YOUNG ANDERSON
BARRISTERS & SOLICITORS

WORKPLACE CASELAW UPDATE

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WORKPLACE CASELAW UPDATE

I. INTRODUCTION

Local governments have been grappling with unprecedented change in 2021, as the pandemic continues and we move to a "new normal" in our work lives. While the vaccines have allowed us to go back to some of our pre-pandemic activities, the introduction of vaccine cards has given rise to a new set of legal issues. At the same time, COVID-related cases have started to reach their conclusion in the courts and at arbitration so we have a better idea of how adjudicators will view claims related to COVID employment issues.

While the pandemic has created new challenges in the area of labour and employment law, local governments continue to manage issues such as misconduct, harassment, and terminations. This paper will provide a survey of recent cases in human rights, labour, and employment law. Topics reviewed include COVID layoffs; gender identity discrimination; employee surveillance; workplace threats; changes to employment contracts; and the continuing importance of treating employees in good faith in the dismissal process.

II. CASELAW UPDATE: HUMAN RIGHTS

A. COVID Vaccine Cards

The first step in processing a complaint at the BC Human Rights Tribunal (the "Tribunal") is a screening decision. Screening decisions determine whether there are facts in the complaint that could violate the Code, if proven. These decisions are normally issued by letter and are not published.

Since BC's COVID vaccine cards were announced in August, the Tribunal has received what it describes as a "large volume" of complaints that the cards discriminate against individuals or groups. The Tribunal took the unusual step of publishing two screening decisions on complaints regarding vaccine cards, to inform the public on the issue. These decisions were anonymized.

In respect of a complaint against John Horgan (*Complainant on behalf of a Class of Persons v. John Horgan*, 2021 BCHRT 120), the Tribunal rejected a claim that vaccine cards constitute discrimination on the basis of political belief. Under sections 11, 13 and 14 of the *Human Rights Code*, RSBC 1996, ch. 210 (the "Code"), it is prohibited to discriminate in employment, employment advertisements, or union membership on the grounds of political belief. Political belief is not a protected ground in relation to other forms of discrimination, such as services or housing. Because the complainant had not alleged any facts that showed an adverse effect on his employment, the complaint was rejected.

Notably, the Tribunal said:

> I accept that a genuinely held belief opposing government rules regarding vaccination could be a political belief within the meaning of the Code. In saying this, however, I stress that protection from discrimination based on political belief does not exempt a person from following provincial health orders or rules. Rather, it protects a person from adverse impacts in their employment based on their beliefs.

In the second screening decision, *Complainant v. Dr. Bonnie Henry*, 2021 BCHRT 119, the complainant said he was being denied services due to his physical disability. He claimed to have asthma and said he would not get an "experimental vaccine". The Tribunal accepted asthma is a disability, but since he had not shown any adverse impact had taken place – just that one might take place in the future –there was no breach of the Code.

The Tribunal commented in relation to medical grounds:

> Here, even if the Complainant had outlined an adverse impact, such as being denied a service because he was not fully vaccinated against COVID-19, he would then have to allege facts that could establish a connection between having asthma and not being fully vaccinated, such as his disability preventing him from being able to get vaccinated. An ideological opposition to or distrust of the vaccine would not be enough.

Given that the Provincial Health Officer has published a very restricted list of medical reasons that allow exemption from a vaccine, it will be very difficult for complainants to successfully argue their disability prevents them from being vaccinated.

B. Discrimination Based on Race and Place of Origin

In *Valle Torres v. Vancouver Native Health Society*, 2021 BCHRT 55, an employer unsuccessfully tried to prevent a former employee from pursuing a human rights complaint after the employee successfully sued for wrongful dismissal in court.

Horacio Valle Torres was terminated from his employment as a program manager for Aboriginal children and families. He was an Indigenous person from El Salvador. He sued for wrongful dismissal. He learned in the course of litigation that he had been terminated because he was not Indigenous Canadian and because he was perceived as having joined with "white doctors" to form a rival organization. At the end of his civil action, Mr. Valle Torres was awarded damages for wrongful dismissal equal to 24 months' salary, plus $30,000 in aggravated damages.

Mr. Valle Torres made a complaint at the Tribunal that he had been discriminated against on the basis of his place of origin and race when he was terminated for not being Indigenous Canadian.

The employer brought an application to dismiss his complaint on the grounds that he had already received a remedy in the civil action. They argued the Tribunal should not allow the complaint to proceed because it would not further the purposes of the Code. The Tribunal has discretion to dismiss a complaint where the underlying issue has already been remedied.

The Tribunal reviewed the Courts' reasons for awarding aggravated damages: the fact the employer escorted him from the premises after abruptly terminating his employment; sent out an email that implied he had done something wrong; deceived him about the reason for his dismissal; made baseless allegations; and sent him a threatening lawyer's letter instead of talking to him about their concerns.

These reasons for damages did not include discrimination. The judge explicitly said the issue of discrimination was not before her. Mr. Valle Torres did not allege discrimination in his civil action because he did not know about it when he started the action. Therefore, no remedy was awarded by the Court for discrimination. The Tribunal also found no steps had been taken by the employer to remedy the discrimination. Therefore, the Tribunal allowed the complaint to proceed.

C. No Discrimination Against Community Member with Mental Disability

In *AB v. Regional District*, 2021 BCHRT 59, the Tribunal found a Regional District did not breach the Code when it denied services to a member of the public with a mental disability after she harassed employees over several years.

Ms. B moved to the District in 2003 and began to make repeated Freedom of Information requests related to the District's finances. She made repeated complaints about barking dogs, then made FOI requests about her complaints. The District found most of her complaints were unsubstantiated. When she was dissatisfied with the District's response, she called District staff. There was evidence that Ms. B's calls to the District in 2016 and 2017 numbered in the hundreds, if not thousands. She would frequently swear at employees, call them names, and sometimes blew an airhorn into the phone.

In 2016 the CAO wrote to Ms. B to tell her she would only be allowed to communicate with him during a set 15-minute block each week. She did not stop her calls to other employees. She was then blocked from contacting the District at all for a period of several months.

In 2017 Ms. B confronted a fire department employee, Mr. S, on the street while he was riding his bike with his children. She filmed them and called him names. She called Mr. S repeatedly with complaints about smoke.

Ms. B was engaged in conflict with many neighbours about their dogs. The RCMP held a public meeting about Ms. B. The CAO attended and spoke. At this meeting, the RCMP encouraged people to submit complaints about her. The employee Mr. S submitted a complaint about her phone calls to him. Ms. B was charged with criminal harassment, and was convicted, but had her conviction overturned. The judge who overturned her conviction said she was "goading" government employees into doing their jobs.

In September 2017 the CAO wrote to tell her she was permanently banned from contacting the District.

Ms. B was later diagnosed with bipolar disorder. While the Tribunal found the District did not know of her diagnosis, it did know Ms. B had a mental disability. The Tribunal also concluded that the bylaw enforcement services denied to Ms. B were services customarily available to the public, and that she suffered an adverse impact with respect to those services.

However, the Tribunal found the District proved that they had non-discriminatory reasons for denying services to Ms. B. The first was the District's limited resources to address Ms. B's large number of complaints. The second was their obligation to provide a safe and harassment-free workplace to their employees. The Tribunal dismissed her complaint, and said (at paras. 142-143):

> There may be a fine line between taxpayers goading government employees to do their jobs and harassing those employees. It is to be expected that people, such as Ms. B, may experience anger or frustration when they feel like staff are not doing their jobs. However, that does not mean employees have to accept harassing or abusive behaviour on a regular basis while doing their jobs.
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> I accept that in this situation, Ms. B's behaviour did cross the line into harassing and abusive behaviour that the District is entitled to protect its employees from. This Tribunal has held that local governments have an obligation to provide its employees with a workplace that is free from harassment: Colbert v. District of North Vancouver, 2018 BCHRT 40 at para. 48. Goading government employees to do their jobs cannot be interpreted so broadly as to permit people to use harassment in their goading.

D. Discrimination based on Gender Identity and Expression

In *Nelson v. Goodberry Restaurant Group*, 2021 BCHRT 137, a restaurant server was awarded $30,000 in damages for injury to dignity after a co-worker repeatedly refused to use their preferred pronouns, conflict between the two co-workers escalated, and the misgendered employee was terminated.

Jesse Nelson, the server, uses the pronouns they/them; they are a gender fluid, non-binary person. After moving to the Sunshine Coast from Vancouver, they applied for a job at a restaurant and were hired. During and after the hiring process, Jesse Nelson explained to the

general manager, Mr. Kingsberry, how important it was to have their pronouns properly used in the workplace. They were the first non-binary person to work in the restaurant. Staff sometimes made mistakes; Mr. Kingsberry corrected those mistakes and supported Jesse Nelson in ensuring they were properly gendered in the workplace.

However, the bar manager, Brian Gobelle, repeatedly referred to Jesse Nelson as "she/her". He also used gendered nicknames such as "sweetheart" and "honey". Jesse Nelson asked Mr. Gobelle to stop. Mr. Gobelle refused. It appeared to them and to other witnesses that Mr. Gobelle was deliberately making them uncomfortable. Restaurant management asked Mr. Gobelle to use they/them, or Jesse Nelson's name, but he persisted in using she/her and the nicknames.

In a meeting of restaurant staff, Jesse Nelson asked staff to use gender neutral terms in the workplace – for example, to say "hello folks" instead of "hello ladies" when greeting customers. They explained how painful it is to be misgendered. Mr. Gobelle got up and left the meeting. From then on, he made Jesse Nelson's job difficult, refusing to speak to them, or to assist them by making drinks or discussing customer complaints. Concerned for their employment, Jesse Nelson went to Mr. Kingsberry and asked for feedback. He said they were doing a great job. Jesse Nelson also raised the problems they were having with Mr. Gobelle, and asked Mr. Kingsberry to talk to him. Mr. Kingsberry said he would, but wanted to wait because they were also addressing other performance issues.

About a week after this conversation, Jesse Nelson discovered Mr. Kingsberry had not talked to Mr. Gobelle about his pronoun usage. They asked if they could talk to Mr. Gobelle directly that night. Mr. Kingberry said to wait until after the shift. Jesse Nelson said they wanted to do it on shift; Mr. Kingsberry agreed they could, during a lull in service.

Mr. Kingsberry did not testify at the hearing. Other managers testified that Jesse Nelson's version of that conversation was incorrect, and that Mr. Kingsberry instructed them not to talk to Mr. Gobelle during his shift, and said he would meet with both of them the next day. Without Mr. Kingsberry's testimony, the Tribunal accepted Jesse Nelson's evidence.

Jesse Nelson approached Mr. Gobelle twice during the shift. He refused to respond, once in Mr. Kingsberry's presence. After the shift, Jesse Nelson went outside to speak to Mr. Gobelle. At the hearing, each of them gave a different version of their conversation. Jesse Nelson, whose evidence was accepted, said that Mr. Gobelle told them they were too "militant" and were "trying to police our language". Mr. Gobelle stormed away when Jesse Nelson told him to use her name rather than nicknames. Mr. Gobelle denied saying these things and said Jesse Nelson had pushed him.

Everyone agreed that Mr. Gobelle then stormed inside and went to the owner, angry and swearing. He said "it's her or me". Jesse Nelson slapped Mr. Gobelle on the back and called him "sweetie", saying they were leaving. They acknowledged they should not have done this.

Mr. Gobelle was not hurt but it was unwelcome contact. Jesse Nelson then left. They said later that Mr. Gobelle's use of the pronoun "her" was the last straw.

The owner determined Jesse Nelson was the aggressor in this conflict, because they spoke to Mr. Gobelle during his shift, against instructions, and later struck him. Jesse Nelson was still on probation so the owner decided their employment could be terminated without giving a reason. The owner interviewed Mr. Gobelle about the confrontation outside but not Jesse Nelson.

Mr. Kingsberry called Jesse Nelson to tell them he was terminating their employment during probation. Jesse Nelson pressed him to explain why. Eventually he said they had come off too strong and were too militant. He said they made people uncomfortable and did not fit with the team.

Jesse Nelson brought complaints against the restaurant, Mr. Gobelle, Mr. Kingsberry, and the owner, Mr. Buono, alleging discrimination in employment on the basis of gender identity and gender expression. The complaints were upheld.

The Tribunal found that Mr. Gobelle had discriminated against Jesse Nelson in their employment when he refused to use their pronouns; was hostile to them; and was indifferent when Jesse Nelson told him how his conduct hurt them. The Tribunal found Mr. Buono and Mr. Kingsberry had not appropriately responded to Jesse Nelson's complaints. While they spoke to Mr. Gobelle and told him to use the proper pronouns, this had no effect on his conduct. The Tribunal recognized that they only had a short time to address the issue, and did take some steps. However, management should not have waited to address the issue until other performance issues had been dealt with. If they were going to wait, they should have taken steps to protect Jesse Nelson from the discriminatory conduct.

The termination of Jesse Nelson's employment was also discriminatory. According to Mr. Buono, they decided to terminate them because they did not wait to speak to Mr. Gobelle about his conduct, and because they were angry and aggressive when they slapped Mr. Gobelle's back. The Tribunal found both these grounds were related to Jesse Nelson's gender identity. The Tribunal stated that Mr. Gobelle's use of improper pronouns was worse than a slap on the back. They cautioned employers against casting employees who react strongly to discriminatory work environments as "angry instigators". Context must be considered when assessing the actions of an employee who has been the subject of discriminatory conduct. The Tribunal found Jesse Nelson was terminated because of how they responded to discrimination.

Jesse Nelson was awarded $30,000 in damages for injury to dignity.

E. Failure to Consider a Claim of Harassment

In *Byelkova v. Fraser Health Authority*, 2021 BCSC 1312, the BC Supreme Court overturned a Tribunal decision that a nurse had no prospect of proving her termination was linked to sexual advances by her manager. The Court found that when an employee alleges adverse treatment in employment after sexual harassment, the adverse treatment and the harassment must be considered separately.

Maryna Byelkova was an emergency department nurse. She was terminated for professional breaches including treating her own parents, accessing their medical records, and giving them medication taken from the hospital. The investigation and termination were led by Jessie Saran, her manager. Ms. Byelkova's union grieved her termination but resolved the grievance when the employer offered to reinstate her. She refused the offer of reinstatement because it did not offer financial compensation. She then filed human rights claims against the union and employer. Both claims were dismissed without a hearing. She appealed the decision to dismiss her claim against the employer.

While Ms. Byelkova admitted most of the allegations were true, she claimed she had refused sexual advances by Mr. Saran and this was the reason he initiated the investigation and terminated her employment. Mr. Saran denied making the advances, and there was evidence before the Tribunal that many others were involved in the decisions. Another nurse submitted an affidavit saying she complained to Mr. Saran about Ms. Byelkova's conduct; it was this complaint that led to the investigation. The Tribunal found that in light of the affidavit, Ms. Byelkova had no basis for her claim that the investigation was due to her rejection of him.

The Tribunal then reviewed the employer's investigation and the grounds for termination. The evidence was that the investigation followed normal procedures, and that the termination was reviewed and approved by several senior managers. The Tribunal concluded there was no prospect Ms. Byelkova could prove she was targeted for unfair treatment by Mr. Saran, and dismissed her complaint.

The Court overturned this decision. The Court found that Ms. Byelkova had filed two separate complaints: the first was a complaint of sexual harassment, and the second related to the investigation and termination. It found the Tribunal had only considered the second complaint. The Court found the Tribunal failed to consider Mr. Saran's alleged sexual harassment as adverse treatment of Ms. Byelkova. It acknowledged that Ms. Byelkova stated in her submissions that it was not improper for Mr. Saran to ask her on a date, but that she was upset

he had retaliated after she refused. However, the Court pointed to other places in her submissions where she said he intensified his advances over the months and overstepped professional boundaries. The Court said because the Tribunal failed to consider this central issue, it had to reconsider its decision to dismiss the complaint. The Court directed the Tribunal to consider whether there was a prospect Ms. Byelkova could prove she was sexually harassed, and also whether sexual harassment was a factor in the decision to investigate her conduct and terminate her employment.

F. Termination of Employment: Discrimination Related to Disability

In *Banfield v. Strata Geodata Services*, 2021 BCHRT 142, an employer terminated a short service employee without cause, paid severance, and had the employee sign a release. Although the Tribunal accepted there were valid reasons to terminate the employee, the termination was found to be discriminatory and the release ineffective.

Catherine Banfield is a geologist. Her former employer is a small consulting company. She worked for her employer for only four months before being terminated without cause.

While working in the field, Ms. Banfield went to a doctor for knee pain, and reported the pain via an incident report. The knee pain may have related to a pre-existing condition, but Ms. Banfield also told her manager that it was related to bad working conditions at the site. Her manager asked her to return to Vancouver and rest her knee for a week.

While she was off work, her manager went to the field site to investigate her working conditions. While he was there, he also investigated client complaints about her work and conduct. These included complaints she sent inappropriate photos to the pilot; yelled at staff; breached the company's alcohol policy; and went through a manager's bag and took out his computer without his permission. In addition, the client said she had not performed the work they expected or worked in a safe manner.

The company decided to terminate her employment. They consulted a lawyer and were advised to terminate her without cause. The lawyer drafted a letter and release of claims. A brief meeting was held. She was given two weeks' pay, signed the release at the meeting, then left.

The Tribunal found the release did not bar Ms. Banfield from recovering damages, and that she had been terminated for reasons connected to her knee pain. She was awarded a total of $22,250.

With respect to the release of claims, the Tribunal found that while it explicitly released the employer from a human rights complaint, and Ms. Banfield was educated enough to understand the document, she had not thoroughly read the document in the meeting before signing it. No one told her the release covered human rights claims, or that she should consult a lawyer about the release before signing it. In addition, since she was already entitled to two weeks' severance pay under her contract, no consideration was paid in exchange for the release. For these reasons, her complaint was not barred by the release of claims.

The Tribunal then turned to the question of whether the termination had been discriminatory. The employer argued Ms. Banfield had knee pain, which was not a physical disability. The Tribunal found that the employer had perceived Ms. Banfield's knee condition as a physical disability. Emails were entered into evidence wherein managers referred to her knee pain as a problem that could impact her performance in the future.

The Tribunal also found that her perceived disability was not the main reason she was terminated. She was fired because of her slow progress; her harsh manner with staff; and her breach of the alcohol policy. However, there was evidence that her perceived disability was a factor in the chain of events that lead to her termination. The management emails referenced a possible Worksafe claim and a sense that there could be further difficulties related to her knee injury. These considerations were found to form a part of the decision to terminate her employment. Although it was not the main reason, the fact that it was a part of the decision was enough to find that she was discriminated against. She was awarded wage losses, and $10,000 damages for injury to dignity.

III. CASELAW UPDATE: LABOUR RELATIONS

A number of interesting arbitration decisions involving discipline and discharge by local governments have been decided over the past two years. There has also been an arbitral decision involving a non-local government employer in which an employee terminated for alleged breach of the employer's COVID-19 protocols was reinstated.

A. Discipline and Discharge Test

In discipline and discharge cases, the questions for the arbitrator are as follows:

- Has the grievor given just and reasonable cause for some form of discipline by the employer?
- If the answer to the first question is yes, was the discipline imposed an excessive response under all the circumstances? and

- If the answer to the second question is yes, what alternative measure should be substituted as just and equitable?

[*William Scott & Co Ltd. v. Canadian Food & Allied Workers Union, Local P-162***,** [1977] 1 Can LRBR 1, [1976] BCLRBD No. 98]

In deciding whether a disciplinary response to misconduct is excessive, arbitrators consider such factors as:

- The grievor's previous good record;
- The long service of the grievor;
- Whether or not the incident was an isolated incident in the grievor's employment history;
- Whether the grievor was provoked;
- Whether the grievor acted on the spur of the moment as a result of a momentary aberration, due to strong emotional impulses, or whether the offence was premeditated;
- Whether the penalty imposed has created a special economic hardship for the grievor in light of their particular circumstances;
- Evidence that the company rules of conduct, either unwritten or posted, have not been uniformly enforced, thus constituting a form of discrimination;
- Circumstances negativing intent, e.g., likelihood that the grievor misunderstood the nature or intent of an order given to them, and as a result disobeyed it;
- The seriousness of the offence in terms of the employer's policy and obligations;
- Any other relevant circumstances including the grievor's failure to apologize, the employer's creation of new rules after the disciplinary incident, or the employer's failure to permit the grievor to explain their conduct.

[*Steel Equipment Co. Ltd.* (1964), 14 LAC 356, [1964] OLAA No. 5 (Reville)]

B. Surveillance

Arbitrator Saunders dealt with a grievance involving the dismissal of six employees in the employer's Utilities Department in *Port Coquitlam (City) v. Canadian Union of Public Employees, Local 498 (Baranec Grievance)*, [2020] BCCAAA No. 83. The employer contended that the grievors had participated in a scheme in which copper obtained on the job was cashed in at a

metal recycler and the revenue distributed among members of the Water Crew. The employer also alleged that the grievors had been dishonest when interviewed and in their testimony at the hearing, and that two of the grievors had stolen fire hydrants. The evidence showed that the copper recycling scheme had been perpetrated for many years as far back as 2000. The Arbitrator held that five of the grievors had participated in the scheme and that their dismissal was not an excessive disciplinary response. There was insufficient evidence that the sixth grievor, a supervisor, was aware of or participated in the scheme. The employer therefore did not have grounds to discipline her and her dismissal was overturned with a make whole order.

In addition to arguing that the employer either did not have just cause for discipline or that the employer's disciplinary responses were excessive, the union also alleged that the employer had breached the privacy of two of the grievors during its investigation which involved covert surveillance. The union also argued that the employer had acted in bad faith in its manner of dismissal of all of the grievors by its representations to the media about the copper scheme, and that damages were an appropriate remedy.

Arbitrator Saunders, in assessing the evidence, made comments about the investigation interviews which are helpful to other employers engaging in disciplinary interviews. In respect of the questions that were asked, the Arbitrator noted that the employer had not put to the grievors the statements made by others that would tend to implicate them in the scheme or statements that would have indicated they did not participate in the scheme. The Arbitrator held that it would have been appropriate to provide the grievors with an opportunity to respond to particulars of possibly inculpatory or exculpatory assertions made by others.

With respect to the allegation that the employer breached the privacy of two grievors during the investigation process, the Arbitrator applied the test set out in *Vernon (City)* and *Vernon Professional Firefighters' Association, IAFF Local 1517*, [2018] BCCAAA No. 81 for the permissible application of covert surveillance. Arbitrator Saunders described the test as follows:

> 536 … [T]he Employer must establish that the collection of personal information through surreptitious surveillance is reasonable in all the circumstances. An employee's right to privacy is not absolute and must be balanced against an employer's legitimate interests to collect personal information. Relevant circumstances include: 1) the reason for surveillance--the basis for suspicion supporting the decision to surveil; 2) efforts made to address the problem in other ways; 3) the availability of other sources of information; 4) employee expectation of privacy at the time and place of the surveillance; 5) scope of personal information collected (all employees or only employees about whom the employer has suspicion); 6) the extent of intrusion into privacy (constant or transitory), and; 7) the seriousness of loss of privacy by employee captured by the surveillance.

Arbitrator Saunders held that there was no reasonable basis for the employer's surveillance of one of the grievors on the suspected theft of a fire hydrant. There were less intrusive steps available to address the employer's concerns. The employer was aware that fire hydrants removed by a contractor were the property of the contractor, not the property of the employer. The contractor had given the fire hydrant to the grievor. The fact that the grievor had left the public works yard with a fire hydrant was observed by an independent witness. There was little to be added to the investigation by the surveillance of the grievor and his wife at their home and in the community. The Arbitrator held that the grievor maintained a legitimate expectation of privacy at his home, and regarding his private business in the community. The employer's surveillance had violated the grievor's privacy and the grievor was entitled to an award of damages. The Arbitrator retained jurisdiction to decide the quantum of damages if the parties could not agree on an amount.

Arbitrator Saunders also held that the employer had a reasonable basis to have another grievor surveilled. The grievor was employed in a supervisory capacity over the Water Crew, and it was logical to investigate whether she was involved in the scheme. He also held that the employer had a reasonable basis to look at the grievor's social media postings in the public domain to identify the grievor's associates in preparation for the investigation. He held that was a transitory and minimal intrusion given that the information reviewed was posted on a public forum where there is little expectation of privacy. It was also reasonable for the employer's investigator to watch the grievor's activities on the evening that she had entered the public works yard after hours with her personal vehicle. The investigator was not aware that the grievor did so because she had been scheduled for a standby shift. Another employee had previously been observed removing bags of scrap copper from the yard after hours. The Arbitrator also considered that the grievor had been observed in a public space where she had a minimal expectation of privacy. The intrusion into her privacy was therefore at the lower end of the spectrum. The employer's surveillance of the grievor was a reasonable exercise of management authority and was not a breach of the grievor's privacy.

The union had also argued that the employer had acted in bad faith and caused the grievors unnecessary mental distress by gratuitously providing false information to the media about the scheme. The employer had provided the lengths of service of the grievors, which allowed one of the grievors to be identified. The employer had also advised a reporter that the estimated loss to the employer over the previous 10 years was more than $75,000, that the grievors had been involved in a coordinated, deceptive, covert and long-standing plan, and that the employer planned to report the allegations to the police.

Arbitrator Saunders held that the applicable test for bad faith required conduct akin to intent, malice or blatant disregard for the employee. He held that the employer's statement of the amount stolen did not amount to intentional disregard of the truth or malice. The employer's estimate of its loss was an informed guess. Further, the employer's assertion that the copper scheme was a coordinated, deceptive, covert and long-standing plan was accurate. However, the Arbitrator also noted that the length of service of the grievors was remotely connected to their identities and should not have been disclosed. Overall, Arbitrator Saunders held that the

employer's disclosure to the media was "ill-advised and regrettable from the standpoint of building positive labour relations". In his view, the employer "committed an act of bad judgment", but the impugned conduct did not meet the test for bad faith.

Based on the *Port Coquitlam* decision, we recommend that an employer when interviewing an employee about alleged misconduct put to the employee all of the allegations made against them by other employees, and also advise them of statements made by other employees that would tend to exonerate them. We also recommend that employers seek legal advice before engaging in an investigation involving the surreptitious surveillance of employees alleged to have engaged in misconduct. Surveillance that does not meet the arbitral test could result in an award of damages to an employee for breach of privacy by the employer. We further recommend that employers not make statements to the media about the circumstances leading to the discipline of an employee. Such statements could lead to a breach of the employee's privacy resulting in an award of damages. Also, if the statements turn out to be inaccurate, an arbitrator could find the employer to have engaged in bad faith conduct and award damages. Further, as Arbitrator Saunders held, statements to the media do not promote positive labour relations.

C. Threats of Violence

Arbitrator Love in *New Westminster (City) v. International Brotherhood of Electrical Workers Local 213 (Urgls Grievance)*, [2021] BCCAAA No. 7 confirmed an employer's obligation to take threats of violence in the workplace seriously. He upheld the employer's decision to terminate a short service employee for making threats during a conversation with another employee. The employer operated an electrical utility which was a highly safety-sensitive work environment. The grievor stated during his conversation with the other employee "when I make up my mind I follow through", "it's like burning the city down", and "it's like throwing a grenade into a room", "just to do battle", and "Once upon a time I used to be always offensive just for the fun of it, to watch people squirm, not anymore, years ago". Another employee overheard the conversation and reported it to the employer as he was concerned for the safety of himself and the other crew members. During the employer's investigation and during his testimony at the hearing, the grievor said that he was unable to recall making the statements other than the grenade statement, but that the statements sounded like things he might say. He had no explanation for making the statements. In respect of the grenade statement the grievor stated that the statement related to the potential impact of releasing information he had recorded about workplace wrongdoing by other crew members.

Arbitrator Love did not accept the grievor's explanation that the grenade statement referred to a bomb of information, as there was nothing about the conversation with the other employee to provide that context. He held that the words "burn a city" and "throw a grenade", when coupled with the words "when I make my mind up I carry through" made it apparent that the grievor intended to carry out some form of destructive action of an undefined nature. The grievor used the word as threats or intimidation. The threat was undefined but could include the possibility of serious bodily harm, property damage or death. The Arbitrator held that the grievor's conduct constituted just cause for discipline.

Arbitrator Love also held that the employer's disciplinary response of dismissal was not excessive. He held that:

> 189 The grievor's misconduct was serious. Workplace threats and intimidation are considered serious matters by arbitrators. Employers have a duty to provide a safe work environment for their employees, by virtue of legislation. There have been unfortunate incidents where employees have been injured or killed in the workplace by fellow employees.
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> 208 An employer is not required to wait until the consequences materialize before it acts. This is particularly so given the safety sensitive nature of this workplace. Here the employer appropriately investigated the complaint and acted in a timely manner.
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> 209 In light of the grievor's lack of explanation, the employer, in my view, is fully entitled to protect itself against all possible risks contained within the language used by the grievor. Those risks include injury, death or damage or destruction to property.

Arbitrator Love also held that none of the mitigating factors identified in *Steel Equipment* were present in the case before him. The grievor had not apologized for his comments, and there was little indication that he had any insight into the nature of his comments or their impact on the employer and the crew. He had testified in cross examination that he did not think that he had done anything wrong. The grievor also had a prior disciplinary record. He had received a three-day suspension for aggressive, threatening and intimidating behaviour the month before the incident. The Arbitrator also considered that following the incident none of the crew members trusted the grievor to be able to work safely, and most would refuse to work with him if he was reinstated. He held that the grievor's co-workers should not have to worry about whether they could work safely with him and that his supervisors should not have to be on guard in their supervision of him, which could impair productivity and safety. The grievor was also a relatively short service employee. He had worked for the employer for only 18 months. Arbitrator Love concluded that the employer's decision to dismiss the grievor was not an excessive response to the grievor's misconduct, and dismissed the grievance.

The *New Westminster* decision indicates that employers are correct to take threats of violence in the workplace seriously, and can impose discipline for threats alone. Employers do not have to wait for violence to actually materialize before taking action. In BC, the *Workers Compensation Act* and *Regulation* require employers to ensure the safety of their employees while at work.

D. Union Official Conduct

In *Squamish (District) v. Canadian Union of Public Employees, Local 2269 (Shard Grievance)*, [2020], BCCAAA No. 21, Arbitrator Brown upheld a three-day suspension of a union president for bullying and harassing conduct towards the employer's human resources advisor while discussing labour relations matters. The union president had come by the human resources office unannounced and in a raised voice accused the human resources advisor of disrespecting her. Other people in the human resources office could hear the conversation. The union president had also sent the human resources advisor numerous emails copied to many other people accusing the advisor of dishonesty, and unethical behaviour. The union president had also demanded in front of others that the advisor personally apologize in relation to grievances. The employer's investigator held that the facts revealed a clear pattern of abuse by the union president of the human resources advisor.

The union argued that there was no cause for discipline as the union president's conduct was not in violation of the employer's Respectful Workplace Policy. The union also argued that the doctrine of union official immunity applied to protect the union president from discipline. In the alternative, the union argued that the three-day suspension was excessive.

Arbitrator Brown held that the union president's conduct did violate the employer's Respectful Workplace Policy. With respect to the issue of whether the union president was protected by union official immunity, the Arbitrator set out the following principles:

> **33** … It is clear from the caselaw that union officials have latitude in their dealings with an employer in order to effectively represent their members. They must be protected from retribution from an employer when they advocate in an assertive manner on occasion.
>
> **34** What might be considered insubordinate in some circumstances may not be when the debate involves a union official and an employer.
>
> **35** However, union officials cross a line when that debate goes "beyond the boundaries of lawful union activity and is detrimental to the interests of the employer".

Arbitrator Brown held that the union president's conduct was not protected by union official immunity. The union president was not just advocating for her members. Some of her comments to the human resources advisor were abusive and were directed at the advisor personally. The comments were not limited to heated debate over the merits of a workplace

issue. The Arbitrator also noted that the employer had an obligation under the collective agreement and pursuant to workers' compensation legislation to provide a workplace free from harassment and bullying. Union official immunity did not provide the union president with the freedom to violate the employer's Respectful Workplace Policy and potentially the legislation. In those circumstances the union president's conduct warranted discipline.

Arbitrator Brown also held that the three-day suspension was not an excessive disciplinary response. He noted that although the union president had told the employer's investigator that she wanted to apologize to the human resources advisor, she had not done so. He concluded that the union president had no remorse for her actions. He also considered the disciplinary penalty to be within a potential norm, and noted that the union president had mitigated her losses as she had worked for and been paid by the union during her suspension.

The union applied to the Labour Relations Board (the "Board") for review of Arbitrator Brown's decision, arguing in part that the award was contrary to the principles of the *Labour Relations Code* regarding union official immunity. In *Squamish (District) (Re)*, [2020] BCLRBD No. 95, the Board dismissed the union's application. The Board held that the Arbitrator had applied the correct test for union official immunity, which was whether the conduct in issue "is beyond the bounds of lawful union activity and is detrimental to the interests of the employer". The Board also held that the Arbitrator had correctly applied that test to the facts before him. The Board noted that Arbitrator Brown had found that the union president was not just advocating for the union's members but had made abusive comments that were directed at the human resources advisor personally. The Board also noted that the Arbitrator had found that the conduct went beyond a heated exchange about a workplace matter. The Board also considered Arbitrator Brown to have implicitly found that the employer's interests were impacted when he noted that the employer had an obligation both under the collective agreement and the legislation to prevent workplace bullying and harassment.

The *Squamish (District)* decisions indicate that union officials are not immune from the application of an employer's respectful workplace policies in their representation of their members. While union officials may be protected by union official immunity from allegations of insubordination during their forceful advocacy on behalf of a member, such immunity will not apply if they cross the boundary of lawful union activity and engage in bullying and harassment of the employer's representatives.

E. Breach of COVID-19 Policy

Although not a case involving a local government employer, Arbitrator Love's decision in *Terrapure Environmental (c.o.b. Envirosystems Inc.) v. International Union of Painters and Allied Trades, District Council 138 (Arnot Grievance)*, [2021] BCCAAA No. 103 is important as it indicates the arbitral approach to an employer's dismissal of an employee for alleged breach of its COVID-19 policies. In that case, the employer had terminated the grievor for alleged insubordination in failing to follow its instructions to self-isolate and get a COVID-19 test, and for lying during the employer's investigation of his conduct. The grievor had lied when he said

that he had gone for a COVID-19 test but had left because the line was too long. At the hearing, the employer also advanced further grounds of dismissal of breach of trust arising from the grievor's surreptitious video recording of a meeting with managers.

The grievor and other members of the employer's crew were working out of town and staying in a hotel paid for by the employer. After consuming some chicken wings, the grievor became ill during the evening and experienced diarrhea. He did not experience any respiratory symptoms. When the grievor reported for work at a job site the next morning, he advised the employer that he was experiencing diarrhea. A supervisor directed him to return to the hotel to get some rest.

The grievor returned to his hotel room and rested during the morning. However, he left his hotel room to meet a friend for lunch. While he was waiting outside the hotel for his friend to pick him up, his supervisor texted him and asked him to call. The grievor called the supervisor and explained that he had diarrhea from eating bad chicken wings the night before and that it was not COVID. The supervisor told the grievor that he would get instructions from the operations manager and would get back to the grievor. The supervisor later texted the grievor that he could not leave his hotel room, that he must call 811 and get a COVID test as soon as possible. It was not clear from the evidence when the grievor saw the text message. The grievor went to lunch with his friend. After lunch, the grievor later called 811, but did not get through. He then used the BC Centre for Disease Control ("BC CDC") COVID-19 Self-Assessment Tool to determine whether he needed a COVID test. The Self-Assessment Tool indicated that he did not have symptoms of COVID and did not need to take a COVID test. The grievor then returned to his hotel room and did not respond to various attempts by the employer to reach him by telephone, and text, and knocking on his room door. The grievor did upon request return a piece of equipment to a supervisor by leaving it outside the supervisor's hotel room door.

In deciding the case, the Arbitrator was concerned that while the employer had a Pandemic Response Policy, it had never distributed the Policy to the grievor or other employees or trained them on its COVID protocols. He considered those steps to be fundamental to the implementation of the Policy. The Policy listed the symptoms of COVID, but did not include diarrhea as a symptom. Diarrhea was not listed as a COVID symptom in the Policy. Nor was diarrhea listed as a key symptom on the BC CDC website. It was listed as an "other symptom". The Policy stated that employees were to stay home if they felt unwell, had a fever, a cough or a sore throat. It also directed employees to see their healthcare provider if they were concerned about their symptoms. The Policy did not include a requirement to get a COVID test before returning to the workplace. The operations manager testified that its practice was that when a person reported that they were ill, the employer required the person to self-isolate for 14 days or produce a negative COVID test result. He was not sure whether that protocol was consistent with the employer's written Policy. Arbitrator Love held that the employer had not followed that protocol when the grievor had been sent back to his hotel room to rest.

Arbitrator Love applied the law related to unilaterally introduced employer rules as set out in *KVP Co. v. Lumber & Sawmill Workers' Union, Local 2537 (Vernonneau Grievance)*, [1965] OLAA No. 2, 16 LAC 73 (Robinson), which held as follows:

> A rule unilaterally introduced by the company, and not subsequently agreed to by the union, must satisfy the following requisites:
>
> 1. It must not be inconsistent with the collective agreement;
>
> 2. It must not be unreasonable.
>
> 3. It must be clear and unequivocal.
>
> 4. It must be brought to the attention of the employee affected before the company can act on it.
>
> 5. The employee concerned must have been notified that a breach of such rule could result in his discharge if the rule is used as a foundation for discharge.
>
> 6. Such rule should have been consistently enforced by the company from the time it was introduced.

Arbitrator Love held that the employer could not apply the self-isolation and COVID test requirement to the grievor because it was an oral rule, and the collective agreement required employer rules to be in writing. He also held that the rule was unreasonable as there was no nexus or connection between the circumstances known to the employer and any primary COVID symptoms. He held that the grievor's diarrhea, without any respiratory symptoms was not cause to demand that he take a COVID test. He also held that there was no evidence that the employer had brought the oral rule to the grievor's attention before he was dismissed. He was not notified that failure to provide a COVID test or self-isolate would result in discharge. The Arbitrator held that while the incident had occurred during a pandemic and the oral rule was for the safety of employees, the long-standing legal principles about employer introduced rules were not suspended.

Arbitrator Love also dismissed the employer's allegations that the grievor had been insubordinate in failing to call for a COVID test, and in failing to self-isolate as directed by the employer. The Arbitrator applied the following test for insubordination:

- There must be a clear order understood by the grievor;
- The order must have been given by a person in authority; and
- The order must have been disobeyed.

Arbitrator Love again indicated his concerns about the reasonableness of the employer's requirement that the grievor get a COVID test. He held:

> 179 … I accept that the employer has a duty to protect other workers, but in my view there should be some connection between the symptoms reported and the employer's decision-making about whether a test is required. The trigger for a test should not be employer whim, but should be grounded in the facts apparent to the employer.
>
> …
>
> 182 What appears to have occurred is that that the employer simply applied the approach that any employee complaining of any illness had to self-isolate and provide a COVID test, based on the potential serious consequences if an employee actually had COVID.

Arbitrator Love dismissed the allegation that the grievor had been insubordinate in failing to get a COVID test. The employer had not done any analysis of whether a COVID test was warranted in the circumstances of the case, and the grievor had done the BC CDC Self-Assessment which indicated there was no need for him to take the test. The Arbitrator held that diarrhea alone was not a sufficient justification for demanding a COVID test.

With respect to the allegation that the grievor had been insubordinate by failing to self-isolate, Arbitrator Love held that the employer had a legitimate interest in ensuring that its crews did not become infected with COVID. However, Arbitrator Love held that the grievor had not been insubordinate. When he was initially sent back to the hotel he was not directed to self-isolate. He had merely been directed to get some rest. The employer had not established that the grievor had left his hotel room to go for lunch after having received a text message from his supervisor to self-isolate and get a COVID test. The employer had therefore not established that the grievor had breached a clear order.

In relation to the employer's directions to call 811, the Arbitrator held that there had been substantial compliance by the grievor. He had called 811 and been unable to get through. He then did the BC CDC Self-Assessment. Arbitrator Love held that by doing the Self-Assessment the grievor had demonstrated that he was not deliberately flouting the employer's direction. In the Arbitrator's view, that was a reasonable way of complying with the employer's direction. It led to the same result, being that the grievor did not require a COVID test based on the symptoms he was experiencing.

Arbitrator Love also held that the employer had failed to prove that it gave a clear order to the grievor to remain in contact with the employer. The grievor had responded to his supervisor's initial text by calling the supervisor. The grievor had also returned the equipment to the other supervisor who had come to his room door. The Arbitrator noted that the employer could have sent a text message or left a voicemail for the grievor requesting him to contact the employer by a certain time or face discipline up to and including termination for insubordination, but that it had not done so.

The Arbitrator held that the grievor had lied about attempting to get a COVID test and that that was grounds for discipline. The Arbitrator also held that the employer was entitled to rely on the grievor's surreptitious video recording of his meeting with the operations manager and supervisor as cause for discipline. The applicable test for an employer to rely on "after discovered" cause was that the employer had become aware of the facts after the date of discharge and could not have discovered those facts with the use of reasonable diligence, and the employer had given appropriate notice that it intended to rely on that cause. Arbitrator Love held that the employer met that test. The grievor's conduct in recording the meeting had been secretive and the employer could not have discovered it until it was disclosed by the union prior to the hearing. It was the Arbitrator's view that making a recording at work without the consent of the other parties in attendance is conduct which merited some discipline. He noted that such conduct could have a chilling effect on labour relations, leading to less open and transparent relationships.

Arbitrator Love also held that while lying during the investigation and videorecording the meeting with management without notice were serious offences, termination was an excessive disciplinary response for that misconduct. The employer had not proven its principal allegation of insubordination. The Arbitrator also noted that the grievor was an industrial worker. His position did not require the employer to trust him with money or confidential information. There was no evidence that the complainant could not be trusted to perform his job duties. There were also a number of mitigating factors in the case. The grievor's conduct in lying to the operations manager and in recording the meeting were spontaneous and were not pre-meditated. The grievor had indicated during the investigation meeting that he had been having some mental health issues on the dates in question and the employer's investigator had not followed up on those statements. The grievor had, during the investigation meeting with the employer's human resources professional, admitted to lying to the operations manager. While the grievor had not apologized for the lie, he recognized during his testimony that he was at fault. The Arbitrator also considered that termination would impose significant hardship on the grievor. If he had to re-train as a result of losing his job it would be difficult for the grievor. The Arbitrator accepted that the grievor had learning difficulties, ADHD and anxiety. There was also no evidence that the employer had attempted progressive discipline with the grievor.

Arbitrator Love substituted a five-day suspension in place of the termination of the grievor's employment, with an order that he be made whole with respect to his salary, benefits and seniority.

Employers can take a number of lessons from the *Terrapure Environmental* decision relevant to the COVID-19 pandemic. First, if an employer has a COVID-19 policy, it should make sure to publish the policy to its employees and to train them on it. Employers will not be able to rely on breach of their policies in disciplining employees if the employees have not been made aware of the policies. Second, employers should follow and apply their COVID-19 policies in deciding how to respond to employees who have symptoms of illness. Third, as Arbitrator Love indicated, if an employer requires an employee to get a COVID test prior to returning to the workplace, the employer's requirement must be reasonable in relation to the symptoms that the employee is experiencing and to all of the surrounding circumstances. Employers are not entitled to react in a knee jerk fashion and require COVID testing in respect of all symptoms of illness. Fourth, if an employer requires an employee to remain away from the workplace until their symptoms resolve or until they provide negative COVID-19 test results, the employer should make that direction to the employee in a clear and direct fashion and should indicate that failure to follow that direction could result in discipline up to and including termination.

IV. CASELAW UPDATE: EMPLOYMENT LAW

A. Frustration of the Employment Agreement

An issue that was hotly debated during the beginning of the COVID pandemic was whether employers could take the position that the employment contract was frustrated, which would relieve employers from their obligation to provide severance pay upon termination without cause. This argument was made by an employer in the travel industry, which undoubtedly was severely impacted by the pandemic (*Verigen v. Ensemble Travel Ltd.*, 2021 BCSC 1934).

The employer, in this case, initially placed the employee on temporary layoff in the hopes that they would be able to recall her back to work, but ultimately decided to end her employment. The employer argued that it was no longer bound by the employment agreement because of the impacts of the pandemic and the global collapse in consumer demand for travel. The Court found that the common law test for frustration applied in the employment context and cited, at para. 58, the following test from *Wilkie v. Jeong*, 2017 BCSC 2131:

> The purpose of the doctrine of frustration is to relieve a contracting party from its bargain by bringing the contract to an end. The doctrine applies "when a situation has arisen for which the parties made no provision in the contract and performance of the contract becomes 'a thing radically different from that which was undertaken by the contract'....

Frustration will be found where a contractual obligation has become incapable of being performed because the circumstances in which performance of the obligation is called for would render the agreement radically different from what was agreed to in the contract. In other words, the contract must be totally different from what the parties had intended as a result of an outside event that occurred after the contract was entered into.

In this case, the Court found that there was no frustration as the collapse in the travel industry went to the employer's ability to perform its obligations under the agreement rather than to the nature of the obligation itself. The Court noted previous caselaw which confirms that, while a lack of money may affect a party's ability to perform an obligation, it does not normally alter the nature or purpose of the obligation itself. The Court also noted that the employer did not terminate the employment of all employees and had recently filled a vacancy. Rather, the employer chose to cut operating costs by terminating the employment of certain employees.

Given the finding in this case, it will be difficult for local government employers to make an argument that an employment agreement has been frustrated when the basis for the frustration relates to an ability to provide work to and pay the wages of particular employees.

B. Temporary Layoffs

Another issue that arose during the pandemic was whether the temporary lay-off of an exempt employee constituted a constructive dismissal. This was also an issue in *Verigen* as the employee argued that she was constructively dismissed when she was first laid off. The employer took the position that the employee was not constructively dismissed and that the relevant date for assessing reasonable notice was the termination of employment date.

In *Verigen,* the Court determined that the employee was not constructively dismissed as she had expressly consented to the temporary layoff. The Court was clear that the result would be different if there was evidence of bad faith on the part of the employer such as a false promise to return to work. However, the evidence in this case was that the employer believed that the pandemic would improve and only made the decision to dismiss the employee when it became clear that there would be no improvement in the travel market in the foreseeable future.

The Court in *Hogan v. 1187938 B.C. Ltd.*, 2021 BCSC 1021, came to a different conclusion and found that a temporary layoff did constitute a constructive dismissal. In this case, the Court noted the unilateral nature of this decision and the significant impact on the employee. There was no finding that the employer misled the employee but the Court found at para. 36 that "...it is clear from the defendant's conduct that it no longer intended to be bound by the contract at the time it laid off the plaintiff."

It is not easy to reconcile the different outcomes in these two cases and highlights the risk of temporarily laying off an exempt employee where there is no basis for a layoff in the employment agreement. Therefore, local governments must exercise caution when considering temporary layoffs and only proceed when there is evidence of a true intent to recall the employee back to work within a reasonable time period and they obtain the consent of the employee.

C. Changes to the Employment Agreement

While an employer has the ability to unilaterally alter an employment agreement, an employee may be able to claim that they have been constructively dismissed depending on the nature of the change. In *Kosteckyj v. Paramount Resources Ltd*, 2021 ABQB 225, the employer announced a cost reduction program in April 2020, which included a 10% salary reduction, suspension of a 6% RRSP Contribution Program and the delay/cancellation of the 2019 bonus program.

One of the issues in this case was whether the above reductions to the employee's remuneration constituted constructive dismissal. The Court applied the following two-part test:

- Did the employer make a unilateral change to the employment agreement and, if so, would a reasonable person feel that the essential terms of the employment agreement have been substantially changed; and

- Would a reasonable person conclude that the employer no longer intended to be bound by the terms of the employment agreement.

The Court determined that the employer had changed the employment agreement by introducing the cost reduction program and noted that the program resulted in a 16.65-20% reduction in remuneration. In light of this significant reduction in remuneration, the Court determined there was a constructive dismissal. The employer had relied on the case of *Doran v. Ontario Power General Inc*, [2007] OJ No 4476, where the Court found that a reduction in remuneration of 14-17% did not constitute a constructive dismissal. However, the Court in *Kosteckyj* came to a different conclusion presumably given the greater reduction in remuneration.

Another issue that arises with respect to changes to employment agreements is whether an employer can rely on employment terms imposed after an employee has commenced employment that limit an employee's entitlement to reasonable notice. This was also an issue in *Verigen* and the employer argued that the employee had agreed to reasonable notice as provided for in the *Employment Standards Act*. The employer relied on an employee handbook that contained a termination clause that was given to the employee a few months after she began working. The employee signed that she had read and reviewed the terms set out in the handbook.

Under contract law, employers are required to provide what is referred to as "consideration" where it seeks to impose an amendment to the employment agreement that is detrimental to the employee. The employee argued that this termination clause was not enforceable because the employer did not provide anything of benefit to her in return for agreeing to the termination clause which restricted her entitlement to severance pay.

The Court agreed with the employee and found that the termination clause was not enforceable. Therefore, reasonable notice was to be assessed according to the common law rather than limited to the minimums set out in the *Employment Standards Act*.

D. Good Faith in the Manner of Dismissal

Two cases illustrate the court's willingness to award extra damages where it has been found that the employer breached its duty of good faith in the manner of dismissal, even where the dismissal was without just cause. The issue in *Younesi v. Kaz Minerals Projects B.V.*, 2021 BCSC 614, was whether increased notice was payable on the basis the employer had induced the employee to leave secure employment, comments made by the employer during the termination meeting, and reliance by the employer on a termination clause that was not enforceable.

The employee in *Younesi* was terminated after a few months of employment because management determined he was not a good fit to their team. The Court found that the employee had been "headhunted" through LinkedIn and the employer had requested the employee send details of his then current employment package for the sole purpose of preparing the compensation package included in the offer of employment. The Court made the following comments at para. 43 about the employer's conduct:

> By any measure, it amounts to inducement far beyond the standard 'wooing' of a prospective employer that might be 'taken with a large grain of salt'... .

However, the Court also noted that the employee knew his employment was not guaranteed. In the circumstances, the Court awarded 2 extra months of reasonable notice because of the effect of the inducement.

The employee also argued he was entitled to aggravated damages because of comments made by the employer during the termination meeting and the fact that the employer tried to rely on a one-month termination clause. During the termination meeting, the employer representatives initially advised that the reasons for the termination did not matter but when pressed by the employee, they made the comments along the lines of the following:

- The employee did not have the respect of senior management;
- He was not a good engineer;
- He was not a good manager; and
- He was an embarrassment to the company.

The Court accepted that the employer did not intend to insult the employee but that the messaging at the termination meeting was unduly harsh, insensitive and insulting. The Court stated at para. 73 that "The termination could have and should have been handled in a much more sophisticated manner."

In its assessment of whether the employer reached its duty of good faith and fair dealing, the Court also noted that the employer tried to rely on the one-month termination clause in the employment agreement, even though it was not enforceable because it was in conflict with the *Employment Standards Act*. Furthermore, the employer attempted to have the employee sign his acceptance of the termination notice which included reference to this unenforceable termination clause.

The Court ultimately awarded aggravated damages in the amount of $12,500.00 and made the following comment at para. 101:

> I have also found that the manner of Mr. Younesi's dismissal was unduly harsh and insensitive and that it caused or contributed to prolonged mental distress beyond the "ordinary" injured feelings and emotional upset that usually accompanies the loss of one's employment. Given the unique circumstances of this case, aggravated compensatory damages are awarded to Mr. Younesi in the amount of $12,500.

The employer in *McGraw v. Southgate (Township)*, 2021 ONSC 7000 was also found to have breached its duty of good faith in the manner of dismissal. The Court in this case determined that the employee was fired from her employment based on unfounded, sexist allegations and gender-based discrimination and awarded various types of damages.

The employee was an administrative assistant and volunteer fire captain of the Township's volunteer fire department and terminated without cause from both positions. The evidence at trial demonstrated that the employee was fired based on various rumours about her which were "...mostly unfounded, malicious, sexist falsehoods" (at para. 10).

The rumours upon which the Township based its decision to dismiss the employee included:

- She sent inappropriate photos to members of the Fire Department;
- She sent text messages to a volunteer firefighter that resulted in that firefighter and his spouse, who was also a volunteer firefighter, leaving the Fire Department;
- The employee, who was also an instructor at the fire college, exchanged "sex for grades";
- She had a romantic relationship with the Fire Chief; and

- Gossip at other neighbouring fire departments that the employee was flirtatious and engaged in inappropriate behaviour.

The employer had retained an HR Consultant to investigate some of the above concerns. The HR Consultant advised there was no proof of the allegations and that dismissal for just cause was not possible. At this point, the HR Consultant had not interviewed that employee. However, the employer felt that the fire department was in a state of crisis so proceeded with the dismissal without cause without waiting for the HR Consultant to interview the employee and finish the investigation. However, the Court determined there was no valid reason not to complete the investigation and interview the employee. The Court also went into great detail to demonstrate that the above reasons were rumours and had little to no basis in fact.

The genesis of the inappropriate photo rumour was a picture the employee had sent of herself in a towel to her boyfriend years earlier who was also a volunteer firefighter. The Court determined that no witness provided first-hand evidence that they saw this photo.

The reference to the text messages were messages between the employee and a male volunteer firefighter who was married to another volunteer firefighter. No evidence was led that there was anything sexual or otherwise inappropriate about these messages. In fact, the evidence was that the employee and this volunteer firefighter were friends. Furthermore, the male volunteer firefighter later rejoined the department without any sanction, which the Court noted was a sexist double standard.

The Court also determined at para. 14 that the "sex for grades" rumour had been made up and was "...completely false and blatant gender-based discrimination". As for the rumours about the employee's relationship with the Fire Chief, they did have one night of intimacy years earlier but were not in a romantic relationship and had remained friends. Again, the Court noted the double standard being applied to the employee as there were no repercussions for the Fire Chief for their relationship. In fact, the Fire Chief was supportive of the employee, was opposed to her dismissal, and resigned the same day the employee was dismissed.

Finally, the gossip from other fire departments was based on comments from the CAO's daughter and son-in-law. The Court determined that this information was unworthy of serious consideration without further investigation.

Given the above findings, it is not surprising that the Court awarded damages related to the bad faith conduct of the employer. As noted by the Court at para. 202:

> For the most part, the allegations against Ms. McGraw were fantastical. They were made in a male-dominated environment. The defendants ought to have been highly suspicious that the allegations were based on discrimination. The failure of the defendants to support Ms. McGraw against discrimination was a significant, distressing failure.

The Court awarded damages in the amount of $75,000, for the employer's bad faith conduct. The Court also found various statements made by the CAO to Council when discussing the dismissal of the employee were defamatory and made recklessly. Therefore, the Court awarded another $20,000 for damages for defamation. Finally, the Court awarded punitive damages in the amount of $60,000.

These cases continue to highlight the importance of treating employees as sensitively and respectfully as possible in the manner of dismissal, even when that dismissal is without cause. We recommend that employers prepare a script in advance of a termination meeting with an employee and ensure that the reasons given to the employee for the termination are truthful and phrased in as sensitive a way as possible. Furthermore, if an employer commences an investigation, it will need to show there was good reason to proceed with a dismissal prior to completing the investigation, even if it is without cause.

E. Just Cause Where Failure to Acknowledge Wrongdoing

The employer in *Hucsko v. A.O. Smith Enterprises Limited*, 2021 ONCA 728, terminated the employment of a 20-year employee for just cause after the employee refused to take remedial action following an investigation that found the employee had engaged in sexual harassment. Following a complaint by a female co-worker, the employer proceeded with an investigation into four alleged inappropriate comments made by the male employee. The investigator concluded the comments were inappropriate and constituted sexual harassment. The employer offered the employee the opportunity to take remedial action including sensitivity training and to make a direct apology to the complainant, which he refused. The employer then terminated the employee's employment for just cause.

The trial judge found that the termination for cause was not justified as there had not been an irreparable breakdown in the employment relationship. The Court of Appeal overturned this decision and concluded the employer had just cause.

The evidence at trial was that the employee did not agree with the investigator's conclusions and asserted he had not done or said anything inappropriate to the complainant. He advised that he would comply with the additional training requirement but was not prepared to issue an apology or admit to any wrongdoing. The employer then terminated the employee's employment for just cause given his lack of remorse and unwillingness to recognize the seriousness of his misconduct.

The Court of Appeal noted that the employer did not initially terminate the employee's employment as a result of the findings in the investigation. Rather, it gave him the opportunity to redeem himself and to save his job. The Court of Appeal agreed that the only conclusion the employer could reach based on the employee's conduct was that there was a complete breakdown in the employment relationship. As noted by the Court at para. 60:

> Faced with the respondent's lack of contrition, lack of understanding of the seriousness of his conduct, and his refusal to comply with the reasonable and essential requirement of an apology to the complainant and target of his comments, the appellant's decision to terminate the respondent's employment was a proportional and wholly warranted response.

This case confirms that a proportional response to findings of harassment is required of employers but where employees fail to acknowledge their misconduct and lack remorse, employers may be able to establish just cause.

F. Conclusion

While COVID has been a dominant topic in the world of labour, employment and human rights law these past 18 months, the cases reviewed above are also a good reminder of the importance of managing the everyday issues that arise in the workplace, particularly as more and more employees are returning to work in person. Employers must be mindful of their obligations under the *Human Rights Code* or face the risk of litigation in the courts and the Human Rights Tribunal. As well, employers will be justified in denying services for the purpose of providing a safe workplace for its employees.

Employers also continue to be required to act reasonably when disciplining employees, even if related to COVID-19, and determining when surveillance is necessary. The above cases also confirm that employers are entitled to discipline and dismiss employees who utter workplace threats, act disrespectfully in the workplace, and refuse to acknowledge their wrongdoing. That being said, employers need to take care and treat employees in good faith during the dismissal process, even when the dismissal is without cause, or face having extra damages awarded against them.

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