LABOUR + EMPLOYMENT LUNCH ‘N’ LEARN:

YEAR IN REVIEW FOR 2022

Presented By:

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ALEXANDER HOLBURN

YOUR **PERSPECTIVE** OUR **FOCUS**™

Today we will cover:

1	A Year in the Life of Our Courts
2	Mixed Messages: *Shultz v Prococious Technology Inc.*
3	Are Decisions Ever Final? Issue Estoppel in Employment Law
4	Just Cause: Where are we now?
5	Remembering the Pandemic

LEGISLATION UPDATE

Legislation Update

BC

- *Workers Compensation Act* – Accommodation and Re-Employment

ONTARIO

- *Employment Standards Act, 2000* - Covid-19 Protection Reduction in Hours to July 30, 2022 Leave and Not Dismissal

- *Infectious Disease Emergency Leave*, O.Reg.228/20 – Emergency Leave Extended to March 31, 2023

- *Working For Workers Act, 2021* – Disconnecting from Work Policy (June 2, 2022), Non-Compete Agreements Prohibition Retroactive to October 25, 2021, and Electronic Monitoring Policy (October 11, 2022)

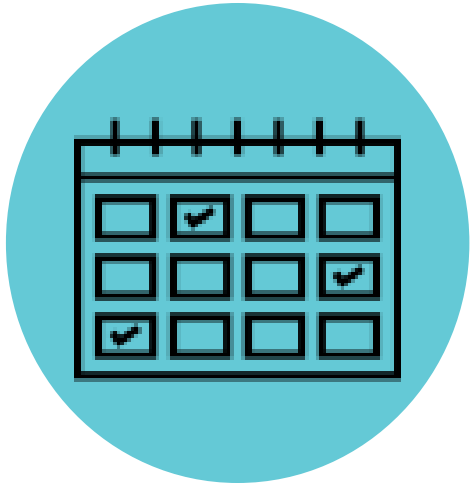
FEDERAL

- *Canada Labour Code* – 10 Days Sick Leave

A YEAR IN THE LIFE OF OUR COURTS

Year in Review

- British Columbia Courts rendered final decisions in 32 wrongful dismissal claims since November 2021
- Just cause was raised as a defence in 7 of those actions and was successful in 5 of them (an unusually high number)
- Several Class Proceedings have been initiated and are in the certification process



MIXED MESSAGES: *SHULTZ V PROCOCIOUS TECHNOLOGY INC.*

Mixed Messages: *Shultz v Prococious Technology Inc.* 2022 BCSC 1420

- EE was unhappy with her job and many of her colleagues. She took it upon herself to address matters by arranging a meeting with the owners of the business and making a presentation outlining why a new role should be created and why she should be placed into that new role.
- Her presentation included statements like: “it’s time to move on”; “I need to move away from the role of Sales Manager”; “I want to stay with Cleardent”; “I want to be part of the future”; and “I must move for my mental and physical health”.
- ER considered that she might have resigned (an understandable assumption) but concluded that the relationship was not sustainable. The decision was made to terminate her employment, and this was done via Zoom while she was in Mexico

Shultz v Prococious Technology Inc. 2022 BCSC 1420

Length of Service

- EE had previously been employed by ER for 11 years before resigning in 2018. She rejoined the ER in April 2019.
- EE sought notice based on 13.5 years of service. ER argued that her entitlement should be based on 2.5 years service

Termination Clause in Contract

- In March 2021, EE was promoted and concurrently entered into a new contract which stated:

  The Company may terminate the Employee's employment, without cause, upon providing the Employee notice or payment in lieu of notice (or a combination thereof) as required by the Employment Standards Act.

Shultz v Prococious Technology Inc. 2022 BCSC 1420

Decision:

1. EE found to have been employed for only 2.5 years. ER had never expressly recognized prior service and when she rejoined the company, she was treated as a probationary employee and earned vacation as a new hire.
2. The termination provision in the contract was valid. Although introduced as part of a new contract, it was accompanied by a salary increase of $416.66 and a promotion.
3. Because ER had given EE two weeks notice already, she was not wrongfully dismissed.

ARE DECISIONS EVER FINAL? ISSUE ESTOPPEL IN EMPLOYMENT LAW

Issue Estoppel in Employment Law

***Read v Rimex Supply Ltd*., 2021 BCSC 2157: (decided November 4, 2021)**

- EE was dismissed for cause. He proceeded to claim EI benefits, initiate a ESB complaint and sue for wrongful dismissal.
- EE prevailed in his EI claim and in his ESB complaint. In both cases, it was determined that the ER did not have cause to terminate.
- EE applied to disallow the just cause defence in the wrongful dismissal on the basis that the issue had already been decided and determined.
- Ct held that the decision of Service Canada was "not procedurally robust enough" to be considered a final determination of the issue. Regarding the ESB decision, the Ct noted that EE was seeking significant damages for wrongful dismissal and that it would be unfair to deny the ER the right to assert a defence on the basis of a prior decision made without the benefit of examinations for discovery or cross examinations.

Issue Estoppel in Employment Law – Part II

***Desmarais v Eat Your Cake Personal Health Delivery Inc*., 2022 BCSC 1566**

- EE dismissed, for cause in November 2019. He brought an ESB complaint and a wrongful dismissal claim. ESB complaint was allowed and defence of just cause rejected.
- EE applies to strike defence in wrongful dismissal claim.
- The application is allowed!!! The Ct notes that the ER failed to "to identify a specific issue" allowing for the conclusion that a potential injustice could arise.
- Apparently, the inability to raise bona fide allegations of misconduct and this avoid liability was not a sufficiently specific issue.

JUST CAUSE: WHERE ARE WE NOW?

Just Cause – Has the standard been lowered?

***Shalagin v Mercer Celgar Limited Partnership*, 2022 BCSC 112**

- EE was employed as a financial analyst beginning in 2010. Over the ensuing decade he received promotions and pay increases, but often complained that he was being targeted and discriminated against.
- In May 2019, he was invited to participate in ER's Bonus Plan. He demonstrated suspicion and distrust about his bonus and was adversarial towards ER when discussing his expectations. His attitude with his supervisors and colleagues cased ER to terminate his employment, for cause in March 2020 .
- Following his dismissal, ER became aware that, while employed, EE had secretly recorded interactions with colleagues, including personal conversations. ER took the position that this constituted "after-acquired cause" for dismissal.

Just Cause

Ct noted that until it had dismissed EE, it had no means of knowing about the surreptitious recordings. In assessing whether those records constituted cause, the Ct noted that EE's actions were not criminal, but noted:

> "…legality is not the sole barometer. The question is whether the employee's actions fundamentally ruptured the relationship, such that the mutual trust between the parties is broken."

By secretly recording conversations and meetings, EE disclosed a complete lack of trust and further destroyed the trust that the ER required in him. In the end, the defence prevailed and the claim was dismissed.

Just Cause – This is more like it

***Cho v Café La Foret Ltd*., 2022 BCSC 1560**

- EE was employed as a head baker. He inappropriately touched a female subordinate who then raised her concerns with the ER.
- When made aware of the victim's concerns, EE offered to either apologize or quit. ER assured him that things could be worked out and ultimately came froward with a request for him to sign an affidavit wherein he admitted to being a sexual predator. When he refused to sign the Affidavit, he was fired for cause.
- The Ct found as a fact that he had engaged in harassment when touched the victims should and patted her in the area of her buttocks.

> "Though the touching was brief, it was intentional, unwarranted, and non-consensual. It was a violation of Ms. Lee's bodily integrity, and caused her emotional distress… The surrounding circumstances lead me to conclude that this action on the part of Mr. Cho reflected a gross error of judgment, rather than an act committed for sexual gratification or with the intention of violating Ms. Lee's bodily integrity. Nevertheless, when Mr. Cho touched Ms. Lee's buttocks, the touching took on sexual connotations."

Just Cause – This is more like it

- Despite finding that EE had committed by sexual harassment and demonstrated abuse of authority in the workplace, the just cause defence was rejected.

- Ct was clearly influenced in reaching that conclusion by the fact that ER was prepared to continue the relationship even after it was aware of the misconduct. It was not until he refused to sign an inculpatory Affidavit that he was fired. ER's actions reflected a view that the employment relationship had not irretrievably broken down. By maintaining that EE could keep his job if he provided the affidavit admitting his guilt, ER did not consider his misconduct against to be sufficiently serious to justify termination.

- The Ct also referenced several mitigating factors: the sexual harassment was at the "low end of the spectrum" ; the contact lasted for only a second or two on each occasion, and reflected a gross error of judgment, rather than *mal fide* intentions; EE had never been warned that such conduct was inappropriate, and that dismissal was a possible consequence; and ER did not have a formal sexual harassment policy.

Just Cause – This is more like it

- If that was not enough, the Ct went further and expressed its outrage at ER's actions in refusing to issue an ROE until he had signed a self-incriminating affidavit; and exerting pressure on him to sign the affidavit knowing that doing so would place EE in legal jeopardy:

  " … the language used in the Affidavit, as well as the requirement that he not have any contact with former, current, or prospective female staff, made it appear as if he was a dangerous sexual offender from whom all female staff must be protected. There was no factual or legal basis for the Employer to impose such a requirement "

- In addition to having to provide him with pay in lieu of reasonable notice, ER was also ordered to pay punitive damages of $25,000!

Just Cause – Maybe the Standard has been Lowered

***Golob v Fort St. John (City),* 2021 BCSC 2192**

- EE was dismissed from employment as Deputy Fire Chief when a series of internal complaints were made by colleagues concerning his loud, brusque and often profane …leadership style." It appears that the decision was made, in some respects to placate the local union which wanted him to be replaced and although ER clearly did not have cause to dismiss him cause was alleged, nonetheless.
- Concurrent with his dismissal, ER was required to relinquish his cell phone, and upon reviewing the phone's contents, ER quickly discovered that he had sent several text messages which were highly derogatory to the Chief and which reflected an "attitude of disdain". Additionally, he shared confidential information with a colleague who was seeking a promotion .

Just Cause – Maybe the Standard has been Lowered

Somewhat surpassingly, the Ct found in favor of ER and dismissed the action. EE was found to have harbored resentment towards the Chief and appeared to have regarded himself as the person who should hold the position.

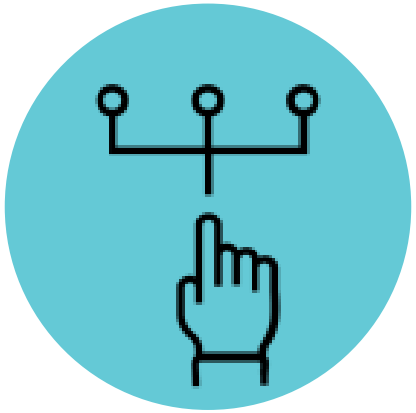
> "Such conduct constitutes a breach of the fundamental terms of the employment contract that Mr. Golob "not promote disharmony or discontent" among other City employees, and that he generally do everything in his power to promote the interests of the City."

REMEMBERING THE PANDEMIC

Remembering The Pandemic

***Parmar v Tribe Management Inc.*, 2022 BCSC 1675**

- The first case in Canada to expressly address the rights of ERs to place EEs on unpaid leave for failing to comply with a mandatory vaccine policy. Decision released in September 2022, when many of the restrictions had been lifted.
- The Ct recalled the context in the fall of 2021. Face masks and vaccine "passports" required participation in many public activities. All public sector workers required proof of vaccination. All levels of government encouraging ERs to mandate vaccinations for EEs. The absence of a mandatory vaccine policy was seen by many as delinquent.



Remembering The Pandemic

- In the fall of 2021, ER did what it was being told to do and implement a policy. All but 2 of its more than 200 EEs complied and became vaccinated. Parmar refused on the basis of principle (she had no medical or religious justification) and ER reluctantly proceeded to place her on an unpaid leave.
- Less than 2 months later, she tendered her resignation and contended that the unpaid leave was unlawful and that she was constructively dismissed.
- The Ct disagreed, and in doing so, took judicial notice of the fact that:

  COVID-19 is a potentially deadly virus that is easily transmissible. Symptoms of the virus may vary from person to person according to age, health, and other comorbidity factors. The virus can mutate. Asymptomatic carriers of the virus can infect others. There is no known immunity to contracting the virus and no verifiable evidence of natural immunity to contracting it, or a known mutation, a second or more time."

Remembering The Pandemic

"Tribe was required to balance Ms. Parmar's personal beliefs as against its interest in ensuring that it protected the health and safety of all other employees in its workplace. Allowing for exemptions would result in selective application of the MVP. As is evident from Ms. Milic's affidavit, she was reluctant to be vaccinated but elected to make a different choice than Ms. Parmar. Individual views of the appropriateness of Tribe's MVP do not undermine the reasonableness of the policy, and an employee's personal belief must give way to the health and safety concerns that form the basis for the MVP."

- The claim was dismissed and provides some comfort to ERs facing similar claims. However, the matter is under appeal … stay tuned.

Q & A SESSION

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Presenter(s) contact details are on next slide.

THANK YOU

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