Hot Topics in Human Rights

The webinar will begin at 9:00 a.m. EST – September 21, 2022

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Agenda

- Racial Discrimination
- Sexual Harassment
- Human Rights in the Unionized Workplace
- Accommodation Round-Up

Racial Discrimination

Racial Discrimination

- To establish discrimination (on the basis of any protected ground), a claimant must demonstrate
  - They are a member of the protected ground
  - They suffered adverse treatment, and
  - Their protected ground was a factor in the adverse treatment
- The last point can often be a challenge for a claimant in cases of racial discrimination

Racial Discrimination

- Racial discrimination is rarely overt and often established through circumstantial evidence
- Recent case law provides examples of what this evidence may look like and how “social context” may be relevant

Racial Discrimination

***LiUNA Local 183 v. CTS (ASDE) Inc.*, 2022 CanLII 14925 (ONLRB)**

- Grievor terminated for just cause after two workplace outbursts
- On first occasion, grievor became angry after his toolbox lock was cut and tools accessed while he was on vacation
  - He was issued a written warning one month after the incident occurred

Racial Discrimination

***LiUNA Local 183 v. CTS (ASDE) Inc.*, 2022 CanLII 14925 (ONLRB)**

- Second incident occurred six months later
  - Employer alleged grievor failed to respond to a radio call
  - Grievor claimed radio did not work, later got upset he was singled out, yelled and allegedly banged his fist on the table
- Terminated for cause ten days after incident

Racial Discrimination

***LiUNA Local 183 v. CTS (ASDE) Inc.*, 2022 CanLII 14925 (ONLRB)**

- Union alleged conduct did not amount to just cause, and that termination discriminatory
- Called expert who testified about impact of implicit bias
  - Large majority of people show an implicit anti-Black bias
  - Common traits unconsciously associated with Black men are that they are loud, threatening, aggressive and hostile

Racial Discrimination

***LiUNA Local 183 v. CTS (ASDE) Inc.*, 2022 CanLII 14925 (ONLRB)**

- OLRB held the expert evidence:

… explains how decent, fair-minded people who would eschew and denounce racist conduct might still act on unconscious biases to the detriment of an "outgroup" and to the benefit of the members of the "ingroup". That is what I believe occurred in this case.

Racial Discrimination

***LiUNA Local 183 v. CTS (ASDE) Inc.*, 2022 CanLII 14925 (ONLRB)**

- OLRB held no just cause to warrant termination
- Also held termination was discriminatory
  - Grievor assumed to be in the wrong, whereas other non-Black employees in similar situations had conduct attributed to external factors
  - Conduct was said to be a threat to employee health and safety, but employees did not find it frightening at the time

Racial Discrimination

Ledger v. Alberta Health Services and Alberta Justice and Solicitor General, **2021 AHRC 95**

- Complainant an Indigenous woman who attended a rally and was photographed holding sign, “White People Scare Me”
- Photo circulated by co-worker at correctional facility where she worked as a nurse

Racial Discrimination

Ledger v. Alberta Health Services and Alberta Justice and Solicitor General, **2021 AHRC 95**

- Complainant placed on paid leave after employer became aware her safety may be in jeopardy
- Co-workers subjected her to threats and abuse
- Offered complainant return to work in segregated role
- Employee did not return and filed human rights complaint

Racial Discrimination

Ledger v. Alberta Health Services and Alberta Justice and Solicitor General, **2021 AHRC 95**

- Alberta Human Rights Commission dismissed complaint on basis employer responded appropriately by placing complainant on leave for her safety
- Complainant filed request for review with Alberta Human Rights Tribunal

Racial Discrimination

Ledger v. Alberta Health Services and Alberta Justice and Solicitor General, **2021 AHRC 95**

- Respondent argued adverse treatment related to the Complainant's conduct attending the rally and holding the sign, not her race

Racial Discrimination

Ledger v. Alberta Health Services and Alberta Justice and Solicitor General, **2021 AHRC 95**

- AHRT overturned Commission decision stating Commission applied a "segmented analysis" when determining whether there was a nexus between the adverse treatment and protected ground
- Temporal and social context underlying complaint must be considered

Racial Discrimination

Ledger v. Alberta Health Services and Alberta Justice and Solicitor General, **2021 AHRC 95**

- Complainant was an Indigenous woman subjected to workplace threats and labelled racist because she was protesting historic bias against Indigenous people
- Tribunal held this was sufficient for the complaint to proceed to hearing on the merits

Racial Discrimination

~Takeaways

- Consider how to reduce impact of bias in disciplinary decisions (e.g., training, diverse management teams, *etc.*)
- In the case of a claim of racial discrimination
  - Ensure investigation evaluates circumstantial and contextual evidence
  - Unlikely to find “smoking gun”

Sexual Harassment

Sexual Harassment

- Recent case law on sexual harassment provides examples of when this conduct will amount to just cause
- Also confirms that not all instances of sexual harassment will deprive employee of termination entitlements under the Ontario *Employment Standards Act* (“ESA”)

Sexual Harassment

Husko v. A.O Smith Enterprises Limited, **2021 ONCA 728**

- Employee made four inappropriate comments to female co-worker
  - Asked if she danced on tables at a work event
  - Told her she needed to sit on a co-worker's lap
  - In discussing gardening, referenced going down on her knees
  - Made vulgar reference to her being "on top" of a list

Sexual Harassment

Husko v. A.O Smith Enterprises Limited, **2021 ONCA 728**

- Co-worker complained and employer investigated
- Complaints substantiated
  - Employee asked to undergo training and apologize
- Employee disputed findings
  - Agreed to training but refused to apologize
- Employment terminated for cause

Sexual Harassment

Husko v. A.O Smith Enterprises Limited, **2021 ONCA 728**

- At trial, judge held comments and response to investigation did not constitute just cause for termination
  - Characterized situation as "two employees were in a difficult work relationship"
- Employer appealed
- Court of Appeal overturned trial judge's decision and found conduct did amount to just cause

Sexual Harassment

Husko v. A.O Smith Enterprises Limited, **2021 ONCA 728**

- Court of Appeal held:
  - Comments were undoubtedly sexual harassment
  - Employee had been trained on the employer's Workplace Harassment Policy and understood conduct could result in termination
  - Employee was unable or unwilling to accept accountability for his conduct

Sexual Harassment

Husko v. A.O Smith Enterprises Limited, **2021 ONCA 728**

- Court held:

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 requirements 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.

Sexual Harassment

***Render v. ThyssenKrupp Elevator (Canada) Limited*, 2022 ONCA 310**

- Employee slapped co-worker's buttocks in front of colleagues and later joked about it
- Trial judge upheld termination for cause
  - "Suggestive banter" rampant in the workplace
  - Apologized but did not appreciate seriousness of actions

Sexual Harassment

***Render v. ThyssenKrupp Elevator (Canada) Limited*, 2022 ONCA 310**

- Employee appealed and argued
  - Employer should have considered less serious punishment
  - Even if conduct constituted just cause, did not meet the threshold of "wilful misconduct" so employee entitled to termination payments under ESA

Sexual Harassment

***Render v. ThyssenKrupp Elevator (Canada) Limited*, 2022 ONCA 310**

- Court of Appeal confirmed conduct was just cause at common law
  - Office environment not a mitigating factor
  - This type of workplace environment "can no longer be tolerated"
- However, allowed appeal on issue of ESA entitlement

Sexual Harassment

Render v. ThyssenKrupp Elevator (Canada) Limited, **2022 ONCA 310**

- Court noted wilful misconduct involves an assessment of "subjective intent"

… to be disentitled from the ESA entitlements under the "wilful misconduct" standard… the employee must do something deliberately, knowing they are doing something wrong…

Sexual Harassment

***Render v. ThyssenKrupp Elevator (Canada) Limited*, 2022 ONCA 310**

- Incident occurred "in the heat of the moment" and not preplanned, "*there was an element of spontaneity in the act itself and at most a "deer in the headlights" freezing of intellect"…"*
- As such, did not constitute *willful misconduct* and employee entitled to ESA termination payments

Sexual Harassment

~Takeaways

- An overly casual workplace is no longer an excuse for inappropriate behaviour
  - Employers must take reasonable steps to prevent harassment in the workplace
- Employee conduct post-harassment may be relevant to the assessment of just cause
  - How likely is it conduct may be repeated?

Sexual Harassment

~Takeaways

- Even if harassment constitutes just cause, employee may have statutory entitlements if conduct occurs in the "spur of the moment"
  - Likely only applicable if isolated incident
  - Difficult for employee to argue conduct not 'willful' if repeated, particularly if advised it is unwelcome

Human Rights in the Unionized Workplace

Human Rights in the Unionized Workplace

- Historically, unionized employee with a human rights complaint could file complaint with provincial human rights body or grievance under the collective agreement (though union)
- Due to a recent Supreme Court of Canada decision, this is not longer the case in at least one Canadian province

Human Rights in the Unionized Workplace

***Northern Regional Health Authority v. Horrocks,* 2021 SCC 42**

- Unionized health care employee terminated for breach of a "last chance agreement" related to alcohol addiction
- Filed a human rights complaint alleging discrimination on basis of disability
- Issue: Did Manitoba Human Rights Commission have jurisdiction to hear the complaint?

Human Rights in the Unionized Workplace

Northern Regional Health Authority v. Horrocks, **2021 SCC 42**

- Went all the way to Supreme Court of Canada which held the Commission did **not** have concurrent jurisdiction over a human rights issue in a unionized workplace
- Fell within the exclusive jurisdiction of a labour arbitrator given the language of the Manitoba *Labour Relations Act* and *Human Rights Code*

Human Rights in the Unionized Workplace ~Takeaways

- In Manitoba, unionized employee must use grievance procedure to litigate employment-related human rights issue
- If and how *Horrocks* may be applied in other jurisdictions remains to be seen
  - Will depend on statutory language
  - Comments from Supreme Court of Canada suggest concurrent jurisdiction will continue in British Columbia and federally

Human Rights in the Unionized Workplace ~Takeaways

- In Ontario
  - No decision yet from the Human Rights Tribunal or courts that directly addresses this issue
  - Earlier Ontario Court of Appeal decision suggests concurrent jurisdiction remains
- Stay tuned!

Accommodation Round-Up

Accommodation Round-Up

- Number of recent decisions of interest to employers
  - Family status claims related to childcare
  - Disability claims related to excessive absenteeism
  - Religious claims related to COVID-19 vaccination

Accommodation Round-Up
~ Family Status

***Kovintharajah v. Paragon Linen Laundry Services Inc.*, 2021 HRTO 98**

- Employee lived with spouse, elderly parents (with significant health issues) and three children under six
- Either employee or spouse had to be home at all times
- Employee's spouse returned to work on an evening shift with 3:00 pm start

Accommodation Round-Up
~Family Status

***Kovintharajah v. Paragon Linen Laundry Services Inc.*, 2021 HRTO 98**

- Employer granted employee accommodation to leave work at 2:30 pm
- Revoked accommodation 1 year later for operational reasons
- Employee's spouse not able to secure accommodation in her workplace

Accommodation Round-Up
~Family Status

***Kovintharajah v. Paragon Linen Laundry Services Inc.*, 2021 HRTO 98**

- Employee continued to leave work at 2:30 and terminated
- HRTO
  - Held employer breached "procedural duty to accommodate" by failing to engage with employee about potential accommodation and terminating employment

Accommodation Round-Up
~Family Status

***Kovintharajah v. Paragon Linen Laundry Services Inc.*, 2021 HRTO 98**

- Awarded 13 months' lost wages and $20,000 for injury to dignity, feelings and self-respect
- Employer argued employee failed to provide evidence they considered alternate care arrangements

Accommodation Round-Up
~Family Status

***Kovintharajah v. Paragon Linen Laundry Services Inc.*, 2021 HRTO 98**

... the respondent had just revoked an accommodation that was in place for over a year, and expected the applicant to make significant changes to their childcare arrangements in a matter of days. Though further exploration of alternatives may have been appropriate, for both sides, had the respondent engaged in a dialogue, in the circumstances I find the applicant had made reasonable efforts to explore alternatives. The respondent did not.

Accommodation Round-Up
~Family Status

***City of Toronto v. CUPE, Local 79.*, 2022 CanLII 51865 (ONLA)**

- Employee requested change to work hours on return from medical leave; wanted to be home for school bus drop off
  - Children too young to be alone
  - Family could not afford aftercare provided by children's private school
  - Spouse (who did not reside in the home) could not meet them due to work commitments, nor could other family members

Accommodation Round-Up
~Family Status

***City of Toronto v. CUPE, Local 79.*, 2022 CanLII 51865 (ONLA)**

- Employer denied request on basis employee had not made reasonable efforts to find alternate care arrangements
- Employee provided financial information as to why she could not pay for childcare; request still denied based on inconsistencies in employee's information

Accommodation Round-Up
~Family Status

***City of Toronto v. CUPE, Local 79.*, 2022 CanLII 51865 (ONLA)**

- Employee grieved
- Union argued employee not required to exhaust all "self-accommodation" options to establish *prima facie* discrimination
- Employer argued request was a *preference*, not a *need*

Accommodation Round-Up
~Family Status

***City of Toronto v. CUPE, Local 79.*, 2022 CanLII 51865 (ONLA)**

- Arbitrator held consideration of "other supports" did form part of *prima facie* discrimination analysis
- While an employee does not need to exhaust all alternatives, the presence of "readily available reasonable alternatives" will weaken a claim of discrimination

Accommodation Round-Up
~Family Status

***City of Toronto v. CUPE, Local 79.*, 2022 CanLII 51865 (ONLA)**

- Claim of discrimination dismissed
- Childcare issues due to employee choice, not need
  - Attributable to decision to have children bussed home
  - Could have used aftercare program available at school and picked children up, as cost was comparable
  - Failed to explore “babysitting” options

Accommodation Round-Up
~Family Status

***City of Toronto v. CUPE, Local 79.*, 2022 CanLII 51865 (ONLA)**

- However, grievor awarded $1,000 for breach of employer's policies and procedural obligations under *Code*
  - Requirement employee provide detailed personal information about family and finances to direct supervisor raised privacy and dignity concerns that could have been avoided

Accommodation Round-Up

~Family Status Takeaways

- Employer entitled to ask for information to evaluate
  - If request is based on “want” vs. “need”
  - Other childcare options available and why not explored
- If collecting sensitive information, implement measures to protect confidentiality

Accommodation Round-Up ~Disability

***TTC v. ATU, Local 113,* (2022 ONLA)**

- Grievor employed for 13 years when employment terminated for innocent absenteeism
- Absent for 197 incidents, totalling 483 days (2 of 13 years)
- Absences managed through employer's attendance management program (AMP) in collective agreement

Accommodation Round-Up ~Disability

***TTC v. ATU, Local 113*, (2022 ONLA)**

- Many absences related to medical condition; others related to personal circumstances
- Grievor one of two blacksmith/welders employed by TTC
  - When he was absent, work had to wait for his return or be performed on an overtime basis by other employee

Accommodation Round-Up ~Disability

TTC v. ATU, Local 113, **(2022 ONLA)**

- Multiple times grievor advised, through AMP, that absenteeism unacceptable and employment in jeopardy
- Grievor continued to believe if absenteeism related to a medical reason, his employment could not be terminated
- Employment terminated

Accommodation Round-Up
~Disability

TTC v. ATU, Local 113, **(2022 ONLA)**

- Immediately after termination, grievor sought treatment that likely would have considerably improved attendance
- Evidence indicated
  - Treatment was available earlier
  - But for termination, grievor would not have sought treatment
  - Even with treatment, would still be some attendance issues

Accommodation Round-Up

~Disability

***TTC v. ATU, Local 113,* (2022 ONLA)**

- Arbitrator upheld termination
  - Absenteeism excessive
  - Sporadic nature caused operational issues for TTC given only two blacksmith/welders
  - Griever took no personal accountability for absences
  - No assurance grievor would maintain regular attendance

Accommodation Round-Up

~Disability Takeaways

- Even if absenteeism is disability-related, can still result in termination if excessive and no reasonable prospect of improvement
- Proper management is key
  - Get the right medical information
  - Give employee notice of potential termination if regular attendance not achieved

Accommodation Round-Up

~Disability Takeaways

- Impact of absence on organization a relevant factor
  - e.g., CEO vs. part-time retail employee
- Managing persistent and periodic absenteeism can be a challenge
  - Reach out to experienced employment counsel for assistance!

Accommodation Round-Up
~Religion and Vaccination

- Key issue is whether objection to vaccination is personal, or tied to faith
- Early Supreme Court of Canada decision (unrelated to employment or vaccination) supports position this *nexus* can be established through individual's personal beliefs even if not shared with other members of the faith

Accommodation Round-Up
~Religion and Vaccination

- However, other human rights decisions (also unrelated to vaccination) have supported position employee must be able to provide objective evidence that belief is one shared by faith leaders and others in community
- Recent case law explores this issue in the context of COVID-19 vaccination

Accommodation Round-Up
~Religion and Vaccination

***Public Health Sudbury v. ONA*, 2022 CanLII 48440 (ONLA)**

- Employer implemented COVID-19 vaccination policy
- Grievor a public health nurse involved in communicating with public about COVID-19 and vaccination
- Claimed a creed-based exemption due to Catholic faith (member of Latin Mass community) and concern fetal cell lines were used in vaccine development

Accommodation Round-Up
~Religion and Vaccination

***Public Health Sudbury v. ONA*, 2022 CanLII 48440 (ONLA)**

- Exemption request denied
  - Request grounded in grievor's singular belief about COVID-19 vaccination, not her faith
- Union grieved, alleging discrimination

Accommodation Round-Up
~Religion and Vaccination

***Public Health Sudbury v. ONA*, 2022 CanLII 48440 (ONLA)**

- Arbitrator held grievor must demonstrate
  - Practice or belief with *nexus* with religion or creed AND
  - Practice or belief calls for particular line of conduct
    - Does not need a practice shared by others of the same faith
    - May be a *personal connection* with the divine or one's spiritual faith

Accommodation Round-Up
~Religion and Vaccination

***Public Health Sudbury v. ONA*, 2022 CanLII 48440 (ONLA)**

- Arbitrator stated:

*Once the grievor learned about the fetal cell line connection with vaccines, even if that connection is factually and objectively quite remote, if **the grievor** sincerely believes that her faith does not allow her to get vaccinate, that would be sufficient grounds for granting her request for an exemption (emphasis added).*

Accommodation Round-Up
~Religion and Vaccination

- Grievor:
  - Had taken no steps to research if any other medication she took had a connection to fetal cell lines
  - Took no issue administering vaccine to others, despite her concern about abortion
  - Initially claimed exemption based on general anti-vaccination position (not religion)

Accommodation Round-Up
~Religion and Vaccination

***Public Health Sudbury v. ONA*, 2022 CanLII 48440 (ONLA)**

- Despite this, Arbitrator satisfied grievor sincerely believed vaccination would be inconsistent with her beliefs and would amount to condonation of abortion
- Grievance allowed
  - Employee entitled to a religious-based exemption to the employer's COVID-19 vaccination policy

Accommodation Round-Up
~Religion and Vaccination

***IWK Health Centre v. NSNU*, 2022 CanLII 57410 (NSLA)**

- Grievor/nurse refused COVID-19 vaccination on religious grounds
- Protestant and member of First Congregational Church
- Concerned COVID-19 vaccine part of "evil plan" to introduce the "Mark of the Beast" in society

Accommodation Round-Up
~Religion and Vaccination

IWK Health Centre v. NSNU, **2022 CanLII 57410 (NSLA)**

- Grievor's church supported member choice on vaccination
- Employer refused exemption request because no established *nexus* to religion
  - Church did not require or oppose vaccination, therefore personal choice not grounded in religion

Accommodation Round-Up
~Religion and Vaccination

***IWK Health Centre v. NSNU*, 2022 CanLII 57410 (NSLA)**

- Consistent with *Public Health Sudbury* decision, arbitrator accepted as sincere grievor's concern about Mark of the Beast
- Belief did not need to be reasonable or shared by others of her faith to establish *nexus* to religion

Accommodation Round-Up
~Religion and Vaccination

***IWK Health Centre v. NSNU*, 2022 CanLII 57410 (NSLA)**

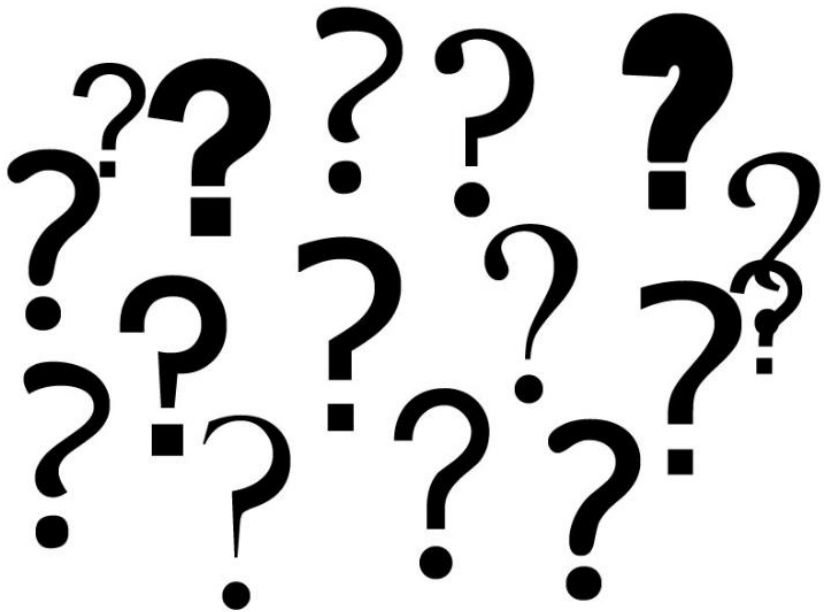
- Grievance allowed
  - Rights under collective agreement and *Human Rights Act* engaged
- Question of how to accommodate vaccine objection in the health care setting remitted back to the parties

Accommodation Round-Up

~Religion and Vaccination Takeaways

- Expect to see more cases on religious accommodation and COVID-19 vaccination
  - Remains to be seen if human rights tribunal adjudicators will take a similar approach or require evidence that belief is supported by religious leaders/community
- For assistance with any vaccine-related accommodation issue, reach out to an SK team member!

Questions



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