

**SUPREME COURT OF CANADA**

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| **Citation:** Stewart *v.* Elk Valley Coal Corp., 2017 SCC 30, [2017] 1 S.C.R. 591 | **Appeal heard:** December 9, 2016  **Judgment rendered:** June 15, 2017  **Docket:** 36636 |

Between:

Brent Bish on behalf of Ian Stewart

Appellant

and

Elk Valley Coal Corporation, Cardinal River Operations and Alberta Human Rights Commission (Tribunal)

Respondents

- and -

Council of Canadians with Disabilities, Empowerment Council, Construction Owners Association of Alberta, Construction Labour Relations — an Alberta Association, Enform Canada, Electrical Contractors Association of Alberta, Mining Association of Canada, Mining Association of British Columbia, Ontario Mining Association, Northwest Territories and Nunavut Chamber of Mines, Saskatchewan Mining Association, United Nurses of Alberta, Ontario General Contractors Association, Ontario Formwork Association and Greater Toronto Sewer and Watermain Contractors Association

Interveners

**Coram:** McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

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| **Reasons for Judgment:**  (paras. 1 to 47) | McLachlin C.J. (Abella, Karakatsanis, Côté, Brown and Rowe JJ. concurring) |

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| **Joint Reasons Concurring in the Result:**  (paras. 48 to 57) | Moldaver and Wagner JJ. |

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| **Dissenting Reasons:**  (paras. 58 to 145) | Gascon J. |

Stewart *v.* Elk Valley Coal Corp., 2017 SCC 30, [2017] 1 S.C.R. 591

Brent Bish on behalf of Ian Stewart Appellant

v.

Elk Valley Coal Corporation, Cardinal River Operations and

Alberta Human Rights Commission (Tribunal) Respondents

and

Council of Canadians with Disabilities, Empowerment Council,

Construction Owners Association of Alberta,

Construction Labour Relations — an Alberta Association,

Enform Canada, Electrical Contractors Association

of Alberta, Mining Association of Canada,

Mining Association of British Columbia,

Ontario Mining Association, Northwest Territories and Nunavut

Chamber of Mines, Saskatchewan Mining Association,

United Nurses of Alberta, Ontario General Contractors

Association, Ontario Formwork Association and Greater

Toronto Sewer and Watermain Contractors Association Interveners

**Indexed as:** Stewart ***v.*** Elk Valley Coal Corp.

2017 SCC 30

File No.: 36636.

2016: December 9; 2017: June 15.

Present: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

on appeal from the court of appeal for alberta

*Human rights — Discriminatory practices — Discrimination based on mental or physical disability — Drug dependency — Employer’s policy aimed at ensuring safety required employees to disclose dependence or addiction issues before drug‑related incident — Employee involved in accident — Employee tested positive for drug use — Employer terminated employee’s employment pursuant to policy — Whether employee was terminated for addiction or for breaching policy — If termination constituted prima facie discrimination, whether employer met its obligation to accommodate employee to point of undue hardship — Human Rights, Citizenship and Multiculturalism Act, R.S.A. 2000, c. H‑14, s. 7(1).*

S worked in a mine operated by the Elk Valley Coal Corporation, driving a loader. The mine operations were dangerous, and maintaining a safe worksite was a matter of great importance to the employer and employees. To ensure safety, the employer implemented a policy requiring that employees disclose any dependence or addiction issues before any drug‑related incident occurred. If they did, they would be offered treatment. However, if they failed to disclose and were involved in an incident and tested positive for drugs, they would be terminated.

S used cocaine on his days off. He did not tell his employer that he was using drugs. When his loader was involved in an accident, he tested positive for drugs and later said that he thought he was addicted to cocaine. His employer terminated his employment. S, through his union representative, argues that he was terminated for addiction and that this constitutes discrimination under s. 7(1) of the Alberta *Human Rights, Citizenship and Multiculturalism Act*.

The Alberta Human Rights Tribunal held that S was terminated for breaching the policy, not because of his addiction. Its decision was affirmed by the Alberta Court of Queen’s Bench and by the Alberta Court of Appeal.

*Held*: The appeal should be dismissed.

*Per* McLachlin C.J. and Abella, Karakatsanis, Côté, Brown and Rowe JJ.: This case involves the application of settled principles on workplace disability discrimination to a particular fact situation. The nature of the particular disability at issue does not change the legal principles to be applied. These issues were within the purview of the Tribunal, and attract deference. The only question is whether the Tribunal’s decision is reasonable. If the decision is within a range of possible, acceptable outcomes which are defensible in respect of the evidence and the law, it is reasonable.

It is clear that there was evidence capable of supporting the Tribunal’s conclusion that the reason for the termination was not addiction, but breach of the policy. On the facts of this case, the Tribunal concluded that S had the capacity to comply with the terms of the policy and that he would have been fired whether he was an addict or a casual user. It was therefore not unreasonable for the Tribunal to conclude that there was no *prima facie* discrimination. Although it is open to a tribunal to find that an addiction was a factor in an adverse distinction where the evidence supports such a finding, this was clearly not the finding of the Tribunal. It unequivocally and repeatedly stated that addiction was not a factor in the decision to terminate. It also rejected the argument that denial prevented S from disclosing his addiction prior to the accident. While S may have been in denial about his addiction, he knew he should not take drugs before working and had the ability to decide not to take them, as well as the capacity to disclose his drug use to his employer. Denial about his addiction was thus irrelevant in this case. Finally, a finding of stereotypical or arbitrary decision making is not a stand‑alone requirement for proving *prima facie* discrimination, and there is no need to alter the settled view that the protected ground or characteristic need only be a factor in the decision.

Since the Tribunal’s decision that *prima facie* discrimination was not established was reasonable, it is unnecessary to consider whether S was reasonably accommodated.

*Per* Moldaver and Wagner JJ.: The Tribunal’s conclusion that S’s drug dependency was not a factor in his termination was unreasonable. To prove *prima facie* discrimination, S is not required to show that his termination was caused solely or even primarily by his drug dependency. Rather, he must only show that there is a connection between the protected ground — his drug dependency — and the adverse effect. His exercise of some control over his drug use merely reduced the extent to which his dependency contributed to his termination — it did not eliminate it as a factor in his termination.

However, the Tribunal reasonably held that the employer had met its obligation to accommodate S to the point of undue hardship. Given the employer’s safety objectives and responsibilities at the coal mine, it was crucial to deter employees from using drugs in a manner that could negatively affect their work performance and potentially lead to devastating consequences. Subjecting S to an individual assessment or imposing an unpaid suspension for a limited period as a disciplinary measure instead of imposing the serious and immediate consequence of termination would have undermined the policy’s deterrent effect. Therefore, the Tribunal reasonably concluded that incorporating these aspects of individual accommodation would result in undue hardship.

*Per* Gascon J. (dissenting): Although drug dependence is a protected ground of discrimination in human rights law, stigmas surrounding drug dependence — like the belief that individuals suffering from it are the authors of their own misfortune or that their concerns are less credible than those of people suffering from other forms of disability — sometimes impair the ability of courts and society to objectively assess the merits of their discrimination claims. These stigmas contribute to the uneasy fit of drug addiction and drug testing policies in the human rights arena. The improper considerations relied on by the Tribunal effectively excluded S from the scope of human rights protections.

A drug policy that automatically terminates employees who use drugs *prima facie* discriminates against individuals burdened by drug dependence. The legal threshold for *prima facie* discrimination is whether the complainant’s protected ground is a factor in the harm they suffer (also called “contribution”). Here, drug dependence was a factor in S’s drug use, so the policy under which S was terminated for using drugs is *prima facie* discriminatory. The Tribunal’s analysis was unreasonable because it misunderstood the legal principles informing discrimination law, and was unsupported by its factual findings.

The analysis of *prima facie* discrimination, and, in particular, contribution, is concerned with discriminatory effect, not discriminatory intent. Contribution addresses the relationship between an employee’s protected ground and harm, not between the ground and the intent to harm that employee. A ground need only be at least one of the factors linked to the employee’s harm. The Tribunal did not follow this established approach. Instead, it unreasonably held that S’s addiction did not contribute to his termination based on four conceptual errors.

First, it required S to make prudent choices to avoid discrimination. Requiring that complainants be prudent in avoiding discrimination amounts to a sort of contributory fault defence in discrimination cases, which (1) places a burden on complainants to avoid discrimination, rather than on employers not to discriminate; (2) is irreconcilable with recently recognized statutory grounds that arguably implicate a complainant’s choices that are significant to their identity; (3) generally contradicts the Court’s rejection of drawing superficial distinctions between protected grounds and conduct inextricably linked to those grounds; (4) specifically contradicts the Court’s rejection of the view that choice makes drug users responsible for the harms of their drug use; (5) reinforces stigma by blaming marginalized communities for their choices; and (6) substitutes the proper inquiry (whether drug‑dependent individuals are adversely impacted by the policy) with an improper inquiry (whether drug‑dependent individuals are so overwhelmingly impacted by their addictions that any discrimination they experience is caused exclusively by their addictions).

Second, the Tribunal limited S’s protections to an assurance of formal equality. While both dependent and recreational drug users will receive similar treatment for violating the policy, only drug‑dependent persons will uniquely and disproportionately struggle in complying with the terms of the policy.

Third, the Tribunal required S to prove that he was treated arbitrarily or stereotypically, importing substantive considerations into the settled and low threshold for *prima facie* discrimination and shifting a justificatory burden from the employer onto the complainant.

Finally, the Tribunal required S to prove a causal relationship between his ground and harm, a higher bar than the mere “factor” threshold repeatedly adopted by the Court. *Prima facie* discrimination should not be narrowly construed to preserve the enforceability of drug and alcohol policies. Doing so imports justificatory considerations into the *prima facie* discrimination analysis and exaggerates the implication of finding such policies *prima facie* discriminatory when they would simply need to be justified as relating to *bona fide* occupational requirements. It also narrows the Court’s recent jurisprudence, which holds that terminating an employee for a reason related to addiction is precisely what it means for that addiction to be a factor in the employee’s harm.

As such, while the Tribunal cited the proper legal test for *prima facie* discrimination, the manner in which it applied that test and the lack of an evidentiary foundation for its findings demonstrate that its holding on contribution was unreasonable and thus unworthy of deference. Although it repeatedly stated that S’s addiction was not a factor in his termination, its reasons suggest that it meant that S’s addiction was not a factor in the employer’s decision to terminate him. That was the wrong legal test. Under the proper test, the evidence before the Tribunal could not support its conclusion that S’s drug dependence did not contribute to his termination. His residual control over his choices merely diminishes the extent to which his dependence contributed to his harm, it does not eliminate it as a factor. The Tribunal avoided this argument by considering discriminatory intent, not adverse effect, and by improperly requiring absolute incapacity to ground a claim relating to discrimination based on addiction. Consequently, the termination of S was *prima facie* discriminatory.

With respect to justification, a policy that accommodates employees through mechanisms which are either inaccessible by the employee due to their disability or only applicable to the employee post‑termination cannot justify *prima facie* discrimination. Reasonable accommodation requires that the employer arrange the employee’s workplace or duties to enable the employee to do his or her work, if it can do so without undue hardship. To determine what reasonable or practical alternatives are available, an employer must engage in an individualized analysis of the employee based on the employee’s individual differences and capabilities. Therefore, any predetermined or blanket approach to sanctions imposed on employees for disability‑related conduct will struggle to fulfill an employer’s individualized duty to accommodate.

Here, the text of the impugned policy provides for individualized post‑incident accommodation: disciplinary action against an employee who tests positive for drugs is to be based on all relevant circumstances, including the employee’s employment record, the circumstances surrounding the positive test, the employee’s stated pattern of usage, the likelihood that the employee’s work performance has been or may be adversely affected, and the importance of deterring such behaviour. However, the policy was implemented, contrary to its express terms, with no consideration of S’s circumstances. In the human rights context, it is not appropriate for the employer to forego individual assessment in the interest of deterrence, even in the safety‑sensitive environment of this workplace, and even though that environment motivates strict drug policies.

None of the employer’s efforts at accommodation provided S with accessible accommodation during his employment, and those efforts failed to consider his individual circumstances in a dignified manner, so the employer cannot be said to have discharged its duty to accommodate him as an employee up to the point of undue hardship and the Tribunal’s findings to the contrary were unreasonable. Before termination, S was purportedly accommodated by the offer of lenient treatment if he voluntarily disclosed his drug dependence. But that accommodation was inaccessible by him because he appeared to have been unaware of his dependence, a symptom of his disability. After termination, he was allegedly accommodated by being given the prospect of reapplying for his position. But accommodation assists employees in their sustained employment, not former employees who may, or may not, successfully reapply for the position they lost as a result of a *prima facie* discriminatory termination. Given that all of the purported accommodations provided by the employer could not qualify as accommodation in law, the Tribunal’s holding that those accommodations constituted appropriate accommodation was open to intervention.

**Cases Cited**

By McLachlin C.J.

**Referred to:** *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3; *Hydro‑Québec v. Syndicat des employé‑e‑s de techniques professionnelles et de bureau d’Hydro‑Québec, section locale 2000 (SCFP‑FTQ)*, 2008 SCC 43, [2008] 2 S.C.R. 561; *Moore v. British Columbia (Education)*, 2012 SCC 61, [2012] 3 S.C.R. 360; *Quebec (Commission des droits de la personne et des droits de la jeunesse)* *v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39, [2015] 2 S.C.R. 789; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Newfoundland and Labrador Nurses’ Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708; *Health Employers Assn. of British Columbia v. B.C.N.U.*, 2006 BCCA 57, 54 B.C.L.R. (4th) 113; *Quebec (Attorney General) v. A*, 2013 SCC 5, [2013] 1 S.C.R. 61.

By Moldaver and Wagner JJ.

**Referred to:** *Quebec (Commission des droits de la personne et des droits de la jeunesse)* *v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39, [2015] 2 S.C.R. 789; *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489; *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868; *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970.

By Gascon J. (dissenting)

*Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39, [2015] 2 S.C.R. 789; *Moore v. British Columbia (Education)*, 2012 SCC 61, [2012] 3 S.C.R. 360; *Hydro‑Québec v. Syndicat des employé‑e‑s de techniques professionnelles et de bureau d’Hydro‑Québec, section locale 2000 (SCFP‑FTQ)*, 2008 SCC 43, [2008] 2 S.C.R. 561; *British Columbia (Public Service Employee Relations Commisson) v. BCGSEU*, [1999] 3 S.C.R. 3; *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] 1 S.C.R. 467; *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134; *Commission scolaire régionale de Chambly v. Bergevin*, [1994] 2 S.C.R. 525; *ADGA Group Consultants Inc. v. Lane* (2008), 64 C.H.R.R. D/132; *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331; *Honda Canada Inc. v. Keays*, 2008 SCC 39, [2008] 2 S.C.R. 362; *British Columbia Public Service Agency v. B.C.G.E.U.*, 2008 BCCA 357, 83 B.C.L.R. (4th) 299; *Nova Scotia (Workers’ Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504.

**Statutes and Regulations Cited**

*Alberta Human Rights Act*, R.S.A. 2000, c. A‑25.5, s. 7(1).

*Canadian Charter of Rights and Freedoms*, s. 7.

*Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 2000, c. H‑14, ss. 7(1), (3), 44(1)(h) “mental disability”, (l) “physical disability”.

**Authors Cited**

Koshan, Jennifer. “Under the Influence: Discrimination Under Human Rights Legislation and Section 15 of the *Charter*” (2014), 3 *Can. J. Hum. Rts.* 115.

Oliphant, Benjamin. “*Prima Facie* Discrimination: Is *Tranchemontagne* Consistent with the Supreme Court of Canada’s Human Rights Code Jurisprudence?” (2012), 9 *J.L. & Equality* 33.

Pothier, Dianne. “Tackling Disability Discrimination at Work: Toward a Systemic Approach” (2010), 4 *M.J.L.H.* 17.

APPEAL from a judgment of the Alberta Court of Appeal (Picard, Watson and O’Ferrall JJ.A.), 2015 ABCA 225, 19 Alta. L.R. (6th) 219, 602 A.R. 210, 647 W.A.C. 210, 87 Admin. L.R. (5th) 299, 24 C.C.E.L. (4th) 1, 81 C.H.R.R. D/367, [2015] CLLC ¶230‑046, 386 D.L.R. (4th) 383, [2015] 9 W.W.R. 1, [2015] A.J. No. 728 (QL), 2015 CarswellAlta 1190 (WL Can.), setting aside in part a decision of Michalyshyn J., 2013 ABQB 756, 581 A.R. 234, [2014] CLLC ¶230‑012, [2013] A.J. No. 1462 (QL), 2013 CarswellAlta 2733 (WL Can.), affirming a decision of the Alberta Human Rights Commission (Tribunal), 2012 AHRC 7, 74 C.H.R.R. D/425, 2012 CarswellAlta 2396 (WL Can.). Appeal dismissed, Gascon J. dissenting.

E. Wayne Benedict, for the appellant.

Peter A. Gall, Q.C., Andrea L. Zwack and *Benjamin J. Oliphant*, for the respondent the Elk Valley Coal Corporation, Cardinal River Operations.

Janice R. Ashcroft, *Q.C.*, for the respondent the Alberta Human Rights Commission (Tribunal).

Karen R. Spector and Mariam Shanouda, for the interveners the Council of Canadians with Disabilities and the Empowerment Council.

Barbara B. Johnston, *Q.C.*, and *April Kosten*, for the interveners the Construction Owners Association of Alberta, Construction Labour Relations — an Alberta Association, Enform Canada, the Electrical Contractors Association of Alberta, the Mining Association of Canada, the Mining Association of British Columbia, the Ontario Mining Association, the Northwest Territories and Nunavut Chamber of Mines and the Saskatchewan Mining Association.

Ritu Khullar, Q.C., and *Vanessa Cosco*, for the intervener the United Nurses of Alberta.

Norm Keith and *Marc Rodrigue*, for the interveners the Ontario General Contractors Association, the Ontario Formwork Association and the Greater Toronto Sewer and Watermain Contractors Association.

The judgment of McLachlin C.J. and Abella, Karakatsanis, Côté, Brown and Rowe JJ. was delivered by

The Chief Justice —

1. Introduction
2. Ian Stewart worked in a mine operated by the Elk Valley Coal Corporation, driving a loader. The mine operations were dangerous, and maintaining a safe worksite was a matter of great importance to the employer and employees. The employer implemented the Alcohol, Illegal Drugs & Medications Policy, aimed at ensuring safety in the mine (“Policy”). Employees were expected to disclose any dependence or addiction issues before any drug-related incident occurred. If they did, they would be offered treatment. However, if they failed to disclose and were involved in an incident and tested positive for drugs, they would be terminated — a policy succinctly dubbed the “no free accident” rule. The aim of the Policy was to ensure safety by encouraging employees with substance abuse problems to come forward and obtain treatment before their problems compromised safety. Employees, including Mr. Stewart, attended a training session at which the Policy was reviewed and explained. Mr. Stewart signed a form acknowledging receipt and understanding of the Policy.
3. Mr. Stewart used cocaine on his days off. He did not tell his employer that he was using drugs. One day, near the end of a 12-hour shift, Mr. Stewart’s loader was involved in an accident. No one was hurt, but Mr. Stewart tested positive for drugs. Following the positive drug test, in a meeting with his employer, Mr. Stewart said that he thought he was addicted to cocaine. Nine days later, his employer terminated his employment in accordance with the “no free accident” rule.
4. Addiction is a recognized disability under the *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 2000, c. H-14 (“Act”). Mr. Stewart, through his union representative Brent Bish, argues that he was terminated for addiction and that this constitutes discrimination under the Act, which states:

**7(1)** No employer shall

* + - * 1. refuse to employ or refuse to continue to employ any person, or
        2. 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 or family status of that person or of any other person.

. . .

**(3)** Subsection (1) does not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.

. . .

**44(1)** In this Act,

. . .

(h) “mental disability” means any mental disorder, developmental disorder or learning disorder, regardless of the cause or duration of the disorder;

. . .

(l) “physical disability” means any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness . . . ;

1. The Alberta Human Rights Commission (“Tribunal”) held that Mr. Stewart was not terminated because of his addiction, but for breaching the Policy, which required him to disclose his addiction or dependency before an accident occurred to avoid termination. The Tribunal’s decision was affirmed by the Alberta Court of Queen’s Bench and by the Alberta Court of Appeal, O’Ferrall J.A., dissenting. Mr. Stewart, through Mr. Bish, now appeals to this Court.
2. Like the majority of the Court of Appeal, I find no basis for interfering with the decision of the Tribunal. The main issue is whether the employer terminated Mr. Stewart because of his addiction (raising a *prima facie* case of discrimination), or whether the employer terminated him for breach of the Policy prohibiting drug use unrelated to his addiction because he had the capacity to comply with those terms (not raising a *prima facie* case of discrimination). This is essentially a question of fact, for the Tribunal to determine. After a thorough review of all the evidence, the Tribunal concluded that the employer had terminated Mr. Stewart’s employment for breach of its Policy. The Tribunal’s conclusion was reasonable.
3. Prior Decisions
   1. The Tribunal Decision, 2012 AHRC 7
4. The Tribunal, in a decision authored by the Honourable Paul Chrumka, accepted the settled two-part test for discrimination in the workplace. At the first step, the employee must establish a *prima facie* case of discrimination, by showing: (1) a disability which is protected under the Act; (2) adverse treatment with regard to his employment or a term of that employment; and (3) that the disability was a factor in the adverse treatment. Relying on expert evidence, the Tribunal concluded that Mr. Stewart was addicted to drugs (even though he did not recognize his addiction at the time), and that this addiction constituted a disability protected under the Act. The Tribunal also concluded that Mr. Stewart’s termination constituted adverse treatment by the employer. However, it found that Mr. Stewart’s disability was “not a factor in the termination” (para. 125 (CanLII)). In the Tribunal’s view, Mr. Stewart was terminated for failing to comply with the Policy, which required Mr. Stewart to disclose his drug use prior to the accident and denied him the benefit of “one free accident” (para. 142). Therefore, there was no *prima facie* discrimination.
5. In the alternative, the Tribunal stated that, if a *prima facie* case of discrimination had been established, it would have found that the employer discharged its onus at the second step of establishing that it had accommodated Mr. Stewart to the point of undue hardship.
6. The Tribunal, at para. 131, relied on *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3(“*Meiorin*”), in setting the test for a *bona fide* occupational requirement. *Meiorin* provides that

[a]n 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 of the job;
      2. that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
      3. that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer. [para. 54]

Then, at para. 133, the Tribunal quoted *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d’Hydro-Québec, section locale 2000 (SCFP-FTQ)*, 2008 SCC 43, [2008] 2 S.C.R. 561, at paras. 12 and 16, elaborating on the undue hardship criteria:

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. . . .

. . .

The test is not whether it was impossible for the employer to accommodate the employee’s characteristics. The employer does not have a duty to change working conditions in a fundamental way, but does have a duty, if it can do so without undue hardship, to arrange the employee’s workplace or duties to enable the employee to do his or her work.

1. The Tribunal found that the employer had adopted the “no free accident” rule in good faith for a job-related purpose, believing that “application of the policy was necessary to ensure the deterrent effect of the policy and ultimately safety in the workplace” (para. 147). The only question was whether the employer could have continued to employ Mr. Stewart without undue hardship. The Tribunal concluded it could not:

If the [employer] 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 [employer]’s safety responsibilities. [para. 152]

1. The Tribunal also found that offering an assessment without termination given that Mr. Stewart was able to make conscious choices regarding his drug use, would dilute the purpose of the Policy. Finally, the Tribunal found that the opportunity under the Policy to come forward and access treatment without fear of discipline, and the invitation to obtain treatment and apply for re-employment in six months, constituted accommodation of the disability.
   1. The Motions Judge’s Decision, 2013 ABQB 756, 581 A.R. 234
2. Mr. Bish appealed the Tribunal’s decision to the Alberta Court of Queen’s Bench. The motions judge (Michalyshyn J.) held that the standard of review was correctness on the issue of a *prima facie* case of discrimination, and reasonableness on the issue of accommodation. He dismissed the appeal on the ground that the Tribunal had not erred in concluding that the reason for termination was not addiction, but breach of the Policy. The evidence supported this conclusion and the fact that Mr. Stewart may have been in denial changed nothing.
3. On the second issue, the motions judge held that if a *prima facie* case had been made out, the Tribunal erred in finding that the Policy accommodated Mr. Stewart, because Mr. Stewart “was not ‘capable’ of seeking treatment under the Policy by reason of a dependency or addiction he did not know he had” (para. 63; see also paras. 58-66). Self-reporting is not an accommodation for people in denial of their disability, he held.
   1. The Court of Appeal’s Decision, 2015 ABCA 225, 19 Alta. L.R. (6th) 219
4. The majority of the Court of Appeal (Picard and Watson JJ.A.) dismissed the appeal and upheld the Tribunal’s decision.
5. On the issue of *prima facie* discrimination, the majority applied this Court’s three-part test set out in *Moore v. British Columbia (Education)*, 2012 SCC 61,[2012] 3 S.C.R. 360, and held that disability must be a real factor in the adverse impact, not just part of the background. Using the example of non-smoking policies, the majority held that it is impermissible to refuse to employ a person simply because they have an addiction, but permissible to refuse to employ a person for violation of a general policy restricting consumption of addictive material that is imposed on everyone. The majority concluded, at para. 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.

1. On the issue of accommodation, the majority held that an employer cannot be required to premise workplace safety policy on a flagrant demonstration of an addiction. The fact that an employee may not know he is addicted or be in denial about the addiction does not change this. Employers should not be required to establish intrusive workplace rules to sniff out potential addictions.
2. O’Ferrall J.A. dissented on the ground that the Tribunal erred in law in relying on the absence of stereotypical behaviour to conclude no *prima facie* case of discrimination had been established, and in failing to consider the employer’s motive of deterrence in determining whether the addiction was a factor in the termination. In his view, the evidence showed that addiction was the real reason for the termination of Mr. Stewart’s employment.
3. O’Ferrall J.A. also concluded that the employer had not accommodated Mr. Stewart’s disability to the point of undue hardship. In his view, self-reporting is not an accommodation for people in denial of their addiction; termination as opposed to suspension pending treatment was unduly harsh in the circumstances; and the Tribunal over-emphasized the employer’s need for deterrence and under-valued the need to assess the circumstances.
4. The Issues
5. The appellant raises three issues on appeal. First, he argues that the standard of review should be correctness. Second, he says that the Tribunal erred in concluding that *prima facie* discrimination was not established. Third, he argues that the Tribunal erred in finding that the employer has met its burden of establishing undue hardship.
6. Analysis
7. Standard of Review
8. Beneath the rhetoric that surrounds standard of review lies the question of deference: Should the reviewing court approach the decision below with deference?
9. Reviewing courts generally approach the decisions of tribunals under human rights statutes with considerable deference. It is the tribunal’s task to evaluate the evidence, find the facts and draw reasonable inferences from the facts. And it is the tribunal’s task to interpret the statute in ways that make practical and legal sense in the case before it, guided by applicable jurisprudence. Reviewing courts tread lightly in these areas.
10. The appellant, relying on what he concedes are “outlier” decisions, suggests that a non-deferential standard of correctness applies because legal issues arise with respect to whether stereotyping is a requirement of a *prima facie* case for discrimination, and with respect to when it becomes “impossible” to alter a workplace policy. As will be seen from the analysis that follows, these are essentially matters of applying the accepted law to the facts.
11. In sum, this case involves the application of settled principles on workplace disability discrimination to a particular fact situation. The nature of the particular disability at issue — in this case addiction — does not change the legal principles to be applied. The debates here are not about the law, but about the facts and the inferences to be drawn from the facts. These issues were within the purview of the Tribunal, and attract deference. The only question is whether the Tribunal’s decision was reasonable.
12. *Was the Tribunal Unreasonable in Finding That Prima Facie Discrimination Was Not Established?*
13. To make a claim for discrimination under the Act, the employee must establish a *prima facie* case of discrimination. If this is established, the onus then shifts to the employer to show that it accommodated the employee to the point of undue hardship.
14. To make a case of *prima facie* discrimination, “complainants are required to show that they have a characteristic protected from discrimination under the [*Human Rights Code*, R.S.B.C. 1996, c. 210]; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact”: *Moore*, at para. 33. Discrimination can take many forms, including “‘indirect’ discrimination”, where otherwise neutral policies may have an adverse effect on certain groups: *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39, [2015] 2 S.C.R. 789, at para. 32. Discriminatory intent on behalf of an employer is not required to demonstrate *prima facie* discrimination: *Bombardier*,at para. 40.
15. It is conceded that the first two elements of a *prima facie* case of discrimination are established in this case. The only dispute is on the third requirement — whether Mr. Stewart’s addiction was a factor in his termination.
16. The Tribunal cited the proper legal test and noted, at para. 117, that it was “not necessary that discriminatory considerations be the sole reason for the impugned actions in order for there to be a contravention of the Act”. After a detailed review of the evidence, it concluded that Mr. Stewart’s addiction was not a factor in his termination for two related reasons. In the Tribunal’s view, Mr. Stewart was fired not because he was addicted, but because he had failed to comply with the terms of the Policy, and for no other reason. The Tribunal also concluded that Mr. Stewart was not adversely impacted by the Policy because he had the capacity to comply with its terms.
17. The only question for a reviewing court is whether this conclusion is unreasonable. Deference requires respectful attention to the Tribunal’s reasoning process. A reviewing court must ensure that it does not only pay “lip service” to deferential review while substituting its own views: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 48. If the decision is within a “range of possible, acceptable outcomes” which are defensible in respect of the evidence and the law, it is reasonable: *Dunsmuir*, at para. 47; see also *Newfoundland and Labrador Nurses’ Union v. Newfoundland and Labrador (Treasury Board)*,2011 SCC 62, [2011] 3 S.C.R. 708, at para. 16.
18. I am satisfied that the Tribunal’s conclusion that addiction was not a factor in the termination of Mr. Stewart’s employment is reasonable.
19. The most important piece of evidence on whether Mr. Stewart’s addiction was a factor in Elk Valley’s reasons for the termination of his employment is the termination letter. The first three paragraphs deal with the reason for termination:

Dear Ian:

**Re: Termination of Employment**

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 acknowledgement 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 behavior by other employees and will terminate the employee unless termination would be unjust in all of the circumstances.

After consideration of all of the circumstances we have concluded that your employment should be terminated. The termination is effective November 3rd, 2005. [Emphasis in original.]

(A.R., vol. III, at p. 48)

1. The first paragraph of the letter refers to Mr. Stewart’s drug test and use of drugs. The second paragraph cites and explains the Policy. The third informs Mr. Stewart of his termination.
2. The Tribunal construed the letter as emphasizing the Policy as the factor leading to Mr. Stewart’s termination, despite his argument that the wording of the letter establishes that addiction was a factor in termination:

I . . . note the submission of [Mr. Bish’s] counsel regarding the wording in the termination letter. However, the contextual emphasis in the letter overall is on the violation of the Policy. [para. 123]

1. The Tribunal found, based on the evidence before it, that Mr. Stewart was terminated “due to the failure of Mr. Stewart to stop using drugs and failing to disclose his use prior to the accident” (para. 120). It accepted that people with addictions may experience denial and that the distinction between termination due to disability and termination due to the failure to follow a policy may appear “superficial” given that the failure to follow a policy may be a symptom of an addiction or disability (para. 122). However, in the circumstances of this case, the Tribunal found that the evidence established that the Policy adversely impacted Mr. Stewart not because of denial “but rather because he chose not to stop his drug use or disclose his drug use” (para. 122).
2. For the Tribunal, the termination letter did not establish that the addiction was a factor in Elk Valley’s decision to terminate Mr. Stewart’s employment.
3. The Tribunal went on to consider whether the Policy itself adversely impacted Mr. Stewart because of his addiction. In that context, the Tribunal noted that “Mr. Stewart would have been fired whether or not he was an addict or a casual user” (para. 123) and that “[t]he Policy as applied to Mr. Stewart which resulted in Mr. Stewart’s termination was not applied due to his disability” (para. 125). The Tribunal concluded that Mr. Stewart had “the capacity to make choices” about his drug use (para. 126). In the Tribunal’s view, the expert evidence in this case demonstrated that Mr. Stewart’s addiction did not diminish his capacity to comply with the terms of the Policy. Accordingly, the Policy did not adversely impact Mr. Stewart.
4. It is clear that there was evidence capable of supporting the Tribunal’s conclusion that the reason for the termination was not addiction, but breach of the Policy. On the facts of this case, the Tribunal concluded that Mr. Stewart had the capacity to comply with the terms of the Policy. It was therefore not unreasonable for the Tribunal to conclude that there was no *prima facie* discrimination in this case. Mr. Stewart makes two arguments in his attempt to overturn the Tribunal’s factual findings.
5. First, Mr. Bish’s attempts to recast the Tribunal’s conclusion as a finding that, while breach of the Policy was the dominant cause of the termination, Mr. Stewart’s addiction was nevertheless “a factor”, and that this suffices to establish a *prima facie* case of discrimination. This was clearly not the finding of the Tribunal. The Tribunal unequivocally and repeatedly stated that addiction was not a factor in the decision to terminate Mr. Stewart:

* “Mr. Stewart was adversely impacted by the Policy not because of denial through drug impairment but rather because he chose not to stop his drug use or disclose his drug use” (para. 122);
* “The Policy as applied to Mr. Stewart which resulted in Mr. Stewart’s termination was not applied due to his disability” (para. 125);
* “Given my finding that Mr. Stewart’s disability was not a factor in his termination” (para. 126).

The Tribunal could not have been clearer — “Mr. Stewart’s disability was not a factor in his termination”.

1. Second, Mr. Bish suggests that Mr. Stewart’s addiction was a factor in his termination because denial was part of the addiction, and prevented him from disclosing his addiction prior to the accident. Breach of the Policy may have been the immediate cause of the termination, but the reason for the breach of Policy was the addiction. Therefore, he submits, the termination was due to the addiction; the addiction indirectly was “a factor” in the termination.
2. As noted above, the Tribunal rejected this argument. While it was “sensitive to the argument that any distinction between termination due to disability, and termination due to failure to follow the Policy, may appear to be superficial given that the misconduct relied upon can be considered, in some circumstances, to be a symptom of the addiction or disability” (para. 122), it concluded that the argument did not assist Mr. Stewart because he “had the capacity to come forward and disclose his drug use” (para. 121) and “did make rational choices in terms of his drug use” (para. 122). While Mr. Stewart may have been in denial about his addiction, he knew he should not take drugs before working, and he had the ability to decide not to take them as well as the capacity to disclose his drug use to his employer. Denial about his addiction was thus irrelevant in this case.
3. It cannot be assumed that Mr. Stewart’s addiction diminished his ability to comply with the terms of the Policy. In some cases, a person with an addiction may be fully capable of complying with workplace rules. In others, the addiction may effectively deprive a person of the capacity to comply, and the breach of the rule will be inextricably connected with the addiction. Many cases may exist somewhere between these two extremes. Whether a protected characteristic is a factor in the adverse impact will depend on the facts and must be assessed on a case-by-case basis. The connection between an addiction and adverse treatment cannot be assumed and must be based on evidence: *Health Employers Assn. of British Columbia v. B.C.N.U.*, 2006 BCCA 57, 54 B.C.L.R. (4th) 113, at para. 41.
4. It was the Tribunal’s task to determine whether the reason for the termination of employment or the impact of the Policy on Mr. Stewart established a *prima facie* case of discrimination. There is ample evidence to support the Tribunal’s conclusion that there was no *prima facie* case and, therefore, no basis to overturn it.
5. O’Ferrall J.A., dissenting, argued that a detailed view of the evidence shows that the real cause of the termination was Mr. Stewart’s addiction. At best, however, this is simply another view of the evidence and the factual inferences to be drawn from it. It does not establish that the conclusion of the Tribunal was unsupported by the evidence and unreasonable. With respect, the role of reviewing courts is to determine whether a tribunal’s decision falls within a range of acceptable outcomes, not to reassess the evidence. To make findings and draw inferences from the evidence is the role of the Tribunal.
6. Where, as here, a tribunal concludes that the cause of the termination was the breach of a workplace policy or some other conduct attracting discipline, the mere existence of addiction does not establish *prima facie* discrimination. If an employee fails to comply with a workplace policy for a reason related to addiction, the employer would be unable to sanction him in any way, without potentially violating human rights legislation*.* Again, to take an example given by the majority of the Court of Appeal, if a nicotine-addicted employee violates a workplace policy forbidding smoking in the workplace, no sanction would be possible without discrimination regardless of whether or not that employee had the capacity to comply with the policy.
7. It is, of course, open to a tribunal to find that an addiction was a factor in an adverse distinction, where the evidence supports such a finding. The question, at base, is whether at least one of the reasons for the adverse treatment was the employee’s addiction. If the Tribunal in this case had found, on the evidence, that the employer terminated Mr. Stewart’s employment, or that the Policy adversely affected him, because, either alone or among other reasons, he was addicted to drugs, *prima facie* discrimination would have been made out. However, in the Tribunal’s view, the evidence did not support that conclusion. As a result, Mr. Bish did not establish a *prima facie* case of discrimination.
8. Two other points raised by the parties, while not essential to the decision in this case, merit comment.
9. First, I see no basis to alter the test for *prima facie* discrimination by adding a fourth requirement of a finding of stereotypical or arbitrary decision making. The goal of protecting people from arbitrary or stereotypical treatment or treatment that creates disadvantage by perpetuating prejudice is accomplished by ensuring that there is a link or connection between the protected ground and adverse treatment. The existence of arbitrariness or stereotyping is not a stand-alone requirement for proving *prima facie* discrimination. Requiring otherwise would improperly focus on “whether a discriminatory *attitude* exists, not a discriminatory impact”, the focus of the discrimination inquiry: *Quebec (Attorney General) v. A*,2013 SCC 5, [2013] 1 S.C.R. 61, at para. 327 (emphasis in original). The Tribunal expressly noted that proof of arbitrariness and stereotyping was not required, at para. 117.
10. Second, I see no need to alter the settled view that the protected ground or characteristic need only be “a factor” in the decision. It was suggested in argument that adjectives should be added: the ground should be a “significant” factor, or a “material” factor. Little is gained by adding adjectives to the requirement that the impugned ground be “a factor” in the adverse treatment. In each case, the tribunal must decide on the factor or factors that played a role in the adverse treatment. This is a matter of fact. If a protected ground contributed to the adverse treatment, then it must be material.
11. Conclusion
12. The Tribunal’s decision that *prima facie* discrimination was not established was reasonable. It is therefore unnecessary to consider whether Mr. Stewart was reasonably accommodated. I would affirm the decision and dismiss the appeal, with costs to Elk Valley Coal Corporation, Cardinal River Operations.

The following are the reasons delivered by

Moldaver and Wagner JJ. —

1. Overview
2. We are of the view that the appeal should be dismissed. While we concur with the Chief Justice in the result, we agree with Gascon J. that the test for *prima facie* discrimination was met in this case. The conclusion of the Alberta Human Rights Commission (“Tribunal”) that Mr. Stewart’s drug dependency was not a “factor” in his termination was unreasonable. Where we part company with Gascon J. is with respect to reasonable accommodation. In our view, the Tribunal reasonably held that the employer met its obligation to accommodate Mr. Stewart to the point of undue hardship. Therefore, we accept the Tribunal’s conclusion that Mr. Stewart’s employer did not discriminate against him on the ground of his drug dependency.
3. Analysis
   1. Prima Facie Discrimination
4. The Tribunal found that Mr. Stewart had a drug dependency that was “characterized by impaired control over the use of a psychoactive substance and/or behaviour” (Tribunal reasons, 2012 AHRC 7, at para. 109 (CanLII)). We accept the Tribunal’s finding that Mr. Stewart was not wholly incapacitated by his addiction and maintained some residual control over his drug use. But we fail to see how the Tribunal could reasonably conclude that because Mr. Stewart had a limited ability to make choices about his drug use, there was no connection between his dependency on cocaine and his termination on the basis of testing positive for cocaine after being involved in a workplace accident.
5. To prove *prima facie* discrimination, Mr. Stewart is not required to show that his termination was caused solely or even primarily by his drug dependency. Rather, Mr. Stewart must only show that there is a “connection” between the protected ground — his drug dependency — and the adverse effect: *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39, [2015] 2 S.C.R. 789, at para. 52. We agree with Gascon J. that Mr. Stewart’s exercise of some control over his drug use merely reduced the *extent* to which his dependency contributed to his termination — it did not eliminate it as a “factor” in his termination (para. 120). Mr. Stewart’s impaired control over his cocaine use was obviously connected to his termination for testing positive for cocaine after being involved in a workplace accident. In our view, the Tribunal unreasonably focused on Mr. Stewart’s limited capacity to control his choices and behaviour regarding his use of drugs and failed to consider the connection between his drug dependency and his employer’s decision to fire him.
   1. Reasonable Accommodation
6. On the issue of reasonable accommodation, however, we respectfully disagree with Gascon J. In our view, it was reasonable for the Tribunal to conclude that Elk Valley Coal Corporation, Cardinal River Operations, reasonably accommodated Mr. Stewart.
7. The question before the Tribunal was whether the employer demonstrated that the *prima facie* discriminatory standard was in fact reasonably necessary, i.e., that it was not possible to accommodate the individual employee “without imposing undue hardship” on the employer: *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3,atpara. 54.
8. The Tribunal found that Mr. Stewart’s immediate termination was reasonably necessary. Elk Valley had imposed Alcohol, Illegal Drugs & Medications Policy (“Policy”), stating that if an employee was involved in a workplace incident and subsequently tested positive for drugs, the employee would be terminated. This “no free accident” rule was meant to deter employees from using drugs in a way that could adversely affect their work performance. As indicated, Mr. Stewart tested positive for cocaine after being involved in a workplace incident and was therefore subject to termination under the Policy. The Tribunal reasoned that if Elk Valley had to offer the opportunity for individual assessment to Mr. Stewart or replace the immediate effect of termination of employment with less serious consequences (such as a suspension), the deterrent effect of the Policy would be significantly lessened. Given Elk Valley’s safety objectives and responsibilities at the coal mine, the Tribunal found that this reduction in the Policy’s ability to deter other employees from using drugs constituted undue hardship.
9. A reviewing court must be careful not to substitute its view on reasonable accommodation for that of a tribunal. Rather, it must determine whether a tribunal’s decision falls “within a range of possible, acceptable outcomes which are defensible in respect of the facts and law”: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 47.
10. In our view, it was reasonable for the Tribunal to conclude that Mr. Stewart’s immediate termination was reasonably necessary, so that the deterrent effect of the Policy was not significantly reduced. Elk Valley’s coal mining operation was a “safety-sensitive environment” (Tribunal reasons, at para. 75). In such a workplace, it was crucial to deter employees from using drugs in a manner that could negatively affect their work performance and potentially lead to devastating consequences. Workplace safety is a relevant consideration when assessing whether the employer has accommodated the employee to the point of undue hardship: *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489, at pp. 520-21. Subjecting Mr. Stewart to an individual assessment or imposing an unpaid suspension for a limited period as a disciplinary measure instead of imposing the serious and immediate consequence of termination would undermine the Policy’s deterrent effect. This, in turn, would compromise the employer’s valid objective to prevent employees from using drugs in a way that could give rise to serious harm in its safety-sensitive workplace. Therefore, the Tribunal reasonably concluded that incorporating these aspects of individual accommodation within the “no free accident” standard would result in undue hardship: see *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868, at para. 42.
11. The employee is not entitled to perfect accommodation, but rather to accommodation that is *reasonable* in the circumstances: *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970, at pp. 994-95. Although Mr. Stewart was immediately terminated, he was offered the opportunity to apply for employment after six months, provided that he completed a rehabilitation program at a recognized facility. The employer agreed to pay 50 percent of the cost of the program on certain conditions being met. There was also evidence that there would have been vacant positions available had Mr. Stewart applied for employment after completing the program.
12. We are therefore of the view that it was reasonable for the Tribunal to find that Mr. Stewart was not discriminated against by his employer on the ground of his drug dependency. We would dismiss the appeal.

The following are the reasons delivered by

Gascon J. (dissenting) —

1. Overview
2. Drug dependence is a protected ground of discrimination in human rights law. Its status as such is settled, and none of the parties dispute this. Still, stigmas surrounding drug dependence — like the belief that individuals suffering from it are the authors of their own misfortune or that their concerns are less credible than those of people suffering from other forms of disability — sometimes impair the ability of courts and society to objectively assess the merits of their discrimination claims. These stigmas contribute to the “uneasy fit of drug addiction and drug testing policies in the human rights arena” noted by the Alberta Human Rights Commission (“Tribunal”) below (Tribunal reasons, 2012 AHRC 7, at para. 153 (CanLII)).
3. Yet, as drug-dependent persons represent one of the marginalized communities that could easily be caught in a majoritarian blind spot in the discrimination discourse, they of course require equal protection from the harmful effects of discrimination. In my view, improper considerations relied on by the Tribunal here — such as drug-dependent persons having some control over their choices and being treated “equally” to non-drug-dependent persons under drug policies, and drug policies not necessarily being arbitrary or stereotypical — effectively excluded Mr. Stewart, a drug-dependent person, from the scope of human rights protections.
4. I have read the majority reasons of the Chief Justice and I partially rely on her summary of the facts and decisions below. I respectfully find, however, that further context relevant to the proper resolution of this appeal should be added to that summary. I also disagree with her disposition of the *prima facie* discrimination issue before us. A drug policy that, in application, automatically terminates employees who use drugs *prima facie* discriminates against individuals burdened by drug dependence. The legal threshold for *prima facie* discrimination is whether a protected ground of the complainant is “a factor” in the harm they suffer. Here, drug dependence (Mr. Stewart’s protected ground) was “a factor” in his drug use (the basis for his termination). In consequence, the Alcohol, Illegal Drugs & Medications Policy (“Policy”) of the Respondent, Elk Valley Coal Corporation, Cardinal River Operations, under which Mr. Stewart was terminated for using drugs, is *prima facie* discriminatory. In my view, the Tribunal’s analysis misunderstood the legal principles informing discrimination law, was unsupported by its factual findings, and was therefore unreasonable.
5. I have also read the concurring reasons of Justices Moldaver and Wagner and share their view that the drug policy in this case *prima facie* discriminated against Mr. Stewart. However, I disagree with their disposition of the justification issue. A policy that “accommodates” employees through mechanisms which are either inaccessible by the employee due to their disability or only applicable to the employee post-termination cannot justify *prima facie* discrimination. Before his termination, Mr. Stewart was purportedly accommodated by the offer of lenient treatment if he voluntarily disclosed his drug dependence. But that accommodation was inaccessible by him because he, as the Tribunal found, appeared to have been unaware of his dependence, a symptom of his disability. After his termination, Mr. Stewart was allegedly accommodated by being given the prospect of reapplying for his position. But, again, accommodation assists employees in their sustained employment, not former employees who may, or may not, successfully reapply for the position they lost as a result of a *prima facie* discriminatory termination. Since none of Elk Valley’s efforts at accommodation provided Mr. Stewart with accessible accommodation during his employment, and since those efforts failed to consider his individual circumstances in a dignified manner, Elk Valley cannot be said to have discharged its duty to accommodate him as an employee up to the point of undue hardship. I thus consider that the Tribunal’s findings to the contrary were unreasonable.
6. I fully appreciate the safety-sensitive environment at the workplace of Elk Valley, and how that environment motivates strict drug policies for employees. Nevertheless, such policies, even if well intentioned, are not immune from human rights scrutiny. In this case, such scrutiny reveals that the Tribunal’s analysis of both discrimination and justification was unreasonable. Accordingly, I would have allowed the appeal.
7. Context
8. I have four points to add to the factual background provided by the Chief Justice.
9. First, Mr. Stewart had a long career with Elk Valley, starting with its predecessor (Cardinal River Operations Ltd.) in 1996, and ending with his termination in 2005 — a total of nine years. During that career, he moved between various positions. He began by operating a haul truck, then a 170-ton truck, and later a 260-ton truck. He also took training and was certified as a wheel loader operator. His final position at the time of his termination was plant loader operator. As noted in the dissenting opinion of the Court of Appeal, in a unionized environment like Elk Valley, these years of experience typically confer many benefits on employees, including preferential treatment with respect to layoffs and vacation entitlements. The dissent also noted that Mr. Stewart had a “clean disciplinary record” for those nine years (C.A. reasons, 2015 ABCA 225, 19 Alta. L.R. (6th) 219, at para. 136). The Tribunal made no observations and found no facts to the contrary.
10. Second, the initial drug policy, implemented by Cardinal River, was jointly agreed to by it and Mr. Stewart’s union. But the subsequent Policy imposed by Elk Valley, was “unilaterally implemented” (Tribunal reasons, at para. 6). That is the Policy at issue in this appeal. The scope of the Policy’s pre-incident efforts at accommodation is important. It provides that “[n]o employee with a dependency or addiction will be disciplined or involuntarily terminated . . . for voluntarily requesting rehabilitative help in overcoming the problem” (A.R., vol. III, at p. 13 (emphasis added)). Consequently, the Policy’s pre-incident accommodation is restricted to employees with dependencies or addictions, and, in turn, is accessible only by employees aware of their dependencies or addictions.
11. Third, the Chief Justice writes that employees were expected to disclose any drug dependency issues before any “drug-related incident” occurred (para. 1) and that Mr. Stewart “tested positive for drugs” (para. 2) following the incident. But there was no finding of fact by the Tribunal either that Mr. Stewart was intoxicated at the time of the incident or that the incident in any way related to his drug use. Rather, Mr. Stewart had an incident and tested positive for cocaine. Based on Elk Valley’s own expert evidence, this merely meant that Mr. Stewart used drugs as early as two days before the incident. Indeed, Elk Valley’s expert report relied on the factual assumption that Mr. Stewart last used cocaine over 21 hours before the incident.
12. Finally, I note that the Policy was implemented contrary to its express terms. Textually, the Policy provides for individualized post-incident accommodation. Specifically, it provides that if an employee tests positive for drugs, then disciplinary action against that employee “will be based on all relevant circumstances”, including: (1) the employee’s employment record; (2) the circumstances surrounding the positive test; (3) the employee’s stated pattern of usage; (4) the likelihood that the employee’s work performance has been or may be adversely affected; and (5) the importance of deterring such behaviour by employees. Here, however, the Policy was implemented with no consideration of Mr. Stewart’s circumstances. He was terminated without any consideration of a medical or professional assessment of his specific circumstances. Elk Valley’s own fact witness conceded that the Policy’s intent, far from considering individual circumstances, is to impose automatic termination if ever an employee tests positive for drug use.
13. Decisions Below
14. I find that the Chief Justice’s discussion of the decisions below (paras. 6-17) requires additional clarification to provide the proper context to my reasons. These decisions reflect a significant amount of discord with respect to the proper approach to *prima facie* discrimination, which must be briefly discussed. In addition, the two decisions below which held that Elk Valley provided insufficient accommodation to Mr. Stewart — the decision of the Court of Queen’s Bench and the dissenting opinion of the Court of Appeal — merit further comments.
    1. Inconsistent Approaches to Prima Facie Discrimination
15. It is undisputed that the basic test for *prima facie* discrimination involves three steps, namely, (1) the complainant having a protected ground under the relevant human rights legislation (which I will call a “ground”, here drug dependence); (2) the complainant suffering disadvantage (which I will call “harm”, here Mr. Stewart’s termination); and (3) the ground being “a factor” in the complainant’s harm (which I will call “contribution”): *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39, [2015] 2 S.C.R. 789, at para. 35; *Moore v. British Columbia (Education)*, 2012 SCC 61, [2012] 3 S.C.R. 360, at para. 33.
16. Despite this established test, the decisions below rendered by the Tribunal, the Court of Queen’s Bench, and the Court of Appeal majority took different approaches to contribution. These approaches differed in three ways. First, they differed on whether direct discrimination and indirect discrimination are assessed under distinct legal frameworks (and, if so, which frameworks apply to them). Second, they differed on the scope of the “factor” test for discrimination, including whether a mere factor is sufficient or an enhanced type of factor (e.g. a “material” or “causal” factor) is required, and whether the factor test considers an employer’s discriminatory intent or the discriminatory effect of the employer’s actions. Third, they differed on whether an employee’s choices, or an employer’s arbitrary or stereotypical treatment of the employee, are legally relevant to *prima facie* discrimination.
17. The Tribunal took one approach to contribution. It held that the threshold for contribution is merely whether the complainant’s protected ground is “a factor” in their harm, nothing more (para. 115c)), though the Tribunal elsewhere suggested that a causal link is required (para. 120). The Tribunal found that Mr. Stewart did not satisfy the contribution requirement (para. 129) as he was fired for drug use (violating the Policy), not for drug addiction (his disability) (para. 120). As such, the Tribunal’s implicit reasoning process was that, to satisfy the contribution requirement, Mr. Stewart’s drug addiction must have been “a factor” in Elk Valley’s decision to terminate him (which goes to Elk Valley’s discriminatory intent), not “a factor” in what led to the termination itself (that is, the discriminatory effect of Elk Valley’s actions). Similarly, the Tribunal’s reasoning process relied on Mr. Stewart’s imprudent choices. The Tribunal wrote that “Mr. Stewart was adversely impacted by the Policy not because of denial through drug impairment but rather because he chose not to stop his drug use” (paras. 120-22). In addition, the Tribunal reasoned that a ground contributing to harm is correlated with the complainant suffering arbitrary and stereotypical treatment (para. 126). Lastly, the Tribunal relied on formal equality principles (i.e. the view that treating everyone the same avoids discrimination, even if such “neutral” policies adversely affect a minority group). Specifically, it observed that “Mr. Stewart would have been fired whether or not he was an addict or a casual user” (para. 123).
18. The Court of Queen’s Bench took a different approach to contribution. It dismissed the motion before it on the basis that Mr. Stewart was terminated for drug use, not for drug addiction (2013 ABQB 756, 581 A.R. 234, at para. 45). This part of its reasoning — which appears to assess discriminatory intent rather than discriminatory effect — matches part of the Tribunal’s approach. However, whereas the Tribunal identified a single test for all discrimination cases (para. 115), the Court of Queen’s Bench adopted a bifurcated approach, where “direct discrimination” cases require that an employer intend to discriminate and “indirect discrimination” cases require that an employer’s decision be rooted in arbitrary or stereotypical reasoning (paras. 38, 42 and 45). In addition, the Court of Queen’s Bench demanded that Mr. Stewart demonstrate a “causal connection” between his disability and harm (para. 45), a higher threshold than being a mere “factor” in that harm (the lower threshold apparently applied by the Tribunal for contribution).
19. The majority of the Court of Appeal took a third approach to contribution. It held that a protected ground must be a “real factor” in the complainant’s harm to satisfy the contribution requirement (para. 63), which is different from the “factor” test referred to by the Tribunal and the “causal factor” test applied by the Court of Queen’s Bench. The majority also held that the Policy did not *prima facie* discriminate because it treated all employees the same, regardless of their disability (paras. 66 and 70), thus relying, like the Tribunal, on formal equality principles. Further, the majority appeared to apply a distorted version of the bifurcated approach adopted by the Court of Queen’s Bench. The latter ruled that “direct discrimination” cases require intent whereas “indirect discrimination” cases require arbitrariness or stereotyping. In contrast, the majority explained that “direct discrimination” cases require arbitrariness or stereotyping whereas “indirect discrimination” cases require “a culture of discriminatory employment arrangements” (para. 76).
    1. Holdings of Insufficient Accommodation
20. Both the Court of Queen’s Bench and the dissenting judge at the Court of Appeal held that Elk Valley failed to reasonably accommodate Mr. Stewart. While the Chief Justice acknowledges these findings in her reasons (paras. 12 and 17), I find that a more detailed consideration of those decisions is necessary for my purposes.
21. The Court of Queen’s Bench opined that Mr. Stewart was not “reasonably accommodated” (para. 1). It explained that Mr. Stewart could not benefit from the pre-incident accommodation offered to him because that accommodation was limited to employees who had a “dependency or addiction” (para. 61), which Mr. Stewart denied to “some degree” (para. 59), making such accommodation inaccessible by “mere drug users” like him (paras. 64-65). As the Tribunal’s holding of sufficient accommodation relied, in part, on this inaccessible pre-incident accommodation, the Court of Queen’s Bench held that, if Elk Valley did *prima facie* discriminate against Mr. Stewart, it failed to sufficiently accommodate him (para. 66).
22. O’Ferrall J.A., in dissent at the Court of Appeal, similarly ruled that Mr. Stewart was not reasonably accommodated (para. 136). He reached this conclusion for four reasons. First, he found that “any number of options, short of termination” (e.g. suspension without pay) could accomplish Elk Valley’s goal of deterrence while simultaneously accommodating Mr. Stewart and maintaining his nine years of seniority at the company (para. 136). Second, he noted that the Tribunal’s generalized approach — prioritizing deterrence in all cases — contradicted the individualized approach to reasonable accommodation adopted by this Court (para. 137). Third, he opined, like the Court of Queen’s Bench, that the Policy’s pre-incident accommodation was inaccessible by Mr. Stewart because he was unaware of his dependence (para. 138). Fourth, he held that the desire for deterrence could not override individual assessment when such assessment was not only a “procedural duty” under this Court’s jurisprudence but was also required by the Policy in this case (paras. 139-40).
23. Analysis
    1. Standard of Review
24. I agree with the Chief Justice on the applicable standard of review (para. 22). This Court recently settled the test for discrimination (in *Bombardier*, which applied *Moore*) and for justification (in *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d’Hydro-Québec, section locale 2000 (SCFP-FTQ)*, 2008 SCC 43, [2008] 2 S.C.R. 561, which applied *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 (“*Meiorin*”)). As a result, the decisions below — which at least noted these settled legal principles and merely purported to apply them to the facts at issue — are reviewed on a reasonableness standard (*Bombardier*, at para. 73; *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3, at para. 50).
    1. Prima Facie Discrimination
25. The Chief Justice correctly identifies the three-part test for *prima facie* discrimination: (1) ground; (2) harm; and (3) contribution (para. 24). She also rightly identifies that the third part of the *prima facie* discrimination test — contribution — is the only part in dispute (para. 25). However, in my respectful view, her analysis, like the decisions below, fails to recognize how the Tribunal applied the test unreasonably. I will explain my reasoning in three steps. First, I will outline what I consider to be the correct approach to contribution. Second, I will explain why the Chief Justice’s approach is, in my opinion, incorrect. Third, I will summarize my assessment of the unreasonable approach taken by the Tribunal, which was based on legal and conceptual errors and reached a conclusion that was unsupported by its own factual findings.
    * 1. The Correct Approach to Contribution
26. The analysis of *prima facie* discrimination, and, in particular, contribution, is concerned with discriminatory *effect*, not discriminatory *intent* (though a proven intent to discriminate against a protected group — a presumably rare circumstance; see *Meiorin*, at para. 29 — would make it difficult for an employer to deny *prima facie* discrimination).
27. The difference between effect and intent, analytically, is best understood from the standpoint of the relationship under consideration. If discriminatory intent were dispositive of contribution, the relevant relationship would be that between an employee’s protected ground and the corporation’s intent to harm that employee. But contribution emphasizes discriminatory effect. Indeed, for human rights legislation to protect against “indirect discrimination” — i.e. neutral rules with adverse consequences for certain groups — intent cannot be a requirement for *prima facie* discrimination (see *Bombardier*, at paras. 32 and 40; *Meiorin*, at paras. 29 and 31). Therefore, the relevant relationship addressed by contribution is that between an employee’s ground and harm.
28. This Court’s jurisprudence has consistently focussed on discriminatory effect — i.e. on the relationship between an employee’s ground and harm — when assessing contribution.
29. In *Meiorin*, where a woman challenged unduly onerous aerobic capacity requirements for forest firefighters, the Court held that those requirements *prima facie* discriminated because they adversely affected women. When adjudicating *prima facie* discrimination, the Court gave no consideration to whether the government intended to discriminate against women. In fact, the aerobic capacity requirements, far from intentionally singling out women, legitimately intended to ensure that forest firefighters, regardless of sex, were sufficiently physically fit to fulfill their employment obligations.
30. In *Moore*,where the father of a child with a severe learning disability challenged a school district’s decision to close a centre uniquely capable of educating students with such disabilities, the Court found that decision *prima facie* discriminatory because it adversely affected those students, even though the motivation behind the decision to close the centre was “exclusively financial” (para. 46) and there was no intent to discriminate against disabled students.
31. Finally, in *Bombardier*, the Court rejected an intent approach to *prima facie* discrimination, writing that “under both Canadian law and Quebec law, the plaintiff is not required to prove that the defendant intended to discriminate against him or her” (para. 40). This is not surprising, given that many forms of discrimination involve either “multiple factors” or “unconscious” considerations (para. 41), neither of which is captured by an inquiry based on intent. As the Court opined in *Bombardier*:

In a recent decision concerning the *Human Rights Code*, R.S.O. 1990, c. H.19, the Ontario Court of Appeal found that it is preferable to use the terms commonly used by the courts in dealing with discrimination, such as “connection” and “factor”: *Peel Law Assn. v. Pieters*, 2013 ONCA 396, 116 O.R. (3d) 80, at para. 59. In that court’s opinion, the use of the modifier “causal” elevates the test beyond what is required, since human rights jurisprudence focuses on the discriminatory effects of conduct rather than on the existence of an intention to discriminate or of direct causes: para. 60. We agree with the Ontario Court of Appeal’s reasoning on this point. [Emphasis added; para. 49.]

1. As these three leading decisions illustrate, this Court has instructed that the *prima facie* discrimination inquiry, and, in particular, the contribution criterion, addresses the relationship between the ground and the harm, not between the ground and the intent to cause harm. The Chief Justice recognizes that the analysis concerns discriminatory impacts, not discriminatory attitudes (para. 45); she further recognizes that a ground need only be “at least one of” the factors linked to the employee’s harm (para. 43), an approach also affirmed by Justices Moldaver and Wagner (para. 50). However, the Chief Justice interprets the Tribunal’s reasons as having followed this established approach. In my respectful view, it did not.
   * 1. The Chief Justice’s Approach to Contribution
2. It seems to me that the Chief Justice’s reasons deviate from this established approach to contribution in three ways: (1) they fail to detect the Tribunal’s misunderstanding of the “factor” test for contribution; (2) they implicitly affirm erroneous legal principles that the Tribunal relied upon in its reasoning; and (3) they improperly import justificatory considerations into the *prima facie* discrimination analysis.
3. On the first point, the Chief Justice defers to the Tribunal’s finding that Mr. Stewart’s addiction was not a factor in his termination, which she characterizes as “essentially a question of fact” (para. 5). However, a careful reading of the Tribunal’s decision shows that it was not concerned with whether drug addiction contributed, at least in part, to Mr. Stewart’s termination (the proper inquiry, as the Chief Justice explains at para. 43). Rather, the Tribunal was concerned with whether Mr. Stewart’s addiction was (1) an irrepressible factor in his termination, i.e. a factor which was completely beyond his control (an improper approach, as I explain below, and as the Chief Justice recognizes at para. 46); and (2) a factor in Elk Valley’s decision to terminate Mr. Stewart (i.e. the intent requirement rejected by this Court’s jurisprudence, as I explained above, and about which the Chief Justice also agrees at para. 24). In light of these errors, while the Tribunal may have repeatedly found that Mr. Stewart’s addiction was not a factor in his harm, that conclusion was based on misapprehensions of principle and is therefore undeserving of deference.
4. The Chief Justice holds that the Tribunal’s conclusion — that Mr. Stewart’s addiction was not a factor in his harm — was reasonable based on the fact that his addiction did not diminish his capacity to comply with the Policy (para. 34). On my reading, the Tribunal never held that Mr. Stewart’s addiction did not diminish (i.e. partially weaken) his capacity to comply with the Policy. Rather, the Tribunal merely held that his addiction did not negate (i.e. completely remove) his capacity to comply with the Policy. Specifically, the Tribunal’s various choice-related findings — i.e. that Mr. Stewart “was able to make choices” about drug use (para. 121); “could, and in fact did make rational choices” about drug use (para. 122); and “had the capacity to make choices” about drug use (para. 126) — only mean that Mr. Stewart maintained some residual control over his choice to use drugs, not that he maintained complete unimpaired control over that choice. In my view, that is the only possible interpretation of these findings when the Tribunal found that Mr. Stewart was addicted to cocaine (para. 118) and interpreted “addiction” as meaning “impaired control” over drug use (para. 109). As a result, admitting that Mr. Stewart had impaired control regarding drug use is irreconcilable with that control being in no way diminished by his addiction.
5. Considering these findings, it seems to me that there was *prima facie* discrimination in this case. At para. 39, the Chief Justice describes a notional spectrum regarding the various degrees to which an addiction may impact an individual’s capacity to control their choices. This spectrum segments into three sections differing in respect of the degree of an addiction’s impact on an individual’s self-control: (1) no impact (a person being “fully capable of complying with workplace rules”); (2) full impact (an addiction “effectively depriv[ing] a person of the capacity to comply”); and (3) some impact (“somewhere between these two extremes”). In my opinion, if we are to truly accept that a protected ground being “a factor” in a complainant’s harm is sufficient to constitute *prima facie* discrimination, then only the ‘no impact’ portion of the spectrum would fail to qualify as *prima facie* discrimination. By including all of the “some impact” portion of the spectrum in the scope of *prima facie* discrimination, I am not assuming that Mr. Stewart’s addiction diminished his ability to comply with the terms of the Policy. I am only recognizing that addiction — meaning, impaired ability to resist using, for example, a specific drug — entails, as a matter of fact and logic, a diminished ability to resist using that drug. We must remember that in order to qualify as addiction disabled (the ground at issue here), the complainant must first prove a sufficient degree of drug craving to reach the threshold of drug dependence.
6. On the second point, I believe that the Chief Justice’s reasons implicitly affirm erroneous legal principles that the Tribunal relied upon in its reasoning. For instance, she approvingly summarizes how the Tribunal limited its reasoning to discriminatory intent rather than effect (paras. 26 and 31-36), despite expressly recognizing that discriminatory intent is not required for *prima facie* discrimination (para. 24). She also approvingly summarizes how the Tribunal relied on “choice” reasoning (paras. 5, 26, 32, 34-35, 38-39 and 42). Lastly, she approvingly summarizes how the Tribunal relied on “formal equality” reasoning (para. 34), despite expressly recognizing the validity of indirect discrimination claims (para. 24). For my part, I would not endorse these principles that depart from the established test for *prima facie* discrimination.
7. I rather prefer, and agree with, the Chief Justice’s description of the proper test for *prima facie* discrimination, namely, that the ground need only be “at least one of the reasons for the adverse treatment” (para. 43) or, in other words, need only be “a factor” that “contributed” to the harm (paras. 24 and 46). I consider that this lower and correct threshold was met on the record before the Tribunal.
8. Lastly, the Chief Justice appears to suggest that *prima facie* discrimination should be narrowly construed to preserve the enforceability of drug and alcohol policies (para. 42). Her reasons reinforce this analysis with the example of nicotine-dependent employees smoking inside offices without being sanctioned by their employer, who is handcuffed by over-generous human rights legislation, thus resulting in unenforceable workplace policies (para. 42).
9. I take issue with this approach. It imports justificatory considerations — like the importance of the workplace policy and its legitimate aims — into the *prima facie* discrimination analysis. Further, it exaggerates the implication of finding such policies *prima facie* discriminatory by claiming that they would be unenforceable (“no sanction would be possible without discrimination”: reasons of McLachlin C.J., at para. 42), when, in reality, they would simply need to be justified as relating to *bona fide* occupational requirements. It also narrows this Court’s recent jurisprudence in *Moore* and *Bombardier*; terminating an employee “for a reason related to addiction” (reasons of McLachlin C.J., at para. 42) is precisely what it means for that addiction to be “a factor” in the employee’s harm.
10. I now turn to the Tribunal’s approach to contribution.
    * 1. The Tribunal’s Unreasonable Approach to Contribution
11. I consider the Tribunal’s analysis indefensible in respect of its factual findings and the legal principles underlying *prima facie* discrimination (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 47). The Chief Justice rightly observes that the Tribunal “cited the proper legal test” for *prima facie* discrimination (para. 26). But the Tribunal is not immune from review merely because it cited the proper legal test. In this case, the manner in which it improperly applied that test, and the lack of an evidentiary foundation for its findings, demonstrate that its holding on contribution was unreasonable and thus unworthy of deference.
    * + 1. The Tribunal’s Improper Understanding of Discrimination Law Principles
12. In my opinion, the Tribunal applied the test for contribution in a manner that mischaracterized the proper inquiry; as a result, it unreasonably held that Mr. Stewart’s addiction did not contribute to his termination. I identify four conceptual errors in the Tribunal’s analysis: (1) requiring the employee to make prudent choices to avoid discrimination (paras. 120-22); (2) limiting the employee’s protections to an assurance of formal equality (para. 123); (3) requiring the employee to prove that he was treated arbitrarily or stereotypically (paras. 124 and 126); and (4) requiring the employee to prove a causal relationship between his ground and harm (para. 120).
13. A complainant’s choices are irrelevant to contribution. This Court’s jurisprudence does not require that complainants be prudent in avoiding discrimination; this would essentially amount to a sort of contributory fault defence in discrimination cases. For example, in *Meiorin*, the complainant was not required to prove that, even with more diligent training, it would have been impossible to achieve the required aerobic capacity for forest firefighting. Rather, the fact that the required aerobic capacity was harder for women to achieve (para. 11) was sufficient to link the ground (sex) and her harm (being laid off).
14. The Tribunal held that Mr. Stewart was terminated “due to [his] failure . . . to stop using drugs and failing to disclose his use prior to the accident” (para. 120). But these were both symptomatic of his drug addiction, which made it more difficult for him to stop drug use, and appeared to have left him unaware of his addiction, thus removing him from the scope of the Policy’s pre-incident accommodation. Claiming that Mr. Stewart’s drug addiction was not “a factor” in his termination because he was fired “due to” his drug use is simply an alternate phrasing for contribution requiring that a ground be a direct cause of harm (the Policy breach), rather than an indirect cause (the addiction contributing to that breach). Similarly, blaming Mr. Stewart for his failure to use the pre-incident accommodation under the Policy, when that failure appears to have been rooted in denial symptomatic of his addiction, only considers his direct failure to use the policy and not the indirect explanation for that failure. In other words, a choice-driven analysis of *prima facie* discrimination requires that a ground be a “direct” factor in the complainant’s harm rather than simply requiring that a ground be “a factor”, the established test. Indeed, asserting that Mr. Stewart’s addiction was not an “immediate” (i.e. direct) cause of his harm because he chose to use drugs reflects how this choice approach modifies the “factor” approach to an “immediate factor” analysis.
15. A choice threshold for contribution is normatively undesirable for many reasons. For instance, such a threshold places a burden on complainants to avoid discrimination, rather than on employers not to discriminate. It is also irreconcilable with recently recognized statutory grounds that arguably implicate a complainant’s choices that are significant to their identity — such as “gender expression” (*Alberta Human Rights Act*, R.S.A. 2000, c. A-25.5, s. 7(1)) — thus making complaints based on those grounds theoretically impossible to advance.
16. Likewise, a choice threshold generally contradicts this Court’s rejection — albeit in the context of other sections of the *Canadian Charter of Rights and Freedoms*— of drawing superficial distinctions between protected grounds, like drug dependence or sexual orientation, and conduct inextricably linked to those grounds, like drug use or sexual activity (*Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] 1 S.C.R. 467, at paras. 121-24), a concern noted by the Tribunal here (para. 122). Further, it specifically contradicts this Court’s rejection — albeit in the context of s. 7 of the *Charter* — of the view that “choice” makes drug users responsible for the harms of their drug use, rather than *Charter*-infringing laws or discriminatory employers (*Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134, at para. 106).
17. In addition, a choice threshold blames marginalized communities for their choices — whether rooted in a choice to express themselves (e.g. gender expression) or an attenuated capacity to control their choices (e.g. drug dependence) — which reinforces stigma, as the Tribunal accepted here (para. 127). This is antithetical to the remedial aims of human rights legislation and is rooted in the very stereotypes that human rights law seeks to address. As one intervener observed, choice, in this context, “is code for moral blameworthiness”.
18. From this standpoint, the Tribunal’s emphasis on the fact that Mr. Stewart’s drug dependence was not completely incapacitating was misplaced. The Tribunal found that Mr. Stewart, despite his drug dependence, was still able to “make rational choices in terms of his drug use” (para. 122) and maintained control over “when and where he used drugs” (para. 121). On the basis of this residual, albeit diminished, control, the Tribunal held that Mr. Stewart’s termination flowed from his choice to use drugs, not his drug dependence (para. 122). I do not accept this reasoning. First, it has the effect of denying human rights protections to a vast majority of drug-dependent people who, despite their addiction, most likely maintain some modicum of control over things as basic as “when and where” they use drugs. Second, it substitutes the proper inquiry — whether drug-dependent individuals are adversely impacted by the Policy — with an improper inquiry, namely, whether drug-dependent individuals are so overwhelmingly impacted by their addictions that any discrimination they experience is caused exclusively by their addictions and is in no way influenced by their willpower. This introduces a novel, and until now unrecognized, contributory fault defence to discrimination.
19. Formal equality, too, is not dispositive of contribution. Human rights protections apply to both direct and indirect discrimination claims (*Bombardier*, at para. 32; *Meiorin*, at paras. 29 and 31). Despite this, the Tribunal’s reasoning has the impact of erasing indirect discrimination from the scope of human rights protections by relying on formal equality principles. In this respect, the Tribunal wrote that “Mr. Stewart would have been fired whether or not he was an addict or a casual user” (para. 123) and that “[t]he Policy applied to both casual users of drugs as well as those who were drug addicted or dependent” (para. 128). In other words, the Tribunal reasoned that the Policy’s equal treatment of drug-dependent and non-drug-dependent persons who violate the Policy prevents it from being *prima facie* discriminatory (para. 128). Similarly, the Court of Appeal reasoned that cigarette smoking prohibitions cannot be *prima facie* discriminatory because they apply to smokers “even if they just started”, i.e. even if they are not yet addicted (para. 65). But such “equal” treatment does not exhaust the *prima facie* discrimination analysis.
20. A male who failed the aerobic requirement in *Meiorin* would have been laid off, just like Ms. Meiorin. What mattered was that female candidates were adversely impacted by the requirement. Similarly, in *Commission scolaire régionale de Chambly v. Bergevin*, [1994] 2 S.C.R. 525, any employee who failed to work on Yom Kippur, whether Jewish or otherwise, would have been required to take unpaid leave. What mattered was that Jewish teachers — to whom Yom Kippur holds unique significance — were adversely impacted by the workplace policy.
21. This case is no different. While it is true that both dependent and recreational drug users will receive similar treatment for violating the Policy, it is only drug-dependent persons, whose disability is a recognized protected ground, that will uniquely and disproportionately struggle in complying with the terms of the Policy. The equal application of a policy to those with and without a protected ground merely means, at most, that the policy does not discriminate directly; it is not dispositive of indirect discrimination, and it therefore fails to exhaust the *prima facie* discrimination inquiry.
22. Furthermore, I find that the Tribunal improperly considered arbitrariness and stereotyping relevant to its contribution analysis. It distinguished *ADGA Group Consultants Inc. v. Lane* (2008), 64 C.H.R.R. D/132 (Ont. Div. Ct.), from the instant case because, in *ADGA*, the employer terminated an employee based on “stereotypes” (para. 124). The Tribunal then commented how, in the instant case, “there is no inference that the application of the Policy was arbitrary or perpetuated historical stereotypes” (para. 126). However, such an approach runs counter to jurisprudence from this Court. This Court has never affirmed a requirement of arbitrariness or stereotyping in the *prima facie* discrimination analysis. And none of the three pillars of *prima facie* discrimination — ground, harm, or contribution — relates, conceptually, to arbitrariness or stereotyping. As academic commentators have observed, to import “substantive” considerations into the settled and low threshold for *prima facie* discrimination conflicts with this Court’s jurisprudence and shifts a justificatory burden from the employer onto the complainant (see e.g. J. Koshan, “Under the Influence: Discrimination Under Human Rights Legislation and Section 15 of the *Charter*” (2014), 3 *Can. J. Hum. Rts.* 115, at pp. 123-25; B. Oliphant, “*Prima Facie* Discrimination: Is *Tranchemontagne* Consistent with the Supreme Court of Canada’s Human Rights Code Jurisprudence?” (2012), 9 *J.L. & Equality* 33, at p. 53; D. Pothier, “Tackling Disability Discrimination at Work: Toward a Systemic Approach” (2010), 4 *M.J.L.H.* 17, at p. 31).
23. For example, the first criterion in justification — rationality — aligns with arbitrariness; they are simply opposites (see e.g. *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, at para. 83). Similarly, all three justification criteria — rationality, good faith, and reasonable accommodation — would be difficult to satisfy if an employer engaged in stereotypical reasoning. There is therefore no basis for making arbitrariness or stereotyping a burden on the complainant at the *prima facie* discrimination stage of the analysis when it is already a burden on the employer at the justification stage (and when the employer knows its own motivations best, in any event).
24. I would add the following on this point. At para. 116, the Tribunal wrote:

A more recent aspect of the *prima facie* discrimination analysis applied by a minority of the Court in *McGill* . . . and seemingly adopted by the majority in *Honda* . . ., 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. [Emphasis added.]

1. This passage does three things in my view: (1) it purports that this Court held in *Honda Canada Inc. v. Keays*, 2008 SCC 39, [2008] 2 S.C.R. 362, that *prima facie* discrimination — which “emphasizes substantive equality” — considers stereotyping and arbitrariness; (2) it says that “proof of” prejudice or stereotyping “are not additional evidentiary requirements” for the plaintiff; and (3) it claims that an inference of stereotyping and arbitrariness “will usually be drawn” where a ground, harm, and contribution are proven. On my reading, this paragraph does not reject arbitrariness and stereotyping as relevant factors. Rather, it affirms their relevance, and makes the more modest observation that they need not be independently proven in every case because, in some cases, they can be inferred from the circumstances. I find that this consideration of arbitrariness and stereotyping is a misapprehension of principle.
2. Finally, the Tribunal misinterpreted the “factor” test established in the jurisprudence. At one point, it stated that “the adverse effect must be causally linked” to the ground (para. 120) — a higher bar than the mere “factor” threshold repeatedly adopted by this Court (*Moore*, at para. 33; *Bombardier*, at para. 49). Additionally, elsewhere in its reasons, the Tribunal’s application of the “factor” test was erroneously concerned with discriminatory intent (an improper inquiry) rather than discriminatory effect (the proper inquiry). I now turn to this key error in greater detail.
   * + 1. The Tribunal’s Understanding and Application of the “Factor” Test
3. The Tribunal dismissed Mr. Stewart’s claim based on a false dichotomy: that Mr. Stewart must have been terminated because of either his addiction or the Policy. The Tribunal explained that the Policy “was not applied [to Mr. Stewart] due to his disability, but rather because of his failure to stop using drugs” (para. 125). The Chief Justice agrees the evidence supported the conclusion that “the reason for the termination was not addiction, but breach of the Policy” (para. 35). However, based on my understanding of the Tribunal’s own factual findings, Mr. Stewart’s termination was clearly linked to both the Policy breach and his addiction.
4. True, the Tribunal repeatedly stated that Mr. Stewart’s addiction was not “a factor” in his termination, which is, on its face, the correct legal test. From the Tribunal’s reasons, though, I gather that it meant rather that Mr. Stewart’s addiction was not “a factor” in Elk Valley’s decision to terminate him, i.e. Elk Valley did not intentionally discriminate against Mr. Stewart’s addiction. This flows from the Tribunal’s reasons and its concern with whether “discriminatory considerations” factored into Elk Valley’s decision to terminate Mr. Stewart (para. 117). That was, with respect, the wrong legal test.
5. The Tribunal’s understanding of the “factor” test is reflected in the two key cases cited in its analysis of contribution: *British Columbia Public Service Agency v. B.C.G.E.U.*, 2008 BCCA 357, 83 B.C.L.R. (4th) 299 (“*Gooding*”), and *ADGA*. The Tribunal relied on *Gooding* for the proposition that a ground is not a factor in harm unless it plays a role “in the employer’s decision” to terminate an employee (para. 119, citing *Gooding*, at para. 11). In turn, it analogized *Gooding* to this case on the basis that Elk Valley’s decision — terminating Mr. Stewart — was made because he breached the Policy, not due to his addiction (para. 120). Similarly, the Tribunal relied on *ADGA* for the proposition that an employer cannot terminate an employee simply because the employee “advise[s] his employer of his medical disability”, a decision “rooted in stereotypes” (para. 124). It then explained how *ADGA* was “quite distinguishable” from this case since Elk Valley terminated Mr. Stewart for his Policy breach, not merely for having a disability (paras. 124-25).
6. The Tribunal’s reliance on these cases for these principles of law illustrates how it narrowed the scope of *prima facie* discrimination to direct and intentional discrimination. *ADGA* is indeed distinguishable from this case, but that is because itwas a case of direct discrimination. Direct discrimination need not be proven in all cases. If such proof were always required, this Court would not have found *prima facie* discrimination in *Meiorin* and *Moore*, both of which involved indirect discrimination.
7. At one point, the Tribunal alluded to the proper approach to *prima facie* discrimination:

. . . I am sensitive to the argument that any distinction between termination due to disability, and termination due to failure to follow the Policy, may appear to be superficial given that the misconduct relied upon can be considered, in some circumstances, to be a symptom of the addiction or disability. [para. 122]

This lower threshold — whether the ground was “a factor” in the occurrence of the harm, not in the employer’s decision to cause that harm — is the correct approach in law, as this Court has consistently ruled. But the Tribunal did not follow it.

1. Given this, the Tribunal’s repeated holding that Mr. Stewart’s disability was not “a factor” in his termination (paras. 122 and 125-26) cannot be accorded deference. Under the proper test — i.e. whether the ground was a factor in the harm — the evidence before the Tribunal could not support its conclusion that Mr. Stewart’s drug dependence did not contribute to his termination.
2. The Chief Justice accepts that “[t]he question, at base, is whether at least one of the reasons for the adverse treatment was the employee’s addiction” (para. 43). In my view, drug addiction was at least one, if not the central, factor in Mr. Stewart’s termination for drug use. The Tribunal found, and both parties’ experts opined, that addiction means “impaired control” over drug use (para. 109). The Tribunal also found that Mr. Stewart was drug-dependent with respect to cocaine (para. 118). Both experts agreed that Mr. Stewart was unaware of his drug dependence at the time of the incident (paras. 58, 61, 66 and 80). Accordingly, Mr. Stewart had an impaired ability to comply with the Policy in two respects: (1) it prohibited drug use, which he uniquely and inordinately craved; and (2) it provided accommodation to drug-addicted persons, which he appears to have denied being — a symptom of his addiction.
3. It is true that Mr. Stewart was not wholly incapacitated by his addiction and maintained some residual control over his choices (paras. 121-22). But that merely diminishes the extent to which his dependence contributed to his harm, it does not eliminate it as “a factor”. To require complete incapacitation for addiction to ground a discrimination claim would effectively erase addiction from the scope of legal disability. This is because addiction, by definition, refers to impaired, not eliminated, control. According to the Chief Justice, the Tribunal “rejected this argument” based “on the facts” of this case (paras. 38-39). But, in reality, the Tribunal did not reject this argument; rather, it avoided it by interpreting the “factor” test as relating to discriminatory intent, not adverse effect, and by improperly requiring absolute incapacity to ground a claim relating to discrimination based on addiction.
4. Consequently, in light of the Tribunal’s factual findings, Elk Valley’s termination of Mr. Stewart was *prima facie* discriminatory. His ground (drug dependence) and harm (termination) are conceded. As for contribution, the link between Mr. Stewart’s drug dependence (impairing his self-control with respect to drug use) and his termination (for using drugs, a symptom, and thus an extension, of his dependence) was established on the record. Similarly, Mr. Stewart’s drug dependence appears to have left him unaware of his addiction, impairing his ability to comply with the voluntary disclosure provisions of the Policy, and making that unawareness far from irrelevant in this case. As one intervener put it, drug dependence — whether through stigma or denial — can be a factor in an employee’s failure to voluntarily disclose their disability. On that basis, *prima facie* discrimination was satisfied here.
5. I also note that, in any event, Mr. Stewart’s drug dependence was seemingly “a factor” in Elk Valley’s decision to terminate him. In this regard, I disagree with the Chief Justice’s characterization of the termination letter as relating solely to Mr. Stewart’s “use of drugs” and as “explain[ing] the Policy” (para. 30). As O’Ferrall J.A. persuasively observed in dissent (paras. 118-21), the termination letter’s phrasing addressed, if not primarily emphasized, Mr. Stewart’s drug dependence. It read:

A further investigation with you revealed that you use drugs extensively.

. . . 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 . . . .

. . .

. . . we are hopeful that you will find the personal resolve that is necessary to overcome an addiction. . . .

. . .

We wish you every success in turning your life around. [Emphasis added.]

(A.R., vol. III, at p. 48; see also C.A. reasons, at para. 119.)

1. Elk Valley’s post-incident questioning of Mr. Stewart, in the presence of his Union President and Vice-President, similarly reflected its specific concerns with his drug dependence. Among the many questions he was asked, the following can be highlighted: “So this wasn’t your first introduction to cocaine? . . . Do you use other drugs Ian? . . . Staying with coke / crack what would be your pattern of usage? . . . Do you have a problem? . . . Do you think you are addicted? . . . What is your pattern of usage now? . . . Do you have an intention to enter treatment?” (A.R., vol. III, at pp. 36-44 (emphasis added)).
2. Considering the termination letter and the transcript of Mr. Stewart’s post-incident interview, it was unreasonable for the Tribunal to conclude that Elk Valley was not at least interested in whether Mr. Stewart was drug-dependent, if not primarily motivated by that concern. This was not a mere fact in the background.
3. Regardless, this analysis of what factored into Elk Valley’s decision to terminate Mr. Stewart is not required to prove *prima facie* discrimination. The contribution inquiry simply addresses whether Mr. Stewart’s addiction was a factor in his termination. The evidence showed that Mr. Stewart’s addiction had indeed factored into his drug use, and in turn, his violation of the Policy. Had the Tribunal reasonably applied the legal test it had identified, it would have found *prima facie* discrimination. Its decision to the contrary was unreasonable and should not be afforded any deference in my opinion.
   1. Justification
4. Turning to the other step of the analysis, the Tribunal (at para. 131) correctly identified the three-part test for justification based on *Meiorin* and *Hydro-Québec*: (1) a connection between the adopted standard and job performance; (2) good faith; and (3) it being impossible to accommodate the employee further without undue hardship (which I will call “reasonable accommodation”). Justices Moldaver and Wagner properly identify that the third part of the justification test — reasonable accommodation — is the only part in dispute (para. 52). I respectfully disagree, however, with their conclusion that the Tribunal reasonably interpreted both the law on reasonable accommodation and the facts before it.
   * 1. The Correct Approach to Justification
5. Reasonable accommodation does not require that it be “impossible for the employer to accommodate the employee’s characteristics” (*Hydro-Québec*, at para. 16). However, the employer “does have a duty, if it can do so without undue hardship, to arrange the employee’s workplace or duties to enable the employee to do his or her work” (*Hydro-Québec*,at para. 16). In distilled form, reasonable accommodation has been described by this Court as being satisfied only if the employer “could not have done anything else reasonable or practical to avoid the negative impact” on the employee (*Moore*,at para. 49).
6. To determine what “reasonable or practical” alternatives are available to it, an employer must engage in an individualized analysis of the employee in question (*Meiorin*, at paras. 54-55; *Hydro-Québec*, at para. 17) based on the employee’s “individual differences” and “individual capabilities” (*Meiorin*, at paras. 55, 64 and 67). In *Meiorin*, this Court went so far as to say that “[e]mployers designing workplace standards owe an obligation to be aware of both the differences between individuals, and differences that characterize groups of individuals” (para. 68). Likewise, in *Nova Scotia (Workers’ Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504, at para. 81, the Court held that “no single accommodation or adaptation can serve the needs of all”, which reflects the wide spectrum on which addiction lies. Therefore, any predetermined or blanket approach to sanctions imposed on employees for disability-related conduct will struggle to fulfill an employer’s individualized duty to accommodate.
7. This individualized analysis involves both procedural and substantive duties. The procedural duties relate to “the procedure, if any, which was adopted to assess the issue of accommodation”; the substantive duties relate to “the substantive content of either a more accommodating standard which was offered or alternatively the employer’s reasons for not offering any such standard” (*Meiorin*, at para. 66 (emphasis deleted)).
8. Lastly, the threshold of undue hardship — i.e. the substantive duty — means that employers, when considering their options, will always have to weigh options resulting in some hardship; it is only hardship that is “undue” that an employer cannot be forced to endure. Compelling employers to bear some hardship strikes the liberal balance sought by human rights legislation:

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. [*Meiorin*, at para. 62]

1. In their concurring opinion, Justices Moldaver and Wagner defer to the Tribunal’s approach to reasonable accommodation (paras. 55-56). In so doing, they affirm that it was appropriate for Elk Valley to forego individual assessment in the interest of deterrence. I do not agree with this proposition in the human rights law context.
2. Individual assessment is foundational to the reasonable accommodation framework. By automatically terminating any employee, no matter their circumstance, for ever testing positive for drug use, whether on or off duty, Elk Valley made no effort to specifically accommodate Mr. Stewart as an individual, contrary to the guidance of this Court. Rather, Elk Valley lumped all drug users (no matter their motivation) and drug addicts (no matter their degree of addiction) into a single group to be dealt with identically and summarily, without any individual assessment.
3. Admittedly, the Tribunal held that requiring Elk Valley to provide any further accommodation to Mr. Stewart would have amounted to undue hardship (paras. 152 and 154). However, if all of the purported accommodations provided by Elk Valley cannot qualify as accommodation in law, then the Tribunal’s holding that those accommodations “constituted appropriate accommodation” (para. 152) is open to appellate intervention. In my view, the Tribunal’s holding — that Elk Valley provided sufficient accommodation to Mr. Stewart — can be overturned, since, in reality, Elk Valley provided him with no accommodation at all.
   * 1. The Tribunal’s Unreasonable Approach to Justification
4. As with *prima facie* discrimination, although the Tribunal identified the correct test (paras. 131-33), the manner in which it applied that test, and the evidentiary foundation for its findings, both demonstrate that its holding on justification was unreasonable.
5. Elk Valley’s purported accommodation must be assessed through the lens of its procedural and substantive duties. Procedurally, the Tribunal accepted that Elk Valley had a duty to inquire as to Mr. Stewart’s specific circumstances before taking adverse action against him (para. 149). Yet it is not disputed that Elk Valley did not consider Mr. Stewart’s specific circumstances (the extent of his addiction, his employment history, his capacity for rehabilitation, etc.) before terminating his employment. The Tribunal justified Elk Valley’s disregard for its procedural duty to accommodate partly on the basis that Mr. Stewart had disregarded his own duty “to request accommodation” for his disability given his “capacity” to do so (para. 149).
6. With respect, this holding is indefensible on the record. The Policy provided pre-incident accommodation only to employees “with a dependency or addiction”. As well, both experts agreed that Mr. Stewart was unaware of his drug dependence at the time of the incident (paras. 58, 61, 66 and 80). To diminish Elk Valley’s duty to accommodate based on Mr. Stewart’s failure to request accommodation, when that failure appears to have been symptomatic of the disability for which he was being discriminated against, was in my view unreasonable. The Court of Queen’s Bench (at paras. 59, 61 and 64-65) and the dissenting judge below (at para. 138) similarly held that Mr. Stewart should not have been expected to disclose a drug dependence of which he was unaware. Bearing in mind that those suffering from addiction are routinely unaware of their drug dependence, this amounts to, in effect, removing all human rights protections for such individuals. In other words, it says: you only get human rights protections if you ask, though we know, due to your disability, that you will not.
7. This insensitivity arises disproportionately in the context of addictions, likely because of the stigma associated with them. We would never demand that an employee with a physical disability complete an unattainable physical activity to access accommodation. Still, that is precisely what Elk Valley, in a psychological context, did to Mr. Stewart here. He could never have sought accommodation for a disability he did not know he had.
8. In any event, Mr. Stewart’s ability “to make conscious choices regarding his drug use” (Tribunal reasons, at para. 150) did not diminish Elk Valley’s duty to accommodate him. Complainants’ choices, imprudent or otherwise, do not weaken their human rights, either in law or in policy. Such an approach reverses the burden and requires that complainants avoid discrimination. In addition, it cannot be reconciled with protected grounds that may in some ways be indivisible from choice (such as “gender expression”), it contradicts this Court’s *Charter* jurisprudence linking protected grounds to conduct related to those grounds, and it blames or stigmatizes marginalized communities for their choices, counter to the remedial aims of human rights legislation.
9. Substantively, the Tribunal accepted that Elk Valley’s duty to accommodate included “examining alternative approaches which have less discriminatory effect” (para. 150). However, the Tribunal excused Elk Valley’s failure to implement such alternatives on the basis of an unreasonable analysis. The Tribunal summarized the pre- and post-incident accommodation provided in this case as follows:

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. [para. 152]

In my opinion, none of these accommodations qualifies as accommodation to Mr. Stewart as an employee. As such, it was unreasonable to hold that such accommodations reasonably discharged Elk Valley’s human rights obligations.

1. The Tribunal held that Elk Valley’s pre-incident accommodation — i.e. letting employees voluntarily disclose their disability without discipline — “should be considered as part of the accommodation provided to Mr. Stewart” (para. 151). That is unsupported on the facts. Reasonable accommodation is an individual exercise, sensitive to the individual characteristics of the employee involved. The experts agreed that Mr. Stewart was unaware of his disability. It follows that Elk Valley’s pre-incident accommodation was inaccessible by him. While those accommodations may have been accessible by other employees who were aware of their disabilities, they appear not to have been accessible by Mr. Stewart, the relevant employee here. As held by the Court of Queen’s Bench below, a policy permitting voluntary disclosure by drug-dependent persons does “little if anything” for someone who is unaware of their drug dependence (para. 61).
2. The Tribunal further held that Elk Valley’s post-incident accommodation — i.e. letting employees apply for new employment six months after their automatic termination and subsidizing their rehabilitation, if successful — “also contributes to accommodation responsibilities” (para. 151). In my view, this belies the concept of reasonable accommodation altogether. These accommodations are not only post-incident, they are also post-employment. They were triggered only after Mr. Stewart was terminated. While they may have been kind gestures, they could not discharge Elk Valley’s duty to accommodate Mr. Stewart as an employee. As a matter of fact, any stranger to this litigation would have been welcome to apply for a position with Elk Valley six months from the date of Mr. Stewart’s termination, making such accommodation rather superficial.
3. In reality, none of the purported accommodations provided to Mr. Stewart was accessible by him during his employment. As a result, the Tribunal held that Elk Valley discharged its duty to accommodate, in effect, by providing Mr. Stewart with no accommodation at all. Such a conclusion was unreasonable. None of the accommodations provided related in any way to Mr. Stewart’s “unique capabilities and inherent worth and dignity” (*Meiorin*, at para. 62). Instead, those accommodations, with no sensitivity to the experience of those suffering from addiction, or to Mr. Stewart’s unique circumstances, guaranteed his termination in the event of a positive drug test, no matter the surrounding circumstances.
4. I would add that the Tribunal paid no regard to the fact that the Policy actually requires individual assessment of employees who test positive for drugs, as the dissenting Court of Appeal judge observed (at paras. 139-40). In fact, the Policy reflects the individual analysis demanded by this Court’s jurisprudence. It provides that if an employee tests positive for drugs, then disciplinary action against that employee “will be based on all relevant circumstances, including . . . : (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” (A.R., vol. III, at p. 16). Despite this language, none of these considerations was weighed by Elk Valley when deciding the appropriate disciplinary action to take against Mr. Stewart. Indeed, Elk Valley essentially conceded that it unilaterally imposed this policy language with no intent of ever following through on it, as Elk Valley’s fact witness explained and as the Tribunal noted (at para. 71).
5. In *Meiorin*, this Court wrote that, for reasonable accommodation, an employer cannot choose an “uncompromisingly stringent” standard unless it reasonably accommodates each employee’s “unique capabilities and inherent worth and dignity . . . up to the point of undue hardship” (para. 62). The implementation of the Policy in this case was based precisely, in my opinion, on such an “uncompromisingly stringent” standard. Elk Valley in no way accommodated factors relating to anything unique about Mr. Stewart, his nine years with the corporation, or his apparently clean disciplinary record.
6. I emphasize one final point on justification. The Tribunal claimed that Elk Valley offered Mr. Stewart “the opportunity of reinstatement in 6 months under certain reasonable conditions” (para. 151). This is, with respect, incorrect. The termination letter sent to Mr. Stewart offered him “new employment” (A.R., vol. III, at p. 48); it made no representations about Mr. Stewart being “reinstated”, i.e. regaining his employment with all of the benefits he accrued in his nine years with Elk Valley. Further, even if Elk Valley intended to offer reinstatement, I question the reasonableness of the Tribunal’s holding that Mr. Stewart’s termination was “reasonably necessary to provide a deterrent effect to drug users and drug addicts” (para. 149). If Elk Valley in fact offered reinstatement, the difference between suspending Mr. Stewart without pay subject to meeting the conditions outlined in the termination letter and terminating him subject to reinstatement if he meets those same conditions, is immaterial. The only difference is that, in the case of the suspension, Mr. Stewart is accommodated while employed, and in the case of the termination, Mr. Stewart is “accommodated” as a former employee (counter to the legal meaning of reasonable accommodation). In either case, his employment with Elk Valley six months later turns only on his successful rehabilitation. If this was the Tribunal’s understanding of the termination letter, I am hard-pressed to understand how such a trivial difference could result in greater deterrence of drug use.
7. As the dissenting Court of Appeal judge correctly noted, “[s]uspension without pay is a significant penalty with considerable deterrent effect” (para. 136), especially if the suspension is for six months. For most persons, the deterrent effect of being suspended from work, and of receiving no salary for the duration of that suspension, is immense and should not be understated. In my view, such a harsh penalty should have been carefully considered alongside other sanctions in the context of reasonable accommodation. It was not. In the end, the only difference between Elk Valley’s chosen sanction and a lengthy unpaid suspension is Mr. Stewart’s loss of his seniority benefits, even if he successfully completed rehabilitation. One should exercise restraint when stripping away an employee’s nine years of seniority, particularly when that harsher sanction serves primarily to punish an employee for misconduct symptomatic of their disability.
8. Conclusion
9. Elk Valley *prima facie* discriminated against Mr. Stewart. He was drug-dependent, and he was terminated for giving in to that dependence, an undeniable symptom of his disability. Further, Elk Valley did not reasonably accommodate Mr. Stewart. Its only accommodation during employment was letting him voluntarily disclose his disability without discipline. But he could not access this accommodation because he appears to have been unaware of his addiction; again, a symptom of his disability. As the Tribunal’s decision to the contrary on both issues was, in my assessment, unreasonable, I would have allowed the appeal.

*Appeal dismissed with costs to Elk Valley Coal Corporation, Cardinal River Operations,* Gascon J. *dissenting.*

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