

The Latest and Greatest from the World of Employment and Labour Law: A Review of Key Recent Decisions and Must-Knows for HR Professionals

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Agenda

Recent key decisions in workplace law

- Employment
- Labour
- Workplace human rights



EMPLOYMENT



Damages

- ***Sollows v. Albion Fisheries Ltd.***,
2017 BCSC 376
- 3 years with Albion, 9 years with Sysco, and 19 years with Albion
- Moved from Calgary to Vancouver
- Dismissed with 3 months of notice



Damages

- ***Sollows***, cont'd
- No inducement
- No agreement on prior service
- Notice of 10 months
- \$5,000 bonus FY2016



Damages

- ***Sollows***, cont'd
- No evidence of failure to mitigate
- Contingency discount too speculative
- Notice reduced if re-employed before date of judgment
- Plaintiff ordered to report to court



Bonus

- ***Paquette v. TeraGo Networks Inc.***, 2016 ONCA 618
- Claim denied in respect of lost bonus
- Appeal allowed
- Bonus part of compensation package
- Would have earned the bonus during the notice period



Bonus

- ***Styles v. Alberta Investment Management Corp.*, 2017 ABCA 1**
- Appeal of \$500,000 bonus
- Appeal allowed
- Disentitled to bonus under terms of written employment contract



Resignation or Dismissal?

- ***Johal v. Simmons da Silva LLP***, 2016 ONSC 7835
- Law clerk with 27 years of service
- Advised of change to reporting structure
- Next day, the plaintiff cleaned out her desk and left the office
- Employer accepted her resignation



Resignation or Dismissal?

- *Johal*, cont'd
- Plaintiff rescinded resignation and commenced action
- Defendant should have inquired
- Actions were out of character
- No resignation



Fixed-Term Contract

- ***Howard v. Benson Group Inc.***,
2016 ONCA 256
- Written contract for five years
- Dismissed without cause after 23 months of employment
- Contract provided for ESA notice



Fixed-Term Contract

- ***Howard***, cont'd
- Two weeks of notice given
- Trial judge awarded common law damages
- Appeal allowed
- Fixed-term contract



Fixed-Term Contract

- ***Howard***, cont'd
- Implied term of reasonable notice ousted by fixed-term employment
- Entitled to contractually-agreed sum for balance of contract
- Not subject to mitigation



Assessment of Notice

- ***Cabott v. Urban Systems Ltd.***,
2016 YKCA 4
- Plaintiff had 14 months of service
- Dismissed with 14 weeks of notice
- Trial judge awarded 6 months of notice



Assessment of Notice

- ***Cabott***, cont'd
- Appeal allowed
- Undue weight given to plaintiff's personal hope to eventually be transferred to Vancouver
- Notice of 4 months substituted



Protection from Dismissal

- ***Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29**
- Wilson dismissed without cause and given generous termination package
- Generous package did not mean dismissal was not “unjust”



Protection from Dismissal

- ***Wilson***, cont'd
- Appeal allowed
- *Canada Labour Code* provides union-like protection in non-union workplaces under federal jurisdiction



LABOUR



Social Media

- ***Re Toronto Transit Commission -and- ATU*** (2016), 270 L.A.C. (4th) 341 (Howe)
- Employer's social media account
- Comments of members of the public, including transit users
- Forum for “haters and abusers”
- Employer ordered to eliminate offensive tweets



Disability and Misconduct

- ***McNulty v. Canada Revenue Agency***, 2016 PSLREB 105
- Senior programs officer
- 25 years of service
- Warned about excessive absences
- Absences for next 10 months covered by medical notes



Disability and Misconduct

- ***McNulty***, cont'd
- Investigation revealed fraud
- 16 medical notes forged
- Grievor suffered from alcoholism
- Disability did not cause misconduct
- Grievance denied



Excessive Innocent Absenteeism

- ***Re Vancouver Coastal Health Authority -and- Hospital Employees' Union***, [2016] B.C.C.A.A.A. No. 112 (Sanderson)
- Frequent, unexpected absences of short duration
- Related to established disability
- Employer tried to accommodate



Excessive Innocent Absenteeism

- ***Vancouver Coastal Health Authority***, cont'd
- Offered transfer to casual status as accommodation
- Refused because fewer benefits as casual
- Short-term absences more disruptive



Excessive Innocent Absenteeism

- ***Vancouver Coastal Health Authority***, cont'd
- Grievor confirmed his condition would not change
- Duty to accommodate satisfied by reasonable offer
- Grievance denied



Off-Duty Misconduct

- ***City of Prince George and Prince George Firefighters, [2016]***
B.C.C.A.A.A. No. 114 (Nordlinger)
- Firefighter with 11 years of service
- Possession of stolen goods
- Purchased from co-worker



Off-Duty Misconduct

- ***City of Prince George***, cont'd
- Arrest, charges and trial reported in media
- Grievor knew the goods were stolen
- *Millhaven Fibres* factors applied
- Isolated incident



Off-Duty Misconduct

- ***City of Prince George***, cont'd
- Insufficient nexus between employment and charges
- Duties did not expose him to temptation
- Reinstated without compensation



Refusing Unsafe Work

- ***City of Hamilton v. CUPE, Loc. 5167 (Czajkowski Grievance)***, [2016] O.L.A.A. No. 74 (Slotnick)
- Grievor claimed his medical restrictions rendered work unsafe
- Refused to perform work
- Reasonable cause for discipline



Refusing Unsafe Work

- ***City of Hamilton***, cont'd
- Grievor had performed the same tasks in the past
- Grievor did not seek medical assistance



Refusing Unsafe Work

- ***City of Hamilton***, cont'd
- Previous discipline for work refusals and AWOL
- Deceitful with employer and at hearing
- Discharge warranted



Admissibility of Evidence

- ***BCGEU and BC Public Service Agency (Admissibility of Surreptitious Recording Grievance)***, [2016] B.C.C.A.A.A. No. 129 (Dorsey)
- Grievor discharged for harassing co-worker
- Co-worker used cell phone to record one incident of harassment



Admissibility of Evidence

- ***BCGEU***, cont'd
- Surreptitious recordings at work
- Chilling effect on work relations
- Probative value, however, outweighed the prejudice



Admissibility of Evidence

- ***BCGEU***, cont'd
- Social context was significant
- Probative value of accurate recording
- Differences in witness recollections
- Recording was ruled admissible



Drug Addiction Disability

- ***Unifor, Loc. 975 v. Enbridge Gas Distribution Inc. (Letwin Grievance)***, [2016] O.L.A.A. No. 369 (Cummings)
- Grievor worked as labourer
- Work involved live gas lines
- Discharged for being intoxicated at work
- History of drug abuse
- Employer had accommodated in the past



Drug Addiction Disability

- ***Unifor, Loc. 975***, cont'd
- Reinstated – 10-day suspension without pay
- Grievor had been dishonest but now in recovery
- Evidence at the hearing established that the grievor had stopped using drugs and alcohol (changed lifestyle to one consistent with maintaining sobriety, received more treatment, and was in sustained recovery)
- Return to safety-sensitive position did not pose risk to public safety
- Duty to accommodate included uncertainty



WORKPLACE HUMAN RIGHTS



Medical Marijuana

- ***Burton v. Tugboat Annie's Pub***, [2016] B.C.H.R.T.D. No. 78
- Bar manager using marijuana at work
- Dismissed from employment
- Claimed medical use to deal with chronic pain



Medical Marijuana

- ***Burton***, cont'd
- Clear policy against drugs and alcohol while working
- No evidence of link between marijuana use and disability
- Complaint denied



Breach of Drug Policy

- ***Stewart v. Elk Valley Coal Corp.***, 2017 SCC 30
- Supreme Court of Canada upheld discharge of disabled worker
- Drug policy provided for:
 - accommodation of drug addicts
 - discipline for recreational users



Breach of Drug Policy

- ***Stewart v. Elk Valley***, cont'd
- Employee tested positive after accident
- Employee said he was addicted
- Employment terminated for breach of policy



Breach of Drug Policy

- ***Stewart v. Elk Valley***, cont'd
- Policy required advance disclosure
- Employee failed to disclose in advance of incident
- Alberta Human Rights Tribunal found no *prima facie* discrimination
- Disability not a factor



Breach of Drug Policy

- ***Stewart v. Elk Valley***, cont'd
- Lower courts agreed that there was no *prima facie* discrimination
- Tribunal's decision upheld
- Employee chose not to comply with the policy



Discrimination – Political Belief

- ***Bratzer v. Victoria Police Department*, 2016 BCHRT 50**
- Police officer openly supported legalization of drugs
- Gave speeches and published articles
- Supported political parties that favoured legalization



Discrimination – Political Belief

- ***Bratzer***, cont'd
- Employer tried to place restrictions on public speech
- Bratzer claimed discrimination
- What constitutes “political belief”?
- Public discourse on issues requiring government action



Discrimination – Political Belief

- ***Bratzer***, cont'd
- Manner of expression as well as belief itself protected in an expansive way, with minimal impairment of free expression
- Restrictions were *prima facie* discriminatory
- BFOR analysis
- Is conduct incompatible with duties?



Discrimination – Political Belief

- ***Bratzer***, cont'd
- Prohibition on insulting comments reasonable
- Prohibition on “left-wing views” unreasonable
- \$20,000 in compensation for injury to dignity, feelings and self-respect



Discrimination – Family Status

- ***Kenworthy v. Brewers Distributor***, 2016 BCHRT 54
- Casual employee with a variable schedule
- Unable to work the variable schedule on account of childcare needs
- Employer extended temporary accommodation until the employee could make alternate arrangements



Discrimination – Family Status

- ***Kenworthy***, cont'd
- Accommodation was at an end because the employee was not making any effort
- *Campbell River* test applied – “serious interference” with “substantial obligation”
- No reasonable prospect of success
- Failed to participate in accommodation efforts



Discrimination – Family Status

- ***Misetich v. Value Village Stores Inc.***, 2016 HRTO 1229
- Developed repetitive strain injury
- Offered temporary duties that required variable shifts
- Shifts interfered with caring for elderly mother



Discrimination – Family Status

- ***Misetich***, cont'd
- Discharged because there was no proof of the mother's medical restrictions
- Complaint dismissed
- Tribunal rejected *Johnstone* test
- Only one test for discrimination



Discrimination – Family Status

- ***Misetich***, cont'd
- Failed to prove eldercare obligations
- Doctor's notes were insufficient
- Family status was not a factor in the decision to discharge
- Employment was terminated for failure to work variable shifts



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