Overholt Law LLP Breakfast Seminar:

The Post-Pandemic Workplace

OVERHOLT
LAW LLP
TRUSTED ADVISORS

Wednesday, September 20, 2023
7:30AM -10:30 AM

Presenters:
Carman J. Overholt, K.C.
Jennifer S. Kwok
Preston I.A.D. Parsons
Graham Nattress
Kai Ying Chieh
Fiona Wong

601 – 570 Granville Street
Vancouver, BC V6C 3P1

Office: (604) 568-5464
http://www.overholtlawyers.com

OVERHOLT LAW LLP

TRUSTED ADVISORS

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.

Agenda

1. **Written Employment Contracts**: what we learned from the COVID-19 pandemic.
2. **Moonlighting and Managing Remote Work**.
3. **Family Status Discrimination**: analyzing the BC Court of Appeal's recent *Gibraltar Mines Ltd.* decision and what it means for employers.
4. **Labour Relations Update**: new labour relations legislation, and a review of some recent arbitration decisions addressing employment misconduct and progressive discipline.
5. **A Tale of Two Outcomes**: Employees and Secret Recordings.
6. **Liability for Loss of Benefits**: how to avoid the worst-case scenario.

OVERHOLT LAW LLP
TRUSTED ADVISORS

Written Employment Contracts:
what we learned from the COVID-19 pandemic

Kai Ying Chieh

OVERHOLT LAW LLP
TRUSTED ADVISORS

Consideration

- Key question: is the written employment agreement enforceable?
- Rapid changes in workforce and working conditions during the pandemic
- **Consideration** – did the employee receive consideration in exchange for the terms of the written agreement?
  - New employees?
  - New terms of agreement for existing employees?

OVERHOLT LAW LLP
TRUSTED ADVISORS

Consideration

- ***Verigen v. Ensemble Travel Ltd.***, 2021 BCSC 1934
  - Plaintiff was a business development director for ETL
  - In March 2020, ETL temporarily laid off the Plaintiff then subsequently terminated her employment. The Plaintiff sued for wrongful dismissal
  - The employer argued that there was an enforceable contractual term that limited the notice to be provided to the employee upon termination of employment

OVERHOLT LAW LLP
TRUSTED ADVISORS

Consideration

- ***Verigen v. Ensemble Travel Ltd.***, 2021 BCSC 1934
  - The Plaintiff's contract did not have a notice provision but it did require that she acknowledge in writing that she had read the employer's policy handbook, which did have a termination policy that limited notice to the minimum statutory requirements
  - Although the employee was required to acknowledge that she had read the handbook, she did not in fact receive a copy from the employer until three months into her employment

OVERHOLT LAW LLP
TRUSTED ADVISORS

Consideration

- ***Verigen v. Ensemble Travel Ltd.***, 2021 BCSC 1934 (at paras 35-38):

  "ETL argues that the reasoning in *Holland* and *Nowak* should no longer be considered authoritative in light of the more recent decision of the Court of Appeal in *Rosas v. Toca*, 2018 BCCA 191. In that case, Bauman C.J., writing for the Court, held that in certain circumstances at least, an amending agreement may be enforced despite a lack of fresh consideration to support it.

  I am not persuaded that anything said in *Rosas* undermines the authority of *Holland* and *Nowak* in this particular context, however. On the contrary, I am satisfied that the governing law continues to be as stated in those earlier cases, for the reasons provided, more recently still, by Verhoeven J. in *Matijczak v. Homewood Health Inc*., 2021 BCSC 1658, as follows:

OVERHOLT LAW LLP
TRUSTED ADVISORS

Consideration

- ***Verigen v. Ensemble Travel Ltd.***, 2021 BCSC 1934

  "While the law relating to the requirement for consideration in order to support amendments to an agreement may be in a state of flux, it appears that **the law in BC continues to require consideration where an employer seeks to impose an amended employment agreement with significant modifications, detrimental to the employee**. . .

  I have concluded that the termination clause in the handbook that Ms. Verigen signed in May 2019 after having already commenced her employment, insofar as it can be interpreted to limit her claim on termination to the statutory minimums, was not binding on her for lack of fresh consideration to support it."

OVERHOLT LAW LLP
TRUSTED ADVISORS

Frustration

OVERHOLT LAW LLP
TRUSTED ADVISORS

Frustration

- ***Verigen v. Ensemble Travel Ltd.,*** 2021 BCSC 1934
  - As an alternative, ETL argued that the employment contract was **frustrated by the pandemic**
  - ETL pointed to:
    - the global collapse in the demand for travel
    - the loss of market value for the work the Plaintiff was hired for, and
    - the fact her job required her to travel up to 50% of her working time which she was not permitted to do

OVERHOLT LAW LLP
TRUSTED ADVISORS

Frustration

- ***Verigen v. Ensemble Travel Ltd.,*** 2021 BCSC 1934
  - The Court found that the employment contract was not frustrated
  - The collapse in the travel market went to ETL's "ability to perform" the employment contract, not "the nature of the obligation itself"
  - ETL "chose to relinquish Ms. Verigen's branch of the business with a view to cutting operating costs so that it could better weather an ongoing storm"
- Confirmation from the Court that frustration can only discharge parties' obligations in exceptional cases

OVERHOLT LAW LLP
TRUSTED ADVISORS

Important Terms and Policies

- Sea changes in the relationship between employers and employees and working conditions
- Pre-pandemic employment contracts and policies may not capture all of the terms that employers and employees now see as priorities

OVERHOLT LAW LLP
TRUSTED ADVISORS

Temporary Layoff Provisions

- Pre-pandemic, temporary layoff provisions in contracts were relatively rare, except in sectors with seasonal work
- In the absence of contractual agreement, putting an employee on temporary layoff may constitute constructive dismissal at common law
- BC *ESA* allows temporary layoffs (as authorized by the contract, well-known industry practice, or employee consent) for up to 13 weeks in a 20 week period

OVERHOLT LAW LLP
TRUSTED ADVISORS

Vacation Policies

- Nobody wanted to go on vacation during the pandemic, leading employers to re-examine their paid vacation policies
- Importance of clear vacation policies dealing with:
  - Employer's right to schedule vacation according to business needs
  - Unused vacation carry-over vs. "use it or lose it" policy
  - Whether vacation must be accrued before it can be used

OVERHOLT LAW LLP
TRUSTED ADVISORS

Flexible Working Arrangements

- Increased interest in remote and hybrid working arrangements
- Flexible schedules have become the norm for many sectors
- Consider:
  - Does the written employment contract address the schedule and location of work?
  - Does the employer retain some discretion to adjust working schedule and location if necessary?

OVERHOLT LAW LLP
TRUSTED ADVISORS

Remote Work Policies

- Employer considerations regarding remote workers
  - Employment standards requirements
  - Occupational health and safety obligations
  - Potential tax implications for remote workers in other jurisdictions
  - What technology or privacy measures are in place to protect the employer's confidential information, or personal information of third parties that is collected in the course of duties?

OVERHOLT LAW LLP
TRUSTED ADVISORS

Technology Policies

- Importance of cybersecurity and data protection measures as online threats to security become ever more sophisticated
  - Are employees in compliance with acceptable use, storage and retention of employer data in accordance with legislative requirements and/or the employer's privacy policy?
  - Are there clear parameters around the use and misuse of 1) employer-provided devices and 2) "bring your own" devices?
  - Involvement of IT professionals is key

OVERHOLT LAW LLP
TRUSTED ADVISORS

Technology Policies

- The pandemic accelerated our reliance on a variety of services used to facilitate the remote workplace
- Consider whether existing technology policies:
  - Accurately reflect the technology being used in your workplace
  - Set out appropriate parameters regarding access and disclosure of confidential information of the employer
  - Are clear as to an employee's reasonable expectation of privacy
  - Are being consistently followed and enforced, including with disciplinary action

OVERHOLT LAW LLP
TRUSTED ADVISORS

Summary

- Significant changes in the law arising from the pandemic in some respects, but also a reminder to employers to set a good foundation
- Clear, well-written employment contracts continue to fulfil a key role in:
  - Confirming the terms agreed upon between the parties at the outset
  - Setting expectations for employee conduct during the employment relationship
  - Anticipating and preventing liability after the termination of employment

OVERHOLT LAW LLP
TRUSTED ADVISORS

Moonlighting and Managing Remote Work

Fiona Wong

OVERHOLT LAW LLP
TRUSTED ADVISORS

What is Moonlighting?

- Moonlighting means “to work a second job in addition to one’s regular employment” – popular trend made available by the increase of remote work environments
- Moonlighting is not illegal
- Many people are thinking of earning additional income
- How does moonlighting affect your business, and are your employees permitted to moonlight?

OVERHOLT LAW LLP
TRUSTED ADVISORS

Why Does Moonlighting Affect a Business?

- Conflict of interest
- Performance issues
- Time theft – being compensated for time not spent working or work not actually performed
- Improper use of company resources

OVERHOLT LAW LLP
TRUSTED ADVISORS

Case Studies

- *Patterson v The Bank of Nova Scotia*, 2011 BCPC 120
- *Ross v IBM Canada Limited,* 2015 ABQB 563
- *Dove v Destiny Media Technologies Inc.,* 2023 BCSC 1032

In all three cases, the employees' for cause terminations were upheld by the court.

OVERHOLT LAW LLP
TRUSTED ADVISORS

Patterson v The Bank of Nova Scotia, 2011 BCPC 120

- Customer service supervisor was terminated for cause because she refused to stop simultaneously working as a realtor at a realty - disobedience
- At the time of promotion, Ms. Patterson was not told that pursuing a real estate career was not permissible, or somehow incompatible with her job at Scotiabank
- No suggestion by the Bank that she performed any realtor duties during Scotiabank work hours

OVERHOLT LAW LLP
TRUSTED ADVISORS

Patterson v The Bank of Nova Scotia, 2011 BCPC 120

- Ms. Patterson was bound by “Guidelines for Business Conduct”
- “Each employee is responsible to ensure that they comply with the Guidelines at all times”
- Express acknowledgement required by employees in writing each year
- Ms. Patterson agreed that she was familiar with the Guidelines, as follows:

OVERHOLT LAW LLP
TRUSTED ADVISORS

Patterson v The Bank of Nova Scotia, 2011 BCPC 120

Introduction

Any breach of the Guidelines is a serious matter and can result in action up to and including termination of employment. The Bank may be required to report certain types of breaches to regulatory authorities in which the case the employee may be subject to criminal or civil penalties.

... You must follow the law wherever the Bank does business and avoid putting yourself or the Bank in a conflict of interest.

OVERHOLT LAW LLP
TRUSTED ADVISORS

Patterson v The Bank of Nova Scotia, 2011 BCPC 120

Avoid putting yourself or the Bank in a conflict of interest

If you cannot fully and objectively perform your duties and obligations in a particular situation because to do so would prevent you from fully and objectively performing your duties and obligations and another then you have a conflict of interest. Even if you do not have an actual conflict of interest, if other people think you do, they will still be concerned that you cannot act properly. For this reason, it is almost as important to avoid the appearance of a conflict as it is to avoid an actual one. Being seen or thought to be in a conflict of interest can damage your reputation or the Bank's.

OVERHOLT LAW LLP
TRUSTED ADVISORS

Patterson v The Bank of Nova Scotia, 2011 BCPC 120

Outside Business Activities, Financial Interests or Employment

You should not commence or continue a business which competes with the Bank or engage in any activity likely to compromise the position of the Bank. **As well, do not conduct non-bank business on Bank time or use Bank equipment or facilities to conduct an outside business interest.** This includes soliciting other employees to participate. Neither you nor members of your household should have a financial interest in or with a customer or supplier of the Bank or any other entity having a close business relationship with the Bank if this would put you in a conflict of interest.

[Emphasis added]

OVERHOLT LAW LLP
TRUSTED ADVISORS

Patterson v The Bank of Nova Scotia, 2011 BCPC 120

Outside Business Activities, Financial Interests or Employment

While employment outside of Scotiabank working hours is not prohibited, this should only be engaged in if there will be no conflict of interest and if the employee's satisfactory performance of his or her job functions with the Bank will not be prejudiced in any way. Before commencing or continuing an outside business interest, making or holding a financial interest in a Bank customer or supplier or other entity having a close business relationship with the Bank or committing to a job outside Bank working hours, **discuss this with your manager** to be sure these activities do not create a conflict. [Emphasis added]

OVERHOLT LAW LLP
TRUSTED ADVISORS

Patterson v The Bank of Nova Scotia, 2011 BCPC 120

Avoid putting yourself or the Bank in a conflict of interest

(Continued) If you find yourself in a conflict of interest or a situation where you believe that others might think you have one, you must immediately advise your manager so that action can be taken to resolve the situation. Your manager who may consult a senior officer if necessary will decide if a conflict exists or if the appearance of a conflict would be damaging to the Bank's reputation.

OVERHOLT LAW LLP
TRUSTED ADVISORS

Patterson v The Bank of Nova Scotia, 2011 BCPC 120

- Ms. Patterson did not seek authorization from Scotiabank before seeking or accepting employment with the realty
  - If she did, Scotiabank would not have approved this second job
- Ms. Patterson argued that she previously ran a small candle business, and other coworkers held serving positions but were not penalized
  - Court did not find this to be a reasonable basis to believe that the Bank's policies were enforced inconsistently

OVERHOLT LAW LLP
TRUSTED ADVISORS

Patterson v The Bank of Nova Scotia, 2011 BCPC 120

- Bank did not have to wait for an actual or real conflict of interest developing or possibly harming its reputation before dealing with and discouraging the employee's conduct (i.e. it could act preventatively as opposed to reactively)
- Bank's order to Ms. Patterson to stop working as a realtor was in line with her employment agreement terms
- Bank was not required to list examples of employment that was not permitted in its Guidelines – not reasonable or necessary

OVERHOLT LAW LLP
TRUSTED ADVISORS

Patterson v The Bank of Nova Scotia, 2011 BCPC 120

- In this case, the Bank admitted that it had no concerns about Ms. Patterson carrying out real estate activities on Bank time
- Bank could not show that it would suffer prejudice because of her position as a realtor – however not determinative
- Further, lending approval at Scotiabank would have required other levels of approval which Ms. Patterson had no authority to do
- Bank had final say in what constituted a “conflict of interest” and whether she contravened the Guidelines

OVERHOLT LAW LLP
TRUSTED ADVISORS

Ross v IBM Canada Limited, 2015 ABQB 563

- Senior salesman was terminated for cause for *regularly* working for his personal company during IBM working hours
  - 3-4 hours per week was considered a “major” breach
- IBM had clear policies on employee conduct which Mr. Ross acknowledged, including prohibition on using company time to perform non-IBM work
  - Clear consequences: dismissal if breached

OVERHOLT LAW LLP
TRUSTED ADVISORS

Ross v IBM Canada Limited, 2015 ABQB 563

- Mr. Ross was well compensated – high income earner
- He worked in an "autonomous situation" based on an honour system, and charged his business phone calls to IBM
- Most importantly, he told IBM that he would transfer operational responsibilities relating to his personal business to his wife when he was hired by IBM, but he did not do so

OVERHOLT LAW LLP
TRUSTED ADVISORS

Ross v IBM Canada Limited, 2015 ABQB 563

2.0 Introduction

Because rapid changes in our industry constantly present new ethical and legal issues, no set of guidelines should be considered the absolute last word under all circumstances. If you have any questions about interpreting or applying these Guidelines – or about guidelines and procedures published by IBM or its operating units, subsidiaries or specific functions, such as the Public Sector guidelines – it is your responsibility to consult your manager or IBM counsel. **A violation of any IBM guidelines can result in disciplinary action, including dismissal.**

[Emphasis added]

OVERHOLT LAW LLP
TRUSTED ADVISORS

Ross v IBM Canada Limited, 2015 ABQB 563

5.1 Conflicts of interest

Your private life is very much your own. You are, however, an IBMer both on and off the job and a conflict of interest may arise if you engage in any activities or advance any person interests at the expense of IBM's interests. It's up to you to avoid situations in which your loyalty may become divided. Each individual's situation is different, and in evaluating your own, you will have to consider many factors. The most common type of conflicts are addressed here to help you make informed decisions.

- 5.1.1 Assisting a competitor
- 5.1.2 Competing against IBM
- 5.1.3 Supplying IBM

OVERHOLT LAW LLP
TRUSTED ADVISORS

Ross v IBM Canada Limited, 2015 ABQB 563

5.1.4 Using IBM's time and assets

You may not perform non-IBM work or solicit such business on IBM premises or while working on IBM time, including time you are given with pay to handle **personal matters**. Also, you are **not permitted to use IBM assets**, including equipment, telephones, materials, resources or proprietary information **for any outside work**.

[Emphasis added]

OVERHOLT LAW LLP
TRUSTED ADVISORS

Ross v IBM Canada Limited, 2015 ABQB 563

[47] Mr. Ross testified that, since Compartment Inc. was in a completely different kind of work from IBM, he did not understand how working for Compartment Inc. could be a conflict with his employment at IBM**. I find as a fact that IBM's Business Conduct Guidelines are clear: in particular, they had separate headings in the conflict area for assisting competitors, competing against IBM and working for a non-competing business on IBM time.** Mr. Ross may not have agreed with IBM's guidelines, but he understood them, or should have understood them. Indeed, if he had any difficulty understanding the plain language of the guidelines, **he could have – should have – made inquiries of IBM's HR staff.**

[Emphasis added]

OVERHOLT LAW LLP
TRUSTED ADVISORS

Ross v IBM Canada Limited, 2015 ABQB 563

[52] In addition, in the circumstances here, no additional notice by IBM of its expectations concerning full-time work was needed. **It was made abundantly clear to Mr. Ross that he was obliged to conform to IBM's Business Conduct Guidelines and that breach of the guidelines could lead to dismissal**. The guidelines themselves were clear. Mr. Ross was a senior employee who should have understood the guidelines. Moreover, it was also made clear to Mr. Ross that **he had an obligation to seek advice** if he had any question about the application of the guidelines to himself and his business interests.

[Emphasis added]

OVERHOLT LAW LLP
TRUSTED ADVISORS

Dove v Destiny Media Technologies Inc., 2023 BCSC 1032

- New decision released in June 2023: to what extent is an employee entitled to work on a side business during work hours?
- Ms. Dove was hired on a full-time basis for 40 hours/week
- No employment contract but Destiny's Code of Conduct included conflict of interest provisions where, if violated, "may result in appropriate disciplinary action, including the possible termination of employment"

OVERHOLT LAW LLP
TRUSTED ADVISORS

Dove v Destiny Media Technologies Inc., 2023 BCSC 1032

- CEO of Destiny Media purchased a café and general store where Ms. Dove became extremely involved
  - In the last 6 months of her employment, spent 3-4 hours per week on the café and general store
  - Asked an employee of Destiny to assist with designing a logo (although outside of work hours, he felt he could not refuse given Ms. Dove's position)
  - Stored the café's goods on Destiny's premises

- Ms. Dove sent substantial emails during Destiny work hours

OVERHOLT LAW LLP
TRUSTED ADVISORS

Dove v Destiny Media Technologies Inc., 2023 BCSC 1032

- Ms. Dove missed deadlines, was not responsive and was regularly absent from work without authorization
- Eventually, Ms. Dove was placed on administrative suspension and terminated for cause for:
  - doing work on the café and general store during work hours;
  - working on the café and general store more and more over time;
  - failing to produce material requested by her superior at Destiny; and
  - being slow in responding to Destiny's emails

Ms. Dove's work was essential to Dove's success.

OVERHOLT LAW LLP
TRUSTED ADVISORS

Dove v Destiny Media Technologies Inc., 2023 BCSC 1032

- Employees have a duty to provide full-time service to their employer unless otherwise agreed upon
- Working for outside business during business hours without approval can be a basis for dismissal
- Court held that Ms. Dove's work on the café impacted her ability to stay current with her work at Destiny

OVERHOLT LAW LLP
TRUSTED ADVISORS

Dove v Destiny Media Technologies Inc., 2023 BCSC 1032

- The court considered that Ms. Dove:
  - had no “clear business conduct guidelines”
  - was not a high paid employee
  - was not working in an “autonomous work situation”
  - did not charge business phone calls to Destiny, unlike Mr. Ross
  - was expected to work outside normal working hours, on occasion
  - was not deceitful, unlike Mr. Ross
- However, these factors were outweighed by the reasons to terminate her employment

OVERHOLT LAW LLP
TRUSTED ADVISORS

Tips to Address Moonlighting

- Implementing and enforcing moonlighting provision in employment contracts and handbooks
  - Require regular acknowledgement by employees
  - Include conflict of interest provisions
- Implementing and enforcing moonlighting policies
  - Include a disclosure requirement of secondary employment to the employer and state that approval by is required by HR
  - Be specific about when an employee may or may not work a secondary job – think about moonlighting risks

OVERHOLT LAW LLP
TRUSTED ADVISORS

Family Status Discrimination:

analyzing the BC Court of Appeal's recent Gibraltar Mines Ltd. decision

Preston I.A.D. Parsons

OVERHOLT LAW LLP
TRUSTED ADVISORS

Confusion, Frustration, and Debate

- Does an employer need to actually ***change*** a term or condition of employment in order for an affected employee to be able to claim family status discrimination, or not?
  - What about the SCC's *Moore* test?

OVERHOLT LAW LLP
TRUSTED ADVISORS

BC Human Rights Code

13. (1) A person must not

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

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

because of the Indigenous identity, race, colour, ancestry, place of origin, political belief, religion, marital status, **family status**, physical or mental disability, sex, sexual orientation, gender identity or expression, 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.

OVERHOLT LAW LLP
TRUSTED ADVISORS

General 3-part test: *prima facie* discrimination

- SCC says that complainants must show:
  - 1) They have a characteristic protected from discrimination under the *Code*;
  - 2) They have experienced an adverse impact; and
  - 3) The protected characteristic was a factor in the adverse impact

  in order to establish a *prima facie* case of discrimination.

Moore v. British Columbia (Minister of Education), 2012 SCC 61

OVERHOLT LAW LLP
TRUSTED ADVISORS

Current BC Test for *prima face* discrimination – family status

- *BCHRT v. Gibraltar Mines Ltd.*, 2023 BCCA 168:

"…s. 13(1)(b) applies whenever a term or condition results in a serious interference with a substantial parental or other family duty or obligation of an employee, whether as a consequence of a change in the term of employment or a change in the employee's circumstances." (para 77)

OVERHOLT LAW LLP
TRUSTED ADVISORS

Restated (Comprehensive) Test

- Combining *Moore & Gibraltar Mines*:

"…To put this test in terms of *Moore*, to establish prima facie adverse impact discrimination as a result of a conflict between work requirements and family obligations, an applicant must establish that their family status includes a substantial parental or other duty or obligation, that they have suffered a serious adverse impact arising from a term or condition of employment, and that their family status was a factor in the adverse impact." (*Gibraltar Mines,* para 101)

OVERHOLT LAW LLP
TRUSTED ADVISORS

Test, cont'd

- Dual requirements to prevent opening the floodgates:
  1. Serious Interference
  2. Substantial duty or obligation

- Cannot be a trivial interference, mere preference/desire, or without real and meaningful consequence

OVERHOLT LAW LLP
TRUSTED ADVISORS

Examples

- NOT Discriminatory
  - OT rule in place requiring EE to work an evening where the EE was already scheduled to attend an activity with his/her child
  - ER assigned EE to travel out of province for 8-10 weeks, despite EE having a wife and 4-month old child; no evidence that the child would not be well cared for in his absence, but EE desired to remain close to home to be with his child and assist his wife; periodic travel part of EE's job description; EE refused and ER terminated employment

OVERHOLT LAW LLP
TRUSTED ADVISORS

Examples

- Discriminatory
  - Shift change for EE seriously interfering with the medical needs of her child with a major psychiatric disorder; child required her regular after-school care
  - Shift change which would require EE to alter a carefully constructed custody agreement

OVERHOLT LAW LLP
TRUSTED ADVISORS

Gibraltar Mines – Outcome TBD….

- Facts:
  - Ms. Harvey and her spouse were employed with Gibraltar Mines, about 60km north of Williams Lake
  - The mine operated 24/7
  - While pregnant, Ms. Harvey and her spouse worked generally the same 12 hour shifts
  - After the birth of her first child and close to the end of her parental leave, she sought an accommodation to change their work schedules to facilitate childcare arrangements. No suitable arrangements were made and a complaint filed
- Outcome on the merits: TBD

OVERHOLT LAW LLP
TRUSTED ADVISORS

Labour Relations Update

Carman J. Overholt, K.C.

OVERHOLT LAW LLP
TRUSTED ADVISORS

Various Legislative Updates

- BC *Employment Standards Act*
  - Paid Sick Leave introduced pursuant to section 49.1
  - Minimum wage increased to $16.75 per hour, effective June 1, 2023
- *Workers' Compensation Act,* Occupational Health & Safety Regulation – section 3.12.1
  - Limitations on reassignment of refused work by employer
- Bill M-215 introduced by BC Green Party
  - Use of Non-Disclosure Agreements

OVERHOLT LAW LLP
TRUSTED ADVISORS

BC *Labour Relations Code*

- The return of Card-based certification
  - Where there is more than 55% membership support in the proposed bargaining unit, certification is automatic
  - Where the support is between 45% and 55%, a secret ballot vote will be held to determine whether the proposed bargaining unit will be certified

OVERHOLT LAW LLP
TRUSTED ADVISORS

Canada Labour Code and Federal Privacy Laws

- Paid Medical Leave – annual entitlement of 3 to 10 days
- Effective February 1, 2024, amendments to section 230 of the *Code*
  - Graduated notice period: Employees with 3 years of completed service will be entitled to notice of 3 weeks, up to 8 weeks after 8 years of service
  - Employers will also be required to provide a written statement of benefits including vacation, wages, severance and other benefits such as cell phone and car allowance arising from their employment
- Workplace Harassment and Violence Prevention Regulations – section 36 requires annual report by March 1 of each year
- Bill C-27 introduced, which includes *Consumer Privacy Protection Act; Personal Information and Data Protection Tribunal Act;* and *Artificial Intelligence and Data Act*

OVERHOLT LAW LLP
TRUSTED ADVISORS

Notable Recent Case Law

- ***Northern Regional Health Authority v. Horrocks***, 2021 SCC 42
  - Court held that the Human Rights Tribunal in Manitoba had no jurisdiction because the matter arose from a collective agreement, and the human rights issue should be determined by a labour arbitrator
  - Decision is based on the language of the applicable provincial human rights legislation
  - Concurrent jurisdiction continues in British Columbia due to the wording of our legislation

OVERHOLT LAW LLP
TRUSTED ADVISORS

Notable Recent Case Law

- ***Gate Gourmet Canada Inc. v. Unite Here, Local 40***, 2023 BCLRB 128
  - BC Labour Relations Board decision involving the use of replacement workers outside of BC
  - Board ordered the Employer not to use replacement workers outside of BC
  - The Board's decision was upheld on reconsideration

OVERHOLT LAW LLP
TRUSTED ADVISORS

Notable Recent Case Law

- ***Elementary Teachers Federation of Ontario v. York Region District School Board***, 2022 ONCA 476
  - Public school teacher employee left open a password-protected document on her work computer which involved private communications between two employees
  - Employer read and captured screenshots of the document and used them to discipline the employees
  - Court held that the employees had a reasonable expectation of privacy in the circumstances, and the Employer conducted an unreasonable search contrary to the *Charter*
  - *Application for leave to the SCC granted*

OVERHOLT LAW LLP
TRUSTED ADVISORS

Notable Recent Case Law

- ***Cybulsky v. Hamilton Health Sciences***, 2021 HRTO 213
  - The Complainant was the only female Head of Cardiac Surgery in Canada, who received complaints about her communication style
  - The Employer subsequently reviewed her performance and decided to invite others to apply for her position
  - Discrimination complaint was upheld based on the Employer's failure to investigate

OVERHOLT LAW LLP
TRUSTED ADVISORS

Notable Recent Case Law

- ***Orange Air and OPEIU (DeGeit), Re***, 2021 CarswellNat 5623
  - Employee was prescribed medically necessary cannabis use
  - Employer's Zero Tolerance Policy was found by the Arbitrator to be draconian
  - Employer was ordered to consider possible accommodations

OVERHOLT LAW LLP
TRUSTED ADVISORS

Notable Recent Case Law

- ***Municipal Police Board v. Municipal Police Association,*** 2022 CanLII 60942 (BC LA)
  - This case involved the breach of a settlement agreement
  - A former constable made disparaging comments about his former employer on Facebook
  - The settlement agreement made terms confidential and subject to no disparagement, and expressly stated that settlement funds would be repaid to the employer in the event of a breach
  - The Arbitrator awarded the employer damages and required repayment by the Grievor

OVERHOLT LAW LLP
TRUSTED ADVISORS

Notable Recent Case Law

- ***Civeo Corporation v. Unite Here, Local* 40**, 2022 CanLII 51879 (BC LA)
  - The union's website displayed a large banner describing the employer's "broken promises" made to Indigenous people regarding wages and hiring
  - The employer brought a grievance. It alleged that the phrase "*Broken Promises*" evoked a harmful association between the employer's conduct and the long history of broken promises made to Indigenous people in Canada by various levels of government
  - The Arbitrator ruled that the statements were defamatory in nature and constituted bad faith in the administration, application, and performance of the collective agreement between the parties
  - Damages were awarded in favour of the employer

OVERHOLT LAW LLP
TRUSTED ADVISORS

A Tale of Two Outcomes:

Employees and Secret Recordings

Jennifer S. Kwok

OVERHOLT LAW LLP

TRUSTED ADVISORS

Surreptitious Recordings

- Distrust and conflict = sometimes an unfortunate consequence when there is a break down of the employment relationship
- A question we often get asked:
  - Can they secretly record meetings?

OVERHOLT LAW LLP
TRUSTED ADVISORS

Surreptitious Recordings

Employee Recordings:

1. *Teljeur v. Aurora Hotel Group*, 2023 ONSC 1324
2. *Shalagin v. Mercer Celgar Limited Partnership*, 2022 BCSC 112

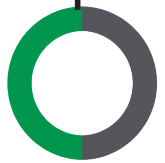
Employer Recordings:

3. *Nova Scotia Government and General Employees' Union v. Department of Justice (Correctional Services)*, 2023 CanLII 31524 (NS LA)

OVERHOLT LAW LLP
TRUSTED ADVISORS

Surreptitious Recordings

- ***Teljeur v. Aurora Hotel Group***, 2023 ONSC 1324
  - Employee – General Manager of a full service resort and golf course
  - Employee was terminated without cause
  - His length of service was just over 3 years
  - The employee sued for wrongful dismissal = 10 months' notice
  - The employer argued that the period of reasonable notice should be discounted for a failure to make sufficient efforts to mitigate the loss of his job
    - The owner asked him for help to find a new property to buy?



OVERHOLT LAW LLP
TRUSTED ADVISORS

Teljeur v. Aurora Hotel Group

- On the question of whether the employee failed to mitigate and whether the owner did in fact offer the Plaintiff with alternate employment at the time of termination:
  - Employee surreptitiously recorded the termination meeting
  - Court requested the transcript of the recording
- The transcript showed:
  - The owner did ask Mr. Teljeur with help in finding another property to purchase should he sell the resort;
  - However, it was not a true job offer
- **No failure to mitigate established in part by the transcript of the recording**

OVERHOLT LAW LLP
TRUSTED ADVISORS

Teljeur v. Aurora Hotel Group

- The employee also sued the employer for damages for bad faith conduct on the part of the employer

"Damages resulting from the manner of dismissal must then be available…where the employer engages in contact during the course of dismissal that is 'unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive'."

- The Court relied primarily on the employee's recording of the termination meeting to determine this issue

OVERHOLT LAW LLP
TRUSTED ADVISORS

Teljeur v. Aurora Hotel Group

- The recording of the termination meeting highlighted a "number of disturbing aspects about the plaintiff's termination"

1. Asked for written notice of termination 3x but employer never provided it
2. Told he would get 8 weeks' severance but the employer did not pay this
3. The employer encouraged the employee to "resign" from his employment
4. The employer told him that it would reimburse the employee "before the next week" for out of pocket expenses

- Plus:
  - Failure to deliver termination pay within 7 days

OVERHOLT LAW LLP
TRUSTED ADVISORS

Teljeur v. Aurora Hotel Group

Court's conclusion:

- The employer's acts *did* constitute actions by the employer which were untruthful, misleading or unduly insensitive
- Also, it would be within the reasonable contemplation of the employer that its manner of the dismissal would cause the employee mental distress
- This was a breach by the employer of their duty of good faith and fair dealing in the manner in which the employee was dismissed

An award of $15,000 for moral damages was appropriate

OVERHOLT LAW LLP
TRUSTED ADVISORS

Teljeur v. Aurora Hotel Group

**** Employers should be mindful of their conduct and statements made during termination meetings****

Here, the employee's recording was admissible as evidence, even thought it was secretly recorded without the employer's knowledge

OVERHOLT LAW LLP
TRUSTED ADVISORS

Shalagin v. Mercer Celgar LLP

- **Issue – Is the surreptitious recording of one's fellow employees a basis for dismissal?**
- Employee was a senior financial analyst
- No written employment contract
- The employee agreed he was bound by a Code of Business Conduct and Ethics, and a Confidentiality Policy

OVERHOLT LAW LLP
TRUSTED ADVISORS

Shalagin v. Mercer Celgar LLP

- Plaintiff did not get along with his former supervisor
- Plaintiff took over certain of his supervisor's responsibilities
- Supervisor had lied to him about a number of things – eg. his management performance and bonus
- Plaintiff challenged company's view of bonus determination
- Employer decided to terminate without cause
- ESA and HR complaint and wrongful dismissal claim
- Based on evidence obtained post-termination, the employer alleged cause for the termination

OVERHOLT LAW LLP
TRUSTED ADVISORS

Shalagin v. Mercer Celgar LLP

- Plaintiff produced a number of documents, including surreptitious recordings he had taken while employed
- Recordings included:

  a) several one-on-one training sessions from 2010 to 2014;

  b) over 100 “Toolbox Talk” and safety meetings, at which he often presented personally; and

  c) at least 30 one-on-one meetings with supervisors and human resources personnel about compensation and recruitment

OVERHOLT LAW LLP
TRUSTED ADVISORS

Shalagin v. Mercer Celgar LLP

- The recordings contained:
  - Confidential company information
  - Sensitive personal family details
  - Conversations with peers and subordinates outside the formal one on one discussions
- They were not shared other than with the BCHRT
- No financial benefit sought from the recordings

OVERHOLT LAW LLP
TRUSTED ADVISORS

Shalagin v. Mercer Celgar LLP

- Was there cause for the Plaintiff's termination?

> *Just cause is behaviour that is seriously incompatible with the employee's duties. It is conduct which goes to the root of the contract, and fundamentally strikes at the heart of the employment relationship. The test is an objective one, viewed through the lens of a reasonable employer taking account of all relevant circumstances*

- The analysis requires a contextual approach of all of the circumstances

OVERHOLT LAW LLP
TRUSTED ADVISORS

Shalagin v. Mercer Celgar LLP

- Misconduct discovered post-termination may constitute just cause
- The bases for after-acquired cause were:

  a) the plaintiff's decision to surreptitiously record his co-workers;

  b) the plaintiff's failure to return a database of work emails he created while employed; and

  c) the plaintiff's alleged improper review of Mercer's confidential bonus analysis without authorization

OVERHOLT LAW LLP
TRUSTED ADVISORS

Shalagin v. Mercer Celgar LLP

- Did the recordings fundamentally rupture the employment relationship?
  - It is lawful to record conversations so long as one party to the conversation consents
  - Legality is not the sole barometer
- Surreptitious recording can cause material damage to the relationship of trust between employee and employer
- The court found the surreptitious recordings constituted just cause for the termination

OVERHOLT LAW LLP
TRUSTED ADVISORS

Employer Recording

- ***Nova Scotia Government and General Employees' Union v. Department of Justice (Correctional Services)***, 2023 CanLII 31524 (NS LA)
  - Two corrections officers were terminated following an employer's review of audio recordings automatically made in an inmate transport vehicle = unprofessional conduct
  - Officers were unaware that the recordings were being made of their conversations
  - Union filed a grievance and motion to exclude

OVERHOLT LAW LLP
TRUSTED ADVISORS

Nova Scotia Gov't and GEU v. Dept. of Justice

- Arbitrator concluded it was not unreasonable for the employer to access the audio as part of its investigation and rely on the recordings as evidence
- There was no reasonable expectation of privacy in the recordings because the inmate could overhear their conversation in the inmate transport vehicle
- Was the best evidence available and was accessed *after* the employer had met with the officers and the inmate

OVERHOLT LAW LLP
TRUSTED ADVISORS

Liability for Loss of Benefits:

how to avoid the worst-case scenario

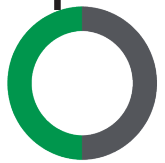
Graham Nattress

OVERHOLT LAW LLP

TRUSTED ADVISORS

Importance of Benefits

- Second to salary
- May include health, dental, life, critical illness, travel and disability coverage
- Allows employers to attract and keep the best employees
- Disability can be short term (STD) or long term (LTD)
- Administration, onboarding and updating must be done correctly to cover employees' reasonable expectations



OVERHOLT LAW LLP
TRUSTED ADVISORS

The Worst Case Scenario

Pasap v Saskatchewan Indian Gaming Authority and Bear Claw Casino, 2022 SKQB 200

- Employee claimed wrongful dismissal; employer maintained he had resigned.
- Employer had offered a ‘resign or be fired’ ultimatum. Trial judge decided this was without cause termination and determined 8 months’ notice of termination should have been provided.
- 2 months after the termination, medical event rendered employee totally disabled.
- Judge found employer responsible for continued disability coverage during notice period and provided lump sum representing benefits to age 65.

OVERHOLT LAW LLP
TRUSTED ADVISORS

Takeaways

- Purchase of new policy by Employer
  - Check for coverage under their general liability policy for negligent administration of benefits
- Onboarding of Employee
  - Explain benefits in detail including premium payment obligations (and if going off on leave limit how long employer will cover premiums)
  - Provide benefits “booklet”
  - Have employee sign off they understand what they do and do not have coverage under the policy and understand they may need to get other coverage if the employer coverage is not enough for their needs

OVERHOLT LAW LLP
TRUSTED ADVISORS

Takeaways (continued)

- Employee on Leave
  - Confirm with broker benefits available through statutory leaves
  - Letter to employee explaining Statutory Leave Options and Employer Leave options and obligations during leave
  - Review benefits coverage
  - Premium obligations
  - Pension entitlements

- "Offboarding" of Employee (Termination)
  - Explain conversion privileges (if any)
  - Tie off relationship quickly to avoid *Pasap* situation

OVERHOLT LAW LLP
TRUSTED ADVISORS

Questions?

Thank you for attending!

Want to learn more about Law@Work?

Subscribe to our blog
http://www.overholtlawyers.com/blog

Follow Us on Social Media

Carman J. Overholt, K.C.	*Jennifer S. Kwok*	*Preston I.A.D Parsons*	*Graham Nattress*	*Brent Mullin*	*Kai Ying Chieh*	*Fiona Wong*

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

OVERHOLT LAW LLP
TRUSTED ADVISORS