

Overholt Law Client Seminar



“Winds of Change in the Workplace”

Recent and Future Anticipated Developments in
the Law

Newlands Golf and Country Club, Langley BC
October 25, 2017

Carman J. Overholt, Q.C.

Preston I.A.D. Parsons

Jennifer S. Kwok

Victoria Petrenko

600 – 889 West Pender Street
Vancouver, BC V6C 3B2

Direct: (604) 676-4196

carman@overholtlawyers.com

Winds of Change in the Workplace



The Impact of the Change in Government: Anticipated Changes in the Law

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Direct: (604) 676-4196
carman@overholtlawyers.com

Overview

- The Winds of Change
 - Canadian Employment Legislation
 - Changes at the Labour Board
 - Minimum Wage Commission
 - The BC Human Rights Commission

Recent Developments

- A number of provinces are expected to see changes to their employment standards legislation in the next few months
- At home in BC, the new provincial government has already announced a number of initiatives that will have a direct impact on the BC workplace

Canadian Employment Legislation

- Both Alberta and Ontario announced earlier this year proposed reviews of their respective labour and employment standards legislation
- Both bills would enact a number of changes, including higher minimum wage, and changes to the nature and length of unpaid leaves

Canadian Employment Legislation

- Alberta: the *Fair and Family-friendly Workplaces Act*
- Highlights:
 - Minimum work age raised to 13
 - Introduction of unpaid leaves; long-term illness and injury (16 weeks), family responsibility (5 days), bereavement (3 days), and child's critical illness (36 weeks)

Canadian Employment Legislation

- Ontario: the *Fair Workplaces, Better Jobs Act*
- Highlights:
 - Increase minimum wage to \$15 per hour by 2019
 - Penalties for workplaces who deliberately misclassify employees as independent contractors
 - Increase in paid vacation entitlement (3 weeks after 5 years of service)
 - Increase in family medical leave (up to 27 weeks in a 52 week period)

What about BC?

- In response to the changing workplace, the BCLI has been conducting research for the past three regarding possible *Employment Standards Act* reform in BC (the “Employment Standards Act Reform Project”)
- No comprehensive review of the *ESA* has been carried out for over 20 years

What about BC?

- The Employment Standards Act Reform Project intends to review and make recommendations for reform to the *ESA*
- Group cites the evolution of the modern workplace, the communications revolution, and increase in irregular hours, variable localities, and virtual workplaces as reasons for conducting the review

Changes at the Labour Board

- In August, Labour Minister Harry Bains announced that Brent Mullin, former chair of the Labour Relations Board and Employment Standards Tribunal, would be replaced after 16 years
- Jacquie de Aguayo was appointed acting chair on Thursday August 24, 2017

Changes at the Labour Board

- De Aguayo has been appointed as acting chair for both boards for up to six months
- A search to fill both positions is currently underway

Changes at the Labour Board

- The Labour Relations Board is also seeking to replace Peter Archibald as vice-chair, who retired in July 2017
- The Board has announced an intention to maintain the number of appointments at the board to eight; four from employers and four from trade unions

Minimum Wage Commission

- On Thursday, October 5, Labour Minister Harry Bains appointed three individuals to a Commission designed to move the province to a \$15/hour minimum wage
- Commission has 90 days to produce a report on how the province should transition to a \$15/hour minimum wage

Minimum Wage Commission

- The Panel:
 - Marjorie Griffin Cohen – economist, SFU professor, helped establish Canadian Centre for Policy Alternatives in BC
 - Ivan Limpricht – current President of the United Food and Commercial Workers Union 1518
 - Ken Peacock – Vice President and Chief Economist of the Business Council of BC

Minimum Wage Commission

- What does this mean for the BC workplace?
 - No immediate changes; government has given the commission a budget for two years of consultations
 - Commission will be responsible for recommending how many years it should take to transition to a higher minimum wage
 - If BC moves to \$15/hour minimum wage, it will be the highest in the country

BC Human Rights Commission

- On August 4, the NDP government announced plans to reinstate the Human Rights Commission
- The Commission was discontinued 15 years ago, leaving BC as the only province without a Human Rights Commission

BC Human Rights Commission

- The Commission was eliminated in 2002 in part to get rid of the “gate-keeper function” the Commission held
- The function refers to the power to decide whether a complaint should go forward to a hearing or be settled/dismissed
- Some groups felt the function caused unnecessary delay, and too few complaints made it through the screening process

BC Human Rights Commission

- The BC Human Rights Tribunal is the adjudicative body that addresses complaints in British Columbia
- A Human Rights Commission will likely have a mandate to act in a proactive manner, and promote and enforce human rights and engage in education and policy development

BC Human Rights Commission

- The government is currently engaged in a consultation process with human rights advocates and activists
- Consultation process expected to run until November 17, 2017
- Legislation expected in 2018

BC Human Rights Commission

- What does this mean for the BC workplace?
 - A Human Rights Commission will likely have an educational function that can benefit businesses and companies seeking to educate themselves on human rights practices
 - Employers may experience investigations conducted by the Commission where group or individual complaints are filed
 - A Commission may become involved as a party to human rights proceedings



The Legalization of Marijuana and its Impact on the Workplace

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Victoria J. Petrenko

600 – 889 West Pender Street
Vancouver, BC V6C 3B2
Direct: (604) 676-4188
victoria@overholtlawyers.com

Overview

- What is marijuana?
- The legislation
- Occupational health and safety
- Drug testing
- Best practices

What is Marijuana?

- Marijuana is derived from the cannabis plant
- Used for both medicinal and social purposes
- Contains hundreds of chemical substances, the most well studied of which is tetrahydrocannabinol (“THC”). This is the substance responsible for the “high” cannabis users identify.

What is Marijuana?

- A variety of products can be derived from the cannabis plant, including:
 - Dried, herbal material (“marijuana”);
 - Oil (e.g. “hash oil”);
 - Concentrates;
 - Foods and beverages containing extracts of cannabis

What is Marijuana?

- Short term effects on the brain:
 - Confusion
 - Fatigue
 - Impaired ability to remember, concentrate, and/or pay attention
 - Anxiety, fear or panic
 - Reduced ability to react quickly



What is Marijuana?

- Short term effects on the body:
 - Decreased blood pressure
 - Increased heart rate
- THC can impair the following:
 - Coordination
 - Reaction time
 - Ability to pay attention
 - Decision-making abilities
 - Ability to judge distances

Legislative Background

- In 2015 the Government of Canada committed to introducing legislation to legalize, regulate, and restrict access to cannabis
- A Task Force on Cannabis Legalization and Regulation was created in 2016 to engage in cross-country consultations and prepare a report with recommendations for any proposed legislation

The Current Framework

- Why legalize cannabis?
 - Youth continue to use cannabis at rates among the highest in the world
 - Thousands of Canadians end up with criminal records for non-violent drug offences each year
 - Organized crime reaps billions of dollars in profits from its sale
 - Changing societal attitudes towards simple marijuana possession

The *Cannabis Act*

- On April 13, 2017, Bill C-45 – *An Act respecting cannabis and to amend the Controlled Drugs and Substances Act, the Criminal Code and other Acts* was introduced and read in the House of Commons
- Also known as the *Cannabis Act*

The *Cannabis Act*

- The *Cannabis Act* aims to provide legal access to cannabis and to control and regulate its production, distribution and sale.
- Numerous stated objectives, including preventing young persons from accessing marijuana, protecting public health and safety, and deterring criminal activity

The Cannabis Act

- If the Bill becomes law, adults 18 years and older would be able to legally:
 - **possess** up to 30 grams of legal dried cannabis or equivalent in non-dried form
 - **share** up to 30 grams of legal cannabis with other adults
 - **purchase** dried or fresh cannabis and cannabis oil from a licensed retailer
 - **grow** up to 4 cannabis plants, up to a maximum height of 100cm, per residence for personal use from licensed seed or seedlings
 - **make** cannabis products, such as food and drinks, at home provided that organic solvents are not used

The *Cannabis Act*

- However, provinces and territories will still have the authority to set additional requirements, such as:
 - Higher minimum age limits;
 - More restrictive limits on possession and personal cultivation;
 - Rules for cannabis-based businesses;
 - Restrictions on where cannabis can be consumed

The *Cannabis Act*

- Initially, adults will be able to legally purchase fresh and dried cannabis, cannabis oil, and seeds or plants for personal cultivation
- Other forms of cannabis, such as “edibles”, will be dealt with once necessary federal regulations are implemented

The *Cannabis Act*

- Until the *Act* becomes law, it remains illegal to possess, sell, produce, import or export cannabis unless it is authorized under the *Controlled Drugs and Substances Act* and its regulations, such as the *Access to Cannabis for Medical Purposes Regulations*.
- If the Bill is approved it will become law no later than July 2018.

Medicinal Marijuana

- Currently governed by the *Access to Cannabis for Medical Purposes Regulations*, SOR/2016-230
- Where the *Regulations* are more restrictive than what is set out in the *Cannabis Act*, the *Regulations* will be amended to align with what is set out in the proposed *Act*

What does this mean for the Canadian workplace?



What does this mean for the Canadian workplace?

- Increase in recreational use
- Increase in medical use and need for employers to accommodate
 - The current program for medical access to cannabis is expected to continue under the proposed *Act*
- Possible changes to workers compensation laws
- Need for updated workplace policies to ensure safe workplaces
- Questions surrounding workplace impairment testing

The *Workers Compensation Act*

- 115** (1) Every employer must
- (a) ensure the health and safety of
 - (i) all workers working for that employer, and
 - (ii) any other workers present at a workplace at which that employer's work is being carried out, and
 - (b) comply with this Part, the regulations and any applicable orders.

The Occupational Health and Safety Regulation

Impairment by alcohol, drug or other substance

4.20 (1) A person must not enter or remain at any workplace while the person's ability to work is affected by alcohol, a drug or other substance so as to endanger the person or anyone else.

(2) The employer must not knowingly permit a person to remain at any workplace while the person's ability to work is affected by alcohol, a drug or other substance so as to endanger the person or anyone else.

(3) A person must not remain at a workplace if the person's behaviour is affected by alcohol, a drug or other substance so as to create an undue risk to workers, except where such a workplace has as one of its purposes the treatment or confinement of such persons.

The *Criminal Code*

Section 217.1 – Duty of persons directing work

Everyone who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task

Have I scared you yet?

- The Task Force recommended that the Federal Government work with provinces, territories, employers and labour representatives to facilitate the development of workplace impairment policies
- Meanwhile, the Saskatchewan Workers Compensation Board told employers in March 2017 that they should have workplace policies in place *before* cannabis is legalized

Workplace Policies

- Existing policies should be amended to reflect cannabis legalization
- This also includes any reference to marijuana as an “illegal off-duty activity”
- Consider the need for a framework surrounding marijuana use at and before work



Workplace Policies

- What should the policy include?
 - What kind of workplace do you have?
 - What does “impairment” and “under the influence” even mean?
 - How is your policy going to be enforced?
 - Once you have drafted the policy or edited an existing policy, how will your employees know about it?

Recreational Use

- Cannabis intoxication should be managed in a similar way to alcohol intoxication
- Duty to keep a safe workplace may require restrictions or prohibitions on recreational cannabis intoxication and usage while at work
- Policies must still be unambiguous with clear penalties for violation

Testing, Testing, 1-2-3

1. Pre-employment testing*
2. Pre-access testing*
3. Random testing*
4. Reasonable cause testing
5. Non-random post-incident testing
6. Follow-up testing
7. Fitness for duty testing



Testing, Testing, 1-2-3

- Considerations:
 - Privacy obligations
 - Goals of the program
 - Type of workplace (safety-sensitive?)
 - Any evidence of substance abuse in your workplace
 - What types of testing should you implement
 - Is the testing reliable?

Testing, Testing, 1-2-3

- Unless the person is visibly stoned, the jury is out on:
 - what amount of marijuana is necessary to cause “impairment”
 - a reliable test to determine *present drug impairment*
- Developments in medical science and technology in the near future will provide solutions

Best Practices

- Understand that the landscape is changing
- Become familiar with cannabis jargon and understand what is being legalized
- Be proactive and implement policies early on

Best Practices

- Avoid drug and alcohol testing at the pre-employment stage
- Consider whether testing is necessary for the position
- Don't immediately revoke the offer of employment if the test comes back positive
- Remember that employers AND employees have obligations to maintain a safe and healthy workplace



Respecting Human Rights



The Duty to Accommodate: Practical Aspects

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Jennifer S. Kwok

600 – 889 West Pender Street
Vancouver, BC V6C 3B2

Direct: (604) 676-4189

jennifer@overholtlawyers.com

Introduction

Employee
Rights

Employer
Rights



The Duty to Accommodate

What is the employer's
duty to accommodate to in the
context of disability
management?

Introduction

- *BC Human Rights Code* = protects against discrimination in employment on various grounds



Prima Facie Discrimination

- The *Prima facie* discrimination test:
 - 1) Does the employee have a characteristic linked to one of the prohibited grounds under the *Code*?
 - 2) Is the employee is experiencing adverse treatment? and
 - 3) Is there is a nexus or a connection between the adverse treatment and the protected characteristic?

Defenses

There are two defenses to a finding of discrimination:

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



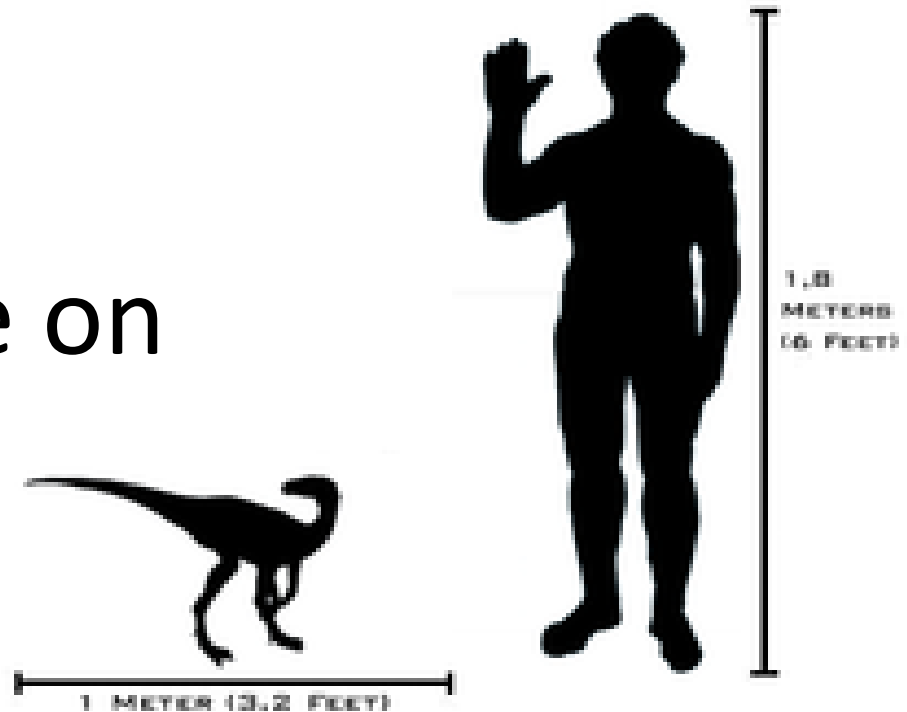
Scope of the Duty

“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

The Duty to Accommodate

- **Each complaint assessed on its own merits**
- The focus must always be on *that particular individual*



Requests for Medical Info

- Can an employer ask for certain medical information from an employee? YES
- Employers need to know:
 - whether the employee has a disability, and if so,
 - what accommodations the employee needs

Duty to Accommodate

- Can the employee perform the essential duties of their position?
- Do they need to be moved to a different position? (non-safety sensitive)
- Do they need to be off work pending treatment?

Requests for Medical Info

- Duty to inquire 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
 - 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

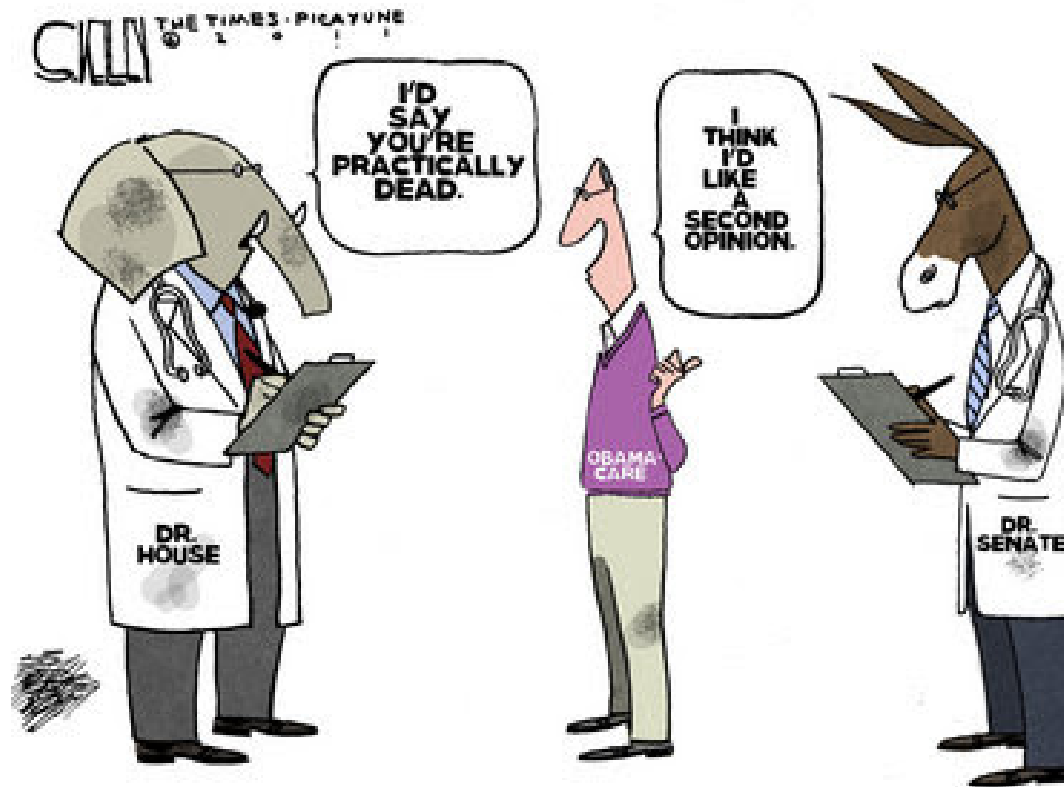


Reciprocal Obligations

- Can you contact employees on leave?
- 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?



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*

The Duty to Accommodate

- What is the duty to accommodate to in the context of a physical/mental disability expressed as a drug or alcohol dependency or addiction?



Discipline v. Accommodation

Right to remove the employee if:

- Workplace accident where impairment suspected
- Behaviour puts their own safety or the safety of others at risk
- Serious impact on workplace where impairment at work suspected (reasonable grounds)

Implement Policies

- Implement policy that outlines acceptable behaviour in the workplace
- Implement a Substance Abuse Policy with resources, program and contact information
- Invest in an EAP?

Accommodation Plan

- Identify specific accommodation measures/solution agreed to
- Identify what changes in the employee's behaviour or performance will be understood as "significant" and therefore requiring updated medical information
- Be flexible - Allow for whatever treatment the employee may require, whether urgent or ongoing
- Consideration the employee may have another physical or mental disability that requires accommodation

Obligations – Employees

A substance dependent employee
has a duty to facilitate
accommodation through
rehabilitation.





Providing References



Privacy, Privilege & Pitfalls

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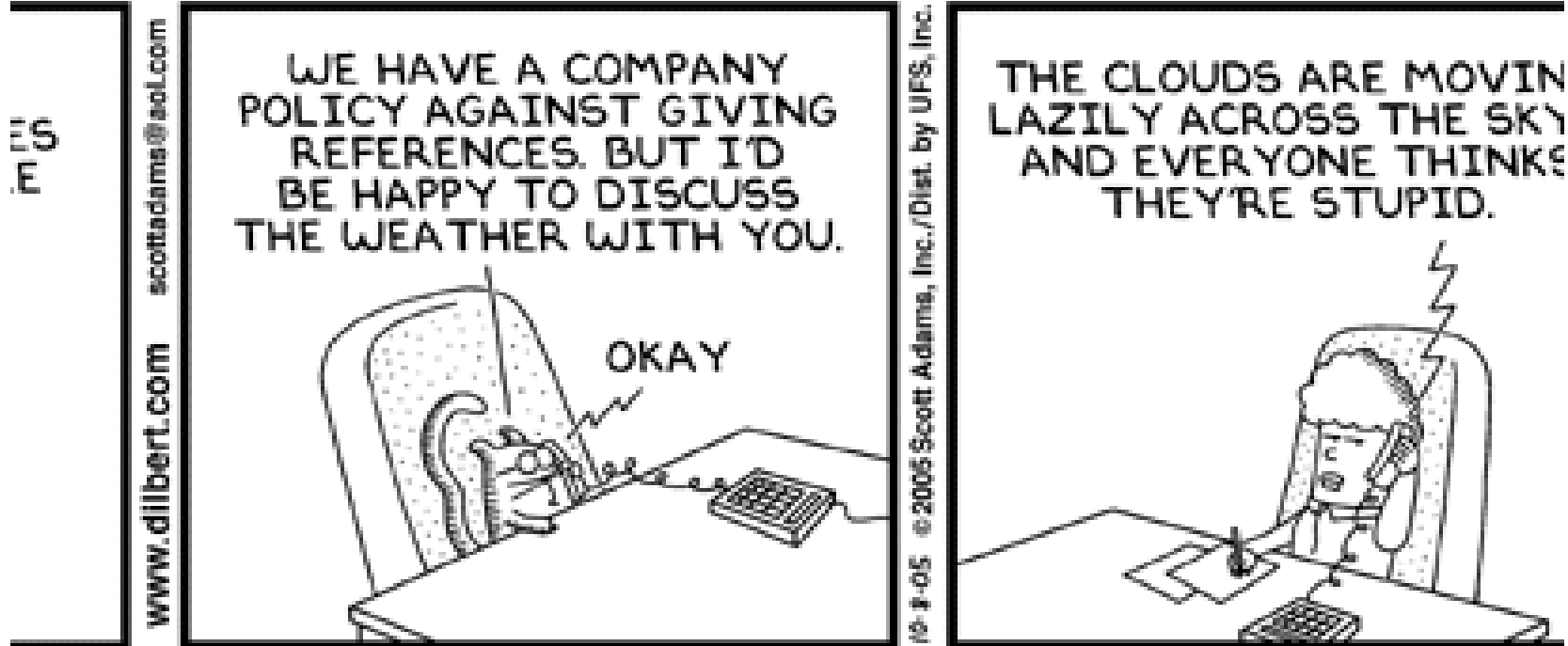
Introduction



Recruitment
Notice



Reference Checks



UFS, Inc.

Reference Checks

Two Considerations:

1. Conducting reference checks
2. Responding to reference requests

Applicable Privacy Legislation

- *Personal Information Protection Act (PIPA)*, S.B.C. c. 63
 - BC Private Sector
- *Freedom of Information and Protection of Privacy Act (FOIPPA or FIPPA)*, R.S.B.C. 1996, c. 165
 - BC Public Sector
- *Personal Information Protection and Electronic Documents Act (PIPEDA)*, S.C. 2000, c. 5
 - Federal works, undertakings, businesses (FWUBs)

Reference Checks

- Employers are restricted by privacy legislation regarding the:
 - collection,
 - use, and
 - disclosureof an individual's personal information.
- Consent = best

Reference Checks

Potential New Employer

- Collection = conducting a reference check
- Use = making decisions about hire based on the reference check information collected

Former Employer

- Disclosure = answering a request for references

Reference Checks

- Collection of personal information must be limited to that which is necessary for reasonable purposes
- Reference checks are a reasonable purpose to collect information

Reference Checks

- Avoiding Privacy Complaints – Easy Rules:
 1. Former Employers: obtain consent from former EEs to provide references on their behalf
 2. Potential new Employer: obtain consent to conduct reference checks and contact former Employers



Questions

- You are hiring for a mid-level communications position. You receive multiple similar applications and decide that you need to conduct thorough reference checks with past employers. Most of the candidates provided a list of references that can be contacted, but some have not. Those that didn't provide references provided CVs showing their former employer.
 1. Should you cold-call the latter groups' former employers?
 2. If you are the former employer receiving the cold call, how do you respond?

Can I be honest?

- You're the former employer. You have permission from your former employee to act as a reference, but if you don't have anything nice to say...
 - Can you give a poor reference check?



Defamation

- **Test:**

1. The impugned words were defamatory (would lower the individual's reputation in the eyes of a reasonable person);
2. The words in fact, referred to the individual; and
3. The words were published (communicated to at least one person other than the individual).

Defamation

- **Common Defences:**

- Truth/Justification
- Absolute Privilege
- Qualified Privilege
- Fair Comment
- Responsible Communication on Matters of Public Interest



Defamation

- Common Defences for Former ER:
 - Truth
 - Statement is objectively true, on a balance of probabilities
 - Qualified Privilege
 - A.K.A. *Honest opinion*
 - Stmts that may be defamatory, but are conveyed to a third party non-maliciously and for an honest, well-motivated reason

Defamation

- EE's job to prove malice, which defeats defence of qualified privilege.
- Show:
 - Spite or ill will;
 - Indirect motive or ulterior purpose which conflicts with the occasion;
 - Speaking dishonestly, or in knowing or reckless disregard for the truth.



Recent Case Law

- *Kanak v Riggan*, 2016 ONSC 2837
- *Papp v. Stokes et al.*, 2017 ONSC 2357

Kanak v Riggin, **2016 ONSC 2837**

- Ms. Kanak worked at Atomic Energy of Canada Limited as Senior Cost Control Analyst
- Worked from 2006 – 2011 (5 years)
- Received + performance ratings, worked hard, received salary increases and was selected for a prestigious int'l travel assignment
- Mr. Riggin was her supervisor's supervisor.

Kanak v Riggin, 2016 ONSC 2837

- Ms. Kanak applied for a job at Bruce Power in 2013 and received a conditional offer
- Provided Mr. Riggin's name for reference check
- Mr. Riggin contacted and provided response to reference request
- Bruce Power revoked its conditional offer
- Ms. Kanak sued Mr. Riggin for defamation

Kanak v Riggin, 2016 ONSC 2837

- The Court found that Mr. Riggin said:
 - There was a lot of conflict between Ms. Kanak, her supervisor and other employees;
 - Ms. Kanak does not take directions well;
 - Ms. Kanak does not handle stress well;
 - Would not re-hire Ms. Kanak in a project controls position in a team environment, but would hire her for a finance role as an individual contributor

Kanak v Riggin, 2016 ONSC 2837

- 3 part test for defamation met
- Defence of Qualified Privilege raised
- Ms. Kanak alleged malice
 - Malice not proven
- Defence of qualified privilege upheld

Papp v. Stokes et al.

2017 ONSC 2357

- Papp: technically good EE, but “superior” attitude
- Employment terminated without cause
- He requested his former ER be a reference and that was agreed
- He found out he was 1st ranked for a new position, informed his former employer this and to expect a call for the reference check

Papp v. Stokes et al.

2017 ONSC 2357

- The former employer provided its opinion (see judgment para 21).
- Key excerpts:
 - performance and attitude issue
 - not that pleased [with the quality of his work]
 - Doesn't get along well in team settings due to a chip on his shoulder
 - Didn't get along greatly with co-workers
 - Would not rehire

Papp v. Stokes et al.

2017 ONSC 2357

- Offer not provided to Papp
- Papp sued for a) wrongful dismissal; b) \$500,000 in damages for defamation; c) \$200,000 for punitive, exemplary and aggravated damages; and d) \$30,000 for intentional infliction of mental suffering

Papp v. Stokes et al.

2017 ONSC 2357

- 3 part test for defamation met
- Defences of justification (truth) and qualified privilege raised
- Papp alleged Stokes not credible and acted with malice
 - Stokes Credible / Truthful
 - Malice not proven
- Defences of truth and qualified privilege upheld.
- All but wrongful dismissal claim dismissed.

Good Takeaway

*“The social policy underpinning the protection of employment references in this manner is clear: **an employer must be able to give a job reference with candour as to the strengths and weaknesses of an employee, without fear of being sued in defamation for doing so.** Without this protection, references would either not be given, or would be given with such edited content as to render them at best unhelpful or at worst misleading to a prospective employer.”*

[emphasis added] [*Kanak*, para 27]

Food for Thought

- Honesty is the best policy



- If you don't have anything nice to say....
 - tell the EE that so they don't use you as a reference...

Food for Thought

- Conduct regular performance reviews / check-ins
- Don't let issues fester
- Be candid with EEs about failings in their performance and areas for improvement during employment

Summary

- Obtain express consent to contact former ERs for references
- Obtain express consent from former EEs to provide references on their behalf
- Your honest opinion is not defamatory



Written Contracts of Employment:



Best Practices

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Introduction

- Historical overview
- Written employment contracts and fundamental terms
- Terminating employment contracts
- The usual terms of employment to consider
- The benefits of written employment contracts
- The Case Law

Historical Overview



Historical Overview

- The development of the Law of Master and Servant to Canadian Employment Law
- Introduction of employment standards, labour relations, human rights and privacy legislation
- Recognition by the Courts of the fundamental importance of employment in Canadian society
- Increasing use of written employment contracts and policies to clarify and define the nature of employment obligations given the complexity of legislative and common law requirements

Written Employment Agreements and Fundamental Terms



Fundamental Terms

- Offer and Acceptance
- Compliance with legislation; ESA, Human Rights, Privacy, Occupational Health & Safety
- Consideration
- Nature of the position, duties
- Employment vs. Independent Contract
- Definite vs. Indefinite Term

Fundamental Terms

- Restrictive covenants
- Severability
- Anticipating future changes in employment
- Governing law
- Dispute resolution
- Changes in duties and location

Fundamental Terms

- Intellectual property ownership
- Benefits
- Policies/employee handbook
- Entire Agreement
- Termination clauses

Legislation

- *Employment Standards Act*
- *Human Rights Code*
- *Workers Compensation Act*
- *Labour Relations Code*
- Federal legislation
- Public sector legislation (limiting notice/severance and other terms of employment)

Terminating Employment Contracts



Termination Restrictions

- What legislation applies to the worker regarding notice entitlement upon termination?
- What is a reasonable restriction on notice or severance?



Termination

- Default is common law presumption of reasonable notice
- Freedom to contract for a different notice period and rebut reasonable notice
- *Employment Standards Act (ESA)* imposes limits on ability to contract by setting minimum statutory standards

Termination

- Part 8 of the *ESA*
 - After 3 months 1 weeks wages
 - After 12 months 2 weeks wages
 - After 3 years 3 weeks wages
 - +1 weeks wages per additional year of service up to a maximum of 8 weeks wages after 8 years of service
 - Termination pay under the *ESA* is not subject to mitigation

Termination

- A severance package must take into account:
 - Relevant legislation
 - Contractual termination clauses
 - Common law entitlement
 - Employee's age;
 - Employee's length of service;
 - The character of the employee's employment; and
 - The availability of comparable employment
 - Duty to mitigate

Termination

- Drafting employment contracts
 - An express termination clause can limit an employee's entitlement to notice upon the termination of their employment
 - Must be clear, concise, and unambiguous
 - Cannot contradict an employee's entitlement to termination pay under the *ESA*

The Usual Terms to Consider



Offer, Acceptance, and Consideration

- When did the employment contract come into existence?
- A valid offer is where the employer demonstrates by its words/conduct that it intended to enter into a legal relationship with the employee

Offer, Acceptance, and Consideration

- Valid acceptance occurs where the employee, expressly or impliedly, in the eyes of a reasonable person, makes the commitment or promise requested by the employer
- For a contract to be enforceable, consideration must flow between the employer and the employee

Restrictive Covenants

- May restrict how employees are permitted to use confidential information during and after the employment relationship ends
- Used to protect trade secrets, confidential information, intellectual property, and trade connections, etc.
- Prevents employees from becoming the competition or soliciting valuable clients or employees, immediately after departure – for example: non-competition clause

Restrictive Covenants: Limitations

- Without a restrictive covenant, a departing employee is free to compete with his or her former employer at common law (*RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc.*, 2008 SCC 54).
- Restrictive covenants – the courts view them as a restraint on trade or competition
- Restraint on the livelihood of the employee and the freedom of employment mobility

Restrictive Covenants: Contract Considerations

- Separate all restrictive covenants under different headers in a written employment agreement
- Burden is on the party seeking to enforce a restrictive covenant to show that it is reasonable
- An employer must show why a non-solicitation clause is insufficient to protect itself before a court will enforce a non-competition clause

Restrictive Covenants: Non-Competition Clauses

Key criteria to consider for a non-competition clause:

1. Does the employer have a legitimate proprietary interest to protect?
2. Is the clause reasonable in its geographic scope?
3. Is the clause reasonable in its temporal scope?
4. Is the clause not otherwise contrary to the public interest?

Restrictive Covenants: Non-Competition Clauses

What happens if the non-competition clause is too broad or ambiguous?

- “notional” severance? (reading down the provision to make it reasonable)

or...

- “blue – pencil” severance? (where you can strike out a portion of the clause to make it what the parties intended, without changing anything else in the contract)

or...

- “void and unenforceable?” (striking out the clause entirely)

Restrictive Covenants: Non-Competition Clauses

Answer: in *Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6, the Supreme Court of Canada held that:

“Blue-pencil severance... may only be resorted to in rare cases where the part being removed is trivial, and not part of the main purport of the restrictive covenant.” [para 3]. “However, the general rule must be that a restrictive covenant in an employment contract found to be ambiguous or unreasonable in its terms will be void and unenforceable.” [para 36]

...

“Notional severance has no place in the construction of restrictive covenants in employment contracts.” [para 37]

Restrictive Covenants: Non-Solicitation Clauses

- Precludes the employee from soliciting clients, customers, suppliers or employees of the former employer upon the termination of employment

Restrictive Covenants: Non-Solicitation Clauses

- Many of the same criteria to consider for a non-competition clause (reasonableness, time period)
- A non-solicitation clause is generally more likely to be enforced than a non-competition agreement
- Requires positive acts of soliciting
- Letters to customers of employee's new position and/or employer
- Consider a "non-deal clause" that prevents dealing with a customer or employee for a certain amount of time

Restrictive Covenants: Confidentiality Clauses

- Employees have a common law duty to maintain their employer's secrets. That duty survives the end of the employment relationship
- Senior managers and officers have a fiduciary duty that is implied under their employment contract

Restrictive Covenants: Confidentiality Clauses

- If a confidentiality clause is in a written employment agreement, it must be reasonable
- Be as specific as possible
- Generally confidentiality clauses cannot last forever
- Cannot restrain employee from using skills and general knowledge gained through employment

Restrictive Covenants: Other Considerations

- Tax issues;
- Injunctive relief if a restrictive covenant is breached;
- Drafting language in the employment contract so that the post-employment obligations continue even if the employee is wrongfully dismissed;
- Termination/departure letter should remind departing employees of post-employment obligations;

Restrictive Covenants: Other Considerations

- Seniority of the employee – consider if it is really necessary to require a restrictive covenant;
- Consider whether a prospective employee is subject to a restrictive covenant and address in contract of employment; and
- Obtain advice in drafting a restrictive covenant

Severability

- In the event that one clause is held to be unenforceable, a severability clause may result in all other terms being found to be enforceable
- Ensures the unenforceable clause is “severed” from the balance of the agreement, and the validity of the remaining provisions remain in full force and effect

Governing Law

- What laws will govern the interpretation of the agreement?
- What if you have employees who work in multiple jurisdictions?
- Possible conflict may arise
 - How is it resolved?
 - How does the contract assist?

Dispute Resolution

- In the event a dispute arises, how will the parties resolve the dispute?
- Consider whether arbitration may be preferable to litigation in the Courts
- If the parties wish the Courts to resolve their dispute, which jurisdiction will govern?
- Is the exclusive jurisdiction of one jurisdiction desirable?

Changes in Duties and Location

- Changes to duties may not constitute a repudiation of the entire contract in all circumstances
- Changes to duties, compensation, or other terms may constitute a constructive dismissal
- Does the contract contemplate and authorize these changes?

Entire Agreement

- Ensures any discussions or prior agreements are not held to be part of the contract of employment
- Agreement may exclude representations
- States that the written contract constitutes the entire agreement between the two parties

Benefits of Written Agreements



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Why have a written agreement?

1. Clarity
2. Certainty
3. Addressing obligations upon termination of employment:
 - severance (bonus or incentive compensation payable?)
4. Protection for the employer's business through additional rights (non-solicitation and non-competition clauses)
 - competition issues
 - property, confidential information

Why have a written agreement?

5. Use of arbitration and mediation in order to avoid public disputes, protracted litigation, and damage to the reputation of the employer
6. Confirm ongoing co-operation and assistance of the employee after termination of the employment relationship
7. Indemnity of the employer for tax purposes or in the event of a claim by the employee

Case Law



Feldstein v 364 Northern Development Corporation, 2016 BCSC 108

What is the significance of pre-employment representations made by the employer to the prospective employee?

Feldstein v 364 Northern Development Corporation, 2016 BCSC 108

- The employee sued for damages for an alleged negligent misrepresentation the employer made during pre-employment discussions
- The negligent misrepresentation was with respect to a statement made in answer to a question from the prospective employee about the LTD Benefits Plan made available to all employees
- The employee has cystic fibrosis

Feldstein v 364 Northern Development Corporation, 2016 BCSC 108

- The Court found that the employer made an erroneous statement about eligibility for coverage under the LTD plan in the course of a 10-15 minute telephone conversation
- The employee alleged that he accepted the offer of employment on the basis of the answer to his question

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
- 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

- **Facts:**

- Mr. Miller began employment in September 2003 with a written agreement.
- He received two promotions in 2006.
- Each promotion required him to execute a new written contract.

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

- Facts:
 - Newest contract had (all boilerplate):
 - 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.
 - 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

- **Mr. Miller's Arguments:**

1. Convergys meant for the probationary period to apply to him;
2. Entitled to reasonable notice at common law as contract breached the *ESA*:
 - a) the probation clause "wiped out" his 3 weeks' accrued notice under the *ESA* for the first 90 days of his employment;
 - b) probation clause was tied to the termination clause;
 - c) this created ambiguity in the agreement;
 - d) probation clause could not be severed using the severability clause without severing the termination clause too; and
 - e) the breach of the *ESA* thus made the probationary clause (and the termination clause) unenforceable at the outset.

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

- **Decision on Appeal:**

- The contract was unambiguous and on its face, merely outlined the same information as the *ESA*
- 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.”
- *Unambiguous severance clause* exists and it is appropriate to sever the probation clause without severing the termination clause
- Mr. Miller’s notice limited to the *ESA*

Buaron v Acuity Ads Inc., 2015 **ONSC 5774**

What happens when an offer letter precedes a formal written contract?

Buaron v Acuity Ads Inc., 2015

ONSC 5774

- Employee terminated without cause after 9 months of service
- His employment agreement “severely limited” the amount of payment in lieu of notice he would be entitled to upon dismissal
- The employee initiated a wrongful dismissal proceeding and sought to set aside the agreement on the grounds that it was unenforceable

Buaron v Acuity Ads Inc., 2015

ONSC 5774

- The employee was emailed an “offer letter” that detailed his position, start date, and salary, among other things
- The employee argued this was the point in time in which he had a contract with Acuity
- The employer argued the offer letter was not a contract, and there was “more” that the employee had to sign

Buaron v Acuity Ads Inc., 2015

ONSC 5774

- The Court found that this “offer letter” marked the beginning of an employment contract with Acuity Ads
- The letter was confirmation of the “verbal agreement” the employee had made prior to receiving the email

Buaron v Acuity Ads Inc., 2015

ONSC 5774

- [18] *“The reference to “contracts” in the e-mail could mean anything. These could be the health benefit contracts or insurance contracts for the plaintiff to sign. It does not lie in the mouth of the defendant to say there was more to sign to create an agreement.”*

Buaron v Acuity Ads Inc., 2015

ONSC 5774

[21] “I find that the Comprehensive Agreement is not enforceable. The parties already had a contract when the offer letter of March 23, 2014, was received. No new or additional consideration was provided to the plaintiff along with the comprehensive agreement in order to vary the existing agreement”

The Plaintiff was entitled to reasonable notice or payment in lieu thereof.

Globex Foreign Exchange Corp. v Kelcher, 2011 ABCA 240



Can an employer uphold a restrictive covenant after an employment contract has been breached?

Globex Foreign Exchange Corp. v Kelcher, 2011 ABCA 240



- A currency exchange business employed three employees as traders
- The employees had contracts containing restrictive covenants
- One employee signed the contract at the beginning of his employment; the other two signed the agreements during their employment

Globex Foreign Exchange Corp. v Kelcher, 2011 ABCA 240



- In 2005 all three employees left their employment and joined a competitor
- Were prohibited from “soliciting customers in any manner whatsoever, in any business or activity for any client of Globex”

Globex Foreign Exchange Corp. v Kelcher, 2011 ABCA 240



- Despite their efforts to respect their non-solicitation covenants, the employees contacted some clients that were “off-limits”
- At trial the Court found that the employees breached both their non-solicitation covenants and their non-competition covenants

Globex Foreign Exchange Corp. v Kelcher, 2011 ABCA 240

- The agreements that were entered into by the two employees after they were hired were not enforceable as they lacked consideration
- The third employee's agreement was also unenforceable because the trial judge found that he had been wrongfully dismissed
- Upheld by the Alberta Court of Appeal

Conclusions

- There are many benefits to employers from properly drafted employment contracts.
- These benefits include certainty and reducing the risk of a dispute.
- In order to achieve these benefits, the contract must meet the legal requirements that have been established.



QUESTIONS?

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Carman J. Overholt, QC

Preston Parsons

Jennifer Kwok

Victoria Petrenko

Main: (604) 568-5464
trustedadvisors@overholtlawyers.com