

# Overholt Law Client Seminar



## Disability Management and Employee Absenteeism

Overholt Law Client Seminar

Terminal City Club, Vancouver, BC

October 5, 2016

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# Frustration of Contract and Abandonment of Employment



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# Topics

- Topics:
  1. Frustration of Contract
  2. Abandonment of Employment

# Frustration of Contract

# Frustration

- Outside of a collective agreement:
  - Frustration of contract
- Where a collective agreement exists:
  - Dismissal for non-culpable absenteeism

# Human Rights Protections

- *BC Human Rights Code*
  - Employers “must not ... refuse to continue to employ” or “discriminate against a person regarding employment or any term or condition of employment”:  
  
**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 to the intended employment of that person.
- A.k.a. the “prohibited grounds” or the “protected grounds” of discrimination

# Human Rights Protections

- Limits to management rights
- Prohibition on discrimination
- Duty to accommodate
  - To the point of “undue hardship”

# Frustration

- What is it?
  - The limit of accommodation
  - The point where no further steps are necessary or possible
  - A complete defence to wrongful dismissal



# Frustration

- Framework of considerations:

Disability/ accommodation /  
undue hardship /frustration

- What does it all mean?

# Frustration

*“...the purpose of the duty to accommodate is not to completely alter the essence of the contract of employment, that is, **the employee’s duty to perform work in exchange for remuneration**”*

Our Supreme Court of Canada in  
*Honda Canada Inc. v. Keays*, 2008 SCC 39

# Frustration



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*“...was the employee’s disability, looked at before the purported dismissal, of such a nature, or did it appear likely to continue for such a period, that further performance of his [or her] obligations in the future would either be impossible or would be a thing radically different from that undertaken by him [or her] and agreed to be accepted by the employer under the agreed terms of his [or her] employment.”*

*Marshall v. Harland & Wolff Ltd.,  
[1972] 2 All E.R. 715*

# Frustration

*“...was the employee’s disability, looked at before the purported dismissal, **of such a nature**, or did it appear **likely to continue for such a period**, that further performance of his [or her] obligations in the future would either be **impossible or** would be **a thing radically different from that undertaken** by him [or her] and agreed to be accepted by the employer under the agreed terms of his [or her] employment.”*

*Marshall v. Harland & Wolff Ltd.,  
[1972] 2 All E.R. 715*

# Frustration

- Can you come back to work or what?!



# Frustration

- Absence(s) related to disability:
  - Can “frustrate” the objects of an employment contract (no work/no pay)
- **OR**
- If employer fails to accommodate, ground actions for wrongful dismissal/ breach of human rights
- Very tricky situation
- Information is your friend

# Frustration

- Factors to consider:

## 1. Terms of Contract

- Weekly/monthly/yearly?
- Sick leave/days in contract?
- Benefits?
  - STD?
  - LTD?
- Policies?

# Frustration

- Factors to consider:
  2. Potential length of employment in the absence of sickness
    - Temporary?
    - Seasonal?
    - Fixed-term?



# Frustration

- Factors to consider:

## 3. Nature of employment

- Key position?
  - One of many employees in a position?
- 
- Nature and size of organization
    - CEO in a small company?
    - Clerk at a large grocery store?

# Frustration

- Factors to consider:

## 4. The nature of the illness or injury

- Total incapacity?
- Period illness has persisted (two years = “lengthy”)
- Get medical information!

## 5. The period of past employment

- Harder to frustrate contracts of long-term employees

# Quick Tips

## Managing Sick Leave



# Managing Sick Leave

- No automatic right to paid sick leave
- Employment Standards unpaid leaves:
  - Pregnancy
  - Parental
  - Family responsibility
  - Compassionate care
  - Reservist
  - Bereavement
  - Jury duty
- NOTE: ESA contemplates frustration at s. 65(1)(d)

# Managing Sick Leave

- Insurance or benefits?
  - Paid sick days in contract? Policies?
  - STD?
  - LTD?
  
- Be careful not to disqualify them!

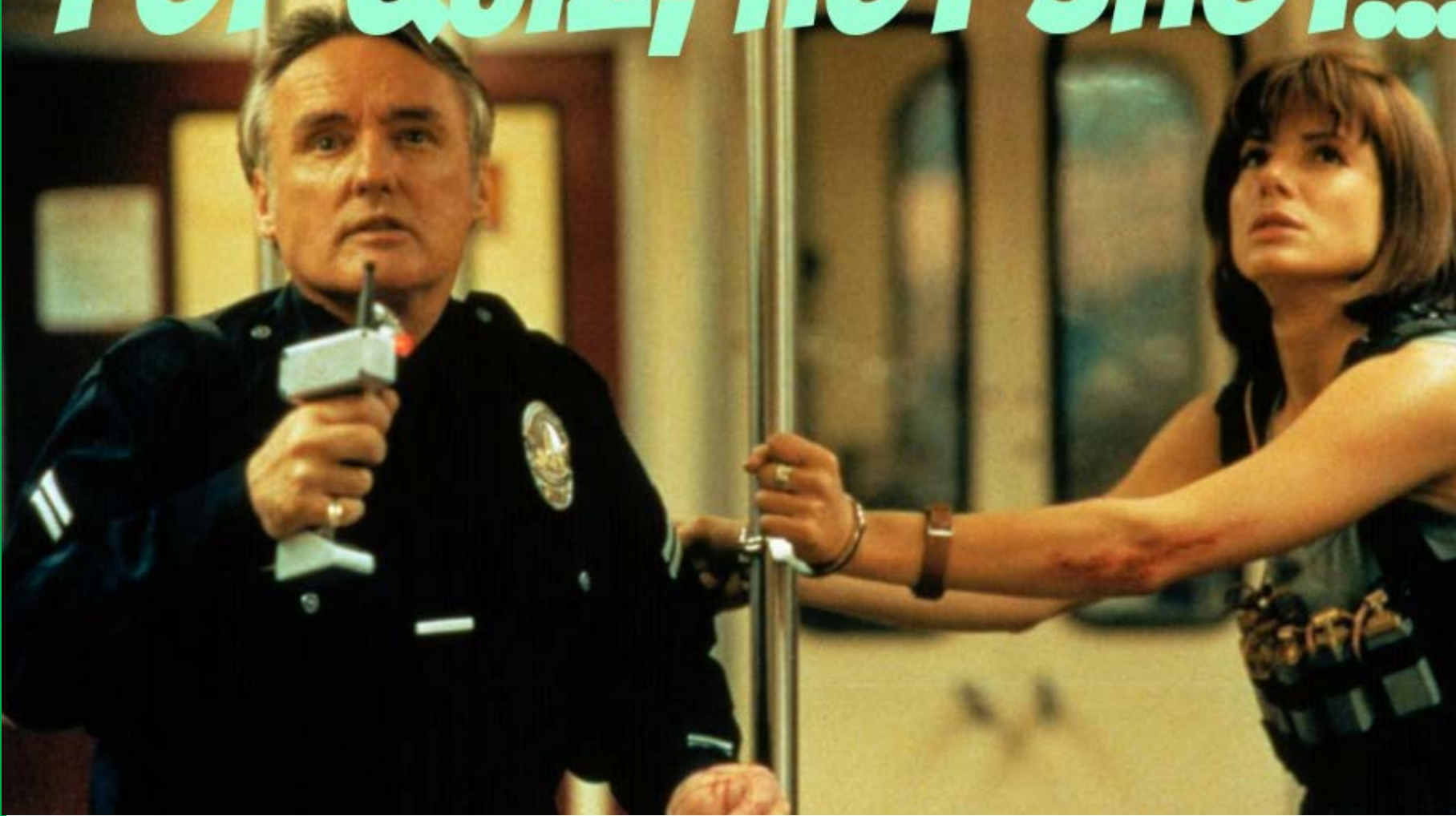
# Managing Sick Leave

- Medical information:
  - Right to request
  - Right to be skeptical
  - Right to coach
  - Right to insist on dealing with employee directly
  - Employee must reasonably cooperate
  
  - Medical certificates?
  - IME??

# Managing Sick Leave

- Always: take time to consider alternatives in accommodation

**POP QUIZ, HOT SHOT...**



**FRUSTRATION**



# Frustrating Quiz

- Office clerk
- 10 years of service
- Metastasised breast cancer
- Away from work for 14 months
- Applies for LTD
- Informs employer they need to hire a replacement
  
- Frustration??

# Frustrating Quiz

- No frustration.

*Dragone v. Riva Plumbing Ltd.,*  
[2007] O.J. No. 3710 (S.C.J.)

# Frustrating Quiz

- Foreman
- Job requires heavy lifting
- Motorcycle accident
- Attempts to return, can't
- Off work a few months
- Replaced, told would be demoted on return
- Still disabled a year after accident
  
- Frustration??

# Frustrating Quiz

- Yes, frustration

*Trevitt Blanch Equipment Rentals Ltd.,*  
2006 BCSC 94

# Frustrating Quiz

- Employee one of a few lending officers at a financial institution
- Long absence starts
- On LTD
- Replaced at work
- Two years into absence
- Told to come back for busy season
- If can't return, told will be demoted to teller
  
- Frustration??

# Frustrating Quiz

- Yes, frustration.

*Burgess v. Central Trust Co.,*  
[1988] N.B.J. No. 124 (Q.B.)

# Frustrating Quiz

- Employee has a variety of conditions, physical and mental
- Missed 960 days of work over 7 ½ years
- Absent 5 months at time of dismissal
- Many attempted returns
  
- Frustration???????

# Frustrating Quiz

- **Trick question!**
  - Non-culpable absenteeism!

*Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000, 2008 SCC 43*

(...so yes, point of undue hardship surpassed)



# Abandonment

# Abandonment

- The AWOL employee
- A form of resignation
  - Sometimes referred to as ‘constructive resignation’
- Repudiation
  - Underlying concept
  - Abandonment/resignation/constructive dismissal/cause

# Abandonment

- First Principles:
  - Resignations must be:
    - Clear
    - Unequivocal
    - Voluntary

# Abandonment

- Resignation can occur through words or conduct:
  - Very fact specific analysis
  - Relatively high bar for employers
  - Silence not the best course
  - Cases suggest that onus may fall to employers to actively seek to confirm

# Abandonment

- Resignations often in the heat of the moment
  - Emotional outbursts followed by regret
  - Employees often retract resignations
  - Employers must be careful in communications (as should employees)
- Question is one of repudiation:
  - Which party acts like the contract has ended?

# Abandonment



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- Test for abandonment:

*“...do the statements or actions of the employee, viewed objectively by a reasonable person, clearly and unequivocally indicate an intention to no longer be bound by the employment contract.”*

# Abandonment



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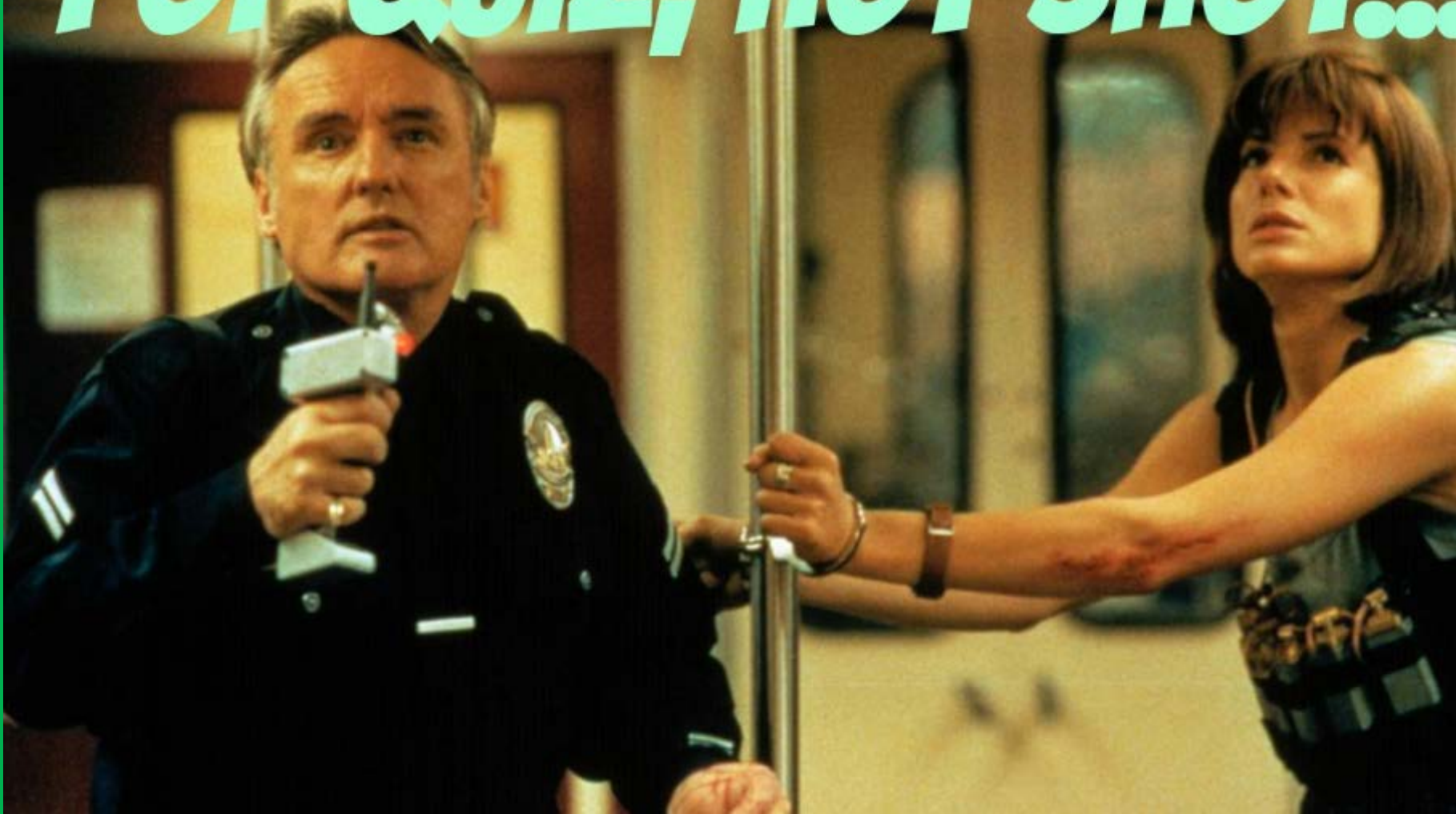
- Abandonment as cause:
  - Where no medical or other non-culpable excuse
  - Employee's can be disciplined for absences
  - Up to and including dismissal
- Underlying consideration: repudiation

# Abandonment

- Tips:
  - Have multiple means to contact employees
  - Make multiple attempts to:
    - Confirm unexcused absences;
    - Outline consequences of continued absence or failure to provide excuse; and/or
    - Confirm understanding and acceptance of resignation.
  - Take high road: allow tempers to cool



**POP QUIZ, HOT SHOT...**



**ABANDONMENT**

# Quiz of Wanton Abandon(ment)

- Deli clerk w/2 ½ years of service
- Conflict with another clerk
- Goes home for an hour, stays for a day
- Then misses a shift
- Calls “I can’t take it any longer I am quitting”
- Calls the next day “do I still have a job?”
- Denied quitting

# Quiz of Wanton Abandon(ment)

- No resignation!
  - Misunderstanding
  - Employer failed to clarify

*Bru v. AGM Enterprises Inc.,*  
[2008] B.C.J. No. 2380 (S.C.)

# Quiz of Wanton Abandon(ment)

- Employee on a term contract for a non-profit
- Has a dispute with direct supervisor
- Starts working from home
- Refuses to report to supervisor, demands CEO
- Suspended, directed to return and report
- Sends letter: “I will only be reporting to you”

# Quiz of Wanton Abandon(ment)

- Employee repudiation!  
(of sorts...)

*Myers v. the Canadian Aboriginal Aids Network*

# Quiz of Wanton Abandon(ment)

- Another deli clerk
- Home destroyed in a fire
- Employer informed, no idea when can return
- Phone disconnected, employer can't contact them (tries twice)
- Employee does not even try to call for a month
- Shows up for her paycheque w/ medical note
- Mean lawyer letters follow

# Quiz of Wanton Abandon(ment)

- No resignation!
  - Misunderstanding
  - Was suffering a medical condition
  - Employer's counsel's refusal to accept the medical condition resulted in dismissal



*Beggs v. Westport Foods Ltd.,*  
2011 BCCA 76

# Quiz of Wanton Abandon(ment)

- Winemaker
- Confrontation after unapproved day off in busy season
- Demands a raise
- Another confrontation happens
- Employee says “good luck making wine”
- Leaves keys
- Employer emails ‘confirming’ planned departure



# Quiz of Wanton Abandon(ment)

- No resignation!
  - Employee actions equivocal
  - Employer's email clear that employment was to end

*Haftbaradaran v. St. Hubertus  
Estate Winery Ltd.,  
2011 BCSC 1424*





# Disability Management



## The Duty to Accommodate: Practical Aspects

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# Introduction

- *BC Human Rights Code* = protects against discrimination in employment on various grounds
- The duty to accommodate continues to develop making continuing education in human resources management training to be a necessary aspect of operations for all organizations with employees
- Important for both employers and employees to understand the legal obligation created by the duty to accommodate and the extent of that duty

# The Duty to Accommodate

- What is the duty to accommodate to in the context of disability management?
- Recent cases assist in showing the extent of the duty to accommodate

# Practical Aspects

Some common questions:

- Can an employer request additional medical information or an IME?
- How do Return to Work programs fit in? (for example, treatment/rehabilitation programs compelled by WorkSafeBC?)
- Are Last Chance Agreements binding in cases of relapse or defiance?

# *Prima Facie* Discrimination

- *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.

# Defenses

There are two defenses to a finding of discrimination:

- a) Accommodation by the employer to the point of **undue hardship**; or
- b) where an objectively justifiable Bona Fide Occupational Requirement (“**BFOR**”) exists.



# Scope of the Duty

“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

# What is Undue Hardship?

- Factors to Consider:
  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.

# What is Undue Hardship?



# The Duty to Accommodate

- **Each complaint assessed on its own merits – no one size fits all analysis**
- **Avoid the application of universal, “one size fits all” policies or standard**

# Requests for Medical Info

- Can an employer ask for information, including medical information, from an employee in regards to appropriate accommodation?
- YES, in appropriate circumstances
- Further, there is a duty to inquire / request medical information if the employer is put on notice that an employee may need to be accommodated

# Types of Information

- What kind of medical information can an employer reasonably ask for?
  - Nature of the illness (permanent, temporary, estimated time from for improvement or RTW)
  - NOT THE DIAGNOSIS
  - Specific restrictions and limitations
  - Treatment or side effects of medication that may impact the accommodation or employee's ability to perform certain tasks

# Required Medical Info

- Can the employee continue to work with accommodation such as flex or part-time hours, job or workspace modifications?
- When do you expect the employee to be able to return to work?
- Can the employee take part in a gradual return to work program? When and how?
- What are the employee's physical limitations?

# Reciprocal Obligations

- Employees are also required to cooperate with the employer's requests for medical information to facilitate accommodation in the workplace
- Make sure requests for doctor's notes/medical information are reasonable



# Reciprocal Obligations

- Contact employees on leave if it is reasonably required
- Considerations:
  - Nature and length of the disability leave?
  - How much time has passed since the last contact?
  - Why is the employer contacting the employee?
  - Does the employer really need more information?
  - How often did the employee say they wish to be contacted?

# Second Opinion?

- When is it appropriate to ask for an IME?
- Does the employer have insufficient or conflicting information to enable it to provide accommodation options?
- It may be reasonable to ask for more information, and / or regular updated medical information.

# Managing RTW Plans

Accommodation after extended absence?

- Reasonable to engage in communication with the injured employee throughout the recovery period
- Appropriate to ask how treatment is progressing
- A RTW program that is inflexible or relies on arbitrary return dates may be a violation of the *Code*

# Last Chance Agreements

- Last Chance Agreements (“LCAs”)
  - Attend or continue treatment, or else!
  - Should only be used as a last resort after other attempts at accommodation have been exhausted
  - They are not appropriate to all situations
  - More commonly seen in unionized work environments

# Conclusion

## Duty to accommodate:

- Medicinal marijuana in the workplace?
- Parental child care obligations?
- Gender identity and expression





# Medical Information and Privacy



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# Outline

- Review of legislative framework
  - British Columbia privacy legislation
  - Federal privacy legislation
- Current class actions in the medical privacy context
- Recent privacy case law



# Legislative Framework

# BC Legislation

## *Privacy Act, RSBC 1996, c 373*

- Statute of general application
- Provides that it is a tort for someone to wilfully violate the privacy of another individual – with or without proof of damages

# BC Legislation

## ***Personal Information Protection Act, SBC 2003, c 63 [PIPA]***

- Governs provincially regulated private sector organizations
- Employee information = information used solely for purposes reasonably required to “establish, manage, or terminate” an employment relationship

# BC Legislation

## ***Personal Information Protection Act, SBC 2003, c 63 [PIPA]***

- Organizations can collect employee information without consent if it's for the purpose of establishing, maintaining, or terminating the relationship (s. 18)
- **The employer must protect this information**

# BC Legislation

## ***Personal Information Protection Act, SBC 2003, c 63 [PIPA]***

BC Reg 473/2003: An organization may disclose information relating to the mental or physical health of the individual to a health care professional for the purpose of obtaining an assessment from the health care professional as to whether the disclosure of that information could reasonably be expected to result in grave and immediate harm to the individual's safety or mental or physical health (s. 5(1))

# BC Legislation

## ***Freedom of Information and Protection of Privacy Act, RSBC 1996, c 165 [FIPPA]***

- Governs provincial public bodies
- Like *PIPA*, it defines personal information as information about an identifiable individual, which includes employee information (but not contact or work product information) (s. 1)

# BC Legislation

## ***Freedom of Information and Protection of Privacy Act, RSBC 1996, c 165 [FIPPA]***

- The head of a public body cannot disclose personal information if it would be an unreasonable invasion of a third party's personal privacy; this explicitly includes "medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation" (22(3)(a))
- BC Reg 155/2012: echoes regulation in *PIPA*

## ***Freedom of Information and Protection of Privacy Act, RSBC 1996, c 165 [FIPPA]***

- Many complaints to the privacy commissioner engage section 22 and unreasonable invasion of an individual's personal privacy
- See: *Community Living BC (Re)*, 2016 BCIPC 21; *Richmond (City)*, 2016 BCIPC 35; *South Coast British Columbia Transportation Authority (Re)*, 2015 BCIPC 64, to name a few.



## ***E-Health (Personal Health Information Access and Protection of Privacy) Act, SBC 2008, c 38***

### **Protection of privacy**

**21** (1) Personal health information must not be collected into a health information bank or used in a health information bank for any purpose or in any manner other than in accordance with the designation order in respect of the health information bank.

(2) Personal health information contained in a health information bank must not be disclosed for any purpose or in any manner other than

- (a) in accordance with the designation order in respect of the health information bank, or
- (b) as permitted under this Act.

# Federal Legislation

## *Privacy Act, RSC 1985, c P-21*

- Governs the personal information handling practices of Federal Gov't institutions
- Personal information held by a government institution (see Schedule A)

# Federal Legislation

## ***Personal Information Protection and Electronic Documents Act, SC 2000, c 5*** **[PIPEDA]**

- Same purpose as *PIPA*; applies to the private sector
- Applies to employees of federal works, undertakings, or businesses (“FWUB”)
- Provincial private sector organizations still governed by *PIPA*

# Common concepts

- *PIPA (BC), FIPPA (BC), Privacy Act (Fed) and PIPEDA* deal with:
  - Personal Information
  - Consent and/or “Valid consent”
  - “Collection”, “Use” and “Disclosure” Rules
  - Reasonable purpose

# Class Actions

# Privacy Class Actions

- CBA Class Actions Database: 13 unique class actions filed in relation to breach of privacy and/or loss of medical information in Canada
  - Provincial overlap
  - Only includes volunteer submissions
- Only 1 is currently certified

# Privacy Class Actions

## ***MM v FCSLLG (Ontario, July 2016)***

- Family and Children's Services of Lanark, Leeds and Grenville (FCSLLG) provides child and family welfare services to Ontario residents in the region
- FCSLLG had personal and confidential information of 285 clients stored in an electronic file, accessible by Board members

# Privacy Class Actions

## ***MM v FCSLLG (Ontario, July 2016)***

- The information in the electronic file formed a confidential statistical report that was presented to Board members
- In April 2016, this report was published on Facebook
- The class action alleges the FCSLLG account was not secure and illegally hacked



# Privacy Class Actions

## ***MM v FCSLLG (Ontario, July 2016)***

- The representative plaintiff was a client of FCSLLG
- Class members are any Ontario residents whose “personal, confidential, personal health, financial, and identifying information was in the possession of the [FCSLLG], which information was later stolen or released or obtained by unauthorized third parties and disclosed on or before April 18, 2016”

# Privacy Class Actions

## ***Taylor Steele v Attorney General of Canada (BC, Nov. 2013)***

- Marijuana Medical Access Program (MMAP) sent mail to registrants including the MMAP return address
- Anyone who intercepted the mail could see the individual was registered with the MMAP
- All individuals registered with MMAP have to prove they suffer from certain medical conditions

# Privacy Class Actions

## ***Marihuana Medical Access Regulations, SOR/2001-227 (since repealed)***

- Schedule 1 lists associated medical conditions, including cancer, AIDS/HIV, multiple sclerosis, spinal cord injury or disease, epilepsy, severe form of arthritis

# Privacy Class Actions

## Inappropriate Access of Personal Health Information

- A few of these filed now in Canada
- *Elias Broutzas et al v CST Consultants Inc et al* (ON, July 2015) – personal health info of new mothers

# Recent Privacy Case Law

# *Doe 464533 v ND, 2016 ONSC* 541

- New tort = “public disclosure of private facts”
- New application of a tort = “breach of confidence” in a personal, non-commercial context
- While not a case dealing with medical information, there is potential to see these cases used in that context.

# *Doe 464533 v ND, 2016 ONSC* **541**

- Facts:
  - The defendant posted naked images of his ex-girlfriend, the plaintiff, online and without her permission.

# *Doe 464533 v ND, 2016 ONSC* **541**

## **Public Disclosure of Private Facts:**

- The **disclosure** of the private facts must be public, not private;
- The **facts** disclosed to the public must be private facts, not public; and
- The **matter** made public must be one which would be offensive and objectionable to a reasonable man of ordinary sensibilities



# *Doe 464533 v ND, 2016 ONSC* **541**

## **Breach of Confidence:**

- Was the information “in confidence” – i.e., not already in the public domain?
- Was it imparted “in confidence” (were you told not to share it)?
  - What is the relationship between the parties?
- Did the disclosure cause harm to the individual who shared that information “in confidence”?

# *Doe 464533 v ND, 2016 ONSC* 541

- Recently considered in BC in *TKL v TMP, 2016 BCSC 789*
- The BC judge found the case “persuasive”, but did not rely on it as it would have unduly increased the Plaintiff’s damages
- However, it’s evident that the *Doe* decision has made it’s way to BC, and may be considered by our Supreme Court in future decisions

# Key Takeaways

- Medical information is sensitive and private
- Privacy actions:
  - can arise from different pieces of legislation and the common law;
  - are increasing in frequency;
  - are likely to increase in terms of damage awards
- Corporate privacy policies and employee training is important
- Collecting less means less to worry about disclosing



# Disability Management: Insurance Issues, Benefits and Human Resources Best Practices



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# Overview

- Medical insurance benefits during an absence from work for medical reasons
- Contractual and legislative obligations to maintain medical insurance benefits
- A discussion of human resources best practices
- Relevant case law

# Medical Insurance Benefits

- Employers often provide a broad range of medical insurance benefits to employees
- Questions often arise as to whether to maintain benefits during a medical leave
- Significant liability may arise if benefits are terminated without a careful assessment

# Medical Insurance Benefits

- What is the nature and length of the absence?
- How will the absence impact on the medical insurance coverage?
- Is there a legal obligation to maintain the benefits coverage during an absence?



# ***Employment Standards Act***

## **Types of leave outlined in the *Employment Standards Act*, RSBC 1996, c 113 (Part 6):**

- Pregnancy leave;
- Parental leave;
- Family responsibility leave;
- Compassionate care leave;
- Reservists' leave;
- Bereavement leave; and
- Jury duty

# *Employment Standards Act*

## **Duties of employer**

54 (1) An employer must give an employee who requests leave under this Part the leave to which the employee is entitled.

(2) An employer must not, because of an employee's pregnancy or a leave allowed by this Part,

(a) terminate employment, or

(b) change a condition of employment without the employee's written consent.

# *Employment Standards Act*

(2) In the following circumstances, the employer must continue to make payments to a pension, medical or other plan beneficial to an employee as though the employee were not on leave or attending court as a juror:

(a) if the employer pays the total cost of the plan;

(b) if both the employer and the employee pay the cost of the plan and the employee chooses to continue to pay his or her share of the cost.

# *Employment Standards Act*

(3) As soon as the leave ends, the employer must place the employee

(a) in the position the employee held before taking leave under this Part, or

(b) in a comparable position.

(4) If the employer's operations are suspended or discontinued when the leave ends, the employer must, subject to the seniority provisions in a collective agreement, comply with subsection (3) as soon as operations are resumed.

# *Employment Standards Act*

## **Employment deemed continuous while employee on leave or jury duty**

56 (1) The services of an employee who is on leave under this Part or is attending court as a juror are deemed to be continuous for the purposes of

- (a) calculating annual vacation entitlement and entitlement under sections 63 and 64, and
- (b) any pension, medical or other plan beneficial to the employee.

# *Employment Standards Act*

(3) The employee is entitled to all increases in wages and benefits the employee would have been entitled to had the leave not been taken or the attendance as a juror not been required.

(4) Subsection (1) does not apply if the employee has, without the employer's consent, taken a longer leave than is allowed under this Part.

(5) Subsection (2) does not apply to an employee on leave under section 52.2.

# *Canada Labour Code*

**Division VII** – Reassignment, Maternity Leave, Parental Leave, Compassionate Care Leave, Leave Related to Critical Illness and Leave Related to Death or Disappearance

**Division VIII** – Bereavement Leave

## **Maternity-related Reassignment and Leave**

### **Reassignment and job modification**

**204 (1)** An employee who is pregnant or nursing may, during the period from the beginning of the pregnancy to the end of the twenty-fourth week following the birth, request the employer to modify her job functions or reassign her to another job if, by reason of the pregnancy or nursing, continuing any of her current job functions may pose a risk to her health or to that of the foetus or child.



# Relevant Case Law

- ***Boehringer Ingelheim (Canada) Ltd. v Kerr***
  - 2009 BCHRT 196
  - 2010 BCSC 427
  - 2011 BCCA 266
- ***Kelly v University of British Columbia (No.4)***
  - 2012 BCHRT 32 and 2013 BCHRT 302
  - 2015 BCSC 1731
  - 2016 BCCA 271
- ***Fair v Hamilton-Wentworth District School Board***
  - 2012 HRTO 350 and 2013 HRTO 440
  - 2014 ONSC 2411
  - 2016 ONCA 421

# *Boehringer Ingelheim (Canada) Ltd. v Kerr*

- The Complainant Kerr worked as a sales representative. Her job required her to drive and to use computers frequently
- After 3 years she was diagnosed with cataracts
- Her employer (BICL) suggested she apply for a disability leave

# *Boehringer Ingelheim (Canada) Ltd. v Kerr*

- After two years the Complainant's disability benefits were terminated because she was capable of working at some occupation
- At this time the Complainant wished to return to work
- BICL was aware of all of the above but took no steps to return the Complainant to work

# *Boehringer Ingelheim (Canada) Ltd. v Kerr*

- The Complainant launched a human rights complaint on the basis of physical disability almost three years after her benefits were discontinued
- The Tribunal found that the process of returning the Complainant to work was “slow and deteriorating”, and that her dignity and self-respect were clearly injured

# *Boehringer Ingelheim (Canada) Ltd. v Kerr*

- The Complainant was awarded damages for lost wages and bonuses, as well as \$30,000 for injury to dignity
- The employer appealed the Human Rights Tribunal decision - the BC Supreme Court dismissed the application for judicial review and the BC Court of Appeal dismissed the employer's appeal

# *Kelly v University of British Columbia (No. 4)*

- The Complainant was enrolled in the Family Practice Residency Program at UBC
- He had been diagnosed with and suffered from ADHD, anxiety, depression, and a non-verbal learning disability
- After two years of the program his enrolment was terminated, and the Complainant filed a grievance and human rights complaint

# *Kelly v University of British Columbia (No. 4)*

S. 8.1 - “...However, there will be instances in which Residents may be deemed by the Program Director to be **unsuitable** for the program for reasons that cannot be remediated. Such reasons may include, but are not limited to, the following:

- (a) the lack of a basic skill (such as physical dexterity in the case of a surgical speciality);
- (b) the presence of a personality problem related to the Resident’s ability to practice medicine;
- (c) conduct unbecoming a member of the medical profession; or
- (d) other qualities of the Resident which make them unfit for the practice of medicine.

# The BC Human Rights Tribunal

- The BCHRT found that UBC knew the Complainant had a mental disability and, despite making *some* modifications to their program, did not fully discharge their duty to accommodate
- The Tribunal could not find that UBC's program would have suffered "undue hardship" by continuing to accommodate the Complainant



# The BC Human Rights Tribunal

- The Complainant sought compensation for lost wages (past and future), expenses, and injury to dignity, feelings, and self-respect.
- The BCHRT felt that the “gravity of the effects of the discrimination in this case warrants a substantial award for damages for injury to dignity, feelings and self-respect **which is beyond the highest award that has yet been made by this Tribunal**”

# The BC Human Rights Tribunal

## Why?

- The Complainant lost the opportunity to complete his residency and apply for licensing;
- The Complainant lost his source of income;
- The Complainant's relationships with his family suffered and he isolated himself;
- The Complainant suffered ongoing humiliation and embarrassment; and
- The Complainant was already vulnerable by virtue of his disability.

# The BC Supreme Court

- UBC sought judicial review of the BCHRT decisions
- The Court found that the decision to award \$75,000 – more than double the previous high of \$35,000 – was “patently unreasonable”
- While the circumstances were acknowledged to be “serious”, the Court found they were no more serious or unique than other cases of lost jobs/opportunities due to discrimination

# The BC Court of Appeal

- UBC further appealed the BCSC's decision to dismiss their application with respect to whether or not they had discriminated against the Complainant, as well their application with respect to the award for wage loss
- The Complainant cross-appealed his reduction in damages for injury to dignity

# The BC Court of Appeal

- UBC's appeal was dismissed, but the Complainant's appeal was successful
- The Court of Appeal found it wasn't patently unreasonable to exceed a "range" of established quantum
- The trial judge should have exercised deference to the Tribunal when weighing the effect of discrimination against the Complainant

# The BC Court of Appeal

[62] As to whether the award was based on the evidence, the Tribunal found that the respondent suffered acutely as a result of the termination; amongst the effects of his emotional hardship it listed depression, dejection, disturbance with personal relationships, embarrassment, and despair. **It is for the Tribunal to measure the weight of these things, not a reviewing judge.**

# *Fair v Hamilton-Wentworth District School Board*

- The Complainant was dismissed from her position with the School Board after her employer determined she was unable to perform the essential duties of her job, due to her generalized anxiety disorder.
- She filed a complaint under the Ontario *Human Rights Code* and alleged discrimination and a failure to accommodate on the basis of disability

# The Ontario Human Rights Tribunal

- The Tribunal found that the School Board discriminated against the Complainant on the basis of her disability
- The Tribunal found that the Board knew about the Complainant's disability and failed to take steps to investigate possible forms of accommodation, such as alternative employment



# The Ontario Human Rights Tribunal

- The Tribunal made several awards to the Complainant, including:
  - Damages for lost wages from June 2003 to June 2012 in the amount of \$419,283.89;
  - Damages for loss of benefits;
  - Interest;
  - A \$30,000 award for injury to dignity; and
  - The Respondent was ordered to reinstate the Complainant “to a suitable position”

# The Ontario Superior Court

- The School Board sought judicial review of the Tribunal's decisions
- Notably, the Board disagreed with the reasonableness of the decision to reinstate the Complainant
- The Board noted that while unusual, the decision to reinstate is not unreasonable

# The Ontario Court of Appeal

- The School Board further appealed to Ontario's Court of Appeal
- Notably, the School Board argued that the Complainant was precluded from reinstatement because she did not request that remedy during her initial complaint
- The School Board further argued that reinstatement was “unreasonable, unprecedented, and disproportionate”

# The Ontario Court of Appeal

- The Court of Appeal found that the Tribunal has broad discretion to award whatever remedy they feel is necessary to “ensure compliance with the Code”.
- The Tribunal had found that there were no barriers to the Complainant being reinstated, and the Court of Appeal refused to interfere with that decision

# Conclusions

- A careful assessment of benefit coverage is necessary
- Identify potential liabilities and assess risk of termination of coverage
- Identify potential human rights issues that may arise in the administration of benefits
- Obtain insurance and legal advice

# QUESTIONS?

## Thank you for attending!

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