What to Expect in Human Resources Management in 2022

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A Review of Recent Developments and Trends in Workplace Law

Overholt Law LLP Webinar
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We are an established boutique labour and employment law firm located in the heart of the downtown Vancouver business community with experience in advising and representing our clients from all sectors of the economy in connection with the wide range of legal matters that arise in the contemporary workplace.

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In The Modern Workplace

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About the Moderator

Kai Ying is a lawyer at Overholt Law LLP and practices in all of the firm's practice areas including labour relations, employment, human rights, occupational health and safety, and privacy law.

Since joining the firm in 2018, Kai Ying has advised a diverse range of clients on matters including employment contracts, severance packages and restrictive covenants, workplace policies, workers' compensation reviews, and human rights claims.

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About the Presenter

Carman J. Overholt, QC

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Carman J. Overholt, QC is a senior litigation lawyer with 35 years of experience in all aspects of employment law, labour relations and commercial litigation. Carman works closely with senior management and human resources professionals to assist employers in connection with the most complex legal matters that arise in the workplace.

Carman is a frequent lecturer and routinely presents on the most recent developments in the law including corporate governance, the duty to accommodate, social media issues, privacy obligations and the protection of an employer's business interests.

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Webinar Overview

1. COVID-19 – the return to the workplace and the future of remote work
2. Bullying and harassment complaints and the importance of respectful workplace policies
3. Addressing systemic discrimination claims/complaints
4. Unfair competition and the use of restrictive covenants to protect your business
5. Dealing with mental illness in the workplace and maintaining a safe and healthy workplace

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1. COVID-19 – The Return To the Workplace And the Future of Remote Work

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1. COVID-19 – Return to Work and Future of Remote Work

a) Status Update

b) Mandatory Vaccination Policies

c) Return to Work and Remote Work Arrangements

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a) COVID-19 – Status Update

- In BC, approximately 85% of people 12 or older are now fully vaccinated against COVID-19
  - (i.e., have 1 dose of the Johnson & Johnson vaccine, or both doses of a 2-dose vaccination series such as Pfizer, Moderna, AstraZeneca)
  - BC has begun rolling out boosters for vulnerable populations and expects to provide boosters to all eligible people in 2022
- Many government restrictions on workplaces have been lifted, except necessary safety precautions in accordance with WorkSafeBC requirements

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b) COVID-19 – Mandatory Vaccination Policies **Poll Question**

Will your organization require proof of vaccination against COVID-19?

a) Our organization already requires proof of vaccination for employees

b) Our organization has a policy that does not require proof of vaccination, but has other requirements e.g. voluntary disclosure

c) Our organization will not require proof of vaccination or any other form of COVID-19 vaccination policy

d) We have not yet decided

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b) COVID-19 – Mandatory Vaccination Policies

- Lots of inquiries throughout 2021 regarding “mandatory” vaccination policies – we expect this to continue in 2022
- Many employers have proceeded to impose variations on these policies as employees have returned to work
  - e.g. Federal government, BC healthcare employers, WorkSafeBC
- There have been only a handful of published decisions dealing with the enforceability of vaccination policies, and those that exist are in the union context

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COVID-19 – Mandatory Vaccination Policies cont'd

- *UFCW, Local 333 and Paragon Protection Ltd.* (November 9, 2021) – Arbitrator Von Veh, Q.C.
  - Security company issued a notice to its employees advising of the implementation of a new policy ordering them to be fully vaccinated by a certain date, that they would be required to complete a declaration form confirming vaccination status, and that there would be serious consequences for those who failed to comply
  - Union filed a policy grievance alleging violations of the Collective Agreement and of the Ontario *Human Rights Code*
  - Employer argued that Policy was an operational necessity and was necessary to maintain a safe and healthy work environment

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COVID-19 – Mandatory Vaccination Policies cont'd

- *UFCW, Local 333 and Paragon Protection Ltd.* (November 9, 2021) – Arbitrator Von Veh, Q.C.
  - Arbitrator dismissed the policy grievance and upheld the Policy
  - The Policy was **reasonable, enforceable and compliant** with respect to the *Human Rights Code*
  - Employer took "every precaution reasonable in the circumstances" to protect the health and safety of its employees and "personal subjective perceptions of employees to be exempted from vaccinations. . . cannot override and displace available scientific considerations"
  - Note that the Collective Agreement specifically had pre-existing vaccination language

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COVID-19 – Mandatory Vaccination Policies cont'd

- **Compare**: *Electrical Safety Authority and Power Workers' Union* (November 11, 2021) – Arbitrator Stout
  - Management first implemented a policy allowing employees who did not voluntarily disclose their vaccination status to be tested on a regular basis
  - Management then **unilaterally** introduced a policy without a testing alternative, requiring all employees to disclose their vaccination status and providing that any employee who does not disclose/is not vaccinated may be placed on unpaid leave or disciplined for refusing to get fully vaccinated
  - Note that there was no vaccination language in the Collective Agreement

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COVID-19 – Mandatory Vaccination Policies cont'd

- **Compare**: *Electrical Safety Authority and Power Workers' Union* (November 11, 2021) – Arbitrator Stout
  - Arbitrator Stout decided that the new policy was unreasonable. The context was extremely important (following the *KVP* test), i.e.:
    - The first policy was in effect with the agreement of the Union and there was no evidence that such "testing" policies were not effective
    - The Employer did not demonstrate any difficulties in protecting the workplace using a combination of vaccination and testing
    - Most of the employees were working remotely and had the right to continue working remotely

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COVID-19 – Mandatory Vaccination Policies cont'd

- The bottom line: in the non-union context, employers are free to implement mandatory vaccination policies, but consider:
  - Are employees sufficiently and reasonably protected already? (i.e. if the workforce will continue to work entirely from home, it is unlikely that a mandatory vaccination policy is necessary)
  - Are there particular vulnerabilities in the workplace that need to be protected e.g. vulnerable colleagues, high-risk or high-contact industries?
  - How will the employer manage, store, and protect personal information disclosed in the course of obtaining proof of vaccination?
  - What accommodations are available to employees who may have legitimate medical exemptions?

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c) COVID-19 – Remote Work – **Poll Question**

What is your organization's plan regarding a return from remote work due to COVID-19?

a) None of our employees can work remotely so this does not apply

b) We have already returned all or some employees to the office

c) We expect to return all or some of our employees to the office in the coming months

d) No plans to bring back employees from remote work at this time

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c) COVID-19 – Remote Work

- Many employers are facing challenges when returning employees to in-office work now that restrictions have generally lifted in workplace settings
  - e.g. an employee who worked from home during the pandemic when the employer's office was closed, wants to permanently work from home despite the employer having return to regular office hours
- Employees who worked remotely due to COVID are not <u>automatically</u> entitled to continue to work from home

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COVID-19 – Remote Work cont'd

- Legal and practical considerations:
  - What do the terms of employment and applicable workplace policies, e.g. remote work policies, provide?
  - Has the Employer already acquiesced or agreed to a new term of employment by permitting the employee to work from home beyond an appropriate timeframe?
  - On a case-by-case basis, what are the reasons for requiring an employee to work from the office rather than continuing to work remotely?

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COVID-19 – Remote Work cont'd

- If it is necessary to recall an employee to in-office work:
  - Advise employees that they are required to return to work in the office with a reasonable period of notice
  - Provide clear direction to employees about expectations and work requirements, based concretely on operational needs
  - Ensure that all reasonable measures necessary to create a safe work environment exist, to address any concerns about workplace safety

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2. Bullying and Harassment Complaints and the Importance of Respectful Workplace Policies

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2. Bullying and Harassment Complaints and the Importance of Respectful Workplace Policies

a) B.C. *Human Rights Code (*the *"Code")* and WorkSafeBC

b) When Must You Investigate?

c) Elements of Proper Investigation

d) The Consequences of Failure to Investigate and/or Inadequate Investigation

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2. Bullying and Harassment Complaints and Respectful Workplace Policies – **Poll Question**

Does your organization have a Respectful Workplace Policy?

a) Yes

b) It is currently in development

c) No

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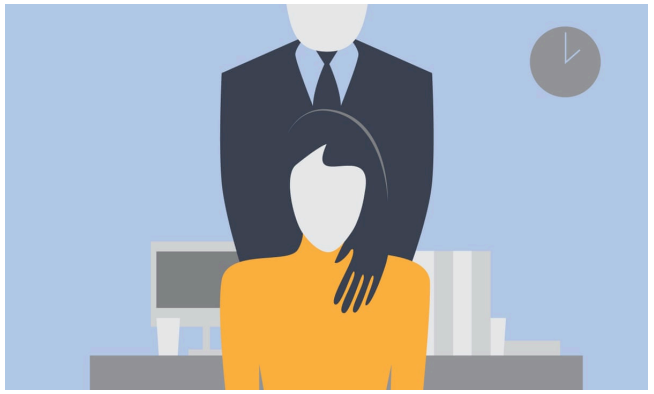
Harassment – Sexual or “Personal”



- Unwelcome conduct of sexual nature that detrimentally affects the work environment
  - Inappropriate verbal, physical, or environmental conduct of a sexual nature
- Poisoned workplace by sexually-related remarks/conduct

- Shouting, yelling
- Foul language/Insulting remarks, gestures or actions

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a) The *Human Rights Code*

- Harassment can be a form of discrimination, pursuant to the *Human Rights Code,* if based on a prohibited ground:

> "race, colour, ancestry, place of origin, religion, family status, marital status, physical disability, mental disability, sex, age, sexual orientation, political belief or conviction of a criminal or summary conviction offence unrelated to their employment."

- Harassment and bullying that target one or more of these protected characteristics—sexual harassment, for example, or homophobic bullying or racial slurs—may be found to be discriminatory and contrary to the *Code*

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a) WorkSafeBC

- WorkSafeBC defines harassment and bullying as:
  - (a) including any inappropriate conduct or comment by a person towards a worker that the person knew or reasonably ought to have known would cause that worker to be humiliated or intimidated, but
  - (b) excluding any reasonable action taken by an employer or supervisor relating to the management and direction of workers or the place of employment

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a) WorkSafeBC cont'd
→ Obligations of workers, supervisors and employers

Employers' obligations:

- Ensure the health and safety of all workers
- Not engage in bullying and harassment of workers and supervisors
- Train supervisors and workers to recognize and respond to bullying and harassment
- Create a policy statement regarding workplace bullying and harassment
- Act to prevent and minimize workplace bullying and harassment
- Establish procedures for staff to report incidents
- Develop and implement procedures for dealing with incidents or complaints of bullying and harassment

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a) WorkSafeBC cont'd
→ Obligations of workers, supervisors and employers

Workers' obligations:

- Not engage in bullying and harassment of others
- Report any bullying and harassing behaviour they experience or observe in the workplace
- Comply with employer's policies and procedures

Supervisors' obligations:

- Not engage in the bullying and harassment of others
- Apply/comply with employer policies & procedures
- Are responsible for ensuring members of their staff do not bully and harass others

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b) When Must You Investigate?

Investigate when there is:

- Suspected employee misconduct

- A complaint or report (formal or informal) of:
  - A breach of an internal policy – e.g., workplace violence and harassment policy
  - A breach of the law – e.g., occupational health and safety or the *Code*
    - Legislative requirement that investigation is undertaken

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When Must You Investigate?

- Must investigate even where you have received:
  - An anonymous complaint
  - Second-hand information or third party complaints
  - Complaints for which no written complaint has been filed

- Where a complainant is reluctant to participate in an investigation
  - Remind them of their duty to report
  - Inform them that employers are not allowed to retaliate against employees for reporting workplace bullying and harassment

    → prohibited action complaint

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c) Proper Investigation

1. Procedural Fairness
   - Neutrality
   - Fairness: investigate in a fair and impartial manner
   - Thoroughness: uncover all necessary information
   - Timeliness: act promptly

2. Framework
   - Set clear objectives
   - Determine the scope of investigation early on
   - Would an internal or external investigator conduct the investigation?

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Proper Investigation cont'd

3. Address preliminary issues
   - Assess the complaint and its nature
   - Employee concerns
     - The employee may be reluctant to participate in an investigation
     - Disclosure requirements
     - Privacy issues

4. Interviews
   - Who? When? About what?

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Proper Investigation cont'd

5. Finalize the investigation
   - Factual finding by the investigator
   - Outcomes
     - Substantiated
     - Not substantiated
     - Inconclusive
   - Report

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Post-Investigation

- What recourse, if any, is necessary, appropriate and *proportional*?
- ***Molloy v EPCOR Utilities Inc,*** 2015 ABQB 356
  - Long-term, senior managerial employee was found to have breached RWP based on conduct that was "hostile, isolating and intimidating"
  - However, just cause dismissal was not an appropriate remedy:

> "Ms. Molloy's disrespectful conduct towards others, considered alone, would not justify summary dismissal. While doubtless difficult for those on the receiving end of Ms. Molloy's outbursts and other misconduct, it warranted a **reprimand and coaching** rather than dismissal."

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d) Consequences of Failure to Investigate or Inadequate Investigation for the Employer

- Constructive Dismissal Claims
- Human Rights Complaints
  - Lost wages
  - General damages – injury to dignity, feelings and self-respect
  - Reinstatement
  - Public interest remedies
- WorkSafeBC Complaints
- Punitive and aggravated damages
- Vicarious liability

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d) Consequences of Failure to Investigate or Inadequate Investigation for the Employer

Case studies

- Failure to investigate allegations of harassment
  - *Horner v. 897469 Ontario Inc.*, 2018 ONSC 121

- Inadequate investigation
  - *Doyle v. Zochem Inc.*, 2017 ONCA 130

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Horner v. 897469 Ontario Inc., 2018 ONSC 121

case study 1: failure to investigate

Facts

- In December 2016, the employee reported that another employee was intentionally rude to her, elbowed her in the hallway when she was walking past him, and angrily blocked her from opening a drawer
- Employer advised her that it would respond in the New Year
- Employer then sent her a termination letter, terminating her employment with cause, for losing temper with that co-worker
- Employee brought wrongful dismissal action

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Horner v. 897469 Ontario Inc., 2018 ONSC 121

case study 1: failure to investigate

Findings

- The Court ruled that the employee wrongfully dismissed
- Awarded:
  - 3 months' notice
  - $20,000 in moral damages (for manner of termination)
  - $10,000 in punitive damages

"I am satisfied on the evidence that the plaintiff was harassed in the workplace and that the employer, rather than investigating, terminated the plaintiff. […T]he employer's conduct was malicious, oppressive and high-handed and must be deterred."

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Doyle v. Zochem Inc., 2017 ONCA 130

case study 2: inadequate investigation

Facts

- 9-year plant supervisor was the only woman employee in the plant
- Employee complained of sexual harassment by fellow manager, e.g. staring at her breasts and repeatedly making offensive comments
- Employer did a “cursory” investigation and terminated her employment five days after her complaint, without reason
- Employee brought a wrongful dismissal action

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Doyle v. Zochem Inc., 2017 ONCA 130

case study 2: inadequate investigation

Findings

- Employer conducted only "cursory" investigation into supervisor's allegations: the complainant was not given an opportunity to respond to the respondent's version of events, and was not told the outcome
- Trial judge found termination discriminatory; decision upheld by the ONCA
- Awarded:
  - 10 months in lieu of notice
  - $25,000 in damages under Ontario's *Human Rights Code*
  - $60,000 in moral damages – breach of duty of good faith; manner of dismissal

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Other Consequences

- Management and human resources time and expense to investigate and manage complaint process
- Reputation damage to the employer
  - Difficulty in recruitment because of reputation damage
- Employee morale
- “Poisoned” work environment
- Employee departures

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Addressing and Investigating Bullying & Harassment Complaints – Summary

- Review your Workplace Bullying & Harassment Policy and Respectful Workplace Policy on a regular basis to ensure compliance with statutory requirements and best practices
- Ensure that employees and supervisors are aware of their duties
- Investigate all complaints of workplace harassment, no matter how trivial
- Make sure that investigations are thorough and procedurally fair
- Keep in mind that a failure to investigate or an inadequate investigation of claims could be costly for employers

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3. Addressing Systemic Discrimination Claims or Complaints

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Addressing Systemic Discrimination Claims or Complaints

a) Definitions

b) Case Studies
   - ***Cybulsky v. Hamilton Health Sciences***, 2021 HRTO 213
     - Failure to investigate allegations of unconscious bias discrimination
   - ***Francis v. BC Ministry of Justice* (No. 3)**, 2019 BCHRT 136
     - Failure to investigate allegations of racial discrimination

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a) Definitions

Employers should address allegations of **unconscious bias discrimination** and **systemic discrimination.**

<u>Unconscious bias</u>
Also known as implicit bias, is a bias that operates outside our awareness. It is a social stereotype, prejudice, unsupported judgment, assumption, or belief that we have in favor of or against one thing, person, or group as compared to another, in a way that is usually considered unfair.

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Definitions cont'd

Systemic discrimination refers to:

> "[…] practices or attitudes that have, whether by design or impact, the effect of limiting an individual's or a group's right to the opportunities generally available because of attributed rather than actual characteristics … It is not a question of whether this discrimination is motivated by an intentional desire to obstruct someone's potential, or whether it is the accidental by-product of innocently motivated practices or systems. If the barrier is affecting certain groups in a disproportionately negative way, it is a signal that the practices that lead to this adverse impact may be discriminatory."

Radek v. Henderson Development (Canada) and Securiguard Services (No. 3), 2005 BCHRT 302 (CanLII)

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b) Case Studies

- ***Cybulsky v. Hamilton Health Sciences***, 2021 HRTO 213
  - Failure to investigate allegations of unconscious bias discrimination

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Cybulsky v. Hamilton Health Sciences

- The Applicant, Dr. Cybulsky, was appointed the Head of Ontario's Cardiac Surgery Service ("CSS") at Hamilton Health Sciences ("HHS")
- She worked in a highly male-dominated environment
- Her position was renewed from 2009 until 2015; however, in 2016 HHS opened the position to others to apply
- One of the main reasons for this decision was a review of CSS (the "Review") in response to "grumblings" about the Applicant's leadership style
- Dr. Reddy (the interim Surgeon-in-Chief) appointed Dr. Flageole (Chief of the Pediatric Surgery Service) to conduct the Review

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Cybulsky cont'd

Dr. Cybulsky:

- Suggested to Dr. Flageole that her inclination toward being an assertive, task-oriented problem solver could work against her as a female leader
- Submitted research throughout the Review demonstrating that female leaders with "male traits" are generally disliked by their male counterparts
- Brought up these concerns with the hospital's Human Rights and Inclusion specialist

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Cybulsky cont'd

- The investigator interviewed the cardiac surgeons at CSS
  - One surgeon had very good things to say
  - The others did not view her so favourably, commenting that she had a direct abrupt communication style; unfriendly body language; that they don't "see the soft side of her", and that "she micromanages…like a mother telling her children what to do"

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Cybulsky cont'd

Findings

- Dr. McLean (the Executive Vice President and Chief Medical Executive at HHS), Dr. Flageole (who conducted a Review of the Cardiac Surgery Service), Ms. Hastie, and Dr. Stacey (who decided to open the role for Applicants) had all breached the Ontario *Human Rights Code*

- Dr. Flageole, Dr. McLean and HHS violated the Applicant's rights under s. 5(1) of the ON *Code* by:
  - Failing to consider the role her sex/gender played in comments made about Dr. Cybulsky's leadership style during the Review
  - Failing to respond appropriately when Dr. Cybulsky raised her concerns

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Cybulsky v. Hamilton Health Sciences cont'd

Findings cont'd

- Ms. Hastie was tasked with dealing with workplace concerns and understanding the issues being raised. The Tribunal found that she violated the *Code* for failing to consult with the Applicant and investigate the allegations of gender bias

- Lastly, Dr. Stacey violated the *Code* because he partly relied on the Review in making his decision not to re-appoint Dr. Cybulsky for the position

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b) Case Studies cont'd

Francis v. BC Ministry of Justice (No. 3)

- Mr. Francis, a 15-year corrections officer, described a poisoned environment and was subject to racial discrimination, including:
  - Being criticized for behaviour that was condoned by supervisors when others were not
  - Experiencing racialized comments and slurs on a daily basis
  - Being publicly denigrated in front of other officers and an inmate by a supervisor who made a "joke" about his colour. When he objected, he was treated as though he was making a big deal out of it

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Francis v. BC Ministry of Justice (No. 3) cont'd

- Francis's complaint to management resulted in slow, cursory investigations, followed by him being singled out for discipline
- Frustrated with lack of progress in the investigation, Francis filed a Human Rights Complaint
- After filing the complaint, Mr. Francis was called a "rat" by colleagues and told that he "had a target on his back"
- Ultimately, the discrimination he experienced caused him to leave the workplace

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Francis v. BC Ministry of Justice (No. 3) cont'd

Findings

- The Province failed to recognize the "complex, subtle, and systemic nature of racism in any workplace" - Francis was targeted and profiled in the workplace, which was a strong indicators of racial discrimination

- While most witnesses for the Province testified that they had not witnessed any racism at the facility, many of these same witnesses acknowledged that racial slurs were prevalent in the workplace: "indicative of a workplace culture that downplayed the very incidents that Francis raised as discriminatory"

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Francis v. BC Ministry of Justice (No. 3) cont'd

The BC Human Rights Tribunal awarded Mr. Francis:

- $176,000 in damages for injury to his dignity, feelings, and self-respect, the highest award in the BC Tribunal's history
- $264,060 for past loss of earnings
- $431,601 for future loss of earnings arising from his inability to return to work, because of his completely debilitating mental health diagnoses triggered by the discrimination
- pension loss of $65,881, $1,140 for counselling expenses, and
- $25,515.24 for disbursements

Bringing the total compensation to **$964,197**

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Addressing Systemic Discrimination Claims or Complaints – Summary

- Liability for employers under the *Code* can arise from both procedural and substantive breaches of the *Code*
- Employer must investigate claims of unconscious bias and gender discrimination, whether they are raised formally or informally
- Failure to investigate allegations of unconscious bias discrimination could lead to a finding that the employee's rights under the *Code* is breached
- Employers should educate decision-makers regarding bias and *Code* protected grounds

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4. Unfair Competition and the Use of Restrictive Covenants to Protect Your Business

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4. Unfair Competition and the Use of Restrictive Covenants to Protect Your Business – **Poll Question**

How concerned is your organization about unfair competition and the misuse of confidential information by former employees?

a) Very concerned

b) Somewhat concerned

c) Not very concerned

d) We have not considered this issue

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Unfair Competition and the Use of Restrictive Covenants to Protect Your Business

a) Restrictive covenants generally

- ***Telus Communications Inc. v. Golberg***, 2018 BCSC 1825

b) Developments in the case law regarding misuse of confidential information

- ***GEA Refrigeration Canada Inc v. Chang et al***, 2020 BCCA 361

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a) Restrictive Covenants

- Increasing number of employers including restrictive covenants into employment agreements at the outset in order to protect against unfair competition in a time of significant employee turnover
  - May include strict non-solicitation and non-competition clauses
  - Restrictive covenants in the employment context are generally *prima facie* unenforceable

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Restrictive Covenants cont'd

- Test for the enforceability of a restrictive covenant:

  1. Does the employer have a **proprietary interest entitled to protection**? (e.g. confidential information, customers or business)
  2. Is the clause **reasonable** in terms of **duration and geographic scope**?
  3. Is the covenant **contrary to the public interest** for restricting competition generally?

  (*Elsley v. J.G. Collins Insurance Agencies Ltd.*, [1978] 2 SCR 916)

- In determining reasonableness, the restrictive covenant must also be **unambiguous.**

  (*Shafron v. KRG Insurance Brokers (Western) Inc.,* 2009 SCC 6)

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Restrictive Covenants cont'd

- *Telus Communications Inc. v Golberg*, 2018 BCSC 1825
  - Telus sought to restrain a former VP from joining Rogers, relying on a restrictive covenant that he signed:

". . . the vice-president will not, without the prior written consent of Telus, directly or indirectly either individually or in partnership or jointly or in conjunction with or on behalf of any person or persons, firm, association, syndicate, corporation or other enterprise, as principal, agent, employee, director, officer, shareholder or contractor or in any other manner whatsoever:

1) carry on or be engaged in executive, management, supervisory or strategic work or participate in, make decision in respect of, direct, assist with, contribute to, advise on, provide consulting or other services in respect of any strategic management, supervisory or executive matters for any person or persons, firm, association, syndicate, corporation or other business enterprise engaged in or concerned with or interested in any business which is competitive with the business of Telus within the provinces of British Columbia, Alberta, Ontario and Quebec."

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Restrictive Covenants cont'd

- *Telus Communications Inc. v Golberg*, 2018 BCSC 1825
  - The Court dismissed Telus' application to prevent him from taking on a new position with Rogers
  - The restrictive covenant was overly broad:
    - It prohibited the employee from taking a managerial role in any company in competition with Telus or *any of its affiliates*, now or in the future
    - The prohibition existed regardless of whether the new position had any relationship to the duties/knowledge the employee had while employed
    - It was too ambiguous by using the phrase "or in any manner whatsoever"
    - It did not place any restriction on the type of competition between other businesses and the specific line of business that Telus wanted to protect

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Restrictive Covenants cont'd

- When including a non-solicitation or non-competition clause in an employment agreement, the employer must consider:
  - What is the restrictive covenant intended to protect? Is it truly proprietary or confidential?
  - What duration is appropriate? (Typically, a restriction lasting more than 24 months will not be enforceable.)
  - What geographic scope is appropriate and is it clearly defined? (This must be determined in relation to the employer's actual business and operations.)
  - Does the nature of the restriction go beyond what is actually necessary to protect the business? (e.g. if the employee has no contact with customers in their role, it may be unnecessary to bar the employee from contacting customers after the end of employment.)
  - Is the clause overall clear and unambiguous?

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b) Misuse of Confidential Information

- Employers are protected against misuse of confidential information by way of:
  - Confidentiality agreements entered into by employees

    (i.e., giving rise to breach of contract claims)

  - Common law duty of fidelity, good faith and loyalty to the employer, including an obligation to maintain the employer's confidence following termination of employment

    (i.e., giving rise to tortious breach of confidence claims)

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Misuse of Confidential Information cont'd

- *GEA Refrigeration Canada Inc. v Chang et al,* 2020 BCCA 361
  - The employees were former employees (as managers, engineers, and designers) of GEA, a company which designed, fabricated and sold industrial hygienic freezers
  - Each of the employees had written agreements with non-competition and confidentiality clauses; the most senior employee, who held a senior management position, also had a non-solicitation clause
  - The employees began discussing the possibility of creating a competitor in fall 2009. In April 2010, a family member incorporated FPS. By May 2010, FPS had a business plan to produce hygenic freezers similar to GEA's

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Misuse of Confidential Information cont'd

- *GEA Refrigeration Canada Inc. v Chang et al,* 2020 BCCA 361
  - GEA's manufacturing process included certain highly confidential engineering drawings, not shared outside the company, that had been retained and used by the employees to develop and produce their competing product
  - FPS was able to develop their product much more quickly than it otherwise would have as a result of the use of GEA's confidential information
  - FPS sold its first hygienic freezer in June 2011, and GEA commenced litigation against its former employees in July 2012 on the basis of **breach of confidence**

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Misuse of Confidential Information cont'd

- *GEA Refrigeration Canada Inc. v Chang et al,* 2020 BCCA 361
  - A breach of confidence action is made out if the Plaintiff can prove:
    1. The information conveyed was confidential;
    2. The information was communicated in confidence; and
    3. The information was used for an improper purpose.
  - In this case, the breach of confidence claim was made out – and likely would have been even if the employees relied on their memories rather than on the drawings

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Misuse of Confidential Information cont'd

- *GEA Refrigeration Canada Inc. v Chang et al,* 2020 BCCA 361
  - The Court has significant latitude to award remedies for breach of confidence (e.g. disgorgement of profits, injunctive relief, damages)
  - In this case, the "**springboard doctrine**" applied: the employer was entitled to recover the value of the economic advantage gained by the defendants at the plaintiff's expense
  - The Court determined that the employees had gained a **four-year** "springboard" by improperly using the employer's confidential information, and accordingly the employer was entitled to disgorgement of their profits for that entire period of time

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Restrictive Covenants and Unfair Competition – Summary

- Recommendations for protecting against unfair competition
  - Clearly drafted confidentiality, non-solicitation, and non-competition agreements are paramount for key employees
  - Seek legal advice before implementing restrictive covenants or attempting to rely on these terms, as they are *prima facie* unenforceable and must be very carefully drafted
  - Employees will additionally be subject to common law obligations of confidentiality that will protect your business

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5. Dealing with Mental Illness in the Workplace and Maintaining a Safe and Healthy Workplace

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5. Mental Illness in the Workplace

a) Fear of stigma and hesitancy to disclose mental illness

b) Cost of not supporting mental health in the workplace

c) Duty to inquire
   - Case study: ***Lord v. Fraser Health Authority and another,*** 2020 BCHRT 64

d) Duty to accommodate

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a) Fear of Stigma and Hesitancy to Disclose Mental Illness

Each year, one in five Canadians experience a mental health problem or illness every year. That's about 7 million of us. By the time Canadians reach 40 years of age, 1 in 2 have—or have had—a mental illness. But despite how common it is, mental illness continues to be met with widespread stigma.

~ Mental Health Commission of Canada

<u>Mental health stigma – the definition</u>

- Refers to societal disapproval, or when society places shame on people who live with a mental illness or seek help for emotional distress, such as anxiety, depression, bipolar disorder, or PTSD
- Operates in society and workplace

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b) Cost of not supporting mental health

- **Absenteeism**
  Workers with mental illness are more likely to be absent from work due to health reasons than other workers and these absences are likely to be longer.

- **Presenteeism**
  Employees with poor mental health come into work when they are unwell for various reasons

- **Retention and recruitment**
  There is a link between employee wellbeing and employee turnover

CAMH, “Workplace Mental Health – A Review and Recommendations”, 2020

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c) Duty to Inquire

- Not all employees will feel comfortable telling their employer that they are dealing with a mental illness (given the discussed stigmas)

- Employers are under an additional duty – the duty to inquire – when presented with an employee who may be dealing with mental health issues

- An employer's duty to inquire is triggered if something reasonably alerts it that the employee may have a disability that requires accommodation. In those circumstances, the duty to inquire would be the first step in an employer's duty to accommodate

Lord v. Fraser Health Authority and another, 2020 BCHRT 64
Lewis v. Hour of Power Canada and another, 2018 BCHRT 25

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Duty to Inquire cont'd

Lord v. Fraser Health Authority and another, 2020 BCHRT 64

- Ms. Lord worked as a nurse for FHA and had certain performance issues
- **2014**: She disclosed her mental health issues and went on medical leave. Her performance improved when she returned from leave
- **July 2016**: She called a patient an inappropriate name. The employer asked whether any medical issue contributed to her conduct
  - Ms. Lord said she was not interested to disclose anything
- **September 2016**: a co-worker found a bottle of alcohol in Ms. Lord's desk. The employer against asked if there were any medical issues
  - Ms. Lord did not disclose any disability

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Lord v. Fraser Health Authority and another cont'd

- **October 2016**: The employer sent her a warning letter, advising that further failure to act in professional manner would result in discipline and termination
- **January 2017**: Ms. Lord made remarks about her supervisor in front of other people to the effect of: "want to put a pillow over his face and kick him"; "he doesn't know what the f*** he is doing" …
- **February 2017**: The employer became aware that she gave alcohol to an alcohol-dependent patient, which was inappropriate and unapproved
  - Due to safety concerns for their staff and patients, the employer placed Ms. Lord on paid leave while they carried out an investigation

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Lord v. Fraser Health Authority and another cont'd

- **March 2017 – Meeting 1:** between Ms. Lord, her union representative, the union labour relations officer, the human resources consultant, and Ms. Erikson
  - Ms. Lord denied that she had a medical condition

- **May 2017 – Meeting 2**: Ms. Lord again denied that she had a disability or significant illness

Three weeks later, Ms. Lord's employment was terminated for cause. Ms. Lord filed a complaint against the employer alleging discrimination on basis of mental disability contrary to s. 13 of the *Code*

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Lord v. Fraser Health Authority and another cont'd

<u>Findings:</u> complaint has no reasonable prospect of success

- No dispute that Ms. Lord had a disability and that she experienced an adverse impact when her employment was terminated
- However, Ms. Lord failed to prove that the termination of her employment (the adverse impact) was related to her disability
    - At all material times, Ms. Lord denied that she had a disability and said she did not require accommodation
    - "[…] the Respondents had put Ms. Lord on notice that termination was a possibility if her behaviour did not change. They gave her many opportunities to disclose that she had a medical condition that was affecting her problematic behavior. **She did not.** They held many meetings with her union present. Given these circumstances, it does not appear unreasonable that the Respondents did not ask her to produce medical information before they terminated her employment. This is especially so because Ms. Lord still does not connect her behaviour to her disability."

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d) Duty to Accommodate

- If you conclude that an employee may have a mental illness, an employer's obligation is to provide the employee with a meaningful opportunity to identify what they are dealing with and request assistance or accommodation

- Under the BC *Human Rights Code* (the "*Code*"), employers and service providers are required to accommodate employees and clients with disabilities, including mental health issues, to the point of "undue hardship"

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“The trend is upwards”
Recent Injury to Dignity Awards

In recent years, the BC Human Rights Tribunal has made increasing injury to dignity damage awards, including in matters involving findings of discrimination on the basis of mental disability, e.g.:

- ***Benton v. Richmond Plastics***, 2020 BCHRT 82 (termination of employment after disclosing mental health issues) - **$30,000**
- ***Davis v. Sandringham Care Centre and another***, 2015 BCHRT 148 (employer intrusively questioned employee about her PTSD and forced her on a medical leave without any request or medical evidence) - **$35,000**
- ***Kelly v. UBC***, 2013 BCHRT 302 (employer failed to accommodate, prohibited the complainant from accessing remediation or probation, and dismissed him from his residency program) - **$75,000**

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COVID and Mental Health

- The COVID-19 pandemic affects most people at both work and home, which can take a toll on mental health. Some common reactions include feeling helpless, overwhelmed, lonely, or afraid for your health or the health of loved ones
- WorkSafeBC has a Guide for Workers that suggests healthy strategies to manage stress and anxiety, with a focus on supporting mental health and well-being of self and others
  - Includes simple conversation starters when talking to co-workers who may be overwhelmed
  - Mental health resources

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Mental Illness in the Workplace – Summary

- Pursuant to the *Human Rights Code*, employees are protected against harassment and discrimination due to disabilities
- Employees are not required to disclose their disability, but employers should do their best to create a work culture in which employees would not feel stigmatized if they did disclose their condition
- In cases where an employer suspects that an employee suffers from a mental illness that may be affecting their performance at work, the employer has a duty to inquire
- Employers have a duty to accommodate any employee with a disability to the point of undue hardship

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Questions?

Thank you for attending!

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