



# Developments in Workplace Law 2024

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CSSEA 2024 AGM and Conference

*Fresh Perspectives*

October 11, 2024

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# Agenda |

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- WCB and return to work of injured employees
- Pay transparency update
- Health spending accounts and ESA sick leave
- Releases of Claims and the BC Human Rights Tribunal
- Employer vicarious liability for sexual abuse
- Termination clauses in BC and *Waksdale*
- “Late” employment contracts
- Surreptitious recording of termination meetings
- Best practices – responding to workplace conduct complaints



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# Workers Compensation and the Return to Work of Injured Employees

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- Effective January 1, 2024, BC employers had new obligations to support the return to work of employees who were injured on the job
- Amendments to the *Workers Compensation Act*:
  1. The Duty to Cooperate
  2. The Duty to Maintain Employment

# Workers Compensation and the Return to Work of Injured Employees

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- The Duty to Cooperate
  - Contact worker as soon as practicable following injury
  - Maintain communication with the worker throughout the injury period
  - Identify work that restores full wages if possible
  - Provide information to WorkSafe BC regarding return to and continuation of work
  - Cooperate in the return to work process
  - \*If a dispute, WCB to make determination within 60 days of complaint

# Workers Compensation and the Return to Work of Injured Employees

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- The Duty to Maintain Employment
  - Applies to employers with 20 or more employees
  - If employee was employed for 12 months, employer obligated to maintain their employment
  - If worker can carry out essential duties of their pre-injury work, with or without accommodation, must offer pre-injury work comparable in duties and earnings
  - If worker can't carry out essential duties of their pre-injury work, must offer first suitable work that becomes available
  - WorkSafeBC will provide guidance and collaborate with parties

# Pay Transparency Update

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- *Pay Transparency Act*
  - Job postings must specify salary or wage
  - “Employer’s reasonable expectation about pay for the job”
  - May be a defined range
  - Don’t have to include value of benefits, overtime, bonuses, commissions, or tips
  - Can’t ask applicants about pay history



# Pay Transparency Update

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- *Pay Transparency Act*
  - By 2026, employers with 50+ employees must publish pay equity information annually, including on employer's website
  - Deadline depends on size of employer - 2023 (BC Govt), Nov. 1, 2024 (employers with 1,000+ employees), 2025 (employers with 300+ employees), 2026 (employers with 50+ employees)
  - Information must include data about differences in pay between specified gender categories – men, women, non-binary, and “unknown” (employees who otherwise, or

# Pay Transparency Update

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- Pay transparency reports must be posted by the employer on its website
- Online reporting tool expected this fall
- “Mock Pay Transparency Report” and guidance and “Gender and Sex Data Standard” available online
- First reports available – ICBC, Transit, BC Liquor Commission, BC Housing
- Still no enforcement measures (but *Human Rights Code* re pay equity . . .)
- Program still seems to be focussed on education and cooperation

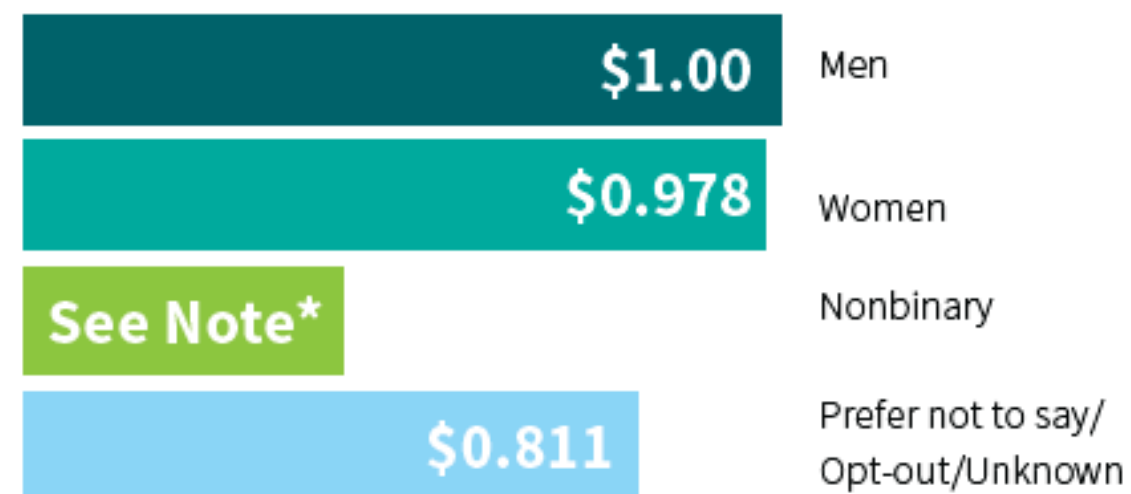
## Employer Details

Employer:	BC Housing
Address:	1700 - 4555 Kingsway, Burnaby, BC V5H 4V8
Time Period:	April 1, 2022 - March 31, 2023
NAICS Code:	91 - Public Administration
Number of Employees:	1000+



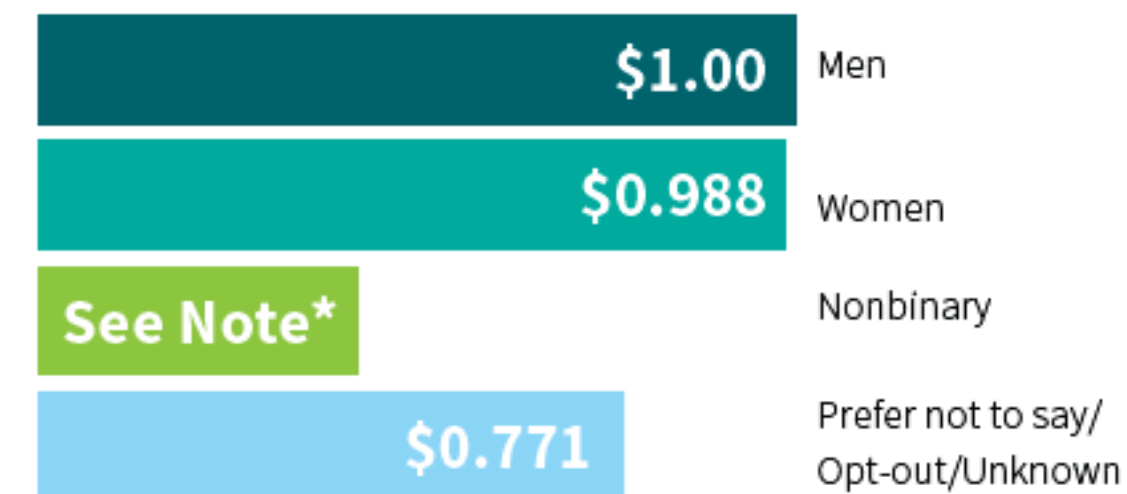
## Hourly Pay

### Mean hourly pay gap<sup>1</sup>



Women's mean (average) hourly wages are 2.20% less than men. For every dollar a man earns on average, women earn \$0.978 cents on average.

### Median hourly pay gap<sup>2</sup>



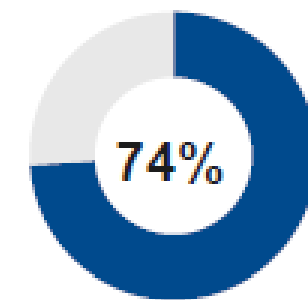
Women's median hourly wages are 1.19% less than men. For every dollar a man earns, women earn \$0.988 cents in median hourly pay.

#### Explanatory Notes

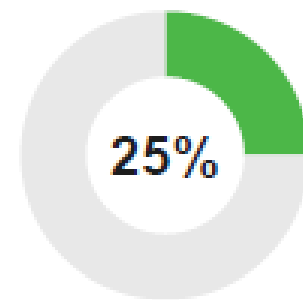
1. "Mean hourly pay gap" refers to the differences in pay between gender groups calculated by average pay.
2. "Median hourly pay gap" refers to the differences in pay between gender groups calculated by the mid range of pay for each group.

Employer Details	
Employer:	BC Transit
Address:	520 Gorge Road East, Victoria, BC, V8W 9T5
Time Period:	Fiscal: April 1, 2022 – March 31, 2023
NAICS Code	Code 48-49, Sector Transportation 485
Number of Employees	1,402

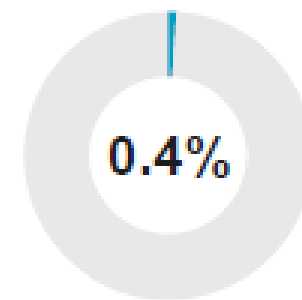
### Percentage of Employees in Each Gender Category



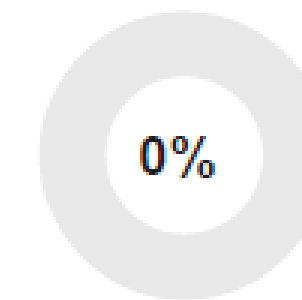
Men



Women



Non-binary People\*



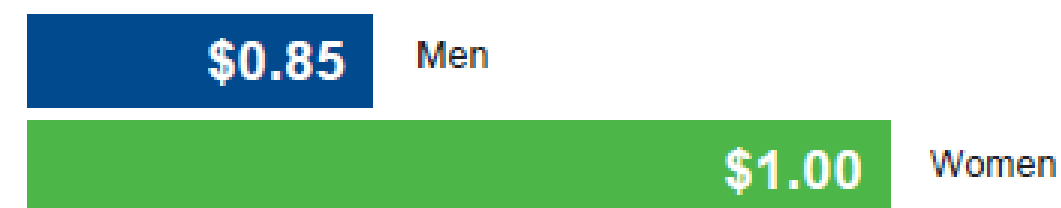
Prefer not to say/Unknown\*

\*Non-binary People and Prefer not to say/Unknown do not meet the data requirements therefore all information is suppressed.



## Hourly Pay

### Mean Hourly Pay Gap<sup>1</sup>



### Median Hourly Pay Gap<sup>2</sup>



# Health Spending Accounts and ESA Sick Leave

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- May 2021 – BC *Employment Standards Act* was amended to provide for 5 days’ paid leave for “personal illness or injury” for employees employed for 90 consecutive days (s. 49.1)
- Many employers had similar pre-existing benefits – health spending accounts, personal leave days, PTOs
- Issue – could employers rely on those pre-existing benefits to satisfy the new ESA entitlement?
- Consensus answer now – probably not

# Health Spending Accounts and ESA Sick Leave

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*Canadian Maritime Engineering Ltd. (Alberni)*, 2024 BCCAAA No. 32 (Hall)

- Collective agreement – “annual spending account” used at employee’s discretion for, amongst other things, “health, dental, sick *or days taken as leave without pay*” (emphasis added)
- Evidence at hearing – used for sick days, personal days, days off to deal with death of a family dog, time off to care for sick child or spouse, time off to accompany partner to ultrasound and pre-natal appointments, time off to help family member following car accident, and bereavement leave

# Health Spending Accounts and ESA Sick Leave

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- Arbitrator Hall– employees used existing benefit for many purposes, not just for sick leave
- Employer precluded from forcing employees to use an existing benefit to satisfy the employer's new statutory obligation
- Effectively, that would reduce the value of the benefit – employees would no longer be able to use the benefit for non-sick leave purposes
- So employees entitled to ESA sick leave in addition to existing sick leave benefits

# Releases of Claims and the BC Human Rights Tribunal

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- Always uncertainty about whether BC Human Rights Tribunal will enforce a Release of Claims
- Will exercise discretion to protect vulnerable individuals
- Employers (and counsel) must recognize that an executed Release may not be effective at BC HRT
- Adopt best practices and stay on high road to maximize chances of successfully relying on Release for human rights claims



# Releases of Claims and the BC Human Rights Tribunal

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*Fyffe v. University of British Columbia*, 2024 BCHRT 88

- Complaint of race-based discrimination by woman of Caribbean and West Indian ancestry
- Dismissal application relying on Release
- Release signed at termination meeting, employee didn't read it, didn't know what it said
- Employer had told her to take time to read it and she had a week to consider
- Employer paid her the money
- Dismissal application dismissed – good issue to be decided

# Releases of Claims and the BC Human Rights Tribunal

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## Considerations

1. Language of the Release and what it covers (clear, plain language)
2. Inequality of bargaining power
3. Substantially unfair settlement
4. Whether employee received independent legal advice
5. Duress, including financial need and short deadline
6. Employee's knowledge of their rights

# Vicarious Liability for Sexual Abuse

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- Employer liability for employee misconduct – was the misconduct strongly connected with the employment and so did the employment materially and significantly increase the risk of harm
  - For example, mere introduction and contact to the victim (boys & girls club) v. providing intimate care (residential facility) (*Bazley v. Curry* and *Jacobi v. Griffiths*, SCC, 1999 )
- Where is the line? Tricky, fact-dependant

# Vicarious Liability for Sexual Abuse

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- Recent illustration - *HN v. School District No. 61*, 2024 BCSC 128
- Private tutor sexually abused student at tutor's home from age 11 to 16
- Whilst watching movies, playing cards and working on home projects
- Connections to school
  - School had recommended tutor to child's parents
  - Tutoring sessions initially held at school
  - Tutoring later at tutor's home, with parents' agreement

# Vicarious Liability for Sexual Abuse

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- BC Supreme Court – must be a “strong connection” between duties imposed by the employer and the misconduct
- Tutor wasn’t an employee of the school
- School didn’t confer to tutor power over child
- No misconduct on employer premises
- Parents didn’t rely on the School District when they made private arrangements
- Note - substantial award against tutor’s estate - \$225,000

# Termination Clauses in BC: Not So Fast *Waksdale*

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- *Waksdale v. Swegon North America Inc.*, 2020 ONCA 391 – because “with cause” provision in employment contract was too broadly defined (and, therefore, violated the minimum threshold set by the Ontario ESA to terminate an employee without pay), all of the termination provisions in the contract were invalid
  - Common law cause for termination v. “wilful misconduct or wilful neglect of duty that is not trivial and that has not been condoned by the employer”
- Result – hyper-critical analysis of termination clauses in Ontario, they’re essentially unenforceable

# Termination Clauses in BC: Not So Fast *Waksdale*

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- *Gracias v. Dr. David Walt Dentistry, 2022 ONSC 2967* - termination clause fine, but separate clause defining cause for termination of employment breached ESA, so termination clause ineffective
- *Henderson v. Slavkin et al., 2022 ONSC* – termination clause fine, but separate “conflict of interest” clause breached ESA, so termination clause ineffective
- Door wide open in Ontario to invalidate termination clauses – Unrelated employment contract clauses? Ancillary documents like confidentiality agreements? Policies (workplace violence, bullying and harassment)?

# Termination Clauses in BC: Not So Fast *Waksdale*

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- BC Court of Appeal – *Egan v. Harbour Air Seaplanes LLP*, 2024 BCCA 22
- Courts must assess the parties’ intentions by applying a “practical, common-sense approach to contractual interpretation” (*magic to our ears!*)
- Proper contractual interpretation is “not accomplished by disaggregating the words in a termination clause looking for ambiguity as a means to find the clause unenforceable” (*also magical*)



# Termination Clauses in BC: Not So Fast *Waksdale*

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- BC Court of Appeal – *Egan v. Harbour Air Seaplanes LLP*, 2024 BCCA 22
- A general reference in a termination clause to the applicable employment standards legislation is sufficient to displace the common law presumption in British Columbia – don't need specific words or phrases in British Columbia, such as “only”, “limited to” or “minimum”
- A termination clause that clearly evinces an intention to incorporate the notice provisions of the employment standards legislation into the parties' contract, which provide for “some other period of notice”, should be sufficient to displace the presumption of common law notice

# Employment Contracts: Too Little, Too Late

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- The dilemma – post-contractual contract terms
- If the employee has already “accepted”\* an offer of employment, too late impose terms like
  - Detailed written contract
  - Policies
  - New terms later like termination provisions and restrictive covenants

\*Employment Law 101, Week 1 – “Offer and Acceptance”

# Employment Contracts: Too Little, Too Late

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*Adams v. Thinkific Labs Inc.* 2024 BCSC 1129

- Employer sent candidate (60 page!) offer by email with some employment terms – position, compensation, bonuses, benefits, leave entitlements, start date, contract to be provided later
- Candidate accepted
- Provided detailed written contract later
- On termination, employer relied on termination provision in later, detailed contract
- Court – detailed contract too late, post-contractual, and therefore ineffective

# Employment Contracts: Too Little, Too Late

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## Best practices

- Provide the entire contract when the offer is made
- If have to provide a preliminary offer, make it expressly subject to review and agreement to terms of contract to be provided later – “no deal until you sign the full contract”
- If want to make policies binding, allow candidate opportunity to review policies
- If want to impose new terms later – provide consideration

# Surreptitious Recordings: Termination Meetings

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- Ease of surreptitious recording in workplace with smartphones now of some legal significance
- Surreptitious recording lawful if one party to conversation consents
- *Shalagin v Mercer Celgar Limited*, 2023 BCCA 373 - repeated surreptitious recordings was cause for termination
- But also some downside for employers who behave badly



She recorded  
her own firing!

# Surreptitious Recordings: Termination Meetings

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*Teljeur v. Aurura Hotel Group* 2023 ONSC 1324

- Resort GM terminated without cause
- Employee secretly recorded termination meeting
- Transcript in evidence at wrongful dismissal trial
- Court found that recording showed employer conduct that was “untruthful, misleading and unduly sensitive” – breached *Honda* duty of good faith and fair dealing in termination
- \$15,000 in moral damages

# Surreptitious Recordings: Termination Meetings

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- Employee asked three times for notice in writing, employer refused despite ESA obligation
- Employer promised pay in lieu of notice which was later withheld
- Employer encouraged resignation by employee – “You don’t have to resign. I’m saying it is better off for you to do it.”
- Employer delayed reimbursement of \$16k in expenses after saying they’d be paid “in the next week or so”



# Best Practices: Responding to a Workplace Conduct Complaint

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*Salanguit v. Parq Vancouver 2024 BCHRT 119*

- A manager filed complaint of discrimination on the basis of disability, alleging that a subordinate mocked her speech impediment
- Employee dissatisfied with steps taken by employer; made complaint to BC Human Rights Tribunal
- Complaint dismissed on employer's application
- In part because of reasonable settlement offer (\$4,000)
- But also because employer took reasonable and effective steps to remedy the discrimination

# Best Practices: Responding to a Workplace Conduct Complaint

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Employer took the complaint seriously:

- Started investigation within a few days of receiving the complaint
- Interviewed complainant, respondent, and witnesses over two months
- Substantiated the allegation
- Issued final written warning to respondent
- Required her to provide written apology to complainant

# Best Practices: Responding to a Workplace Conduct Complaint

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Employer addressed impact on complainant by:

- Referred her to EAP to access counselling
- Accommodated a medical leave
- Thoughtful return to work plan
- Demonstrated respect and support, including deferential tone of communications, settlement offer, and taking responsibility for mistakes

# Best Practices: Responding to a Workplace Conduct Complaint

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Employer took steps to ensure the discrimination wouldn't happen again:

- Memo to employees about respectful conduct and teasing and exclusion of co-workers, and declaring that misconduct would be investigated and may lead to discipline
- Reviewed and updated bullying and harassment policy
- Required employee acknowledgement of updated policy
- In-person training about updated policy

Coffee – and then let's talk about YOU!



# Developments in Workplace Law 2024

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