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EMPLOYMENT + LABOUR LAWYERS

Case Law Update

November 7, 2024

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Agenda

- Charter
- Privacy
- Employment
- Human Rights
- Labour Relations Board
- Arbitration

Charter

York Region District School Board v Elementary Teachers' Federation of Ontario, 2024 SCC 22

Section 8

Facts

- Two teachers recorded their private communications about third teacher and workplace issue in a shared personal, password protected, Google doc, in the cloud. The Principal was made aware of it, found an open screen of the conversation, scrolled through and took screenshots. This formed the basis of discipline.

Decision

- Teachers are protected by s. 8 *Charter* (freedom from unreasonable search and seizure).
- Arbitrator erred by not applying the *Charter's* legal framework.
- Discipline was moot by the time of the SCC ruling (already quashed by ONCA).
- Privacy analysis for s. 8 in workplace not necessarily the same as criminal analysis, will be context dependant.
- What is a reasonable s. 8 search in the workplace must have regard for labour relations and the terms of the collective agreement. The "balancing of interests" analysis ought to be used.

Ontario English Catholic Teachers Association v Ontario (Attorney General), 2024 ONCA 101

Section 2

- In 2019 - ON government passed legislation imposing a 1% cap on wage increases in the public sector for 3 years.
- Public sector unions challenged the legislation alleging it violated their members' rights to freedom of expression (2(b)), association (2(d)) and equality (s.15).
- Application Judge and ONCA both found that the Act violated s. 2(d) of the Charter, with one difference:
- ONCA said the Act violated 2(d) and not saved by s. (1) because:
  - No meaningful bargaining or consultation before the Act was passed.
  - 1% increase was not reflective of comparable wage settlements achieved through other public sector bargaining.
  - Significantly restricted other areas for negotiation.
  - Not saved by s. 1 because not minimally impairing, and serious deleterious impacts.
- However, ONCA said that Act was not void (contrary to the application judge) as it applied to non-union employees because they had no 2(d) right to collectively bargain.

Privacy

Thompson Rivers University (Re), 2023 BCIPC 101

Legal Advice and Solicitor-Client Privilege

Facts

- Faculty member sought access to communications related to terms of reference of external investigator TRU hired to investigate a complaint against him.
- TRU withheld based on s. 13 (legal advice) and s. 14 (solicitor-client privilege), applied both sections to the same information.

Decision

- TRU was authorized to withhold most, but not all, of the information it withheld under s. 14.
- For the "advice or recommendations" exception under s. 13, OIPC needed to review the emails line by line to make a decision so ordered TRU to produce them.

Reasons

- Email for the purpose of giving legal advice and were intended to be confidential, so TRU was entitled to withhold them.

LifeLabs LP v Information and Privacy Commr (Ontario), 2024 ONSC 2194

Solicitor-Client and Litigation Privilege

Facts

- In 2019, cyber-attackers obtained personal health data of millions of Canadians from LifeLabs, most living in Ontario and BC - IPCs investigated.
- During the investigation, the OIPCs sought information about the data breach and its systems that LifeLabs had obtained from its consultants.
- LifeLabs resisted and claimed privilege over the information.
- The IPCs denied the claim of privilege.

Decision

- The Divisional Court upheld IPCs decision, that neither solicitor-client privilege nor litigation privilege applied to the documents.

LifeLabs LP (cont'd)

Reasons

- LifeLabs had argued that it had no obligation to investigate, remediate or produce information. It also argued independent facts on those issues were not producible if contained in privileged documents.
- The Divisional Court dismissed their argument and concluded that this would "permit a regulated entity to defeat investigative orders by placing unpalatable facts within its knowledge into a privileged report to counsel."
- Litigation privilege does not extend to facts or "base information" used to prepare for litigation.
- Solicitor-client privilege does not extend to facts that are required to be produced pursuant to a statutory duty.
- Providing a copy of a document to counsel does not "cloak" the original document with privilege.
- Where facts exist independently of documents subject to claims of privilege, they are producible and cannot be withheld.

Employment

Adams v Thinkific Labs Inc, 2024 BCSC 1129

Offer of Employment

Facts

- The Plaintiff applied for a job as an operator of a software platform.
- The Defendant sent the Plaintiff an 'email offer' of employment containing a 60-page document detailing among other things:
  - Compensation, stock options/vesting
  - Health and wellness spending account;
  - Brochure on benefits plan; and
  - Company policies.
- The 'email offer' also i) requested the Plaintiff's full legal name and desired start date and ii) indicated that upon receipt of that information she would be provided with the 'official employment contract'.
- Email did not contain information on a termination clause or any mention of non-competition in the event of termination.

Adams v Thinkific Labs Inc (cont'd)

- The Plaintiff responded to the email by providing the requested information, and later that day a 'formal contract' was sent to her which she signed.
- The 'formal contract' **contained** terms regarding termination and non-competition not mentioned in the initial 'email offer'.
- 1.5 years later the Defendant terminated her employment and gave notice based on the terms of the termination clause

Decision

- The Plaintiff accepted employment on the terms of the initial offer, and that the 'formal contract' was unenforceable due to lack of consideration.
- The Plaintiff was awarded a reasonable notice period of 5 months.

Adams v Thinkific Labs Inc (cont'd)

Reasons

- The Court found that the 'formal contract' consisted almost entirely of "new" restrictive terms regarding termination, intellectual property and non-competition.
- In the Court's view it significantly limited the Plaintiff's right to seek employment in her chosen field in the event of termination – and the terms had been added by the Defendant without consultation and without the offer or provision of further consideration.
- The Court also found that the "initial" terms of the 'email offer' were not general discussion points.
- Instead, the terms consisted of over 60 pages of all-encompassing, detailed and clear inducements, amassed, collated and presented by the Defendant to the Plaintiff in their offer to her to join them.

Human Rights

Student (by Parent) v. School District, 2023 BCHRT 237

Facts

- The Complainant's parent filed the complaint at the Tribunal alleging that the conditions in her advanced language class (the "Advanced Language Class") exacerbated her disorder and that School District (the "District") failed to appropriately accommodate her.
- The Complainant was diagnosed with an anxiety disorder manifesting in trichotillomania and procrastination.
  - She takes medication, attends counseling, and struggles with self-advocacy due to the invisible nature of her disability.
- The Complainant did not require regular modifications in elementary school but needed occasional accommodations, such as during field trips.
- The Complainant's parents were upset that she and her peers were placed in an inappropriate class without proper consultation or inquiry into her struggles. They felt the school district failed to provide necessary accommodations, leading to the student being set up for failure.

Student (by Parent) v. School District, 2023 BCHRT 237

Decision

- Complaint upheld in part; $5,000 was awarded to the Student for injury to dignity.

Reasons

- The Tribunal noted how the administration was constrained by enrollment numbers and administrative realities.
- With respect to the conditions in the Advanced Language Class, the Tribunal found that it did have adverse impacts on the Student in connection with her disability.
- The Tribunal accepted that the District acted in good faith for a purpose rationally connected to its function, but did not take all reasonable steps to accommodate the student.
- The duty was not triggered when the Student was placed in the Advance Language Class, as she had no prior history of academic accommodation or modification, nor was it triggered when the Student had a drop in grades.
- However, the duty to inquire arose when the Student's parents reached out to the school in April indicating that the Student was struggling, and when considering the teacher's teaching style.
- Tribunal noted that asking a 13-year-old child with anxiety whether they are struggling and receiving the response of "fine" did not satisfy the duty to inquire.

Curken v. Gastronome Enterprises Ltd., 2023 BCHRT 2

Facts

- During Ms. Curken's employment at Gastronome Enterprises Ltd., she experienced frequent and ongoing sexual harassment.
- In Ms. Curken's original complaint of sex discrimination, she alleged that a fellow Gastronome employee sexually harassed her, Gastronome was liable for the sexual harassment, and the sexual harassment resulted in her losing her job.
- She filed her complaint against the employee and Gastronome.
- Ms. Curken settled with the employee, but continued to pursue her complaint against Gastronome.
- She did not report the sexual harassment to Gastronome while she was working there.
- Rather, she disclosed it a few weeks after Gastronome fired her.
- Ms. Curken was of the belief that the employee manipulated Gastronome into terminating her employment.

Curken v. Gastronome Enterprises Ltd., 2023 BCHRT 2

- Ms. Curken provided evidence of the sexual harassment, including text messages with sexually explicit video content, which the employer agreed was offensive and unacceptable.

Decision

- The Tribunal found the conduct constituted sexual harassment.
- And that Gastronome breached s. 13 of the B.C. *Human Rights Code* based on the discriminatory actions of the fellow employee in the course of his employment, and its failure to ensure a workplace free from discrimination.
- Ms. Curken was awarded $25,000 for injury to her dignity, feelings and self-respect.
- The Tribunal found that the sexual harassment was not a factor in Gastronome’s decision to terminate.

Glebov v Fraser International College, 2024 BCHRT 19

Religious Belief

Facts

- Instructor was terminated because of his online YouTube “sermons” which included homophobic and transphobic content.
- Instructor alleged discrimination on the basis of religious beliefs.

Decision

- Complaint dismissed.

Reasons

- Tribunal accepted that the stated beliefs were protected religious beliefs, but that there was no evidence that Glebov’s beliefs also required him to broadcast his beliefs.
- Because of this, broadcasting his beliefs was not protected by the Code.

Pursley v. Donald's Fine Foods dba Britco Pork, 2024 BCHRT 24

Reasonable Settlement Offer

Facts

- Botched accommodation process, contributed to by employee's physician, and employer nonresponding.
- By the time the employer offered a part time accommodation, the employee had found work elsewhere but had been unemployed for 15 months.
- The employer made an offer to settle for $4,000 in lost wages and $2,000 for I2D. Employee refused.
- Employer brought an application to dismiss pursuant to s. 27(1)(d)(ii), alleging the employee refused a reasonable settlement offer.

Decision

- The Tribunal did not agree the settlement offer was reasonable and dismissed the application to dismiss.
- Injury to Dignity Awards from 2000 and 2001 are no longer helpful, according to the Tribunal.

Ng v City of Vancouver (No. 2) 2024 BCHRT 228

Limiting Publication

Facts

- Ms. Ng filed a complaint with the Tribunal alleging that the City of Vancouver (the “City”), her former employer, failed to accommodate her mental disability.
- The hearing was already scheduled for less than two months away.
- Ms. Ng brought an application to limit the publication of her personal identifying information from any written decisions, and to redact her personal information from any parts of her file that could be made available to the public.

Ng v City of Vancouver (No. 2) 2024 BCHRT 228

Limiting Publication

Decision

- Tribunal denied Ms. Ng's application to limit publication because her privacy interests did not outweigh the public's interest in having full access to the proceedings.

Reasons

- Ms. Ng did not show how any stigma associated with her alleged mental disabilities would apply in her circumstances or how she would face harm to her professional reputation should her medical information be made public;
- The complaint was at an advanced stage of the Tribunal's proceedings with details of the complaint having been in the public domain for more than a few months; and
- The nature of the allegations in the complaint (whether the City failed to accommodate her disability) are not prurient or egregious, such as complaints involving sexual harassment.

Kamalov v. Paladin Security Group Ltd., 2024 BCHRT 285

Definition of Disability

Facts

- The employer had been progressively disciplining the Complainant since September 2018 for his poor performance as a Site Supervisor at the mall.
- The Complainant's behaviour continued to be concerning, and as a result of its concerns with his performance, the employer terminated the Complainant's employment in January 2019.
- The Complainant alleged that he experienced discrimination on the basis of disability when he was terminated from his employment.
- The employer applied to dismiss the complaint on the basis that the Complainant did not have a disability under the *Code* and was unable to demonstrate that the alleged disability was a factor in his termination from employment.

Decision

- Complaint dismissed – the Complainant did not have a disability as protected by the *Code.*

Kamalov v. Paladin Security Group Ltd., 2024 BCHRT 285

Definition of Disability

Reasons

- The Tribunal, when it decides whether a specific medical condition is a "disability" within the meaning of the Code, will consider the following:
  - The degree of impairment and functional limitations associated with the condition; and/o.
  - The degree of severity, permanence, and persistence of the condition; and/o.
  - The social perception and response to that condition, taking into account human rights principles.
- The Tribunal considered the evidence before it and found that the Complainant did not have a disability as protected by the Code because:
  - The medical notes indicated that he was only ill for a short period of time. The final medical note indicated that the Complainant was well and able to attend work.
  - Stress is not a disability, in and of itself.
  - While the Complainant may meet the definition for disability in another forum, he did not meet the definition of disability under the Human Rights Code.

Clarke v City of Vancouver and another, 2024 BCHRT 298

Racial Discrimination

Facts

- One of four human rights complaints filed by Mr. Clarke.
- He alleged that, as a Black man, he suffered racial discrimination from his co-workers and the City failed to address the issue.
- Specifically, he alleged that on three occasions, one of his white co-workers yelled and swore at him and nearly hit him with his truck.
- The City denied discrimination and while it agreed Mr. Clarke had two negative interactions with the co-worker, the City disputed the account of those interactions and says they were not related to race or colour.

Decision

- No nexus between the adverse impact he experienced and his race or colour.
- Complaint dismissed.

Reasons

- Tribunal accepted that Mr. Clarke had two negative interactions with his co-workers.
- However, the negative impacts were not connected to Mr. Clarke's race or colour.
- Rather, the co-worker was angry and/or careless.
- The City's investigation was not a relevant matter for this Tribunal since, on the facts, Mr. Clarke did not tell the City he believed the co-worker's conduct was discriminatory.

Labour Relations Board

Kwantlen Polytechnic University, 2024 BCLRB 58; recon denied 2024 BCLRB 108

Section 99 Application

Facts

- The applicant applied under Section 99 seeking a review of an arbitration award.
- Alleged that award inconsistent with the principles expressed or implied in the Code because the Arbitrator failed to apply the proper methodology for assessing witness credibility and reliability.
- The Arbitrator declined to follow the *Faryna v. Chorny* approach to credibility because it was not useful, and instead applied a more holistic approach:

> 54 The Grievor's and the Respondent's accounts are in conflict in all material respects, and each alleges the other's account is a fabrication. In the circumstances, I find a more holistic approach is required. A finding on credibility is a factual determination: On the balance of probabilities, is it the Grievor or the Respondent who is telling the truth? It is axiomatic that, as the trier-of-fact, I do not have "divine insight" into "the truth": *Faryna*. Given the parties' positions, the credibility and reliability of the Grievor's or the Respondent's testimony are inextricably linked.
>
> 55 Accordingly, I have taken a holistic view of the evidence and considered factors such as whether one or the other's testimony and recollection of events was consistent; was modified or embellished; the harmony of their testimony with any independent evidence; and, whether one version seems unreasonable, impossible, or unlikely such that it "places too great a strain upon one's sense of the realities of life": *Faryna*. My determination and the bases for my findings, below, constitute my response to the parties' positions on the evidence in this case.

Kwantlen Polytechnic University (cont'd)

Decision

- Application dismissed.

Reasons

- Arbitrator's approach consistent with way arbitrators deal with evidence of witnesses who tell two diametrically opposed stories.
- Arbitrator provided a reasoned analysis having regard to the real substance of the matters in dispute and respective merit of the positions of the parties.
- No reviewable error.

Board of School Trustees of SD 44, 2024 BCLRB 16

Unfair Labour Practice

Facts

- Teacher who was a union official called an off-site union meeting.
- Sent an email with her personal email address that it was to discuss concerns about bullying and harassment.
- Principal heard teacher had made disparaging remarks about her at the meeting and filed bullying and harassment complaint.
- Employer investigated complaint including inquiring into what was discussed at the union meeting.
- Union filed a complaint, alleging the investigation breached Sections 6(1) and 6(3)(d).

Board of School Trustees of SD 44 (cont'd)

Decision

- Preliminary issue – Board declined to defer to arbitration.
- Uncertain whether grievance and arbitration provisions could provide an adequate remedy.
- Merits – application allowed in part – employer breached Section 6(1) through the manner in which it pursued its investigation of union official.
- The viability of the employment relationship must be balanced against the union's right to carry out its responsibilities.
- The Employer didn't breach the Code by initiating investigation but breached Section 6(1) by inquiring into communications at the union meeting.
- Declaration issued.

Starbucks Coffee Canada, Inc., 2024 BCLRB 60

Unfair Labour Practice

Facts

- Martineau worked for Starbucks and spearheaded efforts to unionize at a store location.
- Starbucks closed the store, and transferred Martineau to a different location.
- A few weeks after starting at the new location, Starbucks terminated Martineau's employment.
- Martineau alleged she was terminated because of her unionization efforts.

Decision

- Application dismissed.

Reasons

- Starbucks had a credible explanation for terminating Martineau's employment, free from anti-union animus.
- Starbucks considered using profanity in the front of house to be a serious offence.
- Martineau was not treated disproportionately when compared to her colleagues.
- Starbucks's investigation did not give rise to a finding of anti-union animus.

Arbitration

Toronto Catholic District School Board v. Ontario English Catholic Teachers' Assn. (Sena Grievance), [2023] O.L.A.A. No. 206

Discharge

Facts

- School board fired teacher after verbal and physical altercation at Starbucks with another customer over teacher not wearing a mask (in 2021).
- TikTok brought incident to employer's attention.

Decision

- Termination excessive – one-month suspension substituted.

Reasons

- Arbitrator was concerned teacher connected to "anti-vax community" and "truckers convoy" but there was not enough evidence of this connection.
- High standard of conduct for teachers, but this was off site and not acting as teacher; conduct harmful to board's reputation but TikTok not foreseeable; teacher had a 13-year unblemished record and expressed remorse; this was a monetary flare-up and a consensual fight with no clear instigator.

Anne & Max Tanenbaum Community Hebrew Academy of Toronto and Federation of Teachers in Hebrew Schools, 2024 CanLII 1398 (ON LA)

Disclosure of Investigation Reports

Facts

- Employer retained third party legal counsel to conduct a workplace investigation.
- Discipline letter referred to the investigation.
- Union sought production of investigation report and investigation file.
- Employer said application was fishing expedition, report was litigation privileged, and solicitor-client privileged.

Decision

- Arbitrator ordered production of the report.

Reasons

- Report was mentioned in the letter, so clearly not a fishing expedition.
- Any privileged was waived by referring to the investigation in the letter.
- Arbitrator denied order for production of investigation file – agreed this was a fishing expedition.

Toronto Metropolitan University and Toronto Metropolitan Faculty Assn., 2024 CanLII 2021

Discipline

Facts

- Employer suspended grievor for two weeks due to alleged violation of civility policy.
- Allegations spanned a 3-year period and included recording a meeting, disrupting meetings with off-topic rants and unsubstantiated allegations, using a hostile and accusatory tone, and creating a tense environment.
- Grievor had a long record with one prior discipline and repeated coaching for similar conduct.

Decision

- Discipline excessive – reduced to two days.

Reasons

- Employer could not rely on a dated accusation (recording a meeting) for which it decided not to issue discipline at the time.
- Arbitrator accepted that grievor did use a hostile and accusatory tone in meetings and created a negative environment, breaching the policy, which was worthy of some discipline.
- Suspension reduced due to not all grounds being valid and the grievor's relatively good record.

Metrolinx v. Amalgamated Transit Union, Local 1587, 2024 ONSC 1900

Judicial Review

- Judicial review of an arbitration decision rendered by the Grievance Settlement Board under Arbitrator Luborsky.
- Text messages came to the attention of the employer, which amounted to sexist bullying and harassment.
- Employer investigated, which led to terminations.
- Arbitrator found no just cause. Text messages were private and could not be used, target of bullying and harassment declined to participate in investigation, so investigation could not be procedurally fair.
- Divisional Court quashed arbitration award, which it said was fatally flawed, and remitted dispute to a new arbitrator.
- Arbitrator failed to recognize that employers have a duty to investigate. Wrong for arbitrator to conclude that matter should have ended when subject refused to participate in investigation. Arbitrator focused too much on intent of messages to be private. They came to attention of employer / were forwarded to other employees.

Pereira v UNITE HERE Local 40, 2024 BCCA 27 (CanLII)

Res Judicata

- Union member sued union for defamation – alleged union representative defamed her by making statements in a grievance that the employer failed to take steps to stop her from bullying and harassing other employees.
- Parties agreed qualified privilege applied but appellant contended it was lost because defamatory words published with malice.
- Appellant had made same allegation re. malice during Section 12 proceedings before Labour Relations Board – Board held they were unfounded.
- BCSC held the issue of malice was *res judicata.*
- BCCA agreed – same question was decided; decision was final; decision was with the same parties.
- Appeal dismissed.

Calgary (City) v. Amalgamated Transit Union, Local 583 (Sharma Grievance), [2023] A.G.A.A. No. 11

Termination for Off-Duty Conduct

Facts

- Employer terminated grievor's employment as a result of his off-duty sexual assault of a co-worker, and the union grieved.
- The co-workers worked for the City of Calgary as transit operators.
- After work, the grievor made sexual advances toward a female coworker (AB), which she rejected.
- AB did not make a complaint in the workplace, but the employer became aware of the incident and conducted an investigation.
- The employer found that AB's evidence was clear and straightforward, but found the grievor's evidence to be vague, self-serving and untruthful.

Calgary (City) (cont'd)

Decision

- Arbitrator dismissed the grievance.

Reasons

- To support termination for off-duty conduct, an employer must first establish:
  - The grievor's conduct harms the employer's reputation;
  - The grievor's behaviour renders the employee unable to perform his or her duties satisfactorily;
  - The grievor's behaviour leads to refusal, reluctance or inability of the other employees to work with him or her;
  - The grievor has been guilty of a serious breach of the Criminal Code, rendering his conduct injurious to the general reputation of the employer and employees; and/or
  - The grievor's conduct makes it difficult for the employer to efficiently manage its work and direct its workforce.
- Depending on the offence and its impact and the overall circumstances, any one factor may warrant discipline or termination.

Heidelberg Materials Canada Limited (Delta Cement) v Cement, Lime, Gypsum and Allied Workers Division, International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers Local D277 (ESA Sick Days Arbitration Grievance), [2024] BCCAAA No 132 (Saunders)

Facts

- Union filed policy grievance alleging employer breached section 49.1 of the BC *Employment Standards Act*, RSBC 1996, c. 113 (the "ESA") by requiring employees to use "personal leave" days for paid sick leave, rather than independently providing five paid sick days under section 49.1 of the ESA.
- Collective agreement already provided for three days of paid sick leave that were separate from the personal leave provisions. The Union and the Employer agreed that these three days counted towards the ESA mandated sick leave.

Decision

- Grievance allowed – employer ordered to make employees whole from April 1, 2022, onward.

Heidelberg Materials Canada Limited (Delta Cement) (cont'd)

Reasons

- The requirement for sick leave under the *ESA* is a minimum standard, regardless of what a collective agreement contains.
- Sick leave and personal leave benefits had different purposes.
  - The purpose of the sick leave provision was "to provide sick leave benefits".
  - The personal leave provision was dedicated to use "by an employee to attend a dental, medical, or legal appointment, or to deal with other personal or family matters that require his absence from work".
- Based on these distinct purposes, Arbitrator Saunders held that personal leave days were not intended to be used interchangeably or in conjunction with sick leave days.
- Overall Arbitrator Saunders concluded that the personal leave days did not count towards the *ESA* sick day requirement and that since the sick leave provision only provided for three paid days of sick leave, the collective agreement fell two days short of the *ESA* mandated minimum.

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