

# Workplace Caselaw Update

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# Introduction

Topics for this session:

Human Rights update: Pam Costanzo

Arbitration update: Michelle Blendell

Employment update: Carolyn MacEachern

# Human Rights Caselaw Update

- Pandemic cases
  - Vaccine card screening decisions
  - Mask exemption
- Gender identity and expression
- Harassment at work

# Human Rights: COVID

Tribunal has received a “large volume” of complaints about vaccine cards

Screening decisions released in September:

Complainant v. Dr Henry

Complainant obo class of persons v.  
Horgan

Both complaints rejected

# Vaccine Complaint Requirements

1. What is the vaccine requirement?
2. How did it negatively impact you?
3. How does the negative impact relate to employment or a service, etc.?
4. How is the respondent responsible?
5. How is a protected characteristic a factor in the negative impact?

# Complainant v. Dr Henry, 2021 BCHRT 19

Complainant has asthma, refused vaccination  
Alleged he would be denied services without a  
vaccine card

“...even if the Complainant had outlined an adverse impact...he would then have to allege facts that could establish a connection between having asthma and not being fully vaccinated...”

# Complainant v. Horgan, 2021 BCHRT 120

Complaint: Vaccine cards are discrimination on the grounds of political belief

No adverse impact shown in relation to employment

Tribunal accepted opposition to vaccine rules could be a political belief

# Coelho v. Lululemon, 2021 BCHRT 156

- Maskless shopper denied entry to a store
- Had a note from naturopath giving exemption
- Offered online shopping or curbside service
- Tribunal accepted she might show a disability and an adverse impact
- Analysis switched to whether Lululemon could offer a defence



# Coelho v. Lululemon, 2021 BCHRT 156

Defence: three part test:

1. Was the policy adopted for a purpose rationally connected to its function?
2. Was the policy adopted in good faith to fulfill that purpose? and
3. Is the policy reasonably necessary to accomplish the purpose (accommodation to the point of undue hardship)?

# Coelho v. Lululemon, 2021 BCHRT 156

1. Policy necessary to ensure safety
2. Mask policy adopted in good faith
3. Ms. Coelho refused alternatives

“If a complainant establishes that they experienced a disability-related adverse impact...this does not then entitle the complainant to simply do what they please.”

# Nelson v. Goodberry Restaurant, 2021 BCHRT 137

- Decision on gender identity/expression and pronoun use
- Co-worker refused to use they/them despite repeated requests
- Employer said complainant should wait while they dealt with performance issues
- Complainant was fired after slapping coworker on the back

# Nelson v. Goodberry Restaurant, 2021 BCHRT 137

- Tribunal found discrimination by coworker, manager and restaurant
- Employer should have intervened sooner and protected complainant
- Unwelcome contact occurred after coworker said “it’s her or me”
- Caution against treating complainants like “angry instigators”

# AB v. Regional District, 2021 BCHRT 59

- Member of the public harassing staff
- Local government stopped providing services
- Tribunal stated “local governments have an obligation to provide its employees with a workplace free from harassment”
- Despite her mental disability, actions of the local government were justified

# AB v. Regional District, 2021 BCHRT 59

- Steps taken by the District:
  - CAO wrote to AB about her actions
  - No more ‘barking dog’ complaints accepted
  - All complaints and communications directed to CAO
  - AB informed she had 15 minutes per week with CAO
  - CAO offered a meeting, with an elected official to facilitate
  - RCMP involved and formal complaint made
  - No further nuisance complaints accepted at all

# LABOUR LAW: DISCIPLINE AND DISCHARGE UPDATE

- Cases for Discussion:

- ***Port Coquitlam (City) v. CUPE, Local 498***, [2020] BCCA 83 (Saunders)
- ***Terrapure Environmental v. International Union of Painters and Allied Trades, District Council (Arnot Grievance)***, [2021] BCCA 103 (Love)

# *Port Coquitlam (City)*

- Provides guidance regarding the use of covert surveillance of employees
- Facts
  - Employer dismissed six employees in the Utilities Department for participation in copper recycling scheme
  - Allegation that two grievors stole fire hydrants



# *Port Coquitlam (City)*

## ■ Findings

- Five grievors participated in the scheme and dismissal was appropriate
- Insufficient evidence the sixth grievor was aware of or participated in the scheme – grievor was reinstated with a make whole order

# ***Port Coquitlam (City)***

- Union argued covert surveillance breached the privacy of two grievors and sought damages
- Use of Covert Surveillance
  - Test set out in ***Vernon (City) and Vernon Professional Firefighters Association 2018*** decision

# *Port Coquitlam (City)*

- Covert Surveillance Test
  - Use of covert surveillance must be reasonable in all the circumstances
  - Employee's right to privacy is not absolute and must be balanced with employer's legitimate interest in collecting personal information

# *Port Coquitlam (City)*

- Covert Surveillance Test Cont'd
  - Relevant Circumstances
    - Reason for surveillance
    - Whether the employer has or could have addressed the problem in another way
    - Whether other sources of information are available

# *Port Coquitlam (City)*

- Covert Surveillance Test Cont'd
  - Relevant Circumstances
    - The employee's expectation of privacy at the time and place of surveillance
    - Scope of personal information collected
    - Extent of the intrusion into the employee's privacy
    - Seriousness of the employee's loss of privacy

# *Port Coquitlam (City)*

- Findings re Covert Surveillance
  - Employer's surveillance breached the privacy of one grievor, but not the other
  - No reasonable basis for surveillance of one grievor suspected of stealing a fire hydrant
  - Less intrusive steps were available to address the employer's concerns

# *Port Coquitlam (City)*

- Findings re Covert Surveillance Cont'd
    - Independent witness had observed the grievor leaving the public works yard with a fire hydrant
    - Grievor had a legitimate expectation of privacy in his home and in the community
    - Employer's surveillance had breached the grievor's privacy – Grievor entitled to damages award
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# *Port Coquitlam (City)*

- Findings re Covert Surveillance Cont'd
  - There was a reasonable basis for surveillance of the other grievor
  - Grievor was a supervisor of the Water Crew
  - Reasonable for investigator to watch grievor after she had entered the public works yard after hours with her personal vehicle



# *Port Coquitlam (City)*

- Findings re Covert Surveillance Cont'd
  - Grievor had been observed in public where she had a minimal expectation of privacy
  - No breach of privacy in looking at grievor's social media postings

# *Port Coquitlam (City)*

- Lesson from the Case
  - Get legal advice before using covert surveillance
  - Surveillance that does not meet the test could breach employee privacy and result in a damages award

# ***Terrapure Environmental***

- Provides guidance on the arbitral approach to allegations of breach of employer COVID protocols
- Facts
  - Grievor terminated for alleged insubordination in failing to self-isolate and get a COVID test, and for lying during the employer's investigation

# *Terrapure Environmental*

## ■ Facts Cont'd

- At the hearing, new allegation that the grievor had surreptitiously video recorded a meeting with managers
- The employer's crew were working out of town and staying in a hotel paid for by the employer
- The grievor ate some chicken wings and became ill with diarrhea

# *Terrapure Environmental*

- Facts Cont'd
  - No respiratory symptoms
  - The next day, the grievor told the employer that he had had diarrhea
  - A supervisor directed him to return to the hotel and rest
  - He later left the hotel to meet a friend for lunch

# ***Terrapure Environmental***

- Facts Cont'd
  - The grievor told supervisor that he had eaten chicken wings and that he did not have COVID
  - Supervisor texted and told the grievor not to leave the hotel room, to call 811 and get a COVID test
  - Evidence not clear re when the grievor saw the text

# *Terrapure Environmental*

## ■ Facts Cont'd

- After lunch, the grievor called 811 but did not get through
- Grievor used a Self-Assessment Tool on the BC Centre for Disease Control website – Result: No COVID test needed
- Grievor did not respond to the employer's attempts to reach him that day or the next

# *Terrapure Environmental*

- Arbitrator's Decision
  - Arbitrator concerned that while the employer had a Pandemic Response Policy, it had not distributed the Policy to the employees or trained them on it
  - Policy and CDC website did not list diarrhea as a key symptom of COVID



# *Terrapure Environmental*

- Arbitrator's Decision Cont'd
  - Policy did not require an ill employee to get a COVID test before returning to work
  - Employer's unwritten practice was to require ill employees to self-isolate for 14 days or produce a negative COVID test result

# *Terrapure Environmental*

- Arbitrator's Decision Cont'd
  - Arbitrator applied the 1965 *KVP Co. v. Lumber & Sawmill Workers' Union, Local 2537* decision re unilateral employer rules
    - Rule must not be inconsistent with the collective agreement
    - Rule must not be unreasonable
    - Rule must be clear and unequivocal

# *Terrapure Environmental*

- Arbitrator's Decision Cont'd
  - **KVP** requirements cont'd
    - Rule must be brought to the attention of the employee
    - Employee must be notified that breach of the rule could result in discipline or discharge
    - Rule must have been consistently enforced by the employer

# *Terrapure Environmental*

- Arbitrator's Decision Cont'd
  - Arbitrator held that the employer could not apply the self-isolation and COVID test requirements to the grievor
  - The unwritten rule was unreasonable as there was no connection between an employee's symptoms and the symptoms of COVID

# *Terrapure Environmental*

- Arbitrator's Decision Cont'd
  - Employer had not brought the oral rule to the grievor's attention, or advised that failure to follow the rule would result in discharge
  - Long-standing principles regarding unilateral employer rules were not suspended during the pandemic

# *Terrapure Environmental*

- Arbitrator's Decision Cont'd
  - Arbitrator dismissed the allegations of insubordination
  - Criteria for a finding of insubordination
    - There must be a clear order understood by the grievor
    - The order must have been given by a person in authority
    - The order must have been disobeyed

# *Terrapure Environmental*

- Arbitrator's Decision Cont'd
  - No insubordination in failing to get a COVID test
    - The BC CDC Self-Assessment indicated there was no need for him to take the test
  - No insubordination in going to lunch
    - No evidence the grievor received the text message to self-isolate before going to lunch

# *Terrapure Environmental*

- Arbitrator's Decision Cont'd
  - The grievor had substantially complied with the direction to call 811
  - The employer had not given a clear order for the grievor to remain in contact with the employer
    - The employer could have sent a text or left a voicemail directing the grievor to contact the employer or face discipline



# *Terrapure Environmental*

- Arbitrator's Decision Cont'd
  - The Result:
    - The grievor's lie about attempting to get a COVID test and his surreptitious video recording of the meeting with managers were just cause for discipline
    - Termination was an excessive disciplinary response
    - The grievor was reinstated with a five day suspension and a make whole order

# *Terrapure Environmental*

## ■ Lessons from the Case

- 1) Publish COVID policy to employees and train them on it
- 2) Follow COVID policy in deciding how to respond to employees with symptoms of illness
- 3) Requirement for COVID test must be reasonable in relation to the employee's symptoms

# ***Terrapure Environmental***

## ■ Lessons from the Case

- 4) Give COVID instructions clearly and directly, and indicate that failure to follow the direction could result in discipline or discharge

# Employment Law Update

- Pandemic cases:
  - Frustration of contract
  - Temporary layoffs/Constructive dismissal
- Wrongful dismissal
- Just cause termination

# Frustration

- Question: could employers argue the pandemic frustrated employment contracts?
- If so, then employers not obligated to provide severance pay upon termination of employment
- Doctrine applies when a situation arises that the parties did not anticipate and that makes performance of the contract radically different from what was intended

# *Verigen v. Ensemble Travel Ltd.*

- Employer in the travel industry
- Travel industry severely impacted by pandemic
- Employer argued that employment agreement was frustrated
- No frustration – changed employer's ability to perform, not the nature of its obligation

# Temporary Layoffs

- Another pandemic issue was whether the temporary lay-off of an exempt employee constituted a constructive dismissal
- Two cases considered this issue and came to different conclusions:
  - *Verigen v. Ensemble Travel Ltd.*
  - *Hogan v. 1187938 B.C. Ltd.*

# Temporary Layoffs

- Courts will look behind the temporary layoff to determine intent of employer
- Local governments must exercise caution when considering temporary lay offs
- Need to have evidence of a true intent to recall the employee back to work
- Should also obtain consent of the employee



# Changes to Employment Contract

- Unilateral changes to employment agreement can constitute constructive dismissal
- Two part test:
  - Was there a unilateral change that a reasonable person would feel changed an essential term?
  - Would a reasonable person conclude employer no longer intended to be bound by agreement?

# Changes to Employment Contract

- *Kosteckyj v. Paramount Resources Ltd.*
  - Cost reduction program introduced without consent of employee
  - 16.65-20% reduction in remuneration
  - Court found reduction constituted constructive dismissal

# Changes to Employment Contract

- *Hogan v. 1187938 B.C. Ltd.*
  - Plaintiff laid off, then terminated
  - Court found employee was constructively dismissed at the time of layoff
    - No evidence of employee consent to layoff
    - No contract term allowing temporary layoff
    - Employee told it would be temporary

# Changes to Employment Contract

- *Verigen v. Ensemble Travel Ltd.*
  - Unlike *Hogan*, employee consented to layoff
  - Employer introduced a term limiting reasonable notice after employee commenced employment
  - Employee argued that term was unenforceable
  - Court agreed as employer did not provide “consideration” for the amendment to the employment agreement

# *Younesi v. Kaz Minerals Projects*

- Employee had been headhunted and therefore “induced” to leave previous employment
- Dismissed without cause after a few months
- Court awarded 2 extra months’ reasonable notice because of inducement
- Insensitive comments made by manager during termination meeting
- Court awarded extra damages given impact on employee

# *McGraw v. Southgate (Township)*

- Employee fired based on unfounded, sexist allegations and gender-based discrimination
- Investigation into rumours about employee's conduct but it was flawed
- Court determined that rumours were “mostly unfounded, malicious, sexist falsehoods”
- Court awarded over \$150,000 in extra damages

# Just Cause

- *Hucsko v. A.O. Smith Enterprises Limited:*
  - Employee accused of sexual harassment by co-worker
  - Independent investigation confirmed inappropriate comments made and constituted harassment
  - Employer offered employee opportunity for remedial action including making an apology to complainant
  - Employee refused to apologize
  - Employer dismissed employee for just cause
  - Court of Appeal upheld dismissal