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AVOIDING SEXUAL HARASSMENT AND DISABILITY COMPLAINTS

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AVOIDING SEXUAL HARASSMENT AND DISABILITY COMPLAINTS

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I. INTRODUCTION

This paper will address two main areas of human rights violations facing employers: sexual harassment and disability.

Employers and unions are subject to human rights legislation. Section 13 of the *Human Rights Code* (the “Code”) provides:

- (1) A person must not
 - (a) refuse to employ or refuse to continue to employ a person, or
 - (b) discriminate against a person regarding employment or any 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 of that person or because that person has been connected of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person.
- (2) An employment agency must not refuse to refer a person for employment for any reason mentioned in subsection (1).
- (3) subsection (1) does not apply:
 - (a) As it related to age, to a bona fide scheme based on seniority, or
 - (b) As it related to marital status, physical or mental disability, sex or age, to the operation of a bona fide retirement, superannuation or pension plan or to a bona fide group or employee insurance plan.
- (4) Subsections (1) and (2) do not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.

II. HARASSMENT

Harassment is unwelcome conduct that has a negative impact on the work environment or leads to negative work consequences for the person being harassed. The unwelcome conduct must be related to the prohibited grounds of discrimination: race, colour ancestry, place of origin, political belief, religion, marital status, family status, physical disability, mental disability, sex, sexual orientation, age, conviction of criminal or summary conviction offence unrelated to employment.

Sexual harassment is discrimination on the basis of sex. Employers have a duty to provide a healthy and respectful work environment free from sexual harassment. If harassment occurs in the work place, employers are responsible. Employers have been held liable for harassment of employees by their co-workers, supervisors or clients.

What precisely constitutes sexual harassment is a subject that often seems to confuse employers as well as their managers and employees. By undertaking proactive measures such as having clear

anti-discrimination policies and moving effectively when employees make complaints, employers can avoid time-consuming legal proceedings. In addition all parties should realize that what may appear to be harmless behaviour for one person can be offensive to another.

For this reason it is almost impossible to give a precise definition of sexual harassment because it covers a wide range of behaviours. The Supreme Court of Canada, in *Janzen v. Platy Enterprises Ltd.*,¹ has broadly defined it “as unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment...”

The Court further stated that “When sexual harassment occurs in the workplace, it is an abuse of both economic and sexual power...By requiring an employee to contend with unwelcome sexual actions or explicit sexual demand, sexual harassment in the workplace attacks the dignity and self-respect of the victim both as an employee and as a human being.”

The courts and the British Columbia Human Rights Tribunal have determined that sexual harassment can range from spoken remarks such as innuendoes about sex or propositions for dates to physical contact or even sexual assault.

This unwelcome conduct includes suggestive or offensive comments or gestures as well as comments regarding sexual orientation. It can be both physical and psychological. It is important to note that harassing actions do not need to be intentional – “it was a joke” or “I meant it as a compliment” are not excuses under the law.

In this province employees who complain of being harassed in the workplace can take their complaints to the BC Human Rights Tribunal, an independent, quasi-judicial body responsible for accepting and resolving complaints under the *BC Human Rights Code*. (Of course, an employee can also pursue a remedy through the courts.) The Tribunal usually attempts to first resolve complaints thorough mediation but, if such efforts are not successful, it may hold a hearing.

To avoid such proceedings, an employer should take a proactive approach towards sexual harassment. Employers that respond quickly and effectively to human rights complaints limit their liability. And those that maintain and distribute a written policy that outlines the complaint procedure for employees are less likely to end up facing legal actions. At a minimum this policy manual should form part of the employment contract and contain the following elements:

- Identification of the person or committee responsible for the policy and its implementation.
- The name or position of responsible person employees can go to if they have a complaint regarding another employee.
- Procedures for updating the complaint procedure and policy regularly.

In addition, employees should have discrimination training for all employees, including supervisors and managers.

When the Tribunal finds that an employee’s sexual harassment accusation is justified, it can, under the Code, order the employer to cease the contravention, to refrain from committing a further contravention under the Code and, in some cases, to attend training sessions. Additionally, the Tribunal can order an employer to pay lost wages and may make a monetary award to an employee

¹ [1989] 1 S.C.R. 1252

for injury to dignity, feelings and self-respect. The following factors will be considered in determining an appropriate award:

- The degree of aggressiveness and physical contact in the harassment
- The ongoing nature and length of time of the harassment
- The frequency of the harassment
- The age of the victim
- The vulnerability of the victim
- The psychological impact of the harassment upon the victim

Finally, an employer should always be mindful that an accused harasser who is dismissed following an unjust disciplinary hearing may have cause for wrongful dismissal. When an alleged harassment appears to be so serious that a dismissal seems likely, the employer should suspend the harassing employee with pay until the case is resolved. This avoids undue financial hardship for a potentially innocent employee.

Finally, you should always deal quickly with the first signs of a potential problem that may involve harassment. Do not wait until a formal complaint has been filed. All complaints should be taken seriously no matter how trivial. Following the company harassment policy closely and carefully, interview affected parties and witnesses and decide on whether discipline should occur only after reviewing all of the evidence.

III. DISABILITY

Human rights laws prohibit employers from discriminating against their employees on the basis of disability. There is no clear definition of what constitutes disability however, over the years courts and human rights tribunals have made decisions as to what is a disability and therefore we must rely on that jurisprudence when concluding whether or not an employee has a disability.

In recent years, as the definition of disability has brought in to include more mental and physical limitations, human rights legislation has also changed to protect disabled people from discrimination in the work place. Some examples of disability include the following: alcoholism, mental or physical disabilities, disfigurement, obesity, drug dependency, mental illness, learning disability, HIV/aids, illnesses, syndromes, and diseases which result in actual or perceived (by others) limitation, handicap or ailment.

Although there have been numerous procedural changes in the past few years to the BC *Human Rights Code*, its basic tenant has remained constant - an employer must accommodate a disabled employee in its work place, unless it can prove in doing so would cause an undue hardship.

The Supreme Court of Canada has addressed this duty to accommodate several times, the pivotal case being *Public Service Employee Relations Commission v. SCGSEU (Re Meiorin)*.² Decided in 1999, *Meiorin* examined the relationship between the duty to accommodate and a “bona fide occupations requirement”. An example of this relationship might be a construction company that claims it cannot safely accommodate a manual worker in a wheelchair on a building site. On the

² [1999] 3 S.C.R. 3.

other hand, it might have a harder time proving that a disabled architect in similar circumstances was unable to supervise the project.

An employer that determines it cannot accommodate a disabled employee must show its decision is rationally connected to the performance of the job and necessary for the accomplishment of a goal.

Establishing this later prerequisite demands considerable examination and analysis: the employer must be able to demonstrate that accommodating the disabled employee in order to meet a job's objective will cause it undue hardship.

The Court in *Meiorin* identified six questions that employers must show they have answered if they are attempting to show they cannot accommodate disabled employees:

1. Has the employer investigated alternative approaches that do not have a discriminatory effect?
2. If alternative standards were investigated, why were they not implemented?
3. Is it necessary to have all employees meet the single standard for the employer to accomplish its legitimate purpose, or could standards reflective of groups or individual differences and capabilities be established?
4. Is there a way to do the job that is less discriminatory while still accomplishing the employer's legitimate purpose?
5. Is the standard properly designed to ensure that the desired qualification is met without placing an undue burden on those to whom the standard applied?
6. Have other parties who are obliged to assist in the search for possible accommodation fulfilled their roles?

In *Grismer v. British Columbia*,³ then Madam Justice McLachlin, applying the *Meiorin* test, defined employers' duty to accommodate as "what is required in the circumstances to avoid discrimination. Standards must be as inclusive as possible. There is more than one way to establish that the necessary level of accommodation has not been provided."

It is clear from the decision in *Grismer* that an employer, in defending a discriminatory policy, will have to provide evidence to justify the policy and its application to the disabled employee. In addition, it might have to consult unions because a collective agreement, or the impact of the accommodation, could have adverse consequences for other staff as well as the disabled employee.

A situation that employers often face is the return to work of an existing employee who has suffered a permanent and debilitating injury and can no longer perform the original job in a normal way. In such circumstances, the first step for an employer is to see if the employee can take special training or use equipment to take on the job again. The second step may be to create another position that the employee can do – but this must not place an undue burden on the employer. Further the job must have beneficial value for the employer.

In workplaces where there is a collective bargaining agreement, an employer may want to consider placing a disabled employee in a different bargaining unit or in a non-union position. Whatever the

³ [1999] 3 S.C.R. 868.

outcome, a union will want to participate in the accommodation process to avoid possible legal action from the disabled employee.

Some examples of accommodation include:

- purchasing or modifying tools, equipment or aids, as necessary
- using temporary works
- modifying job duties
- offering rehabilitation programs
- adjusting policies (example: relaxing start and end times)
- altering the premises to make them accessible.

In the constantly changing human rights environment, employers should be mindful that the scope of disability now includes psychiatric illnesses and learning disorders (such as dyslexia). Courts expect employers to accommodate employees with mental disabilities in the same manner as an employee with physical disability.

IV. COURT ACTIONS

We will set out in some detail below how a complaint can be made by an employee to the Human Rights Tribunal however employees now have obtained significant judgments in the Court for claims brought in both tort and contract.

The basis for the claim in contract is that it is an implied term that no employee should be required to work in an environment where they are exposed to breaches of human rights legislation such as sexual harassment or a failure to accommodate them on the basis of disability. The claims in tort can include either intentional or negligent infliction of mental suffering or in the case of sexual harassment claims that involve touching, claims for assault and battery.

Two recent examples of these types of claims should give all employers pause. In the case of *Sulz vs. Canada (Attorney General)* 2006 BCSC 99, a female member of the Royal Canadian Mounted Police was subjected to significant harassment from her employer. The harassment caused depression and she eventually resigned from her position.

The British Columbia Supreme Court found that although there was insufficient evidence to prove that the infliction of mental suffering caused by the harassment was intentional, nonetheless the female officer had successfully proven that the behaviour of her employers was negligent. As the mental illness which arose from the harassment was foreseeable, the employer was liable for her damages. The damages were based on loss of wages; loss of future earning capacity; and damages for pain and suffering. The total award was \$950,000.00.

The decision of *Keays vs. Honda Canada Inc.* 2006 CanLii 33191 (ON CA) is a wrongful dismissal case. The underlying issue was the failure by Honda to accommodate the disability of Mr. Keays who suffered from fibromyalgia.

The precipitating incident that resulted in Mr. Keays being dismissed was his refusal to cooperate with an independent medical examination. The Court found that the justification for the IME had not been made out and, in fact, had been requested for an ulterior motive namely to disprove the employee's disability.

Because of the high handed approach of the employer in dismissing the employee, the length of notice was extended to 24 months. Because the basis for the dismissal was a breach of human rights legislation the Ontario Court of Appeal held that that was a basis for imposing punitive damages based on an “independent actionable wrong”. Although the Trial Judge had awarded \$500,000.00, the Ontario Court of Appeal held that based on other punitive damages cases, including those determined at the Supreme Court of Canada level, that \$100,000.00 was more appropriate.

Both of these decisions illustrate that the Courts are open to imaginative approaches when awarding damages to wronged employees. The days when an employee could simply be dismissed without cause and be paid wages in lieu of notice are over. If there is an indication that the employer’s actions were malicious or motivated by an intent to circumvent human rights legislation, the Courts have shown themselves willing to impose hefty financial penalties.

V. HUMAN RIGHTS COMPLAINT

As of March 31, 2003, all human rights complaints have been handled by the direct access BC Human Rights Tribunal. The *Human Rights Code* specifically provides employees with a statutory right to file a human rights complaint. The time limit for filing a complaint is six months from the date of the alleged discriminatory conduct. The direct access Tribunal is now responsible for accepting, screening, mediating and adjudicating human rights complaints.

The first step in the human rights complaint process is the filing of a complaint form with the Tribunal. Once the complaint form is received from the Tribunal it is put through the screening process. The complaint form is screened for:

1. completeness;
2. whether the complaint falls within the jurisdiction of the Tribunal; and
3. whether the complaint was made within the required time limit (six months).

If the complaint is accepted by the Tribunal, it will notify the parties that it has been accepted. This notification is often the first time the employer becomes aware of the complaint.

Prior to a hearing there are several avenues available to both the complainant and the respondent such as an early settlement meeting. Before any steps are taken after the filing of the complaint, and acceptance the parties may participate in an early settlement meeting. The meeting usually occurs at the Tribunal and be conducted by a Tribunal member who acts as a mediator in an attempt to help the parties resolve their dispute. This meeting can take place before the filing of the response to the complaint.

If the parties do not settle at the early settlement meeting or elect not to proceed with a settlement meeting, the employer (the respondent) will provide a Response to the Complaint within 30 days. At the same time, the employer may also elect to file an Application to Dismiss the Complaint under section 27 of the *Code*.

There are numerous decisions regarding Section 27 of the *Code*. In essence one can make a pre-application to have a matter dismissed in a similar way one might conduct a summary trial.

As a brief background, after a complaint is made, it will be accepted as long as the Tribunal has jurisdiction over the complaint. The complaints are not screened or investigated during this stage. (Previously, the Commission would undertake an investigation that often took years, before making a recommendation to the Tribunal on whether to proceed with the complaint.) Employers must be aware that there are time deadlines set out by the Tribunal with respect to responding to the complainant and to disclosure. Employers therefore must respond to a complaint even though it

may appear to be without merit. To balance this under section 27 of the *Code*, the Tribunal now has express power to dismiss a complaint prior to a hearing.

The relevant portion of the section provides that the Tribunal can at any time after the complaint is filed with or without a hearing dismiss all or part of the complaint if:

- the acts alleged in the complaint do not contravene the Code
- no reasonable prospect the complaint will succeed
- proceeding with the complaint or that part of the complaint would not
 - benefit the person, group or class alleged to have been discriminated against; or
 - further the purpose of this Code
- the complaint or that part of the complaint was filed for improper motives or made in bad faith
- the substance of the complaint has already been dealt with in another proceeding.

A respondent wanting the Tribunal to dismiss a complaint under section 27 must apply either at the time the Complaint Form is filed or within 30 days from the date “on which the information or circumstances that form the basis of the application came to the respondent’s attention.”

The decisions thus far show that the Tribunal will exercise this power with caution and the Tribunal has warned applicants to ensure that there is enough evidence tendered providing a basis for a preliminary dismissal. Therefore employers must not delay in seeking advice with respect to the jurisdiction of the complaint or the merits thereof. Before bringing forward an application the Respondent should insist on disclosure from the Complainant and then after reviewing the evidence if the case falls under one of the headings in section 27 apply to have the matter dismissed. Affidavits and documents can be tendered at this stage, however one must be aware that the sworn affidavits may be used in the actual hearing if the application to dismiss is not successful.

An example where a respondent successfully applied to have the matter dismissed is *Trevanan v. Citizens’ Assembly on Electoral Reform and others*, 2004 BCHRT 24. Ms. Trevanan applied for and was offered a job as the Director of Communications for the Citizens’ Assembly on Electoral Reform. During the application and interview process, Ms. Trevanan failed to mention that she had been involved with the Green Party. The day after she accepted the position, one of the respondents received information that Ms. Trevanan had been a director with the Green Party and the offer of employment was revoked. Ms. Trevanan filed a complaint alleging that she had been discriminated on the basis of her political beliefs.

It is evident from the decision that both parties filed extensive affidavits and other evidence. The Tribunal member held that based on the filed evidence there was sufficient information upon which to decide the matter as many of the facts were not in dispute.

First the Tribunal held that Ms. Trevanan was in fact discriminated against on the basis of her political beliefs because there was a “sufficiently close nexus” between the beliefs and the decision to withdraw the offer of employment to constitute discrimination. Secondly, however, the Tribunal held that the decision to withdraw the offer of employment was justified because it was based on a bona fide occupation requirement that the Citizens’ Assembly’s Communications Director be free from any reasonable perception of bias as between different electoral systems. As a result there was no reasonable prospect the complaint would succeed.

Section 27 appears to be useful if the general facts are not in dispute or where a complaint involves a single incident instead of a complaint dealing with events that have taken place over a period of time. If credibility is an issue with respect to a matter, the Tribunal may decline to dismiss the application. If the decision can be made without deciding the credibility issue, such as in the *Trevanan* matter, the Tribunal may make the decision.

There is still yet another opportunity to settle the complaint without a formal hearing at a Settlement Meeting. Following applications and the Response to Complaint Form, the parties are given another opportunity to settle by using a mediator provided by the Tribunal. This meeting can take place before or after the disclosure process is complete.

In addition, the Tribunal will often set pre-hearing conference calls setting out time lines for exchange of documents, witness lists and the remedies sought. Time limits for providing these items are set out in the rules of practice and procedure. During the pre-hearing conference, the parties usually schedule a date for the hearing.

VI. HEARINGS

Although hearings are conducted in a setting less formal than Court, formal procedures are followed. Hearings are usually heard by one Tribunal member but they can be heard by up to 3 members in exceptional cases. The hearings are conducted in person and are open to the public. Each party is given an opportunity to present its case through witnesses, documents and other means.

If an employee commences a claim in front of the Human Rights Tribunal alleging discriminatory treatment, s/he can seek to recover wages or losses of consequence of the discrimination. However, because of the compulsory nature of section 37 of the *Code*, they maybe entitled to far greater damages for loss of income then they would have received in a civil wrongful dismissal action.

For example, in *Morris v. BC Rail*, 2003 BCHRT 14, the Tribunal awarded the complainant income losses from the end of his notice period to the date that he would have been eligible for early retirement. The complainant, who worked for BC Rail for approximately 30 years before his termination, received compensation for loss of income for almost 4 years.

VII. CONCLUSION

This paper has only touched on the changing legal dynamic of human rights law and the complaint process. To avoid a human rights complainant, as an employer, at the least you must ensure that you have polices in place to deal with a myriad of potential human rights issues, such as sexual harassment and disability. You must react quickly to any complaint no matter how trivial it may seem. If you do receive a human rights complaint do not delay in seeking legal advice. Many important decisions regarding potential settlement, early dismissal and the hearing process are made during the initial stages of a complaint.