



Workplace Law 2025



CSSEA 2025 AGM and Conference

October 10, 2025

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Agenda

- The Newsy Nine – this year’s developments in legislation and case law in labour, employment, and human rights
- “Duty to inquire” as part of the human rights accommodation process
- Non-culpable absenteeism
- “Suitability” and probationary employees
- Employer responses to investigations by third parties
- Harassment – evolving standards
- Risks in pre-employment training
- Q +A – let’s talk about you

Legislation – what’s happening in Victoria?

Doctors’ notes for short-term illnesses

- ESA amended to prohibit employers from requesting a note from a health practitioner for “short-term” health-related leave in “specified circumstances” (to be defined in upcoming regulations)

Employment Standards and Workers Compensation protections for gig workers

- BC is the first province in Canada to establish minimum ESA standards, compensation coverage through WorkSafeBC, tip protection, and pay transparency for online platform ride-hail and food-delivery workers

Saucy selfies at work

MR v. SS, 2025 BCCRT 851 - no expectation of privacy in intimate images taken at work

- Claimant sent her then-partner photos and videos of herself exposing her body and engaging in sexual acts at her workplace during business hours.
- He later shared the images with her employer to attempt to show that she had engaged in workplace misconduct.
- She claimed that his publication of the images to her employer was done with malicious intent to cause her embarrassment and reputational harm.
- Claim dismissed - Claimant did not have a reasonable expectation of privacy in the images because they were taken in an office accessible to others and it was “in the public interest” for the employer to be told that she had taken the photos on company time.

Violent social media posts and secret recordings

BC Society for the Prevention of Cruelty to Animals v CUPE, Local 1622, 2025 CanLII 5358

- Animal Protection Officer terminated after posting a video of a violent off-duty altercation and secretly recording meetings
- Arbitrator Noonan upheld termination
- Trust especially essential in employment relationships where the employee holds a position of public authority
- Recorded meetings when knew inappropriate
- Insufficient link between grievor's mental health issues and misconduct

Taylor Swift and contract law – “Bad Blood”

Kambere v. Castillo, 2024 BCCRT 1224 – binding contract for Taylor Swift concert tickets based on informal text messages

- Swiftie 1 sent a text message Swiftie 2 asking her to buy two concert tickets if she was able to secure an access code.
- Swiftie 2 replied, “I can buy tickets too because we want to sit together.”
- Swiftie 1 responded, “You’re the best.”
- The CRT held those text messages to constitute offer and acceptance, and therefore formed a legally binding contract
- Confirmed by subsequent messages – Swiftie 2 reported she had purchased the tickets and Swiftie 1 replied “Omg the girls ... are going to go crazy!!” and asked how much she owed. Swiftie 2 replied that they would deal with the matter when she returned from an out-of-country trip.

Punitive damages for failing to comply with ESA

Thompson v. Revolution Resource Recovery Inc., 2025 BCSC 8

- Terminated major/key accounts manager
- Didn't pay statutory severance pay within 48 hrs per ESA
- Issued a severance cheque for one week more than her entitlement pursuant to ESA – said if she cashed it, would be releasing claims
- Relied on “release” at trial
- Punitive damages - \$25,000

Time theft as cause for termination

Basic v. Solid Rock Steel Fabricating Co. Ltd., 2025 BCSC 287

- Employee's practice of claiming pay for additional time despite employer's direction not to was deliberately deceitful and dishonest, and insubordinate, and constituted cause for his termination

Damages for employer improperly accessing Union YouTube video

Corporation of The District of West Vancouver v ATU, Local 134, 2024 CanLII 124405

- Member of management received access from a union member to an "unlisted" YouTube video of grievor giving speech as President of the union
- Grievor had taken substantial steps to secure confidentiality of video
- Arbitrator Sullivan ordered the Employer to pay \$30,000 in damages to the Union

Discrimination in employment based on family status – pushing the envelope?

Obsniuk v. Greater Victoria Public Library Board, 2024 BCHRT 276

- Single mother subject to schedule change which conflicted with child-care arrangements
- Employer's application to dismiss human rights complaint denied by BCHRT
- Perhaps an important expansion of employer obligations in *Campbell River* ("serious interference with a substantial family duty or obligation")?

Employer vicariously liable for employee's foul mouth

Geddes v. Kuehne + Nagel Inc. 2024 HRTO 1127

- At conclusion of hostile encounter in warehouse, male co-worker drove away on lift truck and called complainant a “bitch”
- Complainant reported incident to employer but employer didn’t investigate it
- HRTO – failing to investigate complaint breached obligation to provide discrimination-free work environment
- Employer vicariously liable for discrimination by employees in course of their employment
- But it wasn’t sexual harassment – so damages only \$300 for injury to dignity, feelings and self-respect

Discriminatory to provide LTD plan that end benefits at age 65?

Okanagan College v. Okanagan College Faculty Association (Benefits Grievance), [2024] B.C.C.A.A.A. No. 124 (Peltz)

- 2008 – *Human Rights Code* amended to prohibit mandatory retirement at age 65
- Almost all LTD plans have continued to terminate LTD benefits at age 65 anyway, based primarily on s. 13(3):

“Subsection (1) does not apply (b) as it relates to . . . age, to the operation of a bona fide retirement, superannuation or pension plan or to a bona fide group or employee insurance plan, whether or not the plan is the subject of a contract of insurance between an insurer and an employer.”
- Arbitrator - cap on LTD benefits at age 65 is discriminatory on basis of age and therefore violates *Human Rights Code* in part because there are more options available now for post-65 benefits and the costs of a post-65 benefit would not necessarily be destabilizing and “untenable” for the College

“Duty to Inquire” as part of the human rights accommodation process

- The duty to inquire exists when an employer suspects that an employee's work performance may be impacted by a mental illness or other disability - *Senyk v. WFG Agency Network (BC) Inc (No 2)*, (2008) BCHRT 376
- The duty is a positive legal obligation on employers to make enquiries if an employee exhibits behaviour that may be connected to a disability like poor attendance, low productivity, or emotional outbursts.
- Only triggered when the behaviour is such that the employer ought to have known or suspected that mental health issues could be the cause – an objective standard.
- Before disciplining in these circumstances the employer has a duty to investigate whether a disability could be a factor.
- If so, then the obligation is to consider whether the disability can be accommodated short of undue hardship.

“Duty to Inquire” as part of the human rights accommodation process

- *Willems-Wilson v. Allbright Drycleaners*, 1997 BCHRT 39 - The complainant did not tell her employer that she suffered from depression, but her employer had never seen an employee crying so much, he knew that she went to counselling every week, and he knew that she was hospitalized for emotional problems. Result - the employer had a duty to make some inquiries.
- *Downer v. Alaska Highway Autobody and others* (2011) BCHRT 114 - The complainant's employment was terminated due to his "uncontrollable anger." The Tribunal found that there was nothing in his behavior that was so far from societal or workplace norms as to give rise to a duty to inquire, nor had any requests for accommodation been made.
- First enquiry – do you have a disability which may be effecting your employment?
- If “no” – manage without regard to human rights obligations.
- If “yes” – follow the “usual” path of enquiry for medical information.

“Non-Culpable” Absenteeism

- Absenteeism is presumptively culpable - employee is failing to report to work when supposed to
- If no reasonable prospect for improvement, justifies discipline per *William Scott* (unionized employees) / *McKinley v. BC Tel* (non-unionized employees)
- Only non-culpable if it is a result of a ground protected by *Human Rights Code* like disability, family status, or religion
- Employee must establish protected ground
- Issue then is whether employer can accommodate the absenteeism short of undue hardship

“Non-Culpable” Absenteeism

- *Telecommunications Workers Union v. TELUS*, 2011 BCSC 1761 (judicial review of arbitral award) - Arbitrator found that the employer had met its duty to accommodate, stating it would be unreasonable to expect the employer to tolerate continued absenteeism as there was a limit to accommodation.
- *Vancouver Coastal Health Authority v. Hospital Employees’ Union*, [2016] B.C.C.A.A.A. No. 112 – Grievor’s absenteeism rate averaged 45%, seven to nine times higher than co-workers. After extensive accommodation efforts, employer offered to avoid termination by placing him on short-call status. He refused because would lose LTD coverage. Termination upheld because employer had discharged duty to accommodate.

“Suitability” and probationary employees

- The legal test for termination of employees on probation is the “suitability test” – is the employee suitable for continued employment?
- It is a lower threshold than the just cause test which applies to a regular employee
- Employers are allowed to take a broad view of the employee’s performance and character
- They must act fairly and with reasonable diligence in assessing suitability
- Timing is important – must make a decision at end of probation period, not after or (very much) before

“Suitability” and probationary employees

Liivan v. Mackay Contracting Ltd., 2025 BCSC 284

- Civil construction contractor based in British Columbia had a contract for a construction project in Moa, Cuba.
- Shortly after employee’s arrival in camp, rumours about misconduct
- Employer terminated employment without an investigation
- Made employee stay in hotel room for three days before flying him out, said if he left his room he’d be arrested by local police
- Issue – whether probation clause eliminated any obligation on employer to deal with termination reasonably
- Court – probation not a get-out-of-jail free card
- Must still engage in reasonable assessment of suitability and act fairly
- \$25,000 in aggravated damages and \$20,000 in punitive damages because of way treated

Employer responses to third party investigations

- Criminal investigations and the right to remain silent – don't draw an adverse inference
- Refusal to participate in investigation
- Unavailability for investigation
- Can't rely on findings in third party investigations or reports
 - Different legal relationships, tests and standards
 - Conclusion is hearsay
 - Can't rely on witnesses' evidence

Employer responses to third party investigations

- But can rely on consequences of third party investigations or reports
 - Absence from work
 - Loss of required qualification/license
- Options
 - Re-assignment
 - Leaves of absence, with or without pay
 - Termination
- Consider human rights risks

Harassment – evolving standards

- *Lantic Inc. and Public and Private Workers of Canada, Local 8* – limited, verbal sexual harassment on a picket line justified termination
- *Render v ThyssenKrupp Elevator (Canada) Limited*, 2018 ONSC 3182 – single incident, coupled with lack of remorse, sufficient to justify termination despite 30 years’ service and “clean record”
- *Cho v. Café La Foret Ltd.*, 2022 BCSC 1560 – touching subordinate twice was sexual harassment but did not constitute cause for termination

Risks in pre-employment training

- Key – clear, written training agreements which establish
 - Relationship isn't employment
 - When relationship will end
 - No employment unless subsequent written employment agreement
- Address training in collective agreements
- “Conditional” employment contracts more risky, but possible in theory
- Beware of risk of relationship being deemed to be employment despite training agreement

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