

Breakfast for the Mind: Employment and Labour Spring Seminar 2021

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Breakfast for the Mind: Employment and Labour Spring Seminar 2021

Introductions

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Human rights general damages: Trending upwards in Alberta

Presented by Sarah Offredi

Alberta Human Rights Act – Protected Grounds

Discrimination re employment practices

7(1) No employer shall

- (a) refuse to employ or refuse to continue to employ any person, or
- (b) discriminate against any person with regard to employment or any term or condition of employment,

because of the race, religious beliefs, colour, gender, gender identity, gender expression, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status or sexual orientation of that person or of any other person.

(2) Subsection (1) as it relates to age and marital status does not affect the operation of any bona fide retirement or pension plan or the terms or conditions of any bona fide group or employee insurance plan.

(3) Subsection (1) does not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.

Alberta Human Rights Act – Protected Grounds

- Race
- Colour
- Ancestry
- Age
- Place Of Origin
- Religious Beliefs
- Gender
 - (Incl. Pregnancy / Sexual Harassment)
- Gender Identity
- Gender Expression
- Physical Disability
- Mental Disability
- Marital Status
- Family Status
- Source of Income
- Sexual Orientation

Alberta Human Rights Act – Protected Grounds

- An employer may be found liable for discriminatory conduct that occurs even before the employment relationship begins, including through the recruiting and advertising process for a position or during the interviewing process

Applications and advertisements re employment

8(1) No person shall use or circulate any form of application for employment or publish any advertisement in connection with employment or prospective employment or make any written or oral inquiry of an applicant

- (a) that expresses either directly or indirectly any limitation, specification or preference indicating discrimination on the basis of the [Protected Grounds] of that person or of any other person, or
- (b) that requires an applicant to furnish any information concerning [the Protected Grounds]

(2) Subsection (1) does not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement

Kvaska v Gateway Motors (Edmonton) Ltd., 2020 AHRC 94

Facts

- Employee (JK) alleged that Employer (GME) discriminated against him on the basis of physical and mental disability (i.e., alcohol addiction)
- JK was employed as a sales person at GME for approximately 14 months
- At the time JK was hired, he advised GME that he did not have a driver's license because of an alcohol related driving conviction
- About 7 months into JK's employment, he began drinking heavily and was attending work drunk every day and also began taking prescription medication for sleep disturbances and stress
- Several employees of GME made comments to JK that "[GME's] owner would not put up with drinking on the job"
- JK said GME's owner searched his office claiming to be looking for license plates, but JK felt he was looking for alcohol

Kvaska v Gateway Motors (Edmonton) Ltd., 2020 AHRC 94

Facts

- JK spoke to his manager and asked if GME would hold his job if he took time off for “medical reasons” and was told GME would accommodate
- JK spoke with GME’s office manager about disability leave and benefits, but did not tell the office manager that he wanted to take leave for alcohol dependency
- JK also consulted with his doctor about treatment programs for alcohol dependency
- Before completing his enrollment in the alcohol treatment program, JK attended work “black out drunk” after consuming a combination of alcohol and prescription drugs
- GME’s owner said that JK attended work late, interrupted a staff meeting, and was behaving belligerently towards the general manager (JK did not recall these events)
- GME’s general manager called JK’s wife to pick him up from work, and she told the general manager about JK’s drinking problem, to which he replied “everyone knows”, JK left GME in a cab

Kvaska v Gateway Motors (Edmonton) Ltd., 2020 AHRC 94

Facts

- JK was initially told not to return to work, and then met with the general manager several days later and was informed his employment was being terminated
- JK asked for a chance to attend a rehabilitation program and the general manager declined
- Without employment benefits, JK was unable to afford the rehabilitation program on his own
- JK enrolled in outpatient treatment through Alberta Alcohol and Drug Abuse Commission (AADAC) for 1.5 months, then attended a subsidized 19-day residential treatment program for alcohol and prescription drug abuse
- JK fell into “despair” following his termination and struggled to secure gainful employment for about 4 years following his termination from GME
- JK did not return to car sales, despite enjoying the work he had previously done in that sector

Kvaska v Gateway Motors (Edmonton) Ltd., 2020 AHRC 94

Tribunal Findings

- Tribunal found that JK's termination was discriminatory on the basis of his alcohol addiction
- GME had failed on both procedural and substantive components of the Duty to Accommodate
- In making this finding, I am not saying that the respondent needed to accept a serious safety risk in its workplace or accept ongoing intoxication simply because the complainant had a disability. Rather, it needed to investigate options, including the complainant's request for a medical leave of absence to seek rehabilitation treatment. It did not do this, and I cannot find that continuing to employ the complainant would have created an undue hardship for the employer [...]

Remedy Requested by Director

- \$20,000 in general damages
- Lost wages for 2 years
- Interest

Kvaska v Gateway Motors (Edmonton) Ltd., 2020 AHRC 94

No Limit / Cap on General Damages

- In Alberta there is no statutory limit on the amount of damages available for mental distress, injury and loss of dignity flowing from discriminatory conduct

Approach to Assessing General Damages

Two-part assessment considers:

- (1) the objective seriousness of the discrimination
 - How serious, frequent or prolonged the conduct was
- (2) the particular effect on the complainant
 - Humiliation and hurt feelings experienced by the complainant
 - A complainant's loss of self-respect and dignity
 - A complainant's loss of self-esteem and confidence
 - The experience of victimization and the vulnerability of the complainant

Kvaska v Gateway Motors (Edmonton) Ltd., 2020 AHRC 94

Trends in General Damages

- Tribunal noted in recent years that general damages in Alberta were more often in the range of \$20-25k than before, but that this should not be viewed as “a cap or ceiling”
- Tribunal made the following additional comments and observations on general damages:
 - Low damage awards risk minimizing the seriousness of discrimination and undermining human rights legislation
 - Inadequate awards may perpetuate discriminatory conduct
 - Awards must be high enough to encourage compliance with human rights legislation
 - Low awards could be viewed as a “license fee” for discrimination
 - In an Alberta Labour Arbitration addressing discrimination, a Complainant received \$75,000, which supports the proposition that general damages should not be restricted by “arbitrary constraints”, such as low awards in past cases in Alberta

Kvaska v Gateway Motors (Edmonton) Ltd., 2020 AHRC 94

General Damages in other Jurisdictions

Ontario

- General Damages range from \$10,000 - \$200,000, with several recent awards of \$75,000

Manitoba

- General Damages as high as \$75,000 have been recently awarded
- Province is considering implementing a statutory cap of \$25,000

British Columbia

- General Damages of \$75,000 have been awarded (and upheld on appeal)
- Recent award (2021) of \$176,000 to a complainant with serious mental health issues

Federal

- Statutory Cap: \$20,000 for “pain and suffering”, and an additional \$20,000 if the discrimination was done “wilfully or recklessly”

Saskatchewan

- Statutory Cap: \$20,000

Kvaska v Gateway Motors (Edmonton) Ltd., 2020 AHRC 94

Award to Complainant

1) General Damages

- \$30,000 – considered significant impact on JK and length of time it took him to recover from the termination
- Note: this was \$10,000 MORE than counsel to the Director had requested

2) Lost STD Benefits

- \$6,215 (\$565 for 11 weeks, representing what JK would have earned from STD benefits while pursuing treatment)

3) Lost Wages

- 6 months' wages (the Tribunal found that JK admitted to “screwing up” and relapsing frequently even after treatment, and therefore likely would not have worked for GME for another 2 years as suggested by Director’s counsel)

4) Interest

- Awarded from date of complaint (2015) to date of award (December 14, 2020)

Takeaways for Employers

- There is no statutory cap for general damages in Alberta and general damages are trending upwards
- Other jurisdictions have awarded significantly higher amounts for general damages than in Alberta
- The Tribunal, Alberta Court of Queen's Bench, and the Alberta Court of Appeal have all commented on the need for damages to be sufficiently compensatory to Complainants and also high enough to achieve the objectives of the *Alberta Human Rights Act* (eliminating discrimination)
- In *Kvaska*, the Tribunal awarded more general damages than had been requested
- It is more important than ever for employers to provide discrimination-free workplaces and handle the terminations of employees with protected grounds carefully and ensure that discriminatory reasoning is not part of the decision making process

Work/life balance - When can employers discipline for off-duty conduct?

Presented by Jennifer A. Thompson

Disciplining Off-Duty Misconduct - Overview

- When will off-duty conduct constitute just cause for termination?
- What steps should employers take if they become aware of off-duty misconduct?
- Case Comment
- What can you do now to mitigate your risk in the future?

What is “Just Cause” – non-union?

- Off-duty misconduct may be serious enough to justify termination in rare cases.
- The test for just cause - from *R. v. Arthurs, ExP. Port Arthur Shipbuilding Company* (1967 Ont. CA):

*“If an employee has been guilty of serious misconduct, habitual neglect of duty, incompetence or **conduct incompatible with his duties or prejudicial to the employer’s business**, or if he has been guilty of wilful disobedience to the employer’s orders in a matter of substance, the law recognizes the employer’s right to summarily dismiss the delinquent employee.”*

Key Principles

- Applies to all non-union employees - it is an implied term of employment that the employee will not act in such a way that will be, or is likely to be, prejudicial to the employer's interests or reputation.
- May also be an express element of a contractually binding policy.

How do you know if it is serious enough?

- No single test or rule for the degree of off-duty misconduct that will justify summary dismissal (*McKinley v. B.C. Tel*, 2001 SCC).
 - requires a contextual analysis.
 - cannot be said that a certain kind of off-duty misconduct will always constitute just cause.

Considerations

- Where the conduct is off-duty, for disciplinary action to be upheld by the Court:
 - There needs to be a **nexus** with their employment
 - The disciplinary response must be **proportionate**

How do you know if it is serious enough?

- Contextual analysis - not in isolation
- Nature and seriousness of conduct
- Impact of the misconduct:
 - On the **business** – does it interfere with business interests or operations?
 - On the **workforce** – are other employees willing to work alongside the employee; does the employee's behaviour put others at risk?
 - On the **employee** – can they still carry out their role and discharge their duties?
 - On **reputation** – has the business' reputation with the public been damaged?

Off-duty misconduct – case comment: ***Whitehouse v. RBC Dominion Securities Inc.,*** **2006 ABQB 372**

- 51 year old Vice President and Investment Advisor with 16 years' service.
- One of the top ranked investment advisors in the country.
- During a night of heavy drinking invited a prostitute “Cassandra” up to his office for a “romantic” interlude.
- Escorted Cassandra into the secure reception area (which contained client files) and through an additional security door to the office area.
- Dispute arose regarding payment and the Plaintiff abandoned Cassandra in RBC's reception area.
- When he returned he searched for her, but was unable to find her so he went home.
- Cassandra attended the office the next day explaining what the Plaintiff had done and demanding her money

Whitehouse v. RBC Dominion Securities Inc., 2006 ABQB 372

- RBC investigated and reviewed passcard activity and security videos.
- Upon being confronted with the accusations, the Plaintiff denied that he had brought Cassandra into the office and did not admit to his actions until he was informed that there was video evidence.
- RBC terminated his employment for just cause.
- Although the case was not publicized, the investment industry quickly learned of the Plaintiff's escapades.
- Plaintiff sued for wrongful dismissal.
- RBC counterclaimed for defamation and damages to its reputation.
- Both claims were dismissed.

Whitehouse v. RBC Dominion Securities Inc., 2006 ABQB 372

- The court applied the contextual approach:
 - Examined the employment relationship.
 - Both the Plaintiff's and RBC's reputations were important to the Plaintiff's position and success in his position. Honesty, integrity and confidentiality were essential.
 - RBC's code of conduct emphasized upholding the law, integrity and the importance of clients' privacy and confidentiality. It addressed off-duty conduct:

“You are to avoid any conduct or association – either inside or outside of work – which could bring your honesty, integrity or trustworthiness into question, or which could be detrimental to RBC's security or to its reputation within the community.”
- He was a senior employee and RBC was justified in requiring strict compliance with its code of conduct.

Whitehouse v. RBC Dominion Securities Inc., **2006 ABQB 372**

- Considered the nature and seriousness of the Plaintiff's conduct.
 - Lack of integrity, deficient judgment, dishonesty, untrustworthiness and a careless disregard for client and corporate confidentiality.
- Considered the impact of the conduct on RBC's business and reputation.
 - No evidence of specific damage.
 - Tolerating this type of conduct would have seriously impacted the working relationship in the office and management had to act quickly to restore order and redefine the permissible limits on employee conduct.
- Court concluded that the Plaintiff's off-duty misconduct justified summary dismissal.

What should you do if you become aware of off duty misconduct?

- Don't act in haste!
- Remember that the threshold for just cause is high
- Financial risk if get it wrong
- However, have to balance this risk with the impacts identified, particularly risk to reputation

Ensure you investigate thoroughly

- Undertake a full investigation before any disciplinary action is taken:
 - Establish the facts
 - Don't rely on rumours or hearsay
 - Give the employee an opportunity to give their side of the story
 - Consider mitigating factors and whether admitted/remorse is shown
 - As with all investigations, keep good records and contemporaneous notes!

Options for Response

- Once you have established the facts and the impact of the misconduct, consider response:
 - **Termination for just cause**
 - Risks being challenged
 - **Termination without cause**
 - Disadvantage – need to make payout to employee despite wrongdoing
 - **Other discipline** – written warning

Practical Ways to Mitigate Future Risk

- Ensure your **employment contracts** have valid and enforceable termination provisions allowing for without cause termination with restricted common law reasonable notice
- Low cost option to remove someone from the business without needing just cause

Practical Ways to Mitigate Future Risk

- Ensure your **policies** are up to date and cover off-duty conduct, especially social media, code of conduct and harassment policies
 - Make sure your expectations are clear and the potential disciplinary consequences laid out
 - Supports just cause termination if there is an express breach of employment contract/policies
 - May deter undesirable behaviour if consequences are known and enforced

Takeaways

- **Responding to off-duty misconduct in non-union environment**
- There must be:
 - A real causal connection between the off-duty misconduct and the employer's business;
 - A balance between the employer's interests and the employee's interests; and
 - Proportional interference with the employee's private affairs relative to the employer's interests at stake.
- **Managing off-duty conduct**
- Implementing (and enforcing) proper policies
- Code of Conduct, social media, harassment, etc.

Vaccines in the workplace: An update

Presented by Alison D. Walsh

Vaccination Policies

- No legislation in Alberta mandating vaccinations.
- Ontario government has issued a directive to Long-Term Care Homes in Ontario to establish COVID-19 immunization policies (however, this directive does not make COVID-19 vaccinations mandatory)
- Companies implementing vaccination policies will have to balance interests of workplace health and safety with an employee's right to privacy and equal/non-discriminatory treatment
- COVID-19 vaccination policies are untested in Canadian law.
- Vaccine policy guidance can be drawn from existing law:
 - Influenza vaccination policy case law
 - Random drug and alcohol policy case law.

Vaccine Policies

- Employers considering implementing vaccination policies should evaluate:
 - Is there evidence of serious health and safety risk in the workplace?
 - Is there evidence vaccinations will minimize health and safety risk?
 - Are there less intrusive methods that may be adopted to minimize health and safety risk?
 - Does the seriousness of the risk and introduction of a vaccination policy outweigh the harm to employee privacy?
 - Discrimination risks?
- Vaccination Incentives
- Assess need for liability insurance in case of illness or injury related to vaccination program

Vaccine Passports

- What is a vaccine passport?
 - Essentially a means of verifying that a person has been vaccinated.
- The Federal, Provincial and Territorial Privacy Commissioners have issued a joint statement regarding the privacy implications of COVID-19 of vaccine passports.
- Employers considering implementing should adhere to the following privacy principles:
 - There must be clear legal authority for introducing use of vaccine passports for each intended purpose.
 - Absent clear legal authority, employers may obtain consent to collect vaccine information.
 - Consent must be voluntary and meaningful, based on clear and plain language describing the specific purpose to be achieved.
 - The vaccination passports must be necessary and effective to achieve the intended public health purpose.
 - The purpose of introducing vaccine passports must be one that a reasonable person would consider appropriate in the circumstances and the privacy risks must be proportionate to the public health purpose they are intended to address.
 - Individuals must have a true choice: consent must not be required as a condition of service.

Vaccine Passports

- Requiring a vaccine or proof of vaccination will not be appropriate for every workplace.
- Until governments provide clear legal authority for vaccine passports, workplaces in a non-health care setting, implementing vaccination passports will likely be subject to significant scrutiny under privacy law and human rights law.

Update on alcohol and drug matters in the workplace

Presented by April Kosten

Agenda

- Accommodation Obligations/Medication Disclosure
- Random Testing

Accommodation Obligations

- Disabilities must be accommodated to point of undue hardship, however, “[e]xtending human rights protections to situations resulting in placing the lives of others at risk flies in the face of logic” (*Chiasson*)
- Human rights not engaged absent actual addiction or subjective perception of disability
 - *Chiasson, Luka*
- Past human rights decisions have confirmed:
 - Terminating employee for policy violation provided they previously had opportunity to refer is not generally *prima facie* discrimination (*Elk Valley*); &
 - A&D testing constitutes BFOR in dangerous work environment
- Human rights do not prevent employers from prohibiting cannabis use (subject to duty to accommodate)

International Brotherhood of Electrical Workers, Local 1620 v Lower Churchill Transmission Construction Employers' Association Inc. (2020 NLCA)

Facts

- Grievor accepted for employment on safety-sensitive worksite
- Grievor disclosed use of medical marijuana; grievor vaped every evening to manage chronic pain
- Grievor failed drug test & refused employment
- Union grieved

International Brotherhood of Electrical Workers, Local 1620 (cont'd)

NL Arb

- Concluded grievor discriminated against, but employer unable to accommodate without undue hardship
- Found employer unable to readily measure “impairment” from medical marijuana with currently available technology

NLSC

- Application for judicial review refused

International Brotherhood of Electrical Workers, Local 1620 (cont'd)

NLCA

- Appeal allowed & arbitrator's decision overturned; employer failed to demonstrate undue hardship
- Absence of test or standard did not lead to conclusion that grievor incapable of performing job
- Employer did not investigate alternatives allowing for individual testing of grievor
- Immediate/perfect accommodation not required
- Employer did not take any steps to explore accommodations

A&D Testing Types

- Reasonable cause
- Post-incident
- Return to work
- Unannounced follow-up (post-treatment)
- Pre-employment & pre-access
- Certification
- Random

Random: *Irving*, SCC (2013)

- First SCC decision regarding random testing
- Obligation to balance privacy vs. safety
- Finding workplace is dangerous is first step in determining if random testing reasonable – begins proportionality exercise:
 - *[a] unilaterally imposed policy of mandatory random testing for employees in a dangerous workplace has been overwhelmingly rejected as an unjustified affront to the dignity and privacy of employees unless there is evidence of enhanced safety risks, such as evidence of a general problem with substance abuse in the workplace*

Random: *Phillips v Westcan* (2020 ABQB)

Facts

- Employer carried out random A&D tests as per policy
- As part of employment application, employee signed agreement subjecting him to random A&D testing as condition of employment if application successful
- Employee was hired & signed offer letter - employment terms included agreeing to be bound by A&D testing policy
- Employee sought permanent injunction to prevent employer from carrying out random testing
- Employee claimed random testing was unconscionable & therefore unenforceable

Random: *Phillips* (cont'd)

ABQB

- Application for injunction dismissed; random testing enforceable
- Employee expressly agreed to random testing as term of employment
- To be unconscionable, term would need to be “*sufficiently divergent from community standards of commercial mortality*”
- Court held no divergence from community standards & enforceable
- Court concluded that even if no enforceable contractual term, unilaterally imposed random testing regime would be upheld as proportionate response
- Significant rate of positive testing in random tests, physical evidence of alcohol at work, vast workplace & inherently dangerous work

Questions

Moderator



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