ministry of Health)*, 2010 BCCA 56, [2010] 5 WWR 210, the British Columbia Court of Appeal held there was no separate requirement to show that the adverse treatment alleged was motivated by arbitrariness or stereotypical presumptions, and that the goal of protecting

complainants from such presumptions only required that a complainant show a "link" between the protected characteristic and the adverse effect.

[107] I note, further, that even where the courts have found that a complainant has some limited evidentiary obligation to show arbitrary or stereotypical treatment, it has been held that this will usually be accomplished by simply showing that the first two requirements of the *Moore* test, the protected characteristic and the adverse consequence, have been met. As the Ontario Court of Appeal stated in *Ontario (Director, Disability Support Program) v Tranchemontagne*, 2010 ONCA 593, 102 OR (3d) 97, at paragraph 90:

> In the human rights context, in most instances, it will be evident that a *prima facie* case of discrimination has been established based solely on the claimant's evidence showing a distinction based on a prohibited ground that creates a disadvantage (in the sense of withholding a benefit available to others or imposing a burden not imposed on others). An inference of stereotyping or of perpetuating disadvantage or prejudice will generally arise based on that evidence alone.

[108] Thus, by showing a connection between the protected characteristic and the adverse treatment, the complainant is, in fact, introducing some *prima facie* evidence from which arbitrary or stereotypical behaviour is demonstrated or can be inferred. It needs to be remembered, as well, that at the point of demonstrating a *prima facie* case, a party need only provide enough evidence from which it can be inferred that it has met the burden of proof if no other evidence is called. This is a low threshold. At this point, the adjudicator must go on to evaluate the efficacy of this assertion of discrimination by considering the test in *Meiorin* which is set out in paragraph 128 herein.

[109] The stricter approach argued by the respondent was applied by a majority of this court in *Wright*, relying, in part, on the British Columbia Court of Appeal's decision in *British Columbia (Public Service Agency) v British Columbia Government and Service Employees' Union*, 2008 BCCA 357, 298 DLR (4th) 624 [*Gooding*]. In my view, these cases are distinguishable because they were decided before *Moore*, and because both cases involved a second level of culpable behaviour. In each case, the terminated employees, although working while addicted to a substance (alcohol in *Gooding* and narcotics in *Wright*), had been fired for stealing from their employer. Each claimed their termination was discriminatory because the thefts were said to have been brought on by their addictions. As this Court noted, however, not all addicts steal, and it is not readily apparent that thievery is the natural product of addiction. In such situations, therefore, there may be a greater onus on the complainant to show how the protected characteristic is connected to the adverse effect. In this case, however, the complainant was performing his employment obligations. There was no second level of culpable behaviour alleged beyond the failure to pass a drug test and the alleged breach of the employer's drug and alcohol policy (Policy) with respect to drugs taken while off-duty.

[110] In summary, I find it was not necessary for the complainant in this case to introduce evidence of arbitrariness or stereotypical behaviour to demonstrate a *prima facie* case of discrimination. It was only necessary to show a connection between the protected characteristic and the adverse effect.

B. Did the Tribunal apply the correct test in this case?

[111] As my colleagues point out, it is not absolutely clear what test the Tribunal applied in assessing whether a *prima facie* case of discrimination had been made out. At paragraph 116 of his reasons, the adjudicator stated:

> However, proof of prejudice or stereotyping are not additional evidentiary requirements for the Complainant in proving *prima facie* discrimination. Once adverse treatment is shown on the basis of a prohibited ground, an inference of stereotyping, arbitrariness or perpetuation of disadvantage will usually be drawn. [citing, *inter alia*, *Trachemontagne*].

[112] Having said this, the adjudicator went on to find that the complainant's addiction was not a factor in his dismissal because the termination was based on a breach of the Policy. In particular, the adjudicator found, at paragraph 123 of his decision: "Mr. Stewart's employment was terminated because he failed to stop using drugs or disclose his drug use prior to the accident." But he then went on to say, at paragraph 126: "Given my finding that Mr. Stewart's disability was not a factor in his termination there is no inference that the application of the Policy was arbitrary or perpetuated historical stereotypes." Furthermore, he concluded his findings on the issue of the *prima facie* case at paragraphs 128-129, with similar language, where he stated:

> Neither the application of the terms of the Policy inviting disclosure without disciplinary action, nor the invitation to be reemployed with the Respondent, perpetuated stigma towards drug addicted individuals in that they were less worthy as individuals or undesirable as employees, once they refrained from their drug use. The termination through the application of the Policy spoke to the consequences of workplace drug impairment and nondisclosure of drug use. The Policy applied to both casual users of drugs as well as those who were drug addicted or dependent. The termination through the application of the Policy did not, either through intent or effect, perpetuate disadvantage or historical stereotype against employees suffering from drug addiction.
>
> I find that the Respondent's actions in terminating Mr. Stewart's employment were not *prima facie* discriminatory.

[113] It would appear, therefore, that while the adjudicator found, initially, that the complainant was not required to demonstrate arbitrariness or stereotypical behaviour, he applied these requirements later in determining whether the complainant had demonstrated a *prima facie* case of discrimination.

[114] The appellate judge went even further. After reviewing various authorities, including *McGill*, *Honda*, *Gooding* and *Wright*, the appellate judge concluded, at paragraph 38 of his decision:

> Taken together these authorities support the proposition that the test for *prima facie* discrimination includes some consideration of whether that adverse treatment was based on stereotypical or arbitrary assumptions.

[115] He found the Tribunal had applied this test, and applied it properly. He held at paragraph 45:
> [T]he Tribunal found, consistent with the evidence, that the decision to terminate was not based on arbitrary or preconceived stereotypes. In the circumstances the mere presence of an addiction which had not been identified by anyone at the time of the accident, fails to elevate the employer's decision to *prima facie* discrimination in law.

[116] In my view, therefore, both the Tribunal and the reviewing judge applied the wrong legal test in determining whether the complainant had demonstrated a *prima facie* case of discrimination.

C. Was the correct test met in this case?

[117] The appellant invites us to come to our own conclusions on this issue. My colleagues have ventured into this area, at paragraph 76 of their reasons, and in my view nothing would be gained by simply quashing the decision and sending it back to the Tribunal for reconsideration. This would prolong a process that has already gone on for ten years. Moreover, this is technically an appeal from an appeal, in which the judge below had the statutory jurisdiction to substitute his own reasons for the reasons of the Tribunal. We are given the same authority under the *Rules of Court*. It is in the interests of justice that the issues before us be settled so that any further appeals can be taken and this difficult case resolved.

[118] In my view, the complainant's addiction was not just a factor leading to his dismissal, it was the entire reason for it. That is, the discrimination was "because of" the complainant's conceded physical or mental disability. To get a clear idea of the employer's motive behind the complainant's dismissal, it is necessary to look at the employer's termination letter. A dismissed employee should be able to rely on his termination letter to apprehend the employer's reasons for termination, and it is here that we should reasonably expect to find the employer's justification for its acts – absent any new emerging grounds, post-incident second thoughts, or belated attempts to buttress the record. It must also be remembered, in reviewing this letter, and in coming to a conclusion on the issue of the employer's motives for dismissal, it does not matter if the complainant actually was addicted to cocaine, an issue that seems to have consumed a fair amount of time before the Tribunal and which is now conceded. Section 7 of the *Human Rights Act* prohibits discrimination on the basis of disability

and perceived disability: *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)*, 2000 SCC 27, [2000] 1 SCR 665, at para 72.[1]

[119] In its letter to the complainant the employer said:

> On October 18, 2005, you tested positive for cocaine after being involved in an accident. A further investigation with you revealed that you use drugs extensively.
>
> On July 25th, 2005, you signed an acknowledgment that your employment required you to comply with the Company's Drug and Alcohol policy. It is fundamental to safety at the minesite that employees comply with the Drug and Alcohol Policy and disclose their dependency on drugs or alcohol before breaching the Policy and placing their lives, and the lives of their co-workers at risk. The policy states that in responding to a violation of the policy the Company will place primary importance upon deterring similar behaviour by other employees and will terminate the employee unless termination would be unjust in all of the circumstances.
>
> After consideration of all the circumstances we have concluded that your employment should be terminated. The termination is effective November 3rd, 2005.
>
> Notwithstanding our decision to terminate your employment, we are hopeful that you will find the personal resolve that is necessary to overcome an addiction. [underlining by employer]

[120] The employer's logical pathway to termination in this letter is clear. The complainant tested positive for cocaine use and later admitted that he used the drug frequently. It is fundamental to safety at the mine site that those employees who are dependent on drugs and alcohol report that dependency before being involved in an accident. Where someone who is drug or alcohol dependent does not report his addiction, before being involved in an accident, he will be terminated in order to deter "similar behaviour" by other employees who have not, as yet, reported their dependency. As the complainant was drug dependent, the employer felt it was necessary to fire him to provide that example to others. Notwithstanding the need to fire him, the employer wished the complainant well in dealing with his addiction.

[121] It is obvious, therefore, that in justifying the dismissal in this fashion, the employer was terminating the complainant because it perceived he was drug dependant. The fact that the employer

[1] The reference to the "Charter" in this case is the Quebec *Charter of Rights and Freedoms*, RSQ, c C-12, a Quebec statute, not the *Canadian Charter of Rights and Freedoms*.

perceived the complainant was an addict is reinforced by the comment relating to his addiction going forward.

[122] The Tribunal considered this letter and concluded that the reference to the complainant's addiction was insignificant given its finding that the complainant had been fired for breaches of the Policy, and in particular, because he "failed to stop using drugs or disclose his drug use prior to the accident" (para 123). But even if these were offences attracting the possibility of discipline (and I pause to note that the employer's drug and alcohol policy neither prohibits drug use outside of work, nor requires employees to disclose their drug use), they were not the employer's stated reasons for dismissal. The reason why the complainant was terminated, rather than given a lesser disciplinary penalty, was because the employer wanted to deter other employees like the complainant, who were also drug dependant, from failing to report that dependency prior to a workplace accident.

[123] The Tribunal, therefore, failed to consider the motive of deterrence in determining whether the complainant's addiction, or perceived addiction, was a factor in his dismissal. This was a fundamental error, on any standard of review, and one that was repeated by the appellate judge in upholding the Tribunal's decision. Ironically, while the Tribunal did not consider the issue of deterrence in considering whether addiction played a part in the complainant's dismissal, it considered the issue of deterrence later in finding the employer had accommodated the complainant to the point of undue hardship (paras 146-147).

[124] Before leaving this subject, it is necessary to discuss a further argument made by the employer before the Tribunal. The employer submitted that the complainant's addiction had nothing to do with his dismissal because it would have fired him regardless of the extent of his drug use. The Tribunal accepted this argument at paragraph 123 of its decision where it said: "I accept the Respondent's evidence that Mr. Stewart would have been fired whether or not he was an addict or a casual user." In some ways, this position is even more problematic for the employer. If an employee is fired for failing a drug test, regardless of the nature and extent of his drug use, the employer is adopting a zero-tolerance work rule that is based upon the stereotypical assumption that any amount of off-duty drug use impairs an employee from working safely. Thus, the employer's conduct would satisfy even the harsher test for *prima facie* discrimination on the basis of a perceived disability brought on by the use of drugs.

[125] It follows the Tribunal erred in finding the complainant's addiction, or perceived addiction, was not a factor in, or was not connected to, his dismissal, and that he had not established a *prima facie* case of discrimination. The appellant judge also erred in this fashion by upholding the Tribunal's decision. On this point, therefore, the appellant's appeal must succeed.

V. Issue Two – The application of the *Meiorin* test

[126] Neither the Tribunal, nor the appellate judge, needed to discuss the *Meiorin* test, given their agreement that the complainant had not established a *prima facie* case. Both examined this issue,

however, in the alternative, and came to different conclusions. The Tribunal found that all three requirements under the *Meiorin* test had been met. For his part, aided by the complainant's concession that the only live issue was whether the employer had accommodated the complainant to the point of undue hardship – the third part of the *Meiorin* test – the appellant judge found the Tribunal had come to an unreasonable decision. In the appellate judge's view, the Tribunal erred by finding accommodation through the existing policy because as someone who did not know he had an addiction to drugs, until after his termination, the complainant could not take advantage of the remedial aspects of the Policy before being terminated.

[127] The employer has appealed this latter finding. As I have concluded the complainant established a *prima facie* case of discrimination, it is necessary to determine if the employer accommodated the complainant to the point of undue hardship.

A. The *Meiorin* test

[128] The appellant appears to concede, as he did before the appellate judge, that the only issue flowing from the three-part test in *Meiorin* is whether the employer met the third part of the test. The test is described in *Meiorin* at paragraph 54:

> An employer may justify the impugned standard by establishing on the balance of probabilities:
>
> (1) that the employer adopted the standard for a purpose rationally connected to the performance on 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.

[129] As the appellant concedes the first two aspects of the test have been met, the only question is whether the employer has shown it is impossible to accommodate the complainant without imposing undue hardship. In *Meiorin* the Court set out a number of questions that could be asked in conducting this analysis at paragraph 65:

> (a) Has the employer investigated alternative approaches that do not have a discriminatory effect, such as individual testing against a more individually sensitive standard?

> (b) If alternative standards were investigated and found to be capable of fulfilling the employer's purpose, why were they not implemented?
>
> (c) Is is necessary to have all employees meet the single standard for the employer to accomplish its legitimate purpose or could standards reflective of group or individual differences and capabilities be established?
>
> (d) Is there a way to do the job that is less discriminatory while still accomplishing the employer's legitimate purpose?
>
> (e) Is the standard properly designed to ensure that the desired qualification is met without placing an undue burden on those to whom the standard applies?
>
> (f) Have other parties who are obliged to assist in the search for possible accommodation fulfilled their roles? As Sopinka J. noted in *Renaud*, *supra*, at pp. 992-96, the task of determining how to accommodate individual differences may also place burdens on the employee and, if there is a collective agreement, a union. [emphasis in original]

[130] Finally, the Court suggested that in analysing whether an employer has accommodated an employee it is necessary to consider both the procedure adopted to assess the issue of accommodation and the substantive content of an offered alternative or the employer's reasons for not offering one (*Meiorin* at para 66).

B. Did the employer accommodate the complainant's disability to the point of undue hardship?

[131] The employer submitted before the Tribunal that it was necessary to terminate the complainant as a matter of general deterrence, and that any other form of discipline, short of dismissal, would be inadequate. It also argued that its policy regarding voluntary rehabilitation, pre-accident, was a form of accommodation. Moreover, the employer pointed to the following offer to the complainant in the termination letter:

> [W]e are prepared to consider an application from you, for new employment, after a period of six months from the effective date of your termination, on the following conditions: (a) there must be suitable vacancy with the Company; (b) you have successfully completed a rehabilitation program at a recognized rehabilitation facility; and (c) you agree to a 24-month "Recovery Maintenance Agreement" with the Company that contains terms and conditions to monitor and ensure your commitment to a drug-free lifestyle. If you are successful in complying with the 24-month Recovery Maintenance Agreement, the Company will reimburse you for 50% of your rehabilitation program facility cost. We will consider an extension to the six month

> period if you diligently pursue rehabilitation in a timely manner but, for reasons beyond your control, you cannot access or complete the recommended rehabilitation program within that period.

[132] For his part, the complainant, relying on *Meiorin*, asserted that there was a procedural duty on the employer to assess the extent of the complainant's alleged disability before determining the appropriate penalty and that this had not been done. Furthermore, he submitted, there were other ways of achieving general deterrence in these circumstances, short of termination.

[133] The Tribunal agreed with the employer. It found that termination was not an unreasonable response. Although the Tribunal acknowledged there was a procedural duty to investigate, prior to taking disciplinary action, it found there was a corresponding duty here on the complainant to request accommodation, as he had the capacity to be aware of his disability prior to failing the drug test. More importantly, the Tribunal concluded that "offering Mr. Stewart the opportunity for assessment, rather than the harsher and immediate consequence of termination, would undermine the deterrent effect of the Policy so important in this safety sensitive workplace." (para 149). The Tribunal found the same logic applied to any other possible disciplinary penalties short of termination (para 150). Summing up its conclusions on both points, the Tribunal stated at paragraph 152:

> If the Respondent had to offer the opportunity for assessment to Mr. Stewart or replace the harsher and immediate effects of termination of employment with less serious consequences, the deterrent effect of the Policy would be significantly lessened, and constitute an undue hardship to the company, given the Respondent's safety responsibilities.

[134] The Tribunal also found, however, that the employer had made some effort to accommodate the complainant. The Tribunal stated at paragraph 151 of its reasons:

> Additionally, allowing the employee who comes forward the opportunity to access treatment resources without fear of discipline, should be considered as part of the accommodation provided to Mr. Stewart and other employees with addiction disabilities. Offering the opportunity of reinstatement in 6 months under certain reasonable conditions, also contributes to accommodation responsibilities. The Respondent agreeing to pay 50% of the rehabilitation program facility cost, as set out in the termination letter, also provides accommodation for Mr. Stewart's disability.

[135] The appellate judge came to a different conclusion. In his view, it was unreasonable for the Tribunal to find accommodation in the part of the Policy allowing for those with drug dependency issues to come forward, pre-incident, and seek treatment without penalty. In the appellate judge's view, addicts like the complainant would not be able to take advantage of this opportunity because they would not necessarily be aware of their dependency by virtue of being in a state of denial. He found the Tribunal's decision was, therefore, unreasonable. The employer appeals this finding.

[136] In my view, the Tribunal erred by finding the employer had satisfied the duty to accommodate. I come to this conclusion for several reasons. To begin with, the Tribunal erred by finding there was no other penalty, outside of dismissal, that could both accommodate the complainant's disability and satisfy the employer's goal of general deterrence. The employer had any number of options, short of termination, to accomplish its goal. For example, it could have suspended the complainant for a significant period and made his return to work contingent upon successfully completing a program of rehabilitation, either at his, or the employer's, expense. Suspension without pay is a significant penalty with considerable deterrent effect. Any safety concerns would be dealt with using this approach because the complainant would be out of the workplace until he was treated properly for his disability. But a suspension of this kind would also accommodate the employee by preserving his seniority, and giving him the right to a position without having to reapply, should he choose to seek rehabilitation. In a unionized environment, seniority is a valuable commodity as it determines, among other things, the way layoffs are affected and the length of an employee's vacation period. The complainant was a nine-year employee with a clean disciplinary record. He was entitled to greater accommodation than the employer was prepared to give him.

[137] In my view, in putting the employer's need for deterrence in the forefront of its considerations, the Tribunal effectively asked itself the wrong question. It considered the employer's disciplinary response in the context of what was good for the employer. Thus, the Tribunal could conclude that anything short of the "harsher and immediate consequence of termination would undermine the deterrent effect of the policy" (paras 149; see also para 150). While an employer's needs form part of the considerations under *Meiorin*, the ultimate focus is on the employee, and whether he or she can be accommodated. As McLachlin J (as she then was) noted in *Meiorin*, at paragraph 62:

> The employer must establish that it cannot accommodate the claimant and others adversely affected by the standard without experiencing undue hardship. When referring to the concept of "undue hardship", it is important to recall the words of Sopinka J. who observed in *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970, at p. 984, that "[t]he use of the term 'undue' infers that some hardship is acceptable; it is only 'undue' hardship that satisfies the test". It may be ideal from the employer's perspective to choose a standard that is uncompromisingly stringent. Yet the standard, if it is to be justified under the human rights legislation, must accommodate factors relating to the unique capabilities and inherent worth and dignity of every individual, up to the point of undue hardship. [emphasis added]

[138] The Tribunal also erred by finding that the employer's voluntary referral program had the effect of accommodating the complainant. I agree with the appellate judge who concluded the existing terms of the Policy regarding voluntary treatment, pre-incident, did not accommodate the complainant's disability, or that of others like him, because a drug-dependant employee might not

necessarily know of his dependency prior to failing a drug test. In fact, it appears the complainant was in such a state of denial.

[139] Finally, the Tribunal erred in finding the need for deterrence made conducting of an assessment unnecessary. An assessment is prescribed as a procedural duty in *Meiorin*, but the need for assessment also arises under clause 6(b) of the Policy. It reads:

> If an employee tests positive in a test administered under this Policy, or if the Company investigation otherwise determines conduct contrary to the Rules of Conduct of Employees, the Company will decide whether the employee will be terminated or continued in employment. This decision will be based on all relevant circumstances, including (but not limited to) the following: (i) the employment record of the employee; (ii) the circumstances surrounding the Positive Test; (iii) the employee's stated pattern of usage; (iv) the likelihood that the employee's work performance has been or may be adversely affected; and (v) the importance of deterrence of such behaviour by other employees.
>
> If the Company determines that the employee's conduct will be addressed in a disciplinary manner, the Company will place primary importance upon deterring similar behaviour by other employees and will terminate the employee unless termination would be unjust in all of the circumstances.
>
> If the Company decides to continue the employment of the employee, the Company will require the employee to undertake whatever steps are necessary or appropriated to avoid the risk of workplace impairment in the future. If reasonable in the circumstances, an employee may be required to undergo periodic and/or random testing. The pattern and duration of such testing will be determined by the Company on an individual basis, having regard to what is reasonable in the circumstances.

[140] Even using the presumption described in the second paragraph above, the employer is still required to determine whether termination would be "unjust in all of the circumstances."

[141] Having said this, the error in this case is of little consequence because the complainant was frank with the employer about his drug use. Although he did not admit to it at first, the complainant confessed to his addiction before discipline was imposed. The employer had reason, therefore, to conclude that the complainant had a significant problem with drugs before it imposed discipline.

[142] In summary, the Tribunal erred in interpreting and applying the test set out in *Meiorin*. It follows the employer did not accommodate the complainant to the point of undue hardship. Thus, I would dismiss the cross-appeal on this point.

VI. Conclusion

[143] I would allow the appeal and dismiss the cross-appeal. Were it necessary to decide, I would not send the matter back to the Tribunal for a decision on remedy as the issue is effectively moot.

Appeal heard on October 28, 2014

Memorandum filed at Edmonton, Alberta
this 30th day of June, 2015

Authorized to sign for: O'Ferrall J.A.

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