Employment and Labour Relations Law

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Recent Developments

CPA Surrey, Langley & North Delta Chapter

Newlands Golf & Country Club

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Introduction

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- Employment law and Labour Relations law have grown into expansive “niche” disciplines intersecting with many areas of law

- Today, more than ever before, employers can reap big benefits and potential savings with thoughtful and proactive approaches to dealing with employment and labour relations issues

Outline

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- The benefits of written employment contracts
- New general contract principle of good faith & duty of honest performance
- Common pitfalls in dealing with absenteeism, illness and disability
- Employee misconduct and workplace investigations
- Policies and practices to protect your business

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The Benefits of Written Employment Contracts

Pros of well-drafted contracts

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- Clear Understanding of Contract Terms
- Less potential for misunderstandings on compensation, benefit entitlements, and obligations of each party
- Provides a historical record in the event of a dispute
- Can minimize potentially large liability upon termination of employment
- Can include post-employment obligations (ie. non-competition and non-solicitation clauses)

Miller v. Convergys CMG Canada Limited Partnership, 2014 BCCA 311

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- Demonstrates the value in written employment contracts that are well-drafted
- Also demonstrates the risk employers have in using boiler-plate terms in new written employment agreements for existing employees

Miller v. Convergys CMG Canada Limited Partnership, 2014 BCCA 311

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- **Facts:**
  - Mr. Miller began employment in September 2003 with a written agreement
  - In March 2006, he received a promotion and signed a new written agreement
  - In November 2006, he received a second promotion and signed another new agreement

Miller v. Convergys CMG Canada Limited Partnership, 2014 BCCA 311

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- Facts:
  - Employment K had:
    - a probationary term purporting to be able to terminate Mr. Miller without notice during those 90 days;
    - a termination clause permitting the employer to terminate providing notice under the ESA; and
    - a severability clause
  - There was no evidence at trial as to the employer's intent when the probation clause – appeared to be included as boilerplate

Miller v. Convergys CMG Canada Limited Partnership, 2014 BCCA 311

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- Facts:
  - Mr. Miller's employment was terminated after the probationary period
  - He sued for wrongful dismissal

Miller v. Convergys CMG Canada Limited Partnership, 2014 BCCA 311

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- **Arguments:**
  - Mr. Miller argued he was entitled to reasonable notice at common law as his contract was in breach of the *ESA* due to inclusion of the probation clause, which "wiped out" his 3 weeks accrued notice under the *ESA* for the first 90 days of his employment
  - Mr. Miller argued this breach of the ESA made the probationary clause (and the termination clause) unenforceable at the outset

Miller v. Convergys CMG Canada Limited Partnership, 2014 BCCA 311

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- Arguments:
  - Mr. Miller argued that the probation clause was tied to the termination clause, that this created ambiguity in the agreement, and that the probation clause could not be severed using the severability clause without severing the termination clause too
  - Mr. Miller alleged the contract breached the *ESA* as the probation clause was meant to apply to him

Miller v. Convergys CMG Canada Limited Partnership, 2014 BCCA 311

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- **Decision on Appeal:**
  - The contract was unambiguous and on its face, merely outlined the same information as the *ESA*
  - Based on the evidence at trial, a reasonable person would be unlikely to "conclude the parties intended to place Mr. Miller in a worse… position for the first 90 days in his new position."

Miller v. Convergys CMG Canada Limited Partnership, 2014 BCCA 311

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- Decision on Appeal:
  - The parties included an unambiguous severance clause for a reason and it is appropriate to sever the probation clause without severing the termination clause
  - Mr. Miller's notice limited to the *ESA*

Lesson from Convergys

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- When introducing new employment agreements for existing employees, carefully consider the carry-over of boilerplate language
- Clear, carefully drafted employment contracts will be upheld by the courts

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Organizing Principle of Good Faith & Duty of Honest Performance

Change to Contract Law

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- In November 2014, the SCC was faced with a case where a party had been wronged and the law needed to develop in order to provide the innocent party with justice
- Outlined the “organizing principle of good faith” and the “duty of honest performance” between contracting parties

Bhasin v. Hrynew, 2014 SCC 71

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- **Facts:**
  - C markets educational savings plans through retail dealers. B was a one of C's retail dealers, and so was H. B & H were competitors
  - 3 year Contract between C & B had an automatic renewal clause unless terminated with 6 months notice
  - H had proposed mergers with B to gain access to B's lucrative niche market, but B repeatedly declined. H encouraged C to force the merger

Bhasin v. Hrynew, 2014 SCC 71

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- **Facts:**
  - C appointed H as Provincial Trading Officer ("PTO") to review C's dealers. C needed to appoint a PTO to review compliance with Alberta Securities laws
    - B objected, as C, its competitor, would have access to review B's confidential business records
  - During C's discussions with AB Securities Commission on compliance, C outlined plans which included B working for H

Bhasin v. Hrynew, 2014 SCC 71

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- **Facts:**
  - C repeatedly misled B about H's role, and about what it was telling the Securities Commission
  - B refused to allow H to audit its records
    - In response, C threatened to terminate the contract and so afterwards
  - B lost the value in his business without the agreement and the majority of B's sales agents were solicited by H to work for H
  - B sued C&H

Bhasin v. Hrynew, 2014 SCC 71

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- **Lower Courts:**
  - Trial judge found C was in breach of the implied term of good faith, H had induced breach of contract, and C & H were liable for civil conspiracy.
  - Court of Appeal overturned the judgment and dismissed B's claim entirely

Bhasin v. Hrynew, 2014 SCC 71

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- **SCC Decision:**
  - SCC found Canadian common law needed to develop more:
    - Acknowledged "good faith contractual performance" as a general organizing principle of the common law
    - Recognized a common law "duty to act honestly in the performance of contractual obligations"

Bhasin v. Hrynew, 2014 SCC 71

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- **SCC Decision:**
  - Organizing Principle of "good faith contractual performance"
    - A contracting party should have "appropriate regard to the legitimate contractual interests of the contracting partner"
    - "…merely requires that a party not seek to undermine those interests in bad faith"
    - Conceptually different from fiduciary obligations, which are a much higher standard

Bhasin v. Hrynew, 2014 SCC 71

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- **SCC Decision:**
  - "Duty to act honestly in the performance of contractual obligations."
    - Highly context specific
    - "…parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract"
    - "…does not impose a duty of loyalty or of disclosure… it is a simple requirement not to lie or mislead the other party about one's contractual performance"

Bhasin v. Hrynew, 2014 SCC 71

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- Has yet to be cited in the employment context
- Employment law already recognizes a duty of good faith in some instances, specifically at the time of termination of someone's employment

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Common Human Rights Pitfalls: Absenteeism, Illness & Disability

Absenteeism, Illness & Disability

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- Managing employees who are absent due to non-culpable illness or disability is fraught with difficult issues
- Employers have a Duty to Accommodate employee absences due to illness or disability
  - Failure to meet the Duty to Accommodate is discrimination under human rights legislation

Common Pitfalls

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- Failure to recognize a duty to accommodate
- Providing “working” notice in breach of the BC *Employment Standards Act*
- Improperly distinguishing between culpable and non-culpable absences

BC *Human Rights Code*

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Discrimination in employment

13 (1) A person must not

(a) refuse to employ or refuse to continue to employ a person, or

(b) discriminate against a person regarding employment or any term or condition of employment

because of the race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or intended employment of that person.

BC *Human Rights Code*

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- Exemptions:
  - the operation of a bona fide retirement, superannuation or pension plan or to a bona fide group or employee insurance plan, whether or not the plan is the subject of a contract of insurance between an insurer and an employer.
  - a refusal, limitation, specification or preference based on a bona fide occupational requirement (BFOR).

The Duty to Accommodate

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- Step #1: What is the nature of the accommodation sought?
- Step #2: Is there a duty to accommodate and what is the scope of the duty?
- Step #3: Would a refusal to accommodate be discriminatory and contrary to human rights legislation?
- Step #4: Is there a basis for an agreement on reasonable accommodation?

The Duty to Accommodate

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- Accommodation issues tend to arise with respect to:
  - Physical or mental disability (most common);
  - Religion;
  - Family Status; and
  - Age

The Duty to Accommodate

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Definition of Disability

- *Boisbriand* decision of the Supreme Court of Canada (2000) defined "handicap" (aka disability) broadly as follows:

"may be the result of a physical limitation, an ailment, social constraint, a perceived limitation or a combination of all of these factors…"

The Duty to Accommodate

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Would a refusal be discriminatory?

- Prima facie discrimination in employment can generally be established where:
  1) an employee has a characteristic linked to one of the prohibited grounds under the Code;
  2) the employee is experiencing adverse treatment; and
  3) there is a nexus between the adverse treatment and the prohibited ground.
- If satisfied, the Employer must then prove it met its duty to accommodate

The Duty to Accommodate

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What is the Scope?

"The duty…is to take reasonable steps to accommodate the complainant, short of undue hardship: in other words, to take such steps as may be reasonable to accommodate without undue interference in the operation of the employer's business and without undue expense to the employer."

Ont. Human Rights Comm. v. Simpsons-Sears, [1985] 2 SCR 536

The Duty to Accommodate

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- The Employer does not have a duty to accommodate where:
  - it can demonstrate **undue hardship**; or
  - An objectively justifiable **bona fide occupational requirement ("BFOR") exists**.

The Duty to Accommodate

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- When has the Employer reached "**undue hardship**"?
  - Accommodation efforts must be assessed globally
  - All accommodation during the employment relationship is relevant
  - The undue hardship test does not require the employer to show that it is "impossible to accommodate" the employee
  - The duty to accommodate ends where the employee is unable to fulfill the basic obligations of employment for the forseeable future

Hydro-Quebec, Supreme Court of Canada (2008)

The Duty to Accommodate

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- Factors to Consider for Undue Hardship:
  1. Size of the employer
  2. Interchangeability of the workforce & facilities;
  3. Whether the employee's job exacerbates the disability;
  4. The extent of the disruption of a collective agreement;
  5. The effect on the rights of other employees;
  6. The effect on the morale of other employees;
  7. Costs to accommodate, including impacts on efficiency, wage increases, and other direct $ costs to be incurred
  8. The impact on the safety of the individual, other employees, or the general public.

The Duty to Accommodate

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- Is the standard a **BFOR**? (*Meiorin* test)
  - Employer must:
    - show that it adopted the standard for a purpose *rationally connected* to the performance of the job;
    - establish that it adopted the particular standard in an *honest and good faith* belief that it was necessary to the fulfillment of that legitimate work-related purpose; and
    - establish that the standard is *reasonably necessary* to the accomplishment of that legitimate work-related purpose.

The Duty to Accommodate

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Agreement on Reasonable Accommodation

- Preferable to come to an agreement
- Negotiation process may take place prior to an employee's time off, while the employee is off work, when the employee is planning to return, and when the employee is back and working

Returning to Work

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- Issues upon returning to work:
  - What are the requirements of the position?
  - Is accommodation needed?
  - Privacy concerns
  - Medical information
  - Modified job duties
  - Permanent vs. Temporary restrictions
  - Seniority Rights

Returning to Work

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- Reasons for accommodations vary:
  - Restrictions imposed by childcare
  - Returning from serious workplace injuries
  - Returning from personal medical leaves
  - Returning from substance abuse treatment
  - Permanent restrictions on work capabilities
  - Graduated return to work plans

Returning to Work

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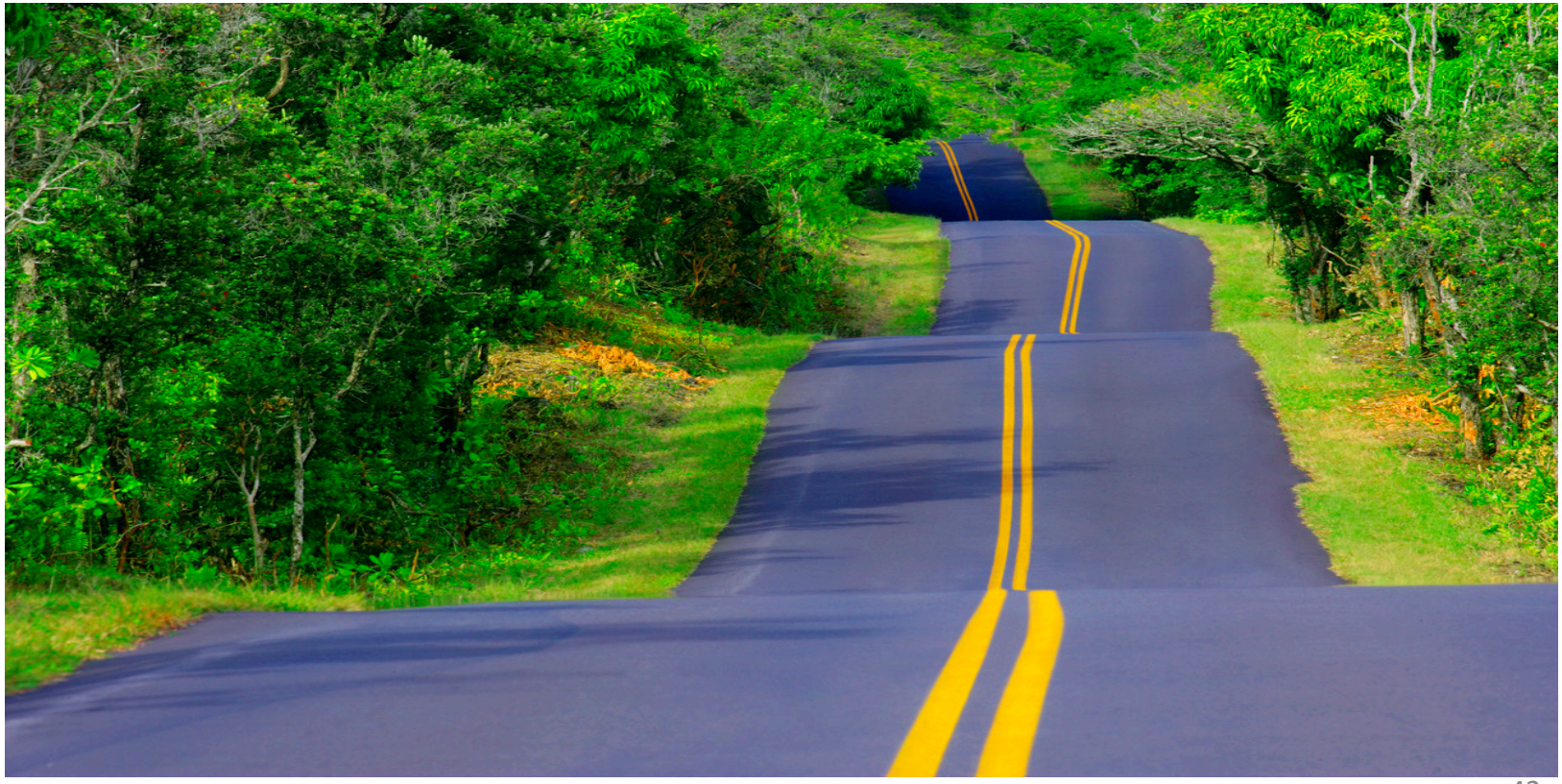
- Accommodation is a 2 Way Street
  - Employees must participate



Returning to Work

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Employer Obligations:

1. Determine reason for request for accommodation
2. Assess nature of discrimination allegations and whether such effects may be alleviated through reasonable accommodations
    - Every situation is different; context important; look at each situation individually
3. Determine whether there is significant cost and disruption caused by accommodation required
    - “impressionistic assumptions” are not good enough

Returning to Work

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4. Consider use of legal, medical and occupational safety experts to determine accommodation options

5. Make an attempt at accommodation that is tangible and measureable

6. Communicate the position to the employee and the Union (if applicable)

Returning to Work

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Employee Obligations:

1. Describe nature of any accommodation required
2. Explain the basis for the accommodation request
3. Provide medical support where appropriate
4. Attend at independent medical examination when reasonably requested
5. Provide ongoing medical disclosure where relevant

Frustration of Contract / Innocent Absenteeism

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- If a return to work is not possible, and will not be for the foreseeable future, the contract may be frustrated at common law
- In the context of a unionized employee, permanent disability may provide the basis for treating the employment relationship as at an end due to innocent absenteeism

Frustration of Contract

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"It has long been a tenet of our law that a contract may be brought to an end by operation of law and the parties discharged from further performance if, without the fault of either party, the circumstances in which it was expected to be performed have changed so radically that performance would be impossible or at least something radically difference than was initially contemplated. In such circumstances, the contract is said to be frustrated."

Wightman Estate v. 2774046 Canada Inc., 2006 BCCA 424

- Frustration is typically referred to as having been brought about by an "act of God"

Frustration of Contract

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- *Dartmouth Ferry Commission v. Marks* (1904)
  - Permanent disability that prevents employee from performing duties frustrates contract; distinct from temporary disabilities
- *Yeager v. R. J. Hastings Agencies Ltd.* (1984)
  - Length of the absence alone is not determinative of the issue (2 years in this case)
  - Abandonment is just cause for dismissal

Frustration of Contract

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- *Demuynck v. Agentis Information Services Inc.*(2003)
  - Absences exceeding 18-24 mths fall outside the "temporary" range and into the "permanent" category

- *Wightman* (2006)
  - Availability of LTD benefits does not mean a contract cannot be frustrated
  - Wording of the employment contract is important

Frustration of Contract

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- What steps do I consider to determine whether the contract has been frustrated?
- *Marshall v. Harland & Wolff Ltd.* (1972)
  - Ask yourself: is the employee's incapacity of such a nature, or does it appear likely to continue for such a period, that further performance of the employee's obligations in the future would be either impossible or radically different from that undertaken by the employee and agreed to be accepted under the agreed terms of employment?

Frustration of Contract

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- Consider:
  a) The terms of the contract, including provisions as to sick pay
  b) How long the employment is likely to last in the absence of sickness
  c) The nature of the employment
  d) The nature of the illness or injury and how long it has already continued and the prospects for recovery
  e) The period of past employment

Null Working Notice

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- Can an employer give working notice of termination to an employee who is away for medical reasons?

Morris v. ACL Services Ltd., 2014 BCSC 1580

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- **Facts:**
  - Mr. Morris employed as a software engineer for 7 years
  - Took leave due to medical issues for approximately one year
  - Employer advised him that unless he returned to work, his unpaid leave of absence and employment would be terminated within 3 months
- **Issue**: When was notice operative?

Morris v. ACL Services Ltd., 2014 BCSC 1580

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- **Decision:**
  - Concept of "working notice" means that the employee will be *working*…
    - The 3 months' notice was null given the *ESA*'s s. 67(1) prohibition against counting notice when an employee is away for medical reasons

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Employee Misconduct And Workplace Investigations

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Jian Ghomeshi - Lawyer to lead investigation

Chris Boyce - Fifth Estate Interview

Misconduct

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- Range from:
  - Breach of “common sense” behaviour; and
  - Breach of policy; to
  - Breach of the law.

- Employee misconduct on and off duty can create grounds for termination

Misconduct

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- Off Duty Conduct
  - Can establish cause for dismissal where the conduct interferes with and prejudices the employer's business interests and operations, or its reputation with the public.

Employee Investigations

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- Investigations required where:
  - Bullying & Harassment complaint made
  - Human Rights Violations alleged
    - e.g. sexual harassment
  - Occupational Health & Safety Violations alleged
    - e.g. workplace fatalitiy
  - Employee is to be terminated for cause

  and more…

Workers' Compensation Act

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- An employer must implement procedures as to:

  - How and when investigations will be conducted
  - What will be included in the investigation
  - What are the roles and responsibilities of employers, supervisors, and workers
  - What does follow-up to the investigation entail including corrective actions and timeframes
  - Record keeping requirements

Workers' Compensation Act

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- **Anti-Bullying and Harassment Policies**

  - Nov 1, 2013: all BC employers were required to put in place a policy on workplace bullying and harassment

WCA and *Human Rights Code*

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- An employer has a duty to prevent, investigate, and stop:
  - Bullying and harassment (*WCA*)
  - Discrimination on the basis of race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment of that person (*Human Rights Code*)

BC Human Rights Code

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- An employer must not retaliate against an employee who files a Human Rights complaint

- S. 43 = Protection for a person who complains, is named in a complaint, who gives evidence or who assists in a complaint under the Code

BC Labour Relations Code

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- An employer must not retaliate against an employee who files a complaint under the *Labour Relations Code*

- S. 5 = Protection for a person who makes an application, complains, exercises a right under the LRC, has participated or is about to participate in a proceeding under the LRC

Employee Investigations

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- Where an investigation is required, employers have a duty of care to complete the investigation objectively and fairly
- Investigations which are rushed, incomplete, or conducted in bad faith reflect negatively on the employer and can lead to big damage awards.

The Case Law: Investigation Done in Bad Faith

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- There are a number of cases that involve examples of poorly done investigations in the context of determining appropriate discipline of an employee for wrongdoing
- Employers need to ensure their investigations are thorough and fair particularly if they decide to terminate an employee for cause

The Case Law: Investigation Done in Bad Faith

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- "If the employer draws unfounded conclusions damaging to an employee's reputation without affording the employee any opportunity to answer those allegations, it exposes itself to a claim for damages for breach of its obligation of fair dealing in the manner of termination of the employment contract"

Honda Canada v. Keays 2008 SCC 39 at paras. 49-59

The Case Law: Investigation Done in Bad Faith

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- Employers can be liable for damages for investigations that constitute bad faith actions
- Shoddy and biased investigations = breach of good faith owed to an employee
- The onus is on the employer to conduct a full investigation before reaching conclusions devastating to an employee's reputation

Bad Faith Investigation: *Ogden v. CIBC*, 2014 BCSC 285

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- In this case, the employer determined that the employee should be terminated for cause
- The Court determined the investigation was done in bad faith and just cause was not made out

Bad Faith Investigation: *Ogden v. CIBC*, 2014 BCSC 285

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- **Facts:**
  - Employee = 41 year old financial advisor
  - Length of service = 7 years
  - Exemplary performance reviews
  - Terminated for cumulative cause: employer alleged contraventions of its Code of Conduct and Conflicts of Interest policy, plus cited previous disciplinary history

Bad Faith Investigation: *Ogden v. CIBC*, 2014 BCSC 285

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CIBC alleged cumulative cause:

1. Breaches of Branch procedural policies; e.g.) document deficiencies (signatures in wrong places, documents not sent to proper office, etc.)
2. Reduction of loan rates contrary to policy
3. Breaches of conflict of interest policy regarding gift of clothing and a mortgage transaction
4. Wire transfer for client through a personal account was a conflict of interest

Bad Faith Investigation: *Ogden v. CIBC*, 2014 BCSC 285

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- **Discipline History**:
  - Employee had received "warning letters" for these infractions – which she disputed at the time
  - Court found the incidents in which she received "warning letters" did NOT justify discipline (there were reasonable explanations for the incidents each time)
  - Nature of the "wire transfer" incident was not a conflict of interest = was an honest mistake of judgment

Bad Faith Investigation: *Ogden v. CIBC*, 2014 BCSC 285

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- **Decision**:
  - CIBC forged ahead with termination for cause based on incomplete and inaccurate information with respect to the earlier discipline letters
  - Bank had a higher level of responsibility to "get it right" before making a decision that would have such a severe financial, professional and emotional impact to Ms. Ogden

Bad Faith Investigation: *Ogden v. CIBC*, 2014 BCSC 285

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- Decision:
  - No intentional malice to disparage Ms. Ogden
  - Corporate mindset was to paper files about employee behaviour and be perceived to have taken action
  - The hasty incomplete investigation by management resulted in erroneous conclusions and wrong disciplinary actions taken

Bad Faith Investigation: *Ogden v. CIBC*, 2014 BCSC 285

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- **The Flawed Investigation**:
  - CIBC failed to provide Ms. Ogden with reasonable opportunity to give a complete explanation of her conduct
  - Interviewer's approach = cut her off, not interested in her explanation, claimed to get acknowledgments that he had not obtained
  - He failed to determine key facts and jumped to conclusions

Bad Faith Investigation: *Ogden v. CIBC*, 2014 BCSC 285

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- The Flawed Investigation:
  - CIBC understood the purpose of the interview was to give Ms. Ogden a chance to explain her conduct
  - However, the interview was conducted in a manner that undermined its very purpose = was an exercise in case building against Ms. Ogden
  - When the interview did not achieve its purpose, CIBC had an obligation to send the interviewer back to obtain further information

Bad Faith Investigation: *Ogden v. CIBC*, 2014 BCSC 285

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- **Decision to Terminate by Panel**:
  - CIBC management failed to ensure the discipline panel, charged with determining the appropriate level of discipline, had complete and accurate information about the prior "warnings" given to Ms. Ogden
  - The panel was not aware of the full circumstances with respect to the previous discipline / warnings and was made to believe she was guilty of 3 prior breaches of the Code of Conduct

Bad Faith Investigation: *Ogden v. CIBC*, 2014 BCSC 285

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- Decision to Terminate by Panel:
  - ie.) CIBC failed to provide the panel with the full and complete context and explanation of the circumstances surrounding all of Ms. Ogden's "alleged" breaches of policy
  - eg.) Some breaches had been approved by her manager; some breaches were "systemic" and common with all lenders, not just Ms. Ogden
  - Court characterized CIBC's actions as "cavalier, reckless and negligent"

Poor Investigation: *Vernon v. BC Liquor Distribution Branch, 2012 BCSC 133*

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- This case is an example of a poorly executed investigation by the employer in the context of an employee complaint against a supervisor for harassment

Poor Investigation: *Vernon v. BC Liquor Distribution Branch*, 2012 BCSC 133

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- **Facts:**
  - Ms. Vernon was 49 years old with a length of service of 30 years
  - She was known as "The Little General" and was recognized as a top employee
  - As Senior Store Manager of a Signature Store, Ms. Vernon was no longer a member of the Union when she was promoted to this position

Poor Investigation: *Vernon v. BC Liquor Distribution Branch*, 2012 BCSC 133

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- Facts:
  - A "particular sensitive employee" made a complaint against Ms. Vernon alleging various harassing behaviour
  - Employer conducted investigation into the complaint, concluding "gross workplace misconduct"
  - Offered Ms. Vernon the chance to resign (with reference letter) or be terminated. She refused and was suspended, then later terminated.

Poor Investigation: *Vernon v. BC Liquor Distribution Branch*, 2012 BCSC 133

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The Complaint:

1. Use of profane language in the workplace
2. Ms. Vernon yelled at the complainant and her tone of voice was threatening
3. Ms. Vernon berated the complainant in front of others
4. Her expectations were impossible to meet
5. Ms. Vernon made the complainant feel embarrassed and humiliated in front of customers

Poor Investigation: *Vernon v. BC Liquor Distribution Branch*, 2012 BCSC 133

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The Investigation:

1. Involved 8 individuals, including various Labour Relations Advisors, the Director of HR, Union representatives, and Liquor Branch General Managers
2. Complainant was interviewed - she simply wanted the conduct to stop and Ms. Vernon to take some training

Poor Investigation: *Vernon v. BC Liquor Distribution Branch*, 2012 BCSC 133

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The Investigation:

3. Ms. Vernon was advised of the complaint over the phone but not told her job was in jeopardy and not provided with copy of the complaint
4. Subsequently, she was interviewed – Ms. Vernon denied the substance of the complaint, admitted some parts, apologized for some parts and named other witnesses who could corroborate her version of events

Poor Investigation: *Vernon v. BC Liquor Distribution Branch*, 2012 BCSC 133

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The Investigation:

5. Union provided some input as to remedy = did not recommend termination
6. A different labour relations advisor then took over the investigation but was not given notes of the previous interviews with the complainant and Ms. Vernon
7. He interviewed 10 more witnesses and recommended termination

Poor Investigation: *Vernon v. BC Liquor Distribution Branch*, 2012 BCSC 133

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The Termination:

1. Ms. Vernon was told she had engaged in gross workplace misconduct including bullying, harassing and intimidating behaviour = told her conduct was shameful
2. Ms. Vernon refused to resign = was suspended without pay pending written Recommendation Memo to be made to the General Manager for her termination

Poor Investigation: *Vernon v. BC Liquor Distribution Branch*, 2012 BCSC 133

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The Termination:

3. Info in the Recommendation Memo would be relied on for the decision whether or not to terminate
4. The Memo contained inaccurate information – incorrectly set out what the employees said during the interviews and included statements intended to bolster the argument Ms. Vernon was a bully
5. Memo stated the employee interviews corroborated the complaint when they did not

Poor Investigation: *Vernon v. BC Liquor Distribution Branch*, 2012 BCSC 133

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Court's Findings re: the Investigation

- "The investigation was flawed from beginning to end. It was neither objective nor fair"
- The person who first conducted the interviews with the complainant and Ms. Vernon had been Ms. Vernon's labour relations advisor in the past – Ms. Vernon often confided in her
  - A different advisor should have handled the investigation

Poor Investigation: *Vernon v. BC Liquor Distribution Branch*, 2012 BCSC 133

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Court's Findings re: the Investigation

- The investigator appeared convinced of Ms. Vernon's wrongdoing after interviewing the complainant
  - The list of witnesses she compiled were people she knew would likely have negative things to say about Ms. Vernon

Poor Investigation: *Vernon v. BC Liquor Distribution Branch*, 2012 BCSC 133

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Court's Findings re: the Investigation

- Interviews of the witnesses were conducted by someone else; i.e.) not the person who interviewed the complainant and Ms. Vernon and he did not have the complainant or Ms. Vernon's interview notes (he only had the original complaint)

Poor Investigation: *Vernon v. BC Liquor Distribution Branch*, 2012 BCSC 133

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Court's Findings re: the Investigation

- The interview of Ms. Vernon was contrary to its intended purpose and extremely unfair
- Ms. Vernon thought she was meeting with her labour relations advisor and area manager to discuss in an informal setting a complaint against her
- Instead, she was the subject of an intense interrogation

Poor Investigation: *Vernon v. BC Liquor Distribution Branch*, 2012 BCSC 133

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Court's Findings re: the Investigation

- The person who she had relied on as her labour relations advisor was now her interrogator
- She was asked in the interview "why would the complainant lie?" = impossible to answer
- Investigator made inaccurate statements in her report that Ms. Vernon had denied all allegations which was not true = showed "lack of remorse" to others relying on the report

Poor Investigation: *Vernon v. BC Liquor Distribution Branch*, 2012 BCSC 133

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Court's Findings re: the Investigation

- The interviews of the witnesses were interrogations and not carried out in an impartial manner
- Witnesses who spoke favourably about Ms. Vernon were accused of lying and were chided and yelled at when they gave answers in support of her
- The Advisor chosen to investigate was inappropriate to lead the investigation and recommend the termination; she became " the prosecutor not the objective investigator"

Poor Investigation: *Vernon v. BC Liquor Distribution Branch*, 2012 BCSC 133

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Court's Findings re: the Investigation

- The decision to terminate Ms. Vernon occurred less than 96 hours from when the 2nd investigator took over = rush to judgment
- She had 12 years as a store manager and no complaints with glowing reviews
- The LDB should have stopped and reflected first = failed to consider the remedy sought by the complainant and appropriate training or disciplinary measures proportionate to the "misconduct"

Poor Investigation: *Vernon v. BC Liquor Distribution Branch*, 2012 BCSC 133

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Court's Findings re: the Investigation

- When Ms. Vernon did not agree to resign, it was egregious to leave Ms. Vernon in limbo from April 19 to May 31 and suspended without pay while they processed the "Recommendation Memo"
- The Recommendation Memo was anything but a balanced report to the General Manager = investigator admitted she was trying to prove Ms. Vernon of misconduct; replete with inaccuracies

Poor Investigation: *Vernon v. BC Liquor Distribution Branch*, 2012 BCSC 133

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Court's Findings re: the Investigation

- The Memo Failed to mention that Ms. Vernon had not been given an opportunity to respond to matters raised in the interviews, that she had agreed to refrain from some behaviour and to apologize for others, and that neither the complainant nor the union were seeking her dismissal.

Poor Investigation: *Vernon v. BC Liquor Distribution Branch*, 2012 BCSC 133

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Court's Findings re: the Investigation

- If this was an administrative law case, the LDB's decision to terminate would be quashed as a breach of natural justice
- She was awarded 18 months' notice
- $35,000 in aggravated damages for the insensitive manner of her termination
- $50,000 in punitive damages for the offer to provide her a reference letter conditional on her resignation = to offer the letter as a carrot to resign was reprehensible

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Policies & Practices to Protect Your Business

Company Policies

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- Well-Drafted Company Policies:
  - Protect your business;
  - Outline expectations clearly for employees; and
  - Help to mitigate or reduce liability.

Recommended Policies

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- All workplaces, regardless of industry, should consider having a:
  - Code of Conduct & Respectful Workplace Policy
  - Confidentiality Policy
  - Conflicts of Interest Policy
  - Privacy Policy*
  - Internet and Technology Use Policy*
  - Bullying & Harassment Policy*
  - Social Media Policy*

Recommended Policies

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- **Privacy Policy**
  - High profile breaches and leaks of consumer/client information have left several companies embarrassed
    - Sony
    - Target
    - Home Depot
  - Policy should address obligations under privacy and freedom of information legislation

Recommended Policies

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- **Internet & Technology Use Policy**
  - **Key Aspects to Address**:
  1. **Employee Privacy**:
     - *R. v. Cole*, 2012 SCC 53
       - Decision from the Supreme Court of Canada confirming the privacy interests employees can develop through the use of employer-owned technology and IT networks

Recommended Policies

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- Internet & Technology Use Policy
  1. Employee Privacy:
     - Reasonable expectation of privacy if there is no policy regarding internet and technology use or policy expressly permits personal use
     - Diminished expectation of privacy with a well-drafted policy limiting personal use
     - No expectation of privacy: would need a well-drafted policy to that effect, plus consistent enforcement

Recommended Policies

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- Internet & Technology Use Policy
  2. **Handling Personal Data on Termination of Employment**
     - Where a termination of employment occurs, how do you navigate sensitive personal information on company networks?
  3. **Appropriate & Inappropriate Use**
     - Clearly identify what is appropriate and inappropriate usage and outline consequences for inappropriate use

Recommended Policies

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- **Bullying & Harassment Policy**
  - November 2013 Amendments to *Workers' Compensation Act* and WorksafeBC Policy make these *highly* recommended
  - Failure to have one in place may weigh against the employer in the event of a WorksafeBC complaint investigation

Recommended Policies

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- Bullying & Harassment Policy
  - Recommend integrating as part of a comprehensive Respectful Workplace policy dealing with discrimination and harassment under human rights legislation

Recommended Policies

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- **Social Media Policy**
  - Proliferation of social media sites create a minefield for potential damage to an employer's reputation
  - Enables (or sometimes encourages) rapid communicates without much forethought
  - Serves to remind employees that conduct which negatively reflects on the employer constitutes grounds for discipline

Recommended Policies

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- Social Media Policy
  - Employees can get in trouble by:
    - using their employers' social media account inappropriately; or
    - using their personal social media account in a way that reflects negatively on their employer.

Employees who tweeted their way out of a job

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- 2013: Two firefighters published inappropriate and sexist tweets on their personal accounts that were picked up by the media
  - "Reject a woman and she will never let it go. One of the many defects of their kind. Also weak arms."
  - "I'd never let a woman kick my ass. If she tried something I'd be like Hey! you get your bitch ass back in the kitchen and make me some pie!"
- They were both suspended for a month and then terminated.

Using Social Media to obtain… a high?

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- 2013: A Greater Toronto Area employee working at Mr. Lube tweeted a public request for a drug dealer to deliver goods to his workplace:
  - "Any dealers in Vaughan wanna make a 20sac chop? Come to Keele/Langstaff Mr. Lube, need a spliff. @Sunith_DB8R"

- The York Regional Police replied:
  - "Awesome! Can we come too? MT…"

Using Social Media to obtain… a high?

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- Next…the York Regional Policy re-tweeted the original message to Jim Treliving (who owns Mr. Lube)…
  - "@JTreliving FYI – MT…"

- The Mr. Lube twitter account responded:
  - "@YRP Thank you to the York Regional Police for your help and great work. The matter has now been handled"

- Mr. Lube terminated the employee's employment

Best Practices for Employers

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- **Policies:**
  - Carefully draft them
  - Incorporate them by reference into employment contracts
  - Train Employees on them
    - Provide time for discussion and questions
  - Enforce them consistently
    - Walk the Talk: If you don't intend to enforce something, best to leave it out of the policy
  - Review them annually for potential updates

Best Practices for Employers

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- **Investigations:**
  - Seek legal advice
  - Consider hiring an objective external investigator

- **Human Resources:**
  - Consider hiring an HR Consultant or a full-time HR manager if size warrants

SUMMARY

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- Employers can take lots of steps with early advice to craft fair contracts and policies which protect the business and clarify expectations for employees

- Where employment relationships are strained, these documents and the employer's adherence to their terms is invaluable

QUESTIONS?

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Thank you for attending!

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