

# Common Pitfalls in Labour Relations

*The Duty to Accommodate*

# Presentation Agenda

- What is discrimination under the BC Human Rights Code?
- What is the obligation of an employee requesting an accommodation?
- What is the obligation of the employer?
- What is the obligation of the union?
- What is undue hardship?
- Recent Case-Law
- Introduction of a Request for Accommodation worksheet

## BC Human Rights Code – Section 13

### Discrimination in Employment

**13** (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 the Indigenous identity, race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression, or age of that person or because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person.

# What is the Employees Obligation?

## **The person with a disability is required to:**

- Advise the Employer of the disability
- Answer questions or provide medical information regarding relevant restrictions or limitations
- Participate in discussions regarding possible accommodation solutions
- Co-operate with any experts whose assistance is required to manage the accommodation process

# What is the Employers Obligation?

## **The employer is required to:**

- Accept the employee's request for accommodation in good faith
- Obtain expert opinion or advice
- Take an active role in ensuring that alternate approaches and possible accommodation solutions are investigated
- Keep a record of the accommodation request and action taken
- Maintain confidentiality
- Limit requests for information to those reasonably related to the nature of the limitation or restriction so as to be able to respond to the accommodation request, and
- Grant accommodation requests in a timely manner, to the point of undue hardship.

## What steps should an Employer take once Medical has been Received?

### Steps the employer should take:

- Determine whether the disabled employee can perform their existing job
  - If not, assess whether the employee's existing job can be modified in some way so as to be suitable
  - If this is still not possible, determine whether another job within the workplace is suitable
  - If the employee cannot perform the essential duties and responsibilities of a different existing position, can that different job be modified?
- 
- In each step the employer's efforts must be genuine
  - As part of the process the employer will be expected to give serious consideration to recommendations made by a disabled employee's physician or independent medical evaluator

# What is the Unions Obligation?

## **The union is required to:**

- Take an active role as partners in the accommodation process,
- Share joint responsibility with the employer to facilitate accommodation, and
- Support accommodation measures irrespective of collective agreements, unless to do so would create undue hardship.

# Undue Hardship

## Central Okanagan School District & Renaud: (Supreme Court of Canada)

*“more than mere negligible effort is required to satisfy the duty to accommodate. The use of the term “undue” infers that some hardship is acceptable; it is only “undue hardship” that satisfies the test.*

*The extent to which the discriminator must go to accommodate is limited by the words “reasonable” and “short of undue hardship”. These are not independent criteria but are alternate ways of expressing the same concept.*

*What constitutes reasonable measures is a question of fact and **will vary with the circumstances** of the case”.*



# Undue Hardship

Undue hardship MAY be established where accommodating the employee would mean:

- Creating a new job for the employee that didn't previously exist;
- Creating a job with functions which are, at the time of the search for accommodation not being performed in the workplace;
- Displacing another employee from their position;
- A significant impact of the terms of the collective agreement; or
- An increased safety risk or a shift in the safety risk from one employee to another.

## Case Law 1

# *PPWC Local 1 v. Mercer Celgar Ltd.*

# *PPWC Local 1 v. Mercer Celgar Ltd., 2023 BCLA 88235*

## **The Facts:**

- An EE injured her wrist at work. The ER filed a WSBC claim and placed the EE on light duty.
- The EE was then assigned to a training trailer to study for a certification exam.
- The EE's shift changed from four days on/off, to five days on, 2 off. During this period the EE asked to study from home to care for children because of pandemic school closures.
- Her request was denied.
- After her mental & physical health began to deteriorate, the EE was sent for a psychological assessment by WSBC.
- The EE attended a meeting expressing concerns of how the new work schedule was affecting her mental and emotional health.
- The ER dismissed the concerns.
- On the advice of her doctor, the EE left the workplace after having suffered an acute stress reaction.
- A few months later a repeat assessment suggested that the EE's mental health had improved and that she could return to regular work.
- However, WSBC had determined that her wrist injury had stabilized into a permanent condition. Limitations to performing work were identified.

# PPWC Local 1 v. Mercer Celgar Ltd., 2023 BCLA 88235

- WSBC advised the EE that the ER was not able to provide them with a suitable accommodation. The EE informed the ER that they wanted to stay in the workplace in any position.
- The ER took the position that WSBC made a decision that there was no suitable work, and took no further steps to accommodate the EE.
- The union grieved. First that the ER had discriminated against the EE on the basis on family status. However, the test for **prima facie** family status discrimination was not satisfied.
- Second, the union argued that is was discrimination on the basis of physical disability.
- Applying the **Moore test**, a prima facie case of disability discrimination had been made out:
  - *they have a characteristic protected by the Human Rights Code [Code];*
  - *they experienced an adverse impact with respect to an area protected by the Code; and*
  - *the protected characteristic was a factor in the adverse impact.*
- The EE was injured on the job and suffered several physical limitations, preventing them from providing meaningful work in their pre-injury position.

# *PPWC Local 1 v. Mercer Celgar Ltd., 2023 BCLA 88235*

- To determine whether the EE had been sufficiently accommodated, the arbitrator applied the **Meiorin test** on accommodation:
- *The workplace standard was adopted for a purpose rationally connected to the performance of the job;*
- *It was adopted in an honest and good faith belief; and*
- *It was impossible to accommodate the EE without imposing undue hardship.*
- The arbitrator held that the employer must keep the following factors in mind when they are searching for a workplace accommodation:
- *The ER has an obligation to make independent enquiries/assessments of the worker and to seek medical information to assist in its determination of accommodation on an ongoing basis;*
- *The ER should determine if there is a suitable alternate job available for the worker;*

*PPWC Local  
1 v. Mercer  
Celgar Ltd.,  
2023 BCLA  
88235*

- *The ER should investigate whether there are modifications, bundling/unbundling of duties of existing jobs/job descriptions that can be made to enable the worker to return to work;*
- *The ER should consult with the worker and the union over possible suitable positions and working conditions; and*
- *The ER should make a reasonable proposal for accommodation that would not result in undue hardship.*

# *PPWC Local 1 v. Mercer Celgar Ltd., 2023 BCLA 88235*

- In their ruling, the arbitrator found that the ER's complete reliance on the decisions of WSBC meant that it failed to satisfy its duty to accommodate.
- No clear evidence was provided by the ER that the point of undue hardship had been reached regarding the accommodation it was considering.
- There was no evidence that the employer considered possible modifications to the EE's pre-injury job, or to other positions.
- The grievance was upheld.
- The arbitrator ordered the EE to be returned to active employment and the parties were to continue with the search for an accommodation.

- As well, the EE was awarded \$15,000 in human rights damages for injury to dignity.

## **Implications for Employer's:**

- ER's cannot rely solely on determinations made by third parties, such as WorkSafe BC, that an employee is unfit for work and cannot be accommodated.
- The ER must engage with their own investigation of an EE's capacities and limitations, and determine for themselves whether they can be accommodated up to the point of undue hardship.



## Case Law 2

# *The Estate of Donald Mitchell v. South Country Co- op Limited*



# *The Estate of Donald Mitchell v. South Country Co- op Limited*

- An EE worked as a clerk at a liquor store.
- The EE reported for work clearly under the influence of alcohol. The ER sent him home, and terminated him several days later for violating its Alcohol and Substances Policy.
- At the termination meeting, the EE told his ER that he suffered from anxiety, depression and alcohol abuse, and had booked a counselling appointment to receive treatment.
- Subsequently, he made additional attempts to raise his mental health issues by sending emails, including a medical note.
- The ER replied that it would not reconsider his termination.
- The ER did not investigate accommodating the employee, stating that it had terminated him before it learned of his disabilities.

# *The Estate of Donald Mitchell v. South Country Co- op Limited*

- The EE passed away as a result of suicide. He had already launched a human rights complaint against the ER alleging a breach of the duty to accommodate.
  - This complaint was taken over by the Director of the EE's estate. He requested the power to acquire carriage of the complaint.
  - The ER did not object to this request.
- The Tribunal began its analysis by applying the prevailing anti-discrimination test in **Moore**, which placed the burden of proof on the Director to establish that the deceased EE:
    1. Had a characteristic protected by the Human Rights Act;
    2. Had an adverse impact; and
    3. The protected characteristic (i.e. disability) was a factor in the adverse impact.

# *The Estate of Donald Mitchell v. South Country Co- op Limited*

- The Tribunal decided that the EE's mental disabilities – particularly his alcohol dependency – were the cause of the breach of the alcohol policy which led to his termination.
- Accordingly, it found that the EE's disabilities were a factor in his termination and the burden of proof to establish a **prima facie** case of discrimination was met.
- Therefore, the duty to accommodate arose. The Tribunal concluded that the ER had breached the duty to accommodate because it did not take any
  - procedural or substantive steps to accommodate the EE.
  - It determined that the purpose of damages awards in the context of a discrimination case was to restore the complainant to the place they would be in if discrimination had not occurred.
  - Therefore, since the EE had died and, therefore, could not be restored to the position he would have been in had discrimination not occurred, a damages award to his estate would be inappropriate.

# *The Estate of Donald Mitchell v. South Country Co- op Limited*

## **Implications for Employers**

- The duty to inquire is an integral part of the duty to accommodate. Human rights law is clear that an employer cannot discipline an employee for conduct that may have arisen from a characteristic protected by the accommodation duty.
- Mental illnesses and alcohol dependency are disabilities and are therefore protected. This means that, in almost all cases when an employee shows up to work under the influence of drugs or alcohol, the employer is
  - required to investigate the possibility of an addiction requiring accommodation before pursuing discipline.
  - As a damages award was unavailable, the Tribunal directed the ER to refrain from committing contraventions of the Human Rights Act in the future.

## Case Law 3

# *Fenech v. PNI*

# *Fenech v. PNI Media Inc. and another, 2023 BCHRT 120*

- An EE began work as a lead developer at an information technology company, in the ER's Vancouver office.
- Prior to her hiring, the ER had implemented a dog-friendly policy which allowed EE's to bring their dogs into the office so long as they were not brought into meeting rooms.
- The EE was allergic to dogs, with exposure triggering asthma, migraines and painful inflammation.
- She had mentioned her animal allergy to the ER when she was hired and
- again on her first day of work. Despite this, she was consistently exposed to dogs at work, and her allergy symptoms worsened.
- In an attempt to manage the EE's symptoms, the director of human resources directed that office meeting spaces were to be dog free. An email was sent out to all dog owners with a reminder of the policy, but several owners did not get the email and dogs continued to be present in office meetings involving the EE.



# *Fenech v. PNI Media Inc. and another, 2023 BCHRT 120*

- The EE informed the ER that her allergies were not getting better and that her doctor had indicated she could not be in a work environment with dogs.
- In a meeting with the ER, she requested a formal accommodation by removing the dogs in her area of the office, including the kitchen and washroom. The ER requested a doctor's note explaining her disability, functional limitations, treatment and necessary workplace accommodations.
- In the interim, the ER attempted to accommodate her by moving her desk to a more isolated area.
- The EE's doctor provided a medical certificate which stated that the EE had a chronic allergic respiratory condition triggered by pet exposure. The doctor recommended that she not work in a space with pets.
- In response, the ER determined that she would be permanently accommodated by working from home.

# *Fenech v. PNI Media Inc. and another, 2023 BCHRT 120*

- The EE resisted this accommodation because it physically isolated her from her work team. She requested that the pet-friendly policy be eliminated or, alternatively, that the employer establish one of its two office floors be dog-free.
- The ER refused this accommodation, stating it would cause financial hardship on other EE's (expenses for pet care while at work) and because the policy was a key part of its recruitment strategy.
- The EE worked from home and only came to the office for occasional meetings. When she did attend, dogs were kept out of the meeting spaces. However, she did not have access to washrooms or other spaces in the office.
- After the EE filed a human rights complaint, the ER offered to make one of its offices dog-free for the EE so that she could work with her team.
- The EE rejected this proposal, stating that it would isolate her from the rest of the department. As the parties could not agree on a solution, the EE continued to work from home.



# *Fenech v. PNI Media Inc. and another, 2023 BCHRT 120*

## ANALYSIS

- At the beginning of the Human Rights Tribunal hearing, the ER brought an application to dismiss the EE's complaint.
- The ER argued that the pet policy was a bona fide occupational requirement and it had made all reasonable efforts to accommodate her.
- The Tribunal had to determine whether or not a prima facie case was established, and whether or not to advance the complaint to a full hearing.
- The Tribunal applied the **Moore** discrimination test:
- This required the employee to demonstrate that:
  - 1. They had a protected characteristic under the Code;
  - 2. They experienced an adverse impact in employment; and
  - 3. The protected characteristic was a factor in the adverse impact experienced.

# *Fenech v. PNI Media Inc. and another, 2023 BCHRT 120*

- The parties agreed that the EE's dog allergy constituted a disability under the Code.
- However, on balance, the Tribunal found that the EE's evidence suggested:
  - That the constant exposures to pets in meeting rooms aggravated her allergies;
  - that the ER did not take adequate steps to ensure her safety at work;
  - and that she may have suffered an adverse impact from colleagues making discriminatory comments regarding her disability.

# *Fenech v. PNI Media Inc. and another, 2023 BCHRT 120*

- The ER made two further arguments:
- that it had reasonably accommodated the EE;
- and that offering a dog-friendly office is an important workplace perk that is good for employee morale.
- It argued that it was common practice in the industry and is an important part of its employment recruitment and retainment strategy.
- The Tribunal Member applied the **Meiorin** test on accommodation, which required the ER to establish that:
  - 1. The dog-friendly office policy was adopted for a purpose rationally connected to the performance of the job;
  - 2. It was adopted in an honest and good faith belief; and
  - 3. It was impossible to accommodate individuals sharing the characteristics of the claimant without imposing undue hardship.

# *Fenech v. PNI Media Inc. and another, 2023 BCHRT 120*

- The Tribunal found that the ER had taken several steps to accommodate the EE, including reminding dog owners of the policy prohibiting dogs in meetings, relocating the employee and allowing the employee to work from home.
- However, its efforts to enforce the dog policy were found to be ineffective since it only applied to rooms where the EE would be, but would not eliminate allergens elsewhere in the workplace, including washrooms.
- Working from home also excluded the EE from collaborating with co-workers.
- The concept of reasonable accommodation requires employers to take reasonable and practical steps to assess whether working conditions can be changed to allow the employees to do their work and, if not, whether there is other work that they can do.
- The reasonableness of the proposed accommodation is dependent upon whether the employer could prove that undue hardship would result if the dogs were removed from the workplace.

# *Fenech v. PNI Media Inc. and another, 2023 BCHRT 120*

- The concept of undue hardship sets the limit for the lengths that employers are required to go to, and the point at which further efforts become unreasonable.
- It is recognized that there may be some hardship in accommodating a persons disability. Accommodation is not always easy, convenient, or cost-effective.
- The employer's most recent accommodation offer which would eliminate dogs on the employee's floor may have been reasonable, but this determination would require a full hearing.
- Further, the reasonableness of the accommodation would still require a finding that undue hardship would result from the elimination of the dog-friendly policy.
- The outcome was not reasonably certain.
- The Tribunal Member denied the employer's application to dismiss the complaint, and a full hearing on the merits was ordered.

# *Fenech v. PNI Media Inc. and another, 2023 BCHRT 120*

## IMPLICATIONS FOR EMPLOYERS

- Employers must promptly respond to employee requests for accommodation in the workplace.
- While it is reasonable for employers to ask for medical documentation to establish the need for an accommodation, an employer must not delay the investigation of such a request or prolong their response time following the receipt of the documentation.
- As well, the requirement to respect human rights will invariably supersede a workplace policy that is meant to raise employee morale, where there is no ability for the two to coexist.

Introduction  
of the New  
Form

# Request for Accommodation Worksheet

## DUTY TO ACCOMMODATE REQUEST

*This worksheet is to be completed by the Manager or Human Resources when an employee requests an accommodation.*

Employee name:	
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### EMPLOYEE REQUEST

(1) Date of request:	
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(2) Details of request for accommodation:	
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(3.a) To whom was the request made?	
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(3.b) Was the request made in writing?	YES		NO	
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*If "yes", please attach.*

(4.a) Was there a medical attached to the request?	YES		NO	
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*If "yes", please attach.*

*If "no", please request medical documentation and attach once received.*

Date medical was received:	
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**NOTE:** *If medical has not been received, the employer should request it at this time. The employer may consider a reasonable, temporary accommodation while awaiting medical documentation. This temporary arrangement should be provided in writing to the employee.*



MEETING WITH EMPLOYEE

Please complete the following form. A separate form must be completed for each additional meeting.

This process should include a conversation with the employee who is requesting an accommodation to explore options based on the employee's limitations and/or restrictions. Accommodation discussions should be tri-party and involve the employer, the employee and the union.

(1) Date of meeting:	
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(2) Names and titles of people present at the meeting: <i>(Employer, Employee, Union, External 3<sup>rd</sup> party, i.e., WCB, LTD, DMI)</i>

(3) Details of meeting: <i>Please include the statements made and questions asked by both the employee and the employer's representative(s). Attach any documents that were reviewed and/or discussed.</i>

## REASONABLE ACCOMMODATION

The following are examples of reasonable accommodations:

Changes to policies and procedures; changes to the physical workplace; adaptations to equipment, tools or uniforms; flexible work hours or job sharing; relocation of workspace within workplace; changes to position schedule or job duties; existing vacant position; Improve accessibility to workplace, rest area; modified break schedule.

(1.a) Did the employee request a specific accommodation?	YES		NO	
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(1.b) If "yes" what was the requested accommodation?

(2.a) Is the employee's request supported by the medical document received?	YES		NO	
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*If the answer is "no", this is not a reasonable accommodation request.*

(3.a) From the employer's perspective, would the employee's proposed accommodation impose an undue hardship? See page 4.	YES		NO	
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(3.b) If the answer is "yes" to (3.a)above, please provide detailed reasons:

(4) Was a reasonable accommodation offered to the employee as per the definition of "reasonable accommodation" above? <i>If "yes" answer questions (5) and (6). If "no" proceed to question (7).</i>	YES		NO	

(5) If a reasonable accommodation was offered to the employee, please provide details:

(6.a) If a reasonable accommodation was offered to the employee, was it accepted?	YES		NO	

(6.b) If "yes", what is the effective date?

(6.c) If "no", please outline the reasons for the employee's refusal:

(7) If a reasonable accommodation was not offered to the employee, please provide the reasons why:

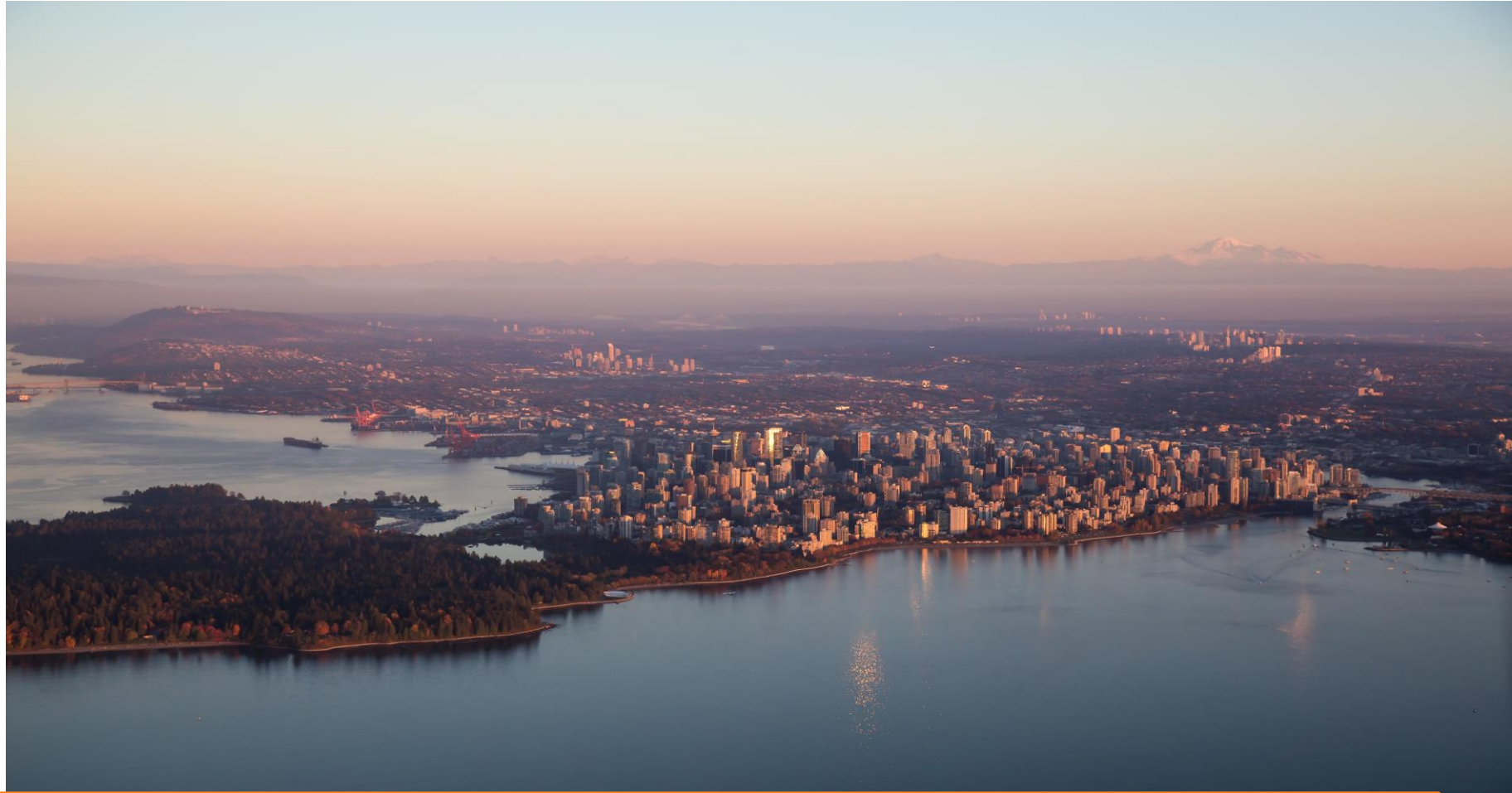
**NOTE:** It is advised that you consult with your CSSEA representative before determining that an accommodation is an undue hardship.

Prepared by:	
Position/Title:	
Date:	

# To Summarize

- Accept the employee's request for accommodation in good faith
- **Obtain medical**
- Take an active role in ensuring that alternate approaches and possible accommodation solutions are investigated
- Keep a record of the accommodation request and action taken
- Maintain confidentiality
- Grant accommodation requests in a timely manner, to the point of undue hardship.

Thank you for  
attending



# Avoiding Pitfalls in Performance Management

Employers' Due Diligence

# Considering Workplace Culture

- Employers can build a positive workplace culture by using informal methods of managing misconduct.
  - Informal meetings
  - “Fireside chats”
  - Follow up email
  - “Confident you can do better/improve.”
- This form of performance management can become overused
  - No real consequences?
  - Repeat offenders
  - Experience shows co-workers often reluctant to report harassment

# Considering Workplace Culture 2

- Result may be that employers are not fully aware of the extent to which misconduct is damaging the workplace culture.
- Conclusion: Is informal performance management building workplace culture the way you want?
- Your best employees may be negatively impacted by your unwillingness to manage misconduct.
- Suggest a balance: Informal Chat  
Letter of expectation  
Progressive discipline



# Due Diligence to Avoid Pitfalls

- The rest of this presentation focuses on how to avoid some of the pitfalls employers experience when managing misconduct through progressive discipline.
- Emphasis on harassment or bullying cases.

# Investigating Complaints

Investigating allegations of misconduct is extremely important when managing performance because doing so represents a key piece of **due process** and allows you to:

- Acquire the facts necessary for an informed decision
- Gather evidence to support your case if there is a grievance
- Ensure Due Process for everyone involved (must do)
- Determine credibility if a “balance of probabilities” assessment must be made
- Demonstrates employer took the issue seriously

# Balance of Probabilities

- Many employers believe they cannot make a solid determination of misconduct when they have a case of two employees with conflicting stories.
- No witnesses available to confirm the outcome.
- We see this often. The balance of probabilities test enables employers to reach a defensible conclusion.

# Balance of Probabilities 2

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject the story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, **the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable** in that place and in those conditions. (Faryna v Chorny)

# Key Elements of Credibility

- Does the witness's story remain consistent with repeated telling of the story or does it change?
- Do the changes include new information that the witness has learned during the investigation?
- Is the witness's story consistent with what a practical, informed and reasonable person would believe?
- Or does it require the listener to stretch their imagination to believe?
- Does the witness provide evidence that conflicts with their own story?

# Key Elements of Credibility 2

- Is the witness evasive when answering questions during the investigation or are they forthcoming, even about incidents that do not paint them in a positive light? (make sure your notes document this)
- Does the interviewee have ulterior motives that may drive their complaint/evidence or cause them to exaggerate the severity of the complaint?
- Is this witness known to have lied about issues in the past?

# Making Your Decision

- Once you have completed the investigation, you get to weigh all of the evidence in order to make your decision about what really happened and does it represent culpable misconduct.
- Does one story line up reasonably with what a practical and informed person would believe happened in the circumstances?
- Does the other story (or parts of it) require you to stretch your imagination to believe? Be careful to apply this reasoning to important points – not unimportant ones.
- Did one person evade answering key questions?
- Chances are that neither story is the absolute truth – that's ok.

# Investigation Tips

- Get the complaint in writing
  - as much detail as possible
  - were there any witnesses?
  - complaints can be vague and overly generalized - will not help you make defensible conclusions
- Interview the complainant to fill in the blanks (who, what, when, where, why)
- You don't know what the respondent is going to say so having as many details as possible could make the difference in making the final assessment with conflicting stories.



# Investigation Tips 2

- The investigator must remain objective with all parties
  - ask probing questions about the allegations
  - Be skeptical
  - The same applies when interviewing the Respondent and witnesses.
- Not just a conversation – your job is to get to the bottom of it.
- Assess the witness's evidence for facts and for exaggeration/falsification.
- Complainants have been known to exaggerate the severity of a situation or to characterize rumours as facts.

# Investigation Tips 3

- Assess the witness's evidence for consistency with itself. Do they say anything that contradicts other things they have said?
- An example for illustrative purposes
  - long service caregiver accused of neglect.
  - Relied on evidence that they had done the job for decades.
  - But there was one example of neglect where there were witnesses and no question about what had occurred.
  - The respondent defended their actions that they had always done it this way, despite clear policies and care plan to the contrary.
  - This was a key inconsistency in the story that damaged the Respondent's credibility, drawing the rest of their evidence into question.

# Investigation Tips 4 – Vague Answers

- Try to get as much detail as possible and do not accept vague answers. Use follow up questions.
- If the person answers with “I don’t remember” or “I don’t know”, ask follow up questions.
- You may want to respond with something like “Can you tell me what you do remember?”
- If they insist they don’t remember, remind them that other witnesses remember so you will forced to lean toward accepting their recollection of events if this person cannot provide more.

# Investigation Tips

## 5 - Evasion

- If the person is evasive when you ask questions, note it and confront them with it professionally.
- Ask them why they are evading answering the question and remind them that they are required to answer the questions honestly and fully.
- An assessment of credibility will need to be performed by the employer when reaching its conclusion – evasive behavior does not support an assessment of credibility.

# Investigation Tips 6 – Due Process

- Always conduct an investigation professionally and if the union rep alleges you are harassing the Complainant with your questions, respond that putting the details of the complaint to the respondent is part of their due process which allows them to understand the complaint against them and provide their side of the story.
- Sometimes the allegations are uncomfortable to hear but this is their opportunity to get their story out so the employer can make an informed decision.

# Investigation Tips 7 – Misc.

- What to do if the union rep. answers for the person.
  - Remind both that the employee must provide their own evidence.
  - Check if employee will answer question(s).
  - If continues, advise that if the employee refuses to answer the question, you will make a note of it and the assessment will be made without their evidence. Ask question one last time.
- What to do when the employee walks out of the investigation
  - Carry out investigations on work time whenever possible.
  - If they threaten to leave, advise they must participate and will be placed on unpaid leave until they participate in the investigation.

# Investigation Tips 8 – Misc.

- Do not delay – this can hurt an otherwise good investigation.
- Prepare questions before meeting.
- Try to predict where dishonesty may arise and draft questions accordingly.
- Caucus when you receive unexpected answers.
- Only investigate witnesses with direct evidence

# Investigation Tips 9 – Article 29.01(b)

- Good faith actions of a manager or supervisor relating to the management and direction of employees – such as assigning work, providing feedback to employees on work performance, and taking reasonable disciplinary action – do not constitute harassment.
- These must be investigated.
- No protection if the manager carries out their duties in a manner that is unprofessional or disrespectful.



# Avoiding Pitfalls in Discipline


- Intent of progressive discipline is to correct unwanted behavior – not to punish.
  - apply the lowest degree of discipline required to correct the behaviour
  - progress to higher levels if misconduct continues.
- Not good practice to use one example of misconduct as a means to catch up on all of the other issues that may have slipped by without discipline in the past.

# Avoiding Pitfalls in Discipline 2

- In order to support a termination, you will need to show there have been a number of disciplinary actions taken to date and this is the final straw.
- You will need to demonstrate that
  - the employment relationship is damaged to such an extent that it cannot be salvaged or
  - that your continued efforts to correct the misconduct have had no effect so that termination is the only reasonable answer or
  - both.
- Employers should also be cautious when considering backwards steps in progressive discipline.

# Avoiding Pitfalls in Discipline

# End



# Harassment vs Interpersonal Conflict in the Workplace

How to pre-assess and deal with these increasingly common challenges?

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# Agenda

- Definitions of Interpersonal Conflict and Harassment and hallmarks to look out for
- Managing at the outset and covering your bases / Pre-assessment
- Addressing Interpersonal Conflict
- Addressing Harassment
- Group Work with Examples

# Interpersonal Conflict

Examples can be vast and in some cases will be defined by what it is not (see Harassment)

- Interpersonal conflict can be defined incredibly broadly as any type of conflict involving two or more people
- Does the conflict arise out of a failure to show understanding, courtesy, empathy and tact?
- Fundamental characteristic is that each party to the dispute feels disrespected
- See example of shared workspace at a CSS counselling office

# Interpersonal Conflict

Continued...

- Using the previous example, a critical thing to remember as managers is to maintain your own objectivity
- Remember that everyone feels disrespected and that all people come to situations with a myriad of lived experiences/values/personal characteristics/emotional responses
- Focus on how to get the relationship back on track – mediation, communication training, policy review and even performance management are some good examples of how to address

# Harassment

Sources for Definitions:

WorkSafe

Collective Agreement  
Employer Policies

Canadian Centre for Occupational  
Health and Safety

- Note that harassment is also a form of interpersonal conflict but it can be distinguished in that it is typically graver in nature and may include personal and psychological harassment or sexual harassment
- “A worker is bullied and harassed when someone takes an action that he or she knew or reasonably ought to have known would cause that worker to be humiliated or intimidated.”
  - WorkSafeBC



# Sexual Harassment

Note that in our society, sexual harassment can be more insidious...

- Defined at Article 29.2
- Can be persistent, repeated or singular
- Sexually orientated verbal or physical behavior which an individual would reasonably find unwelcome or unwanted

# Pre- Assessment

Interpersonal Conflict or  
Harassment?

- How to tell the difference?
- Harassment is often repeated
- Harassment often is personally orientated and contains attacks (appearance, name calling)
- A harasser will often have a precise target, for example choosing to send sexually explicit jokes to one particular employee, not via the worksite WhatsApp group
- Are there imbalances of power at play?
- Has the conduct risen to the point that harassment is being broadcasted or made known?

# Addressing Interpersonal Conflict

Options for how to address to get the relationship back on track...

DOCUMENT!

- If your pre-assessment leads to a conclusion that interpersonal conflict is at issue, some of the options to get employees back working together from a respectful place are:
- Coaching sessions with management (individual and together)
- Mediation
- Session with a workplace therapist
- Communication coaching
- Other external resources as you see fit

# Addressing Harassment

Look to Article 29 and understand the Complaints Procedure

Note this is heavy on procedure so review and then contact your HRLR rep if questions

DOCUMENT!

- Look to Article 29.4 Complaints Procedure
  - Complaints must be submitted in writing within six months of the last alleged occurrence
  - Note significant process involved to investigate and additionally timelines, notice requirements and varying issues for example if ED/CEO are named
  - Third party may be necessary/appropriate if complaints are against ED or are systemic

# When to Involve the Union?

Note express expectations in the Article 29.4 Complaints Procedure of

- Article 29.4(b), (f) and (i) all outlines an express obligation to communicate with the Union on submission of the complaint, and an obligation to advise as to the substance of the investigation report
- Where the Respondents is an ED/CEO or where there are systemic/multiples issues or complaints, the Complainant will contact the Union and the Union will notify CSSEA and the ED
  - CSSEA and the Union will then work with the Employer to secure an external investigator
  - CSSEA will communicate with the Employer's board on this

# Good Faith Management and Vexatious Complaints

Article 29.1(b)

Article 29.4(j)

- A couple things to look out for with harassment complaints:
- 29.1(b) outlines that coaching, performance management and discipline do not constitute harassment
- 29.4(j) outlines that an Employer may discipline if an investigation determines that a complaint is frivolous, vindictive or vexatious

# Group Work

Breakout into groups and pre-assess the following examples

## EXAMPLE 1:

- Employee 1 who is a new Canadian working under a student visa lets you know that another employee (Employee 2) is calling them fat but doing so covertly by speaking in Russian so it is not something anyone else would be able to corroborate. Employee 1 reports that when they make mistakes, Employee 2 (a Canadian citizen) threatens to call the government and report them to immigration...
- Suggestions for next steps?

# Group Work

Example 2 – Pre-assess

Example 2:

An Employee requests a meeting with you as the HR Manager/ED and lets you know they are being harassed by their director. The director has issued them a letter of discipline after putting them on a performance improvement plan

Suggestions for next steps?



# Group Work

Pre-assess

- Two employees reach out indicating they are being bullied by the other
- They have both made formal complaints and outlined incidences including leaving “lol face” emojis on a recent bereavement post one of them made on Facebook
- Circulating a rumour about an affair the wife of one of the employees is having with the employee’s hairdresser
- Suggestions for next steps?

# Group Work

Pre-assess

- Employee 1 reports to you that they have been asked on dates by Employee 2 on 6 different occasions in the last 6 months.
- Employee 1 acknowledges being friendly but has indicated they were not interested several times
- Employee 1 indicates that Employee 2 has told them they smell good and is very active on social media sending Employee 1 tiktoks from their favourite sex therapist and generally seeking contact outside of the work context
- Suggestions for next steps?

# Questions?

