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The Danger of Being Wrong about Human Rights Workshop

Hosted by: Boughton's Employment and Labour Group

March 25, 2010

*Feel like you're walking a fine line? In this seminar we'll look down at the biggest risks for your business
and help you safely to the other side.*



Topics specifically covered include:

- *Spotting human rights issues during hiring, firing, and day-to-day operations of your business;*
- *Employer's Duty to Accommodate; and*
- *The Human Rights Tribunal Procedure.*

Workshop Speakers:

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The Danger of Being Wrong About Human Rights
March 25, 2010

Presentation by:

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Welcome!

- This morning we will:
 - a) frighten you with some details of human rights complaints;
 - b) straighten you out about a few myths; and
 - c) enlighten you about the law on human rights with the goal of helping you, your managers and your human resource department avoid human rights complaints.



Part 1

Introductory Remarks and Overview Michael J. Weiler



An Increase in Human Rights Litigation

- Human rights complaints and litigation has skyrocketed over the last number of years
- This is in large part due to the Supreme Court of Canada's case in B.C. v. BCGSEU ("*Meiorin*") [1999] 3 S.C.R. 3.



The Meiorin Test and the Restatement of the Duty to Accommodate

- In order for an employer to establish a bona fide occupational requirement in defense of its actions it must establish the following elements:
 - That the employer adopted the standard for a purpose rationally connected to the performance of the job;
 - The employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfillment to that legitimate work related purpose; and
 - The standard is reasonably necessary to the accomplishment of the work related purpose.
- To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship on the employer.



A Common Sense Approach to the DTA

- SCC also directs that a “common-sense” and practical approach be taken to human rights complaints, including a consideration of the duty to accommodate:
 - The factors that will support a finding of undue hardship are not entrenched and must be applied with common sense and flexibility (*Meiorin*, at para. 63; *Commission scolaire régionale de Chambly v. Bergevin*, [1994] 2 S.C.R. 525, at p. 546; and *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489, at pp. 520-21).
 - For example, the cost of the possible accommodation method, employee morale and mobility, the interchangeability of facilities, and the prospect of interference with other employees’ rights or of disruption of the collective agreement may be taken into consideration.
 - Since the right to accommodation is not absolute, consideration of all relevant factors can lead to the conclusion that the impact of the application of a prejudicial standard is legitimate.
McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l’Hôpital général de Montréal, [2007] 1 S.C.R. 161, 2007 SCC 4 (para. 15)



How Litigious Can It Get?

- See *Brown v. PML and Wrightman* (No. 4), 2010 BCHRT 93
 - Complaint by employee that employer discriminated against her during and upon her return from maternity leave, alleging discrimination on the basis of sex and family status
 - 15 days of hearing, 6 lawyers (3 each), and a 259 page decision of 1218 paragraphs resulted in 2 orders against the employer for \$10,000 each, with further submissions sought on compensation for legal expenses and expert fees



A New System

- In 2002, the government went to a direct access system with funding for a human rights clinic to represent complainants.
- The clinic services are provided by the BC Human Rights Coalition up until the time the complaint is set for hearing, and then the Community Legal Assistance Society represents complainants.
- Not all complainants have access to these services and they must either represent themselves or retain counsel.



Expansion of HRT Remedies

- As we will see, the Tribunal has broad powers to remedy human rights violations, including orders for payment of lost wages, reinstatement, damages for injury to dignity and hurt feelings, and legal fees.
- In one case, the Tribunal awarded \$35,000 for hurt feelings.
- In another case, UBC claimed \$150,000 in legal fees in a case that was dismissed on a preliminary objection with no hearing days on the merits of the case (and the parties are now at judicial review).



Expansion of HRT Remedies cont'd

- In one case, the damages were over \$2 million.
- In another case, three years wages were ordered, the total bill for the employer is almost \$400,000, and they are still at judicial review.
- There have been an increasing number of human rights cases (with their attendant costs) in the courts, including the BC Court of Appeal and the Supreme Court of Canada.



Worst Case Scenario

- Perhaps the best example of what can go wrong in a human rights case is found in the 10 year odyssey involving the B.C. government and one of its liquor store managers: *BC v. BCGEU* 2008 BCCA 357 (Gooding), leave to appeal to the SCC denied.



Part 2

Procedure & Strategy at the HRT

Elizabeth A. Reid



The Bad News: Annual Report of the British Columbia Human Rights Tribunal (the "Tribunal"), 2008-2009

- There were 1,141 human rights complaints filed with the Tribunal;
- The most common inquiries posed to the Tribunal related to employment, and the vast majority of filed complaints (64%) related to employment;
- Mental and physical disabilities were cited as the grounds for discrimination in 40% of all cases, making disability the single largest category of discrimination.



Examination of Human Rights Complaint

The Players

1. The Discrimination
2. Human Rights Tribunal or Commission
3. Tribunal Staff, Members or Commissioners
4. Complainant
5. Respondent
6. Witnesses
7. Experts
8. Lawyers
9. Advocacy Groups
10. Interveners



Western Canadian Tribunals & Commissions

Commission or Tribunal	Legislation	Website
Canadian Human Rights Commission and Canadian Human Rights Tribunal	<i>Canadian Human Rights Act</i>	Chrc-ccdp.ca (commission) Http://www.chrt-tcdp.gc.ca (tribunal)
British Columbia Human Rights Tribunal	<i>BC Human Rights Code</i>	Bchrt.bc.ca
Yukon Human Rights Commission	<i>Yukon Human Rights Act</i>	Humanrights@yhrc.yk.ca
Alberta Human Rights and Citizenship Commission	<i>Human Rights, Citizenship and Multiculturalism Act</i>	Albertahumanrights.ab.ca



Examination of a Human Rights Complaint

THE PROCESS

See Hand-Out



Overview of the Decision Making Power of the Tribunal (s. 37 of the HR Code)

- The Tribunal can:
 1. declare that you have discriminated against an employee;
 2. make you fix the discrimination in your workplace in whatever manner it deems appropriate;
 3. make you reinstate an employee who was fired or grant a privilege to an employee that was denied;
 4. make you pay the employee for lost wages and other costs incurred as a result of the discrimination;
 5. make you pay the employee for hurt feelings or injury to dignity or self-respect; and
 6. if it thinks you breached the tribunal's rules or otherwise conducted yourself improperly in defending the complaint, make an award of costs.



Procedural Strategies

1. Applications to Dismiss
2. Applications to Defer
3. Early Settlement Offers
4. Applications to Limit Public Disclosure



Applications to Dismiss (Generally)

- burden is on the employer to show that the complaint should be dismissed
- in 2008-2009, 61% of applications to dismiss resulted in a complete (47%) or partial (14%) dismissal of the complaint
- you only get one chance, so make sure you are ready
- you must bring the application within the time limit specified in the Rules
- You must put forward evidence in support of your application



Procedural Strategies - Applications to Dismiss

Under s. 27, a respondent can apply to have a claim dismissed on any of the following grounds:

- No jurisdiction
- No contravention alleged
- No reasonable prospect of success
- No point in proceeding
- Improper motives
- Complaint is out of time
- Failure to pursue
- Substance of complaint already dealt with in another proceeding



1. No Jurisdiction & No Contravention

1. No Jurisdiction

- Consider time limits, constitutional issues, and whether the complaint falls within the HR Code

2. No Contravention of the HR Code Alleged

E.g. *Moyeni v. Vision 2000 and others*, 2009 BCHRT 201



3. No Reasonable Prospect of Success

- is not an application to determine whether the complainant has established a prima facie case of discrimination, nor to determine the bona fides of the response
- is an assessment, based on all of the material before the Tribunal, of whether there is a reasonable prospect the complaint will succeed - *Geldreich v. Whisper Creek*, 2009 BCHRT 178
- Unlikely to be successful if there are serious differences in the facts – *Criper v. Helton Industries*, 2009 BCHRT 190



4. No Point in Proceeding

- This application should be considered if:
 - (a) the impact of the discrimination is limited - *Callahan v. Capilano Suspension Bridge*, 2009 BCHRT 127; or
 - (b) individual employees are named as respondents along with their employers - *Bogner v. Octaform Systems and others*, 2009 BCHRT 148, citing *Daley v. B.C.*



5. Improper Motives

- Least likely to be successful
- Tribunal has to be satisfied that the complaint was filed on the basis of something other than an honest belief that the allegations in it occurred and amounted to a breach of the Code
- Standard is an objective one
- Employer must show that the allegations have no foundation in fact or reality and are made for spurious reasons



6. Complaint Out of Time

- > 6 months since the last contravention
- Be sure there are no continuing violations
- In duty to accommodate cases, may be a continuing violation if you continue to fail to accommodate the employee
- Must not be in the public interest to accept the complaint



7. Failure to Pursue (Rules s. 4(3)-(5))

- Pay attention to whether the complainant responds to the Tribunal in a timely way
- If he or she does not, a member may dismiss the complaint



Applications To Defer (s. 25, HR Code)

- May be able to defer a complaint until another proceeding is completed
 - The Tribunal will consider all of the factors it considers relevant, including the:
 - subject matter of the other proceeding
 - nature of the other proceeding
 - adequacy of the remedies available in the other proceeding
 - the timely resolution of the human rights issue
 - the status of the other proceeding in relation to the status of the complaint, and whether it has already been scheduled
- (*Young v. Coast Mountain Bus Company Ltd.*, 2003 BCHRT 28)



Other Procedural Strategies – Early Settlement Offers

- It is never too late to settle: See *Carter v. Travelex Canada Limited*, 2009 BCCA 180.
- *Carter* confirmed that the scope of section 27 of the HR Code is broad enough to allow a tribunal to dismiss a complaint on the basis that the complainant failed to accept a reasonable settlement offer.



Applications for Disclosure of Documents

- Rule 29 allows applications for disclosure of specific documents by parties
- Section 34 of the *Administrative Tribunals Act* allows the Tribunal to order a third party to produce documents – this can be particularly useful for medical evidence required in duty to accommodate cases



Applications to Limit Public Disclosure

- Three months before a hearing, certain parts of the complaint file are made public
- Applications can be made under Rule 6(5) to limit disclosure
- It is difficult to succeed unless there is extremely sensitive personal information which would be revealed



Conclusion – The Good News

Of the 1,188 complaints which were closed with the Tribunal in 2008-2009:

- 31% were not accepted (i.e. they were rejected by the Tribunal because it did not have jurisdiction or because the complaint was filed out of time);
- 17% were dismissed;
- 16% were withdrawn or abandoned;
- 35% were settled; and
- only 1% of complaints went to a full hearing and were successful.



Part 3

Prima Facie Discrimination &
The Elimination of Mandatory Retirement

Anne Muter



Prohibited Grounds - Provincial

- For provincially regulated employee's, the B.C. *Human Rights Code* provides that no employer may refuse to employ, continue to employ, or discriminate with respect to employment, or a term or condition of employment because of:

- Race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age.

- EXCEPTIONS:

- Where it is based on bona fide occupational requirement;
- As it relates to a bona fide scheme based on seniority;
- As it relates to some prohibited grounds and the operation of a bona fide retirement, pension, or insurance plan; and,
- As permitted or required by an Act or regulation.

(B.C. *Human Rights Code* ss. 11, 13, 41)



Prohibited Grounds - Federal

- For federally regulated employees, the *Canadian Human Rights Act* prohibits discrimination on the basis of:

- Race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted.

- EXCEPTIONS:

- If it is based on a bona fide occupational requirement;
- As allowed by statute, or prescribed guidelines;
- For discrimination on the basis of age if the employee has reached the "normal age of retirement for employees working in similar position" or if they are not within the minimum or maximum age limitations as may apply (N.B. this is different than for provincially regulated employees);
- As it relates to specific types of pension benefits;

(*Canadian Human Rights Code*, s. 3, 15)



The Basic Test for Prima Facie Discrimination

- Generally, the initial onus is on the employee to establish a prima facie case of discrimination, by proving:
 - The employee is, or was perceived to be, a member of a group protected under the enumerated grounds of the code;
 - The employee experienced adverse treatment or consequences; and,
 - It is reasonable to infer from the evidence that the protected ground was a factor in the adverse treatment or effect.



The Basic Test for Prima Facie Discrimination cont'd

- This test is the simplified version used the BC Human Rights Tribunal and arbitrators in the past
(Health Employer Assn. of B.C. (Kootenay Boundary Regional Hospital v. B.C. Nurse Union, 2006 BCCA 57("HAEBIC"))).
- However, it does not take into further complexities in evaluating on a more individual level the nature of the connection between the treatment and the membership in the group and the arbitrariness or stereotypical assumptions involved, as set out in recent S.C.C. decisions
(see McGill University Health Care Centre v. Syndicat des employés de l'Hôpital général de Montréal, 2007 SCC 4 ("McGill"), minority judgment by J. Abella; Law v. Canada (Minister of Employment and Immigration, [1999] 1 S.C.R. 497 ("Law"))).



The Basic Test for Bona Fide Occupational Requirement

- Once the employee has established prima facie discrimination, the onus shifts to the employer to defend or justify the conduct or requirement.
- The main justification is that the treatment was because of a bona fide occupational requirement. In order to rely on this, an employer must establish:
 - The requirement or conduct was adopted by the employer because it was rationally connected to workplace performance;
 - The requirement or condition was adopted in good faith belief that it was a necessary requirement; and,
 - That it can be demonstrated that the requirement is reasonably necessary to accomplish the work AND that the duty to accommodate has been met.



Leading Authorities - Sandu

- The complainants were not actively at work due to disability when the employer provided severance by agreement with the union for the partial closure of a mill. As non active employees, the complainants did not receive severance (*International Forest Products Ltd. v. Sandu*, 2008 BCCA 204 ("**Sandu**").
- The Tribunal compared the complainants with the active employees and found discrimination.
- The Court of Appeal found that the Tribunal erred in its use of the comparator group and in not considering the legal considerations from the tests developed under the *Charter* (see *McGill*). The court adopted previous language about the need to conduct a more individualized assessment of the arbitrariness of the impact on the individual.



Leading Authorities – Sandu cont'd

- In quashing the lower decision, the Court of Appeal held that:
 - The evidence before the tribunal is incapable of supporting the conclusion that the agreement contained anything other than a fair and commercially-sensible distinction between the respondents and active employees on the basis of availability for work. It was clearly not a distinction based upon physical or mental disability. The respondents did not receive severance pay because they did not become available for work before retirement or before Interfor invoked the absenteeism clause in the collective agreement. They suffered no disadvantage under the agreement between Interfor and the union. The agreement caused no negative impact on the respondents and the distinction was not discriminatory on a proper application of *Andrews* (*Sandu* at para 33).



Leading Authorities – Gooding

- The arbitrator found that the employer breached the *Human Rights Code* when it fired a supervisory employee who had repeatedly stolen alcohol from the store and suffered from alcoholism.
(British Columbia (Public Service Agency) v. BCGEU, 2008 BCCA 357, leave to the SCC denied (“Gooding”))
- The B.C. Court of Appeal (leave to appeal to the SCC was denied) framed the issue as whether a prohibited ground of discrimination was one of the factors taken into account and contributed to the decision.



Leading Authorities – Gooding cont'd

- The Court of Appeal held that:
 - I can find no suggestion that Mr. Gooding's alcohol dependency played any role in the employer's decision to terminate him or in its refusal to accede to his subsequent request for the imposition of a lesser penalty. He was terminated, like any other employee would have been on the same facts, for theft. The fact that alcohol dependent persons may demonstrate "deterioration in ethical or moral behaviour", and may have a greater temptation to steal alcohol from their workplace if exposed to it, does not permit an inference that the employer's conduct in terminating the employee was based on or influenced by his alcohol dependency.
(*Gooding* at para 11)



Leading Authorities – Gooding cont'd

- The Court of Appeal went on to reference leading decisions and state that:
 - The essence of discrimination is in the arbitrariness of its negative impact.
 - This year, the majority of the Supreme Court of Canada reiterated the importance of proof of discriminatory conduct (in the sense of stereotyping or arbitrariness) by the employer...
(*Gooding* at para 13, 14)



Leading Authorities – Gooding cont'd

- This suggests that there is something more than a connection between the conduct and the protected ground; a possible requirement of proof of arbitrariness or stereotypical assumptions.
- This case is intriguing because there was evidence that the thefts were caused by the complainant's addiction, but the Court of Appeal found that it was his addiction was not a **factor** in his treatment and thus prima facie discrimination was not established. It raises the question about the relevance of the alleged discriminator's intention or state of mind was at the time.



Recent Decisions - *USWA v. Weyerhaeuser*

- The United Steel-Workers Association, Local 1-423, filed a complaint that 4 of their members had been discriminated in their employment on the basis of mental and physical disability (*USWA v. Weyerhaeuser*, 2009 BCHRT 328("USWA v. Weyerhaeuser"))
- The 4 employees had been on LTD benefits for periods ranging from months to years. The employer terminated their employment based on non-culpable absenteeism, giving notice April 9, 2007 with termination effective June 15, 2007. The union did not file grievances.
- On September 17, 2007 the employer announced permanent closure of the mill effective December 17, 2007. The Collective Agreement provided severance to employees terminated at the time of permanent closure. Because the 4 employees were not employees at that time, they did not qualify for severance.



Recent Decisions - *USWA v. Weyerhaeuser* *cont'd*

- The union alleged the 4 employees had been terminated to avoid being paid severance.
- The Tribunal turns to the issue of the applicable test for prima facie discrimination, setting out the “simple” 3 part test
(*USWA v. Weyerhaeuser* at para 213).
- The issue was raised as to whether the test had been changed and something more than a connection was required at the 3rd stage as in *Sandu*, where McGill is cited for the requirement of arbitrariness or stereotypical assumptions. However, the Tribunal does not address these interesting issues and finds that really nothing has changes despite clear discussion of changes underway towards a more purposive approach.



Recent Decisions - *Armstrong*

- The complainant alleged discrimination on the basis of sex, because the province did not pay for his prostate cancer screening test (PSA) while it pays for cervical and breast cancer screening tests for women (PAPS and mammograms) (*Armstrong v. British Columbia (Ministry of Health)*, 2010 BCCA 56 (“*Armstrong*”).
- The Human Rights Tribunal held that prima facie discrimination had not been established.
- The B.C. Supreme Court overturned the Tribunal on basis the Tribunal erred in the legal test, considering the differences in the jurisprudence between the legal tests for discrimination of the *Human Rights Code* versus discrimination as a violation of the *Charter*.



Recent Decisions – *Armstrong* cont'd

- The matter is then appealed to the Court of Appeal, and supports the three part test for prima facie discrimination, as referred to above, noting particularly:
 - That the Supreme Court judge may have been overly broad in defining the comparator group at stage 2nd of the test as women who want access, when only women of certain age categories receive the screenings at no cost.
 - At the 3rd stage of the test, the question is whether the protected grounds or characteristic was a factor in the adverse treatment, stating that “there must be a link or nexus between the protected ground or characteristic and the adverse treatment” (*Armstrong* at para 24).
 - As in *Gooding*, the court refers to the minority judgment of Abella J. in *McGill* that, “it is the link between that group membership and the arbitrariness of the disadvantaging criterion or conduct, either on its face or in its impact, that triggers the possibility of a remedy” (*Armstrong* at para 25)



Recent Decisions – *Armstrong* cont'd

- On the “interesting legal question” of whether there was a new element beyond the 3 part test to prove arbitrariness, the Court of Appeal held that such a separate requirement does not exist, but was already incorporated within the goal of the 3rd part of the test.
- The Court of Appeal declined to address whether or not the second legal test in the context of the *Charter* was applicable, as it was unnecessary to making the judgement and had not impacted the Tribunal’s decision.
- The B.C. Court of Appeal reinstated the Tribunal’s dismissal of the complaint.



The Elimination of Mandatory Retirement in BC

January 2008 Amendments

- The B.C. *Human Rights Code* prohibits discrimination on the basis of age.
- Before the amendments effective January 1, 2008 the *Human Rights Code* defined “age” as: an age of 19 years and less than 65 years.
- The *Human Rights Code (Mandatory Retirement Elimination) Amendment Act, 2007* changed the definition of age: an age of 19 years or more.
- Therefore, discrimination based on all ages is prohibited, except if under the age of 19.
- Federally regulated employees have not been affected by the recent change, because the *Canadian Human Rights Code* applies and treats mandatory retirement differently.



The Elimination of Mandatory Retirement in BC

Implications

- This means that mandatory retirement programs, policies and practices are now illegal in B.C.
 - In other words, a person required to retire based on their age may make a discrimination claim with the Human Rights Tribunal.
 - An employer then has to be able to prove that there was a bona fide occupational requirement.
- It does NOT mean that “Normal Retirement Age” of 65 in pension plans must change. What it prohibits is a “Mandatory Retirement Age”.
- It is NOT retroactively effective.
- It means that employment contracts that previously ceased at age 65 are now indefinite term contracts.
- It removes an upper limitation on damages for wrongful dismissal, because the contract was not going to end in any event at age 65.



Part 4

The Importance of Following the Procedural Aspects of the Duty to Accommodate

Michael J. Weiler



The Importance of Procedure in the DTA: Form Over Substance

- The following 3 cases demonstrate that the Tribunal places almost as much importance on the procedural aspects of the DTA than it does on the substantive aspects of the Complaint.
- The Tribunal separates out these two aspects in its analysis—first it will consider the procedure adopted to assess the DTA and then proceed to consider the substantive aspects of the DTA.
- Simply stated: The ends will not always justify the means when it comes to human rights.



Datt v. McDonald's Restaurants Of Canada Ltd., 2007 BCHRT No 324 ("Datt v. McDonald's")

- Bad facts often make bad law.
- McDonald's terminated Ms. Datt due to her inability to comply with McDonald's hand washing requirements after she developed a skin condition while performing her duties as a crew person.
- Ms. Datt was a long service and loyal McDonald's employee who loved her job. She had been with McDonald's 23 years when she was terminated. She earned \$9.75 per hour.



Datt v. McDonald's: Facts

- Ms. Datt went on disability and tried unsuccessfully to return to work 3 times.
- The medical information was primarily between Ms. Datt's doctors and GWL, the insurer. Her doctors stated among other things that she could not perform any job requiring "frequent hand washing ever" and that she could not return to a "restaurant position with McDonald's".
- McDonald's terminated her because of her doctor's note that she could not work in the restaurant business. The employer also relied on GWL's conclusions that she could not return to restaurant work.



Datt v. McDonald's: Holding

- The Tribunal found that McDonald's had violated the Code and that it had failed to accommodate Ms. Datt to point of undue hardship.
- It did so despite stating that “It may be that, at the end of the day, Ms. Datt could not have been accommodated at McDonald’s because she simply could not meet its hand-washing policies doing any job or combination of jobs, but based on the evidence, McDonald's failed to take all the necessary steps to make this final determination.”



Datt v. McDonald's: Remedy

- McDonald's was found liable for:
 - the net loss of two years wages;
 - top up costs for taxes on the lump sum;
 - loss of profit share;
 - medical and dental expenses and interest.
- Ms. Datt was also awarded \$25,000 for compensation to injury, dignity and self-respect.
- Perhaps the scariest part of the award is the Tribunal’s comments that in the appropriate case it might well award future wage loss. Here there was no expert evidence to prove such a claim and therefore this aspect of the claim was dismissed as being too speculative.



Datt v. McDonald's: Why did McDonald's lose?

1. It relied too heavily on the advice and dealings with GWL. The Tribunal stated "The law is clear and I have no difficulty in finding that this primary responsibility [the DTA] lies with McDonald's."
2. McDonald's failed to recognize its obligation that as an employer it "must take the necessary steps to inform itself of the nature of the employee's medical condition, the prognosis and the employee's capabilities for alternate work".
3. McDonald's did not fully appreciate the heavy onus on it to prove that that it had satisfied the DTA.
4. McDonald's tried to hide behind the regulations and common sense that require frequent hand washing, and did not explore what the doctors meant by "frequent hand washing". Although McDonald's might not have been obligated to create a job it certainly had to consider modifying jobs or organizing them in a different way.



Datt v. McDonald's: Why did McDonald's lose?

5. Finally McDonald's forgot that this case would be considered in the context of a David versus Goliath conflict:
McDonald's did not argue that it did not have the financial, or other resources, to accommodate Ms. Datt. Given the size of McDonald's, and the resources available to it, I am at a loss to understand why McDonald's did not take more steps to try and accommodate Ms. Datt, a 23-year committed employee. Ms. Datt was not entitled to a "perfect" solution, but she was entitled to fulsome consideration of her restrictions and how those restrictions intersected with the hand-washing policies and the jobs that were available. Without having done so, neither Ms. Datt nor McDonald's was in a position to know what the outcome of a return to work, with accommodations, might have been (at para. 249).



Senyk v. WFG Agency Network (B.C.) Inc., 2008 BCHRT 376 (“Senyk v. WFG”)

- Ms. Senyk was a 59 year employee of a small local insurance agency in Kelowna. It was sold in 1998 to a large agency. Ms. Senyk had worked for the agency for over 34 years and was a top producer earning in excess of \$100,000 in 2003.
- She went LTD in April 2004 and was terminated after 2 years absence while she was still on LTD in April 2006. She was terminated by way of an email. The Tribunal found that in fact she continued to be totally disabled and was receiving LTD as of the hearing some 2 years after her termination in April 2006 and some 4 years after the start of her medical leave. The Tribunal found that it was not probable that she would return to work in any capacity.



Senyk v. WFG: Facts

- Ms. Senyk advanced two claims. First she claimed that she was harassed by her managers in the course of her employment from 2000-2004 when she went on medical leave. Secondly she claimed that WFG discriminated against her when it terminated her employment on April 7th 2006.
- The Tribunal dismissed the first part of the complaint stating it was unable to find that WFG discriminated against Ms. Senyk during her period of active employment up to April 2004.



Senyk v. WFG: Facts cont'd

- However, the Tribunal found that WFG did discriminate against Ms. Senyk when it terminated her employment in April 2006 and that it was not justified as a bona fide occupational requirement under the Meiorin test.
- The Human Resource Manager was located in Alberta and had been dealing with Ms. Senyk by email for the most part. She decided to terminate Ms. Senyk at the 2 year absence and conveyed this news by way of an email of April 7th 2006. It is worth noting the content of that email: see hand out.



Senyk v. WFG: Legal Frustration

- The Tribunal used this occasion to affirm that the doctrine of legal frustration applies to the Code.
- There comes a point in time where it can be said that the employee becomes incapable due to a disability to perform work as required under an employment contract and the employer is at that point relieved of its obligations under the employment contract.
- The Code does not abrogate the doctrine of frustration. What constitutes frustration will depend on the facts of each case and the fact that someone is absent for two or even three years, does not necessarily constitute legal frustration.



Senyk v. WFG: Holding

- WFG violated the Code even though at the time of the hearing, some 4 years in to Ms. Senyk's absence, it was clear that the contract was legally frustrated.
- WFG failed to follow the procedural aspects of the DTA and the Tribunal was clearly offended by what it perceived as the callous way in which the employment relationship was ended.



Senyk v. WFG: Holding cont'd

- The Tribunal held that the DTA includes the obligation for the employer "to inform itself of the employee's disability and to make enquiries as to whether it could be accommodated without undue hardship."
- The procedural content of the DTA "may be rendered meaningless if respondents are permitted to justify prima facie discriminatory decisions by reference to after the fact and after-acquired, evidence of the nature of the disability."



Senyk v. WFG: Lessons Learned

- The failure to engage Ms. Senyk in a discussion of her situation at the time she was terminated was fatal to WFG's defense.
- Ms. Senyk was entitled to be put on notice that her employment was in jeopardy.
- WFG should have enquired as to her current or future ability to return to work. This failure constituted a lost opportunity to be heard and to prepare herself for the eventual termination.
- In this case it was found that the April 7th 2006 email had a devastating effect on Ms. Senyk. The fact that WFG did not have to terminate Ms. Senyk at that time, brought into question their motives in terminating at the time and in the manner it did.



Senyk v. WFG: Remedy

- In a lengthy and precedent-setting decision, the Tribunal ordered the following:
 - A declaration that WFG had discriminated against Ms. Senyk and a cease and refrain order
 - \$35,000 for injury to dignity, hurt feelings, and self-respect
 - Reasonable legal fees and expenses
 - \$10,000 for additional expenses
- Although on the facts of this case, Ms. Senyk was not entitled to lost wages because the discrimination did not itself render her incapable of working, had her disability improved sufficiently by the date of her termination to the point that the evidence established that it was the termination which caused her inability thereafter to return to work, WFG could have been liable for an order for substantial lost salary. Further, the Tribunal noted that in the appropriate case, an employer may be liable for lost salary in lieu of reinstatement.



Senyk v. WFG: Legal Fees Update

- Since the *Senyk* decision, there have been two decisions of the Tribunal that address legal fees
- In *Kerr v. Boehringer Ingelheim (Canada) (No. 5)*, 2010 BCHRT 62, the Tribunal held that it had no jurisdiction to award legal costs for the period after the complaint was filed, but it could award legal costs incurred prior to the complaint being filed
- In *Brown v. PML*, supra, the Tribunal noted the conflict in the two decisions and asked the parties for submissions on this point. As a result, the Tribunal's case law on the issue of legal costs "is in a state of some uncertainty": *Wells v. UBC and others* (No. 4), 2010 BCHRT 100.



Cassidy v. Emergency Health and Services Commission, 2008 BCHRT 125 ("Cassidy v. EHSC")

- This case further illustrates the need to be careful about not only the substantive aspects of the DTA but also the procedural aspects. This case sets what I consider to be a dangerous precedent.
- The issue involved the actions taken by the BC Ambulance Service ("BCAS") in respect of a paramedic who had MS. As a result he had diminished sensation in his hands resulting in an inability to palpate pulses. Paramedics are required as part of their jobs to palpate pulses.
- The case is unusual in that Mr. Cassidy was represented by a union and was covered by a collective agreement. Further, Mr. Cassidy, while unable to be employed as a paramedic, remained in the employ of the BCAS.



Cassidy v. EHSC: Holding

- In yet another extraordinarily long and complex judgment (almost 600 paragraphs) and 22 days after hearing including extensive expert evidence the Tribunal dismissed the substantive part of the complaint.
- It found that the employer had established that the requirement that paramedics be able to manually palpate pulses is a BFOR as it was not reasonably possible to accommodate Mr. Cassidy by allowing him to work as an attending paramedic in light of his inability to do so.



Cassidy v. EHSC: The Importance of Procedure

- “The conclusion that the BCAS is justified in refusing to allow Mr. Cassidy not to work as an attending paramedic is not, however, the end of the analysis. The question remains to be considered: did the BCAS treat Mr. Cassidy fairly, and with due respect for his dignity, throughout the accommodation process? A failure to do [so] may result in a breach of the procedural aspect of the duty to accommodate, notwithstanding the fact that the standard the employer applied to the employee was otherwise justified.”



Cassidy v. EHSC: Mistakes Made

- The following factors went into the Tribunal's finding that BCAS did not treat Mr. Cassidy fairly and with due respect to his dignity in the process it adopted:
 - Despite having the functional limitation for over a year, he was abruptly informed, by telephone, that he was no longer permitted to work. The circumstances called for a more sensitive approach, such as a face-to-face meeting.
 - BCAS treated the issues as a safety hazard, which was demeaning to Mr. Cassidy. Mr. Cassidy should have been treated not as a safety risk, but rather, as “a human being to whom the employer owed a duty to accommodate”.



Cassidy v. EHSC: Mistakes Made cont'd

- Inappropriate comments were made to other crew members having the effect of spreading and perpetrating misinformation about Mr. Cassidy's condition and its real functional effects.
- While BCAS was justified in not allowing Mr. Cassidy to work as an attending paramedic, he should have been allowed to work in some other capacity. The BCAS did not properly co-operate with Mr. Cassidy and his union.



Cassidy v. EHSC: Mistakes Made cont'd

- Mr. Cassidy was not entitled, during this period, to any kind of income replacement benefits. BCAS should have, in light of the financial circumstances, been pro-active and diligent in returning him to the workplace in some capacity. Any effort on BCAS's part to do so was belated, half-hearted, and grudging, demonstrating a lack of respect for Mr. Cassidy's human dignity.
- In the absence of medical evidence, BCAS took active steps to seek to have Mr. Cassidy's driver's license revoked.
- BCAS took active steps to seek to have Mr. Cassidy's paramedic license revoked.



Cassidy v. EHSC: The Tribunals Conclusion

- Accordingly, the Tribunal concluded:
"Taking the entire history of the matter into account, I find that the BCAS failed to comply with the procedural aspect of the duty to accommodate, in that it failed to treat Mr. Cassidy fairly or with due respect. By its conduct, the BCAS subjected Mr. Cassidy to unnecessary frustration, anxiety, and financial insecurity and hardship.

This case highlights the importance of the procedural aspect of the duty to accommodate. Even where a respondent is ultimately able to justify its standard, including showing that the standard is reasonably necessary, in that it would be impossible to admit exceptions to that standard without causing undue hardship, the respondent remains under an obligation to treat the individual to whom the standard is being applied fairly, and with dignity and respect, throughout the accommodation process. The failure to do so may cause real and substantial harm to the person to whom the standard is applied, and may substantially undermine the fundamental principles upon which our human rights law is based."



Cassidy v. EHSC: Reasons for the Remedy

- The complaint was upheld in part as the BCAS and Mr. Cassidy's supervisor failed to comply with the procedural aspect of the DTA.
- The damage award and the basis for such an award are found at paras 585 -589 and are as follows:
- The manner in which the respondents chose to deal with Mr. Cassidy left him anxious and frustrated. He never knew from day to day when or if the respondents would allow him to return to work. In his July 15, 2005 telephone conversation with Mr. Garland, he complained that he felt like the goal posts kept moving. In the circumstances, this feeling was entirely justifiable.



Cassidy v. EHSC: Reasons for the Remedy

- The respondents, in particular Mr. Garland, viewed Mr. Cassidy with suspicion and hostility. Mr. Mann, Mr. Cassidy's direct supervisor, evidently shared those feelings. Members of his crew became fearful of working with him as a result of Mr. Mann's comments and the respondents' failure to address them effectively. While many of the explicit expressions of these feelings were not communicated directly to Mr. Cassidy, it is reasonable to infer that they would have affected all of these people's direct interactions with Mr. Cassidy.



Cassidy v. EHSC: Reasons for the Remedy

- All of this went on for a substantial period of time – over a year passed between the May 13, 2005 phone call informing Mr. Cassidy that he was being removed from active service and the June 14, 2006 meeting at which Mr. Harder agreed to allow him equal access to the schedule as a driver only. The length of time over which Mr. Cassidy was subjected to unnecessary uncertainty and the deprivation of his livelihood is a significant factor weighing in favour of a larger award. In many ways, living with such uncertainty over a prolonged period of time may be more harmful than the short, sharp sting of termination.



Cassidy v. EHSC: Reasons for the Remedy

- An employer such as the BCAS which is charged with looking after vulnerable people in difficult circumstances must be vigilant in ensuring that its workforce is functionally able to serve that vulnerable user group. As submitted on its behalf, the BCAS is a sophisticated employer, and the care of sick and injured people is its daily bread. The BCAS had special expertise in considering the significance of Mr. Cassidy's functional limitations, and I have found that the BCAS and Mr. Garland had legitimate concerns about Mr. Cassidy's functional ability to serve patient needs in the capacity of an attending paramedic. Those legitimate concerns entitled them to take Mr. Cassidy out of active service, and not to allow him to return to work as an attending paramedic. They did not entitle the BCAS and Mr. Garland to treat Mr. Cassidy in the manner they did: with little or no concern for Mr. Cassidy's legitimate interests, insensitive to the effects which their actions had on him.



Cassidy v. EHSC: Remedy

- Mr. Cassidy was entitled to a sizeable award for injury to dignity, feelings and self-respect, and quantum was assessed at \$22,500.00.
- The other scary part of this award is the fact that the manager was found jointly and severally liable for the damages. The chilling effect of such a decision on a manager's ability and desire to act on behalf of an employer in a unionized setting cannot be overstated.



Cassidy v. EHSC: Remedy

- The issue of the appropriate remedy was further considered in *Cassidy v. Emergency and Health Services Commission and another (No. 3)*, 2009 BCHRT 110 (CanLII).
- The HRT ultimately awarded Mr. Cassidy an additional \$35,000 in damages.



Summary

- It is possible that all three employers would have avoided violating the Human Rights Code if they had made two phone calls:
 1. A call to their lawyers; and
 2. A call to (and face-to-face meeting with) the complainant before they terminated his or her employment.
- Treating the complainants with respect and dignity while being sensitive to their particular circumstances would have likely cost none of these employers a great deal of money, but may have saved them a great deal of money.



Thank you!

