



DENTONS

WEBINAR SERIES
LEGAL UPDATES
FOR CANADIAN EMPLOYERS

Navigating what's next: Calgary's guide to 2025 workplace challenges

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Agenda

Topic	Speakers
Navigating neurodiversity in the workplace	April Kosten , Partner
Navigating offers of employment	Jennifer Thompson , Partner
Employee termination entitlements	Carly Kist , Associate
Employee recordings in the workplace	Roxana Jangi , Partner

Housekeeping

- Have questions? Please hold them until the end of all presentations, and our speakers will do their best to address as many as possible.
- **CPHR:** This program has been accredited for 1 Continuing Professional Development (CPD) hour with CPHR Alberta.





Navigating neurodiversity in the workplace

Introduction

- Around 15–20% of people worldwide considered neurodivergent
- 25% rise in neurodiversity diagnoses since pandemic
- Employers likely to work with increasing neurodivergent employees

What is neurodivergence?

- Neurodivergence refers to individuals whose neurological development or function differs from societal norms
- Broad, non-exhaustive umbrella term that includes conditions such as:
 - Autism
 - Attention-deficit/hyperactivity disorder (ADHD)
 - Bipolar disorder
 - Dyslexia
 - Generalized anxiety disorder
 - Post-traumatic stress disorder (PTSD)
 - Tourette syndrome
- Type & degree of manifestations highly individualized
- One-size-fits-all approach insufficient

Disclosure

- Employers have duty to accommodate up to undue hardship
- Duty is triggered when employer made aware of accommodation need, or circumstances are such that employer should reasonably have known of need for accommodation
- Employers can encourage self-disclosure by fostering environment where employees feel safe to ask for help
- But, no obligation for employees to disclose

Duty to inquire

- Non-disclosure does not remove employer's duty to accommodate
- Duty to inquire may be triggered in some circumstances but not all
- *Stewart v Ontario (Government Services)*, 2013 HRTO 1635
 - Project manager dismissed for poor performance
 - Filed human rights application alleging discrimination (processing learning disorder and ADHD)
 - Applicant had not disclosed disabilities to employer but argued employer should have inferred them from workplace behaviours, such as preference for visual aids, difficulty with acronyms, disorganization, forgetfulness & poor time management
 - She contended these signs & her performance issues were documented in evaluations & performance improvement plan should have triggered employer's duty to inquire
 - Tribunal disagreed, ruling that lack of information demonstrating clear link between behaviour & known or suspected disability made it reasonable for employer to view difficulties as skill-based

Informal disclosure

- Consider if someone in organization alleged to have knowledge of potential disability but failed to act
- *Bakery, Confectionery, Tobacco Workers and Grain Millers International Union (BCT), Local 406 v Bonté Foods Limited*, 2017 CanLII 12517 (NB LA)
 - Employee with 14 years of service was terminated for repeated food safety violations despite prior discipline & LCA
 - Employee mentioned condition to supervisor but no formal disclosure or accommodation request
 - Arbitrator ruled duty to inquire arose because employee disclosed diagnosis to supervisor, obligating employer to explore whether disability contributed to his recurring errors

Accommodating neurodivergence in workplace

- Duty to accommodate includes:
 - Procedural component: Employers must turn minds to individualized consideration of employee's needs, gather information required to understand needs, & identify whether it can meet those needs short of undue hardship
 - Substantive component: Accommodation ultimately implemented as result of information gathered through procedural assessment, & its sufficiency is assessed at time of alleged discrimination

Do not rely on generalized information

- *Gaisiner v. Method Integration Inc.*, 2014 HRT0 1718 (CanLII)
 - Employer conducted google search on ADHD accommodations & created accommodation plan based from their online findings following employee's self-disclosure of ADHD
 - OHRT found online Google search insufficient to fulfill procedural component of employer's duty to accommodate because:
 1. Internet searches yield general information & are not tailored to individual's characteristics & needs, nor the workplace environment
 2. Information on internet is often misleading or incorrect
 3. Information risks being prejudicial because of stereotyping & stigmatization

Inquire whether accommodation is needed & ask for supporting documentation

- To ensure needs are understood & effectively captured, it is permissible for employer to ask for disclosure of all relevant documentation necessary for accommodation as employees are obligated to provide such materials
- Employee's failure to do so can result in finding that employee has not established disability, that they did not cooperate in accommodation processes, or that all of employers' accommodation obligations are deemed to be met

What medical evidence can employers request?

- Amount of medical information & type of information depends on circumstances of each case
- Categories of information commonly accepted as appropriate:
 - Objective medical information that confirms existence of disability
 - Medical evidence does not need to specify precise diagnosis, &, in fact, employers should avoid asking for diagnosis
 - Information on whether disability permanent or temporary
 - Information on restrictions or limitations that flow from employee's disability
- Employers should not contact or communicate directly with employee's physician unless they have received employee's permission to do so
- In most cases, effective method for receiving medical information is to provide employee with written questionnaire or form that they can provide to their physician
- Consider IME

Accommodation & undue hardship

- While acknowledging contextual & individualized nature of neurodiversity, various workplace accommodations & measures have been considered
- Variable or flexible schedule
 - Lighten duties
 - Instructions in written form, or written summaries of meetings
 - Instruction in-person to pick up verbal & non-verbal cues
 - One-on-one hands-on training
 - Modified or adjusted working environment
 - Noise-cancelling headphones or work location with fewer distractions, such as private office
 - Remote work
- Only have to accommodate to point of undue hardship
- Reaching undue hardship will be difficult in many cases & will take work



Navigating offers of employment

Navigating offers of employment

Written offers

- **Do:**
 - Use a written agreement to capture the terms and conditions of employment
 - Get individuals to sign confidentiality agreements or restrictive covenant agreements before starting work
 - Include a well drafted termination provision
- **Don't:**
 - Get individuals to agree to a high level “offer” and then follow with a more detailed contract:
Adams v Thinkific Labs Inc., 2024 BCSC 1129

Navigating offers of employment

Probationary periods

- **Do:**
 - Consider whether you need a probationary period: *Sprong v Chinook Lifecare Association*, 2024 ABCJ 163
 - Use the correct length for the province of employment

Navigating offers of employment

Background checks

- **Do:**
 - Consider what checks are required on a case-by-case basis
 - Get consent for checks
- **Don't:**
 - Collect information that you do not need to have

Navigating offers of employment

Right to work

- **Do:**

- Include right to work legally in Canada as a condition of employment
- Confirm that individuals are legally able to work in Canada
- Be careful when asking individuals to disclose nature of right to work

- **Don't:**

- Hire individuals who are unable to show they have the right to work

Navigating offers of employment

Remote work

- **Do:**
 - Consider whether the location of work is a permanent arrangement
 - Build in flexibility to require hybrid employees to come to the office more or less
 - Have a policy on remote and hybrid work
- **Don't:**
 - Allow individuals to move province without permission



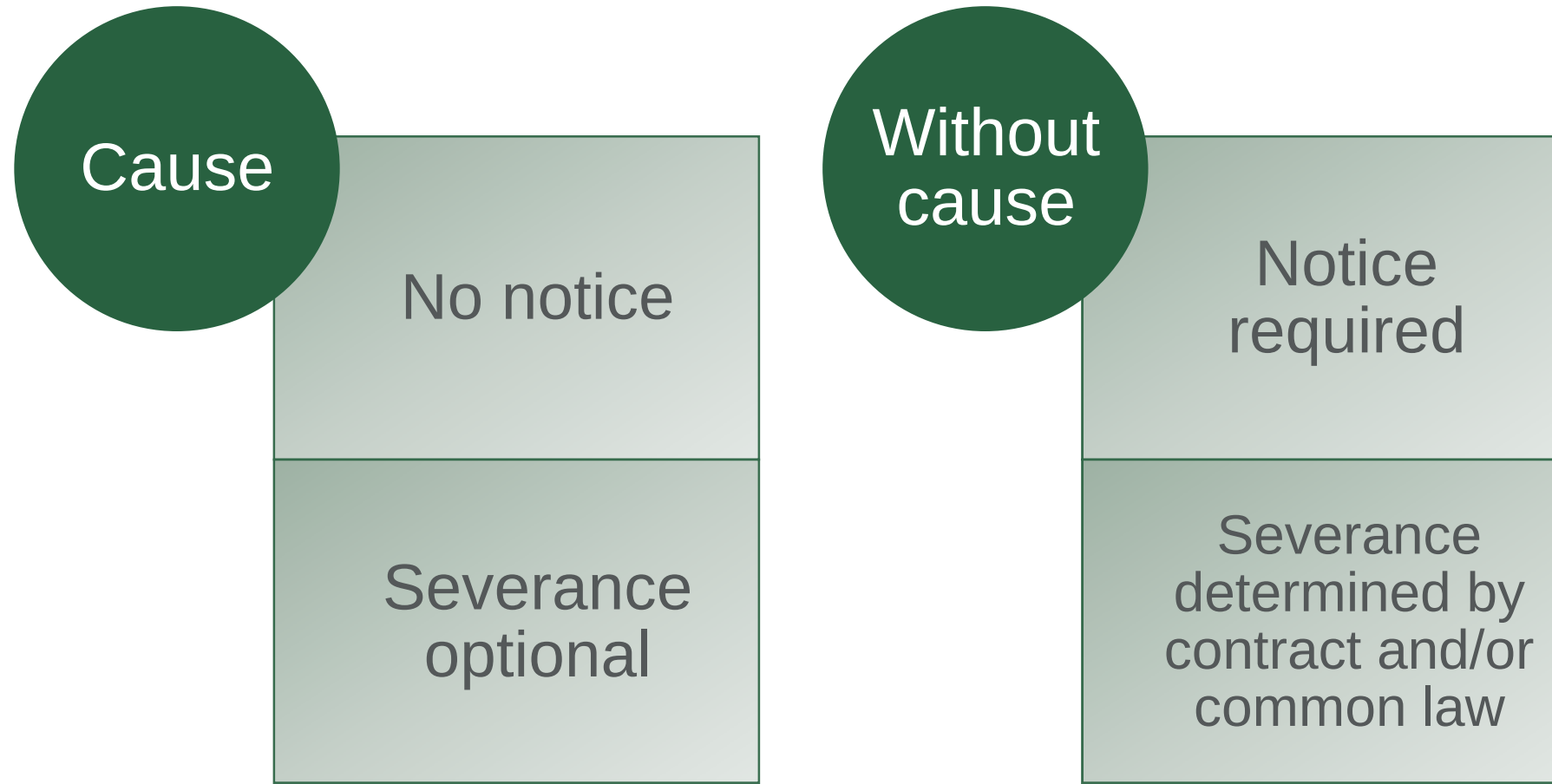
Employee termination entitlements

Agenda

1. Triggering termination entitlements
2. Sources of termination entitlements
3. Statutory notice
4. Contractual termination entitlements
5. Common law reasonable notice
6. Risks if termination entitlements are disputed

Triggering termination entitlements

Cause or no cause?

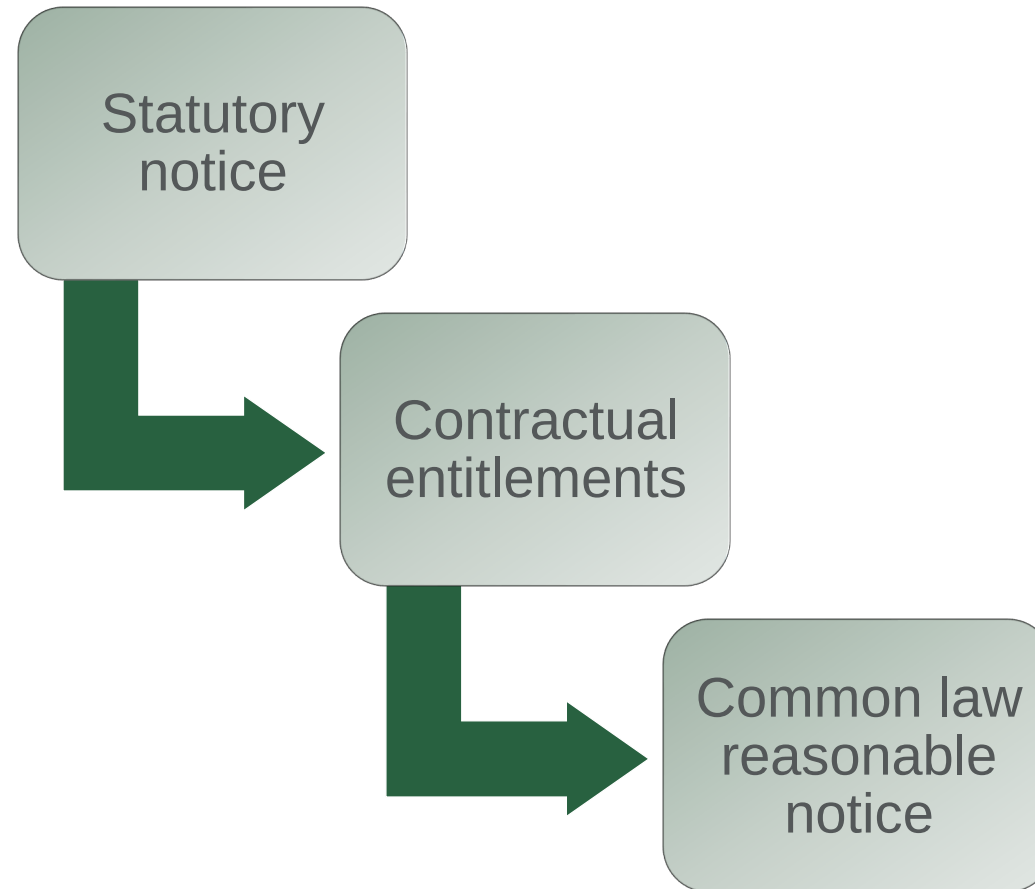


Triggering termination entitlements

Other situations to consider

- Transactions (asset sale)
- Constructive dismissal
- Layoffs
- Change of control / good reason provisions

Sources of termination entitlements



Statutory termination entitlements

Alberta Employment Standards Code

Notice Period	Length of Employment
1 week	More than 90 days but less than 2 years
2 weeks	2 years but less than 4 years
4 weeks	4 years but less than 6 years
5 weeks	6 years but less than 8 years
6 weeks	8 years but less than 10 years
8 weeks	10 years or more

- Different notice periods in different jurisdictions
- Exceptions are narrowly construed
- Cannot be contingent upon a Release
- Alberta - Must be paid within 10 calendar days after the end of the pay period in which termination occurred, or within 31 calendar days of the last day of employment
- Termination during the Probationary Period – must be based on suitability to terminate with no notice

Contractual termination entitlements

Case law chaos

Bad news

- Confusion from Ontario
 - *Bertsch v. Datastealth Inc.*, 2024 ONSC 5593
 - *Baker* (2025 ONSC 952), *Jones* (2025 ONSC 2482), *Chan* (2025 ONSC 4561), *Li* (2025 ONSC 2959)

Good news

- Practical approach in BC and Manitoba
 - *Egan v. Harbour Air Seaplanes LLP*, 2024 BCCA 222
 - *Hebert v. Colin's Mechanical Service Ltd.*, 2025 MBKB 87

State of the Law in Alberta

- Up in the air
 - *Singh v Clark Builders*, 2025 ABKB 3

Contractual termination entitlements

Drafting considerations

- Clear language
- Simple language where possible
- Consider your audience
- Reference proper legislation
- Consider offering more than the minimums
- Fixed term contract presumptions

Common law reasonable notice

A slippery slope

- Individual assessment
- *Bardal* Factors
- *Lischuk v K-Jay Electric Ltd*, 2025 ABKB 460
 - Exception Factors
 - Mitigation

Risks

When things go wrong

- Demand letters
- Employment standards complaint
- Labour grievance
- Wrongful dismissal lawsuit
- Human Rights complaint



Employee recordings in the workplace

Agenda

- Whether secret recordings in the workplace are legal?
- Whether secret recordings in the workplace can be used in the course of civil and administrative proceedings?
- Whether secret recordings in the workplace amount to just cause?
- Methods to mitigate the risk against the use of secret recordings in the workplace?

Is it illegal for employees to record workplace conversations

- Sections 184(1)-(2) of the Canada *Criminal Code*
- “One party consent” applies in Canada
- Employees may lawfully record conversations that they participate in without consent of others involved in the conversation
- It is an offence to record and intercept “*private*” communications between other individuals where you are not a party to the conversation
- *Criminal Code* principles have been applied in employment-related civil cases:
 - *Shalagin v Mercer Celgar Limited Partnership*, 2022 BCSC 112
 - *Rooney v GSL Chevrolet Cadillac Ltd*, 2022 ABKB 813

Secret recordings and just cause for termination

- Secret recordings can amount to just cause depending on the context and the surrounding circumstances
- General test for just cause applies – *McKinley v. BC Tel*, 2001 SCC 38
 - Key question: Whether the conduct in question is so serious that it destroys the trust and confidence inherent to the employment relationship?
 - Context surrounding the misconduct matters
- Notable cases specifically related to secret recordings:
 - *Shalagin v Mercer Celgar Limited Partnership*, 2022 BCSC 112 – Just cause established
 - *Rooney v GSL Chevrolet Cadillac Ltd*, 2022 ABKB 813 – No just cause

Admissibility of secret recordings into evidence

- Secret recordings are not automatically inadmissible
- Civil proceedings – Courts focus on established test when admitting the secret recordings: relevance, probative vs. prejudicial effect of the recordings
- Distinction between cases arising out of arbitration awards and civil cases – acceptance and rejection of public policy arguments

Mitigation strategies

- Have a policy in place
 - Address the issue specifically – no secret recordings; consent must be obtained prior to making a recording; confidential information
 - Outline consequences of breaching the policy
 - Ensure employees have reviewed and been made aware of the policy – keep a record of this
 - Consistently apply the policy
- Assume the worst
- Meetings – Best practices
 - Stick to the script
 - Have a witness at important meetings
 - Follow up with a written summary of confirmation emails to create contemporaneous record

An aerial photograph of a dense forest. The top half of the image shows trees with vibrant green foliage. The bottom half shows trees with bright yellow foliage, indicating autumn. A large, semi-transparent green shape with a rounded corner on the right side is overlaid on the left and center of the image. The word "Questions" is written in white, bold, sans-serif font on the green overlay.

Questions

Thank you!



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Thank you for joining us!