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Calgary Labour Arbitration and Policy Conference:

Current practices, emerging trends

June 13 – 14, 2024
The Westin Calgary



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42nd Annual Labour Arbitration and Policy Conference

Calgary, June 13 and 14, 2024



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	Day 1 Thursday, June 13, 2024
5:00 p.m.	Cocktail networking reception
7:00 p.m.	Co-chair remarks and introduction of keynote
7:10 p.m.	Keynote <i>The Honourable Chief Justice Ritu Khullar</i> Public Confidence and Trust: Why You Should be Concerned
7:40 p.m.	Break
7:45 p.m.	Evening Plenary Arbitrating AI: Debating the strengths and limitations of AI in labour relations
9:00 p.m.	End of day 1

	Day 2 Friday, June 14, 2024
8:00 a.m.	Breakfast
8:45 a.m.	Plenary #2 Current and Critical: Major developments in legislation and caselaw
10:00 a.m.	Morning break
10:15 a.m.	Plenary #3 Off-Duty, Off-Base? Balancing employees' freedom of speech and employers' interests
11:20 a.m.	Break
11:35 a.m.	Concurrent sessions
12:35 p.m.	Lunch
1:45 p.m.	Concurrent sessions continued
2:45 p.m.	Afternoon break
3:00 p.m.	Plenary #4 Is it Harassment or Not? An interactive panel with case studies and scenarios
4:15 p.m.	Conference Ends

Continuing Professional Development



This program has been approved by **CPHR Alberta** for **7.5 Continuing Professional Development hours**.



- This program has been approved by the **Law Society of British Columbia** for **7.5 Continuing Professional Development hours**.

Evening Plenary - Arbitrating AI: Debating the strengths and limitations of AI in labour relations

June 13, 2024, 7:45 p.m. – 9:00 p.m. MT

Panelists

Kelly Williams-Whitt, Arbitrator/Mediator, Professor, Human Resources and Labour Relations, Dean, Faculty of Business, Communication Studies and Aviation, Mount Royal University

Wilson Chan, Employer Counsel, Mathews Dinsdale & Clark LLP

Natalia Makuch, Union Counsel, Chivers Carpenter Lawyers

Given the lack of Canadian arbitration decisions on the use of artificial intelligence (AI) to select and manage employees, this session will provide employers and unions with the best available insight into how grievances against such uses of AI would be mounted, defended, and decided. Experienced union and management counsel will join an arbitrator to discuss a union challenge to algorithmic management drawn from U.S. caselaw and a challenge to a program designed to vet job candidates. Specific issues to be addressed include:

- What principles in existing arbitral jurisprudence or legislative provisions could be invoked to challenge an employer's use of algorithmic management (i.e. use of AI and data to manage employees)?
- Can employers rely on management rights to justify the use of AI to evaluate employee performance and manage employees?
- What arguments for and against the use of algorithmic management would arbitrators in Alberta find most compelling?
- What legal concerns are raised when an employer uses AI to assess candidates' suitability for positions?
- What privacy concerns are raised by using AI to evaluate job applicants based on their internet activity?

Closing Remarks

9:00 p.m. MT



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Thursday, June 13, 2024



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Evening Plenary – Arbitrating AI: Debating the strengths and limitations of AI in labour relations

1. The Scenarios

- 1.1 **Scenario #1** – *Independent Union of Educators v. Calgary Independent School District*
[Editors' Note: This is a fictional scenario drawing on facts from a real U.S. court decision.]
- 1.2 **Scenario #2** – *Municipal Government Employees' Union of Alberta v. City of Newbury*
[Editors' Note: This is a fictional scenario based on a real artificial intelligence (AI) program.]

2. The Law

- 2.1 Mort Mitchnick & Brian Etherington, *Leading Cases on Labour Arbitration Online*, 2nd ed. (Toronto: Lancaster House, 2024, online),
 - *Charter of Rights and Freedoms* (1.2.4)
 - Pre-Employment Matters (3.1.2)
 - Discharge of Probationary Employees (3.8)
 - The Just Cause Standard (10.1)
 - Non-Disciplinary Discharge – Innocent Incapacity (10.10)
 - Validity of Employer Rules (14.1)
 - Excerpts from: Employer Rules Affecting Privacy (14.2) –
 - Searches (14.2.1)
 - Video Surveillance (14.2.3)
 - Biometric Scanning (14.2.5)

- Criminal And Police Record Checks (14.2.6)
 - GPS, Drive Cams, and Swipe-Cards (14.2.7)
 - Limitations on Management Rights (17.2)
 - Validity of Test or Interview – Characteristics Of A Valid Test Procedure (20.4.3)
- 2.2 Jeffrey Sack & Peter Neumann, *Unionized Workplaces in Canada: Labour Laws and Contract Clauses* (Toronto: Lancaster House, 2024, online), Job Vacancies, Transfers, and Promotions – Applicable Legislation (14.1)
- 2.3 Peter Neumann & Jeffrey Sack, *Wrongful Dismissal & Employment Law eText* (Toronto: Lancaster House, 2024, online), Discrimination in Hiring and Promotion (5.2.3.1.4)

See also: *Houston Federation of Teachers, Local 2415 et al. v. Houston Independent School District*, United States District Court, Southern District of Texas, Houston Division, May 4, 2017, online: [USCOURTS-txsd-4 14-cv-01189-0.pdf \(govinfo.gov\)](https://uscourts-txsd-4.14-cv-01189-0.pdf) [Editors' Note: Clicking on this link may download a PDF document to your device.]

See also: Shelby Webb & John Harden, "Houston ISD settles with union over controversial teacher evaluations," *Houston Chronicle*, October 11, 2017 (updated October 12, 2017), online: <https://www.chron.com/news/houston-texas/education/article/Houston-ISD-settles-with-union-over-teacher-12267893.php>

See also: Brian Merchant, "Predictim Claims Its AI Can Flag 'Risky' Babysitters. So I Tried It on the People Who Watch My Kids," *Gizmodo*, December 6, 2018, online: <https://gizmodo.com/predictim-claims-its-ai-can-flag-risky-babysitters-so-1830913997>

See also: Diana Drake, "Babysitters Beware: AI Technology May Soon Be Lurking on Your Social Media," *Wharton Global Youth Program*, Wharton University of Pennsylvania, December 5, 2018, online: <https://globalyouth.wharton.upenn.edu/articles/babysitters-beware-advanced-ai-technology-may-soon-be-lurking-in-your-social-media-feed/>

3. What principles in existing arbitral jurisprudence or legislative provisions could be invoked to challenge an employer's use of algorithmic management (i.e. use of AI and data to manage employees)?

- 3.1 Jeffrey Sack & Peter Neumann, *Unionized Workplaces in Canada: Labour Laws and Contract Clauses* (Toronto: Lancaster House, 2024, online),
- Technological Change (15.4)
 - Workplace Privacy – Applicable Legislation (19.9)
 - Surveillance (19.9.1)

- 3.2 "Biometric attendance system reasonable in light of minimal intrusion on employee privacy, arbitrator rules," *United Steelworkers Local 1-2017 v. Canadian Forest Products Ltd. (Plateau Sawmill Division)*, 2023 CanLII 5478 (BC LA), Lancaster's *Workplace Privacy Law*, eAlert No. 55
- 3.3 "Transportation company's continuous audio and video surveillance of truck drivers breached privacy legislation, federal privacy commissioner holds," *PIPEDA Case Summary #2022-006*, 2022 CanLII 90889 (PCC), Lancaster's *Workplace Privacy Law*, eAlert No. 52
- 3.4 "Use of GPS technology to monitor employees' proximity to worksite during working hours was permitted under privacy legislation and was a reasonable exercise of management rights under the collective agreement, arbitrator rules," *International Union of Elevator Constructors, Local 82 v. Kone Inc.*, 2022 CanLII 1018 (BC LA), Lancaster's *Workplace Privacy Law*, eAlert No. 48
- 3.5 "Electronic timesheet system that required daily 'selfie' photos and GPS tracking on employees' personal devices was unreasonable infringement on employees' privacy rights, arbitrator holds," *International Union of Operating Engineers, Local 793 & Labourers' International Union of North America, Local 183 v. Earth Boring Company Limited*, 2021 CanLII 42419 (ON LA), Lancaster's *Workplace Privacy Law*, eAlert No. 40
- 3.6 "Arbitration award concerning legal aid society's call monitoring program was reasonable, labour board rules," *Legal Aid Society of Alberta v. Alberta Union of Provincial Employees*, 2019 CanLII 74890 (AB LRB), Lancaster's *Labour Arbitration*, eAlert No. 294

See also: Acton Clarkin, "Alberta working on its first regulations governing artificial intelligence," *CBC News*, March 16, 2024, online: <https://www.cbc.ca/news/canada/calgary/alberta-province-artificial-intelligence-regulations-1.7145925>

See also: Mavra Choudhry, Nic Wall, & Molly Reynolds, "Guide to artificial intelligence regulation in Canada," *Torys LLP*, April 27, 2023, online: <https://www.torys.com/en/our-latest-thinking/publications/2023/04/guide-to-artificial-intelligence-regulation-in-canada>

See also Document 6.1: Robbie Grant & Ioana Pantis, "Legal Risks Associated with Automated Hiring Tools in Canada," *McMillan LLP*, July 13, 2023, online: <https://mcmillan.ca/insights/publications/legal-risks-associated-with-automated-hiring-tools-in-canada/> [Editors' Note: For a summary of further proposed amendments to the draft *Artificial Intelligence and Data Act*, see Bernice Karn & Gerrit Yau, "ISED Minister Publishes Letter on Amendments to the Artificial Intelligence and Data Act," *Cassels Brock & Blackwell LLP*, December 14, 2023, online: <https://cassels.com/insights/ised-minister-publishes-letter-on-amendments-to-the-artificial-intelligence-and-data-act/>. At the time of writing, Bill C-27 had completed second reading and was undergoing consideration in committee: <https://www.parl.ca/legisinfo/en/bill/44-1/c-27>.]

See also: "Summary of privacy laws in Canada," Office of the Privacy Commissioner of Canada, January 2018, online: https://www.priv.gc.ca/en/privacy-topics/privacy-laws-in-canada/02_05_d_15/

See also: "Guide on the use of generative AI," Government of Canada, modified May 8, 2024, online: <https://www.canada.ca/en/government/system/digital-government/digital-government-innovations/responsible-use-ai/guide-use-generative-ai.html>

See also: "Provincial and territorial privacy laws and oversight," Office of the Privacy Commissioner of Canada, June 11, 2020, online: <https://www.priv.gc.ca/en/about-the-opc/what-we-do/provincial-and-territorial-collaboration/provincial-and-territorial-privacy-laws-and-oversight/> [Editors' Note: See "Alberta."]

See also: "Guidance for Small Custodians on the Use of Artificial Intelligence," Office of the Information and Privacy Commissioner of Alberta, November 2023, online: https://oipc.ab.ca/wp-content/uploads/2023/11/Guidance-for-Small-Custodians-on-the-use-of-Artificial-Intelligence-November-2023_revised_clean-with-reference-to-PDF-link.pdf [Editors' Note: Clicking on this link may download a PDF document to your device.]

See also: "Privacy Laws in Alberta," Office of the Information and Privacy Commissioner of Alberta, 2021, online: <https://oipc.ab.ca/wp-content/uploads/2022/03/Privacy-Laws-2021.pdf> [Editors' Note: Clicking on this link may download a PDF document to your device.]

See also: Catherine Skrzypinski, "Canada: Workplaces Should Consider Bias, Privacy in AI Policies," Society for Human Resources Management (SHRM), October 1, 2023, online: <https://www.shrm.org/topics-tools/news/canada-workplaces-ai-policies>

4. Can employers rely on management rights to justify the use of AI to evaluate employee performance and manage employees?

4.1 Jeffrey Sack & Peter Neumann, *Unionized Workplaces in Canada: Labour Laws and Contract Clauses* (Toronto: Lancaster House, 2024, online), Management Rights (8)

- Management Rights and Rules (8.1)
- Fairness Clauses (8.2)

See also: Anja Karadeglija, "With AI, workplace surveillance has 'skyrocketed' – leaving Canadian laws behind," *Bloomberg*, March 11, 2024, online: <https://www.bnnbloomberg.ca/with-ai-workplace-surveillance-has-skyrocketed-leaving-canadian-laws-behind-1.2045115>

See also: Emily Douglas, "AI anti-bias laws: Are algorithms 'inherently' discriminatory?," *Human Resources Director (HRD)*, April 13, 2023, online: <https://www.hcamag.com/ca/specialization/employment-law/ai-anti-bias-laws-are-algorithms-inherently-discriminatory/442646>

See also: "Artificial Intelligence in the Workplace: Top Tips and Takeaways," Blake, Cassels & Graydon LLP, September 27, 2023, online: <https://www.blakes.com/insights/artificial-intelligence-in-the-workplace-top-tips/>

5. What arguments for and against the use of algorithmic management may arbitrators find most compelling?

5.1 Robert Donoghue & Tiago Vieira, "Horrible bosses: how algorithm managers are taking over the office," *The Conversation*, October 11, 2022, online: <https://theconversation.com/horrible-bosses-how-algorithm-managers-are-taking-over-the-office-191307> [Published under a Creative Commons – Attribution/No derivatives license CC BY-ND 4.0 DEED <https://creativecommons.org/licenses/by-nd/4.0/>.]

See also: "Algorithmic Management: Opportunities for Collective Action: A Guide for Workers and Trade Unions," UNI Global Union, online: <https://uniglobalunion.org/wp-content/uploads/Algorithmic-Management-Opportunities-for-Collective-Action.pdf> [Editors' Note: Clicking on this link may download a PDF document to your device.]

See also: Gregory Brown Jr. & Ya Xin Huang, "3 Key Risks When Using AI for Performance Management & Ways to Mitigate Them," Jackson Lewis P.C. via *JD Supra*, February 27, 2024, online: <https://www.jdsupra.com/legalnews/3-key-risks-when-using-ai-for-7007201/>

See also: Aidan Macnab, "Making one person accountable when implementing AI in the workplace is vital: employment lawyer," *Law Times*, March 11, 2024, online: <https://www.lawtimesnews.com/practice-areas/labour-and-employment/making-one-person-accountable-when-implementing-ai-in-the-workplace-is-vital-employment-lawyer/384424>

See also: Christy Dunn, "Employment Discrimination Via Artificial Intelligence," Young Moore and Henderson, P.A., September 5, 2023, online: <https://www.youngmoorelaw.com/blog/employment-discrimination-via-artificial-intelligence/> [Editors' Note: Note that this article speaks to U.S. law and cases.]

See also: Xavier Parent-Rochelleau et al., "Algorithmic HR management: Identifying best practices and worker impacts," *Knowledge Synthesis Grants Evidence Briefs*, Social Sciences and Humanities Research Council, modified May 30, 2022, online: https://www.sshrc-crsh.gc.ca/society-societe/community-communite/ifca-iac/evidence_briefs-donnees_probantes/skills_work_digital_economy-competences_travail_economie_numerique/parent-rocheleau_gaudet_gagne_lirio_bujold-eng.aspx [Editors' Note: This link includes a summary of the project and key findings. The full report is also available on this page.]

See also: Valerio De Stefano, "'Negotiating the Algorithm': Automation, Artificial Intelligence and Labour Protection" (2019), 41:1 *Comparative Labor Law & Policy Journal*, online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3178233

See also: Carlotta Bunzel & Corine Boon, "Algorithmic Management in Organizations: Benefits, Challenges, and Best Practices," Academy to Innovate HR (AIHR), online: <https://www.aihr.com/blog/algorithmic-management/>

6. What legal concerns are raised when an employer uses AI to assess candidates' suitability for positions?

6.1 Robbie Grant, Ioana Pantis, & David Adjei, "Legal Risks Associated with Automated Hiring Tools in Canada," McMillan LLP, July 13, 2023, online: <https://mcmillan.ca/insights/publications/legal-risks-associated-with-automated-hiring-tools-in-canada/> [Reproduced with permission. Author contact information is available via their profile links on the article webpage. For a summary of further proposed amendments to the draft *Artificial Intelligence and Data Act*, see: Bernice Karn & Gerrit Yau, "ISED Minister Publishes Letter on Amendments to the Artificial Intelligence and Data Act," Cassels Brock & Blackwell LLP, December 14, 2023, online: <https://cassels.com/insights/ised-minister-publishes-letter-on-amendments-to-the-artificial-intelligence-and-data-act/>. At the time of writing, Bill C-27 had completed second reading and was undergoing consideration in committee: <https://www.parl.ca/legisinfo/en/bill/44-1/c-27/>.]

See also: Aidan Macnab, "Latest employment law reform includes new disclosure rules for AI used for job applicant screening," *Law Times News*, April 29, 2024, online: <https://www.lawtimesnews.com/practice-areas/labour-and-employment/latest-employment-law-reform-includes-new-disclosure-rules-for-ai-used-for-job-applicant-screening/385822> \

See also: Shayla Klein & D. Josiah Allison, "Social media screening for job applicants: Human rights and privacy risks Alberta employers should be aware of," Miller Thomson LLP, March 22, 2024, online: <https://www.millerthomson.com/en/insights/labour-and-employment-communiqué/social-media-screening-job-applicants-human-rights-privacy-risks-alberta-employers/>

See also: Jo Faragher, "Workday accused of AI discrimination against applicants," *Personnel Today*, February 23, 2024, online: <https://www.personneltoday.com/hr/workday-ai-discrimination/> [Editors' Note: Note that this article speaks to U.S. law and cases.]

See also: Anna Lena Hunkenschroer & Christoph Luetge, "Ethics of AI-Enabled Recruiting and Selection: A Review and Research Agenda" (February 2022), 178 *Journal of Business Ethics* 977-1007, online: <https://doi.org/10.1007/s10551-022-05049-6>

See also: "How Employers Are Using AI to Make Hiring Decisions," Government of Alberta, online: <https://alis.alberta.ca/plan-your-career/workplace-trends/artificial-intelligence-ai/how-employers-are-using-ai-to-make-hiring-decisions/>

7. What privacy concerns are raised by using AI to evaluate job applicants based on their internet activity?

See: Shayla Klein & D. Josiah Allison, "Social media screening for job applicants: Human rights and privacy risks Alberta employers should be aware of," Miller Thomson LLP, March 22, 2024, online: <https://www.millerthomson.com/en/insights/labour-and-employment-communique/social-media-screening-job-applicants-human-rights-privacy-risks-alberta-employers/>

See also: "Guidelines for Social Media Background Checks," Office of the Information and Privacy Commissioner of Alberta, December 2011, online: <https://oipc.ab.ca/wp-content/uploads/2022/02/Social-Media-2011.pdf> [*Editors' Note:* Clicking on this link may download a PDF document to your device.]

Plenary #2 - Current and Critical: Major developments in legislation and caselaw

June 14, 2024, 8:45 a.m. – 10:00 a.m. MT

Panelists

Greg Francis, Arbitrator and Mediator

Maurice Dransfeld, Employer Counsel, McLennan Ross LLP

Dana Christianson, Union Lawyer, Seveny Scott Lawyers

In this session, experts will examine recent significant developments in federal and provincial labour law. Panelists will address the latest cases on topics such as:

- discrimination, harassment, and accommodation;
- government intervention in collective bargaining;
- privacy;
- discipline;
- contracting out, statutory freeze issues, and illegal strikes; and
- key issues at interest arbitration, including inflation, recruitment and retention, and minimum wage increases.

Panelists will also discuss recent legislative initiatives, such as:

- Federal legislation to ban the use of strike replacement workers;
- The recent report of the *Employment Equity Act* Review Task Force and related changes to the *Act*;
- Limiting the importation of goods involving the use of forced labour and child labour in international supply chains; and
- The impact of Alberta's recently introduced *Public Sector Employer Amendment Act, 2023*.

Morning break

10:00 a.m. – 10:15 a.m. MT



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Friday, June 14, 2024



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Plenary #2 – Current and Critical: Major developments in legislation and caselaw

1. Government Involvement in Collective Bargaining

- 1.1 "Alberta legislation prohibiting Crown prosecutors from choosing own bargaining agent not unconstitutional, appeal court holds," *Alberta Crown Attorneys' Association v. Alberta (Justice and Solicitor General)*, 2023 ABCA 120 (CanLII), Lancaster's *Collective Bargaining*, eAlert No. 142 [*Editors' Note*: An application for leave to appeal to the Supreme Court of Canada was dismissed: 2023 CanLII 122419 (SCC), online: <https://canlii.ca/t/k1wqh>.]

Further Reading:

- 1.2 "Ontario public sector wage cap legislation (Bill 124) violates *Charter* rights of unionized employees, appeal court holds," *Ontario English Catholic Teachers Association v. Ontario (Attorney General)*, 2024 ONCA 101 (CanLII), Lancaster's *Collective Bargaining*, eAlert No. 147
- 1.3 "Court of Appeal upholds award against Manitoba government of nearly \$19.5 million in *Charter* damages to faculty association for interference in collective bargaining," *The Government of Manitoba v. Manitoba Federation of Labour*, 2023 MBCA 65 (CanLII), Lancaster's *Collective Bargaining*, eAlert No. 145

See also: Andréane Giguère, "Supreme Court of Canada rules managers cannot unionize in Quebec," Norton Rose Fulbright, April 25, 2024, online:

<https://www.nortonrosefulbright.com/en/knowledge/publications/b0cf429c/supreme-court-of-canada-rules-managers-cannot-unionize-in-quebec> [Editors' Note: This article addresses the decision in *Société des casinos du Québec inc. v. Association des cadres de la Société des casinos du Québec*, 2024 SCC 13 (CanLII), online: <https://canlii.ca/t/k44b2>.]

See also: *Nova Scotia Teachers Union v. Nova Scotia (Attorney General)*, 2023 NSCA 82 (CanLII), online: <https://canlii.ca/t/k11np> [Editors' Note: In this decision, the Nova Scotia Court of Appeal held that a lower court did not commit a reviewable error when it declined to award a remedy under s.24(1) of the *Charter of Rights and Freedoms* after it had found legislation imposing a collective agreement on the Nova Scotia Teachers Union to be of no force and effect because it breached members' rights to freedom of association under s.2(d) of the *Charter*.]

See also: *ATU Local 113 v. Her Majesty the Queen in Right of Ontario*, 2023 ONSC 3618 (CanLII), online: <https://canlii.ca/t/jxnvb> [Editors' Note: In this decision, an Ontario judge ruled that the *Toronto Transit Commission Labour Disputes Resolution Act, 2011*, introduced by the Ontario government, violated the guarantee of freedom of association in s.2(d) of the *Canadian Charter of Rights and Freedoms* by prohibiting strike action by Toronto Transit Commission workers.]

2. Discipline and Off-Duty Conduct

- 2.1 "Arbitration board upholds dismissal of employee who engaged in a pattern of anti-Asian racist and sexist workplace harassment," *Health Sciences Association of Alberta v. Alberta Health Services*, 2023 CanLII 37831 (AB GAA), Lancaster's *Gender, Equity and Work-Life Balance*, eAlert No. 175
- 2.2 "Dismissal warranted for bus driver who sexually harassed and assaulted co-worker while off duty, arbitrator rules," *Amalgamated Transit Union, Local 583 v. Corporation of the City of Calgary*, 2023 CanLII 20867 (AB GAA), Lancaster's *Municipal Employment Law*, eAlert No. 154
- 2.3 "Arbitrator reinstates public servant who used N-word during meeting, with two-week suspension," *Alberta Union of Provincial Employees v. Government of Alberta*, 2023 CanLII 2834 (AB GAA), Lancaster's *Discharge and Discipline*, eAlert No. 302

Further Reading:

- 2.4 "Court of Appeal upholds \$310,000 aggravated and punitive damages award for correctional officer," *Canada (Attorney General) v. LL*, 2024 FCA 26 (CanLII), Lancaster's *Discharge and Discipline*, eAlert No. 309

See also: *Association of Academic Staff: University of Alberta v. University of Alberta*, 2023 CanLII 45765 (AB GAA), online: <https://canlii.ca/t/jxfbk> [Editors' Note: In this decision, an Alberta arbitrator dismissed a grievance over the early removal of an associate professor from her appointment as a departmental associate chair, finding that the removal due to the professor's role in a broader debate about "gender-critical feminist" views and the protection of transgender persons, which it considered to impair her ability to fulfil her role as associate chair in an effective manner, was within its broad discretion to make administrative appointments. The arbitrator found that the university exercised its authority to end the appointment in a fair, reasonable, and non-arbitrary manner and that the decision was neither disciplinary in purpose or effect nor a violation of academic freedom.]

See also: *Metrolinx v. Amalgamated Transit Union, Local 1587*, 2024 ONSC 1900 (CanLII), online: <https://canlii.ca/t/k3tj8> [Editors' Note: In this decision, the Ontario Divisional Court held that an arbitrator's decision to reinstate five bus drivers was unreasonable. The arbitrator had determined that the drivers were unjustifiably dismissed following a series of WhatsApp messages on their personal cell phones that included sexually inappropriate comments about their co-workers. Holding that it was unreasonable for the arbitrator to view the messages as akin to private conversations outside the employer's purview, as the messages had ultimately made their way into the workplace, the Court also took issue with the arbitrator's determination that the employer had improperly proceeded with an investigation in the absence of a formal complaint by the victim. In the court's view, provincial health and safety legislation required an employer to investigate incidents of workplace harassment even without a complaint. Considering the ruling as based on stereotypes of how a victim of harassment should react, the Court quashed the decision and remitted the matter to a different arbitrator for reconsideration.]

See also: Rhonda Levy & Monty Verlint, "British Columbia Appeal Court Finds Employee's Sexual Harassment of Subordinate not Sufficiently Serious to Justify His Dismissal," Littler LLP via *JD Supra*, October 18, 2023, online: <https://www.jdsupra.com/legalnews/british-columbia-appeal-court-finds-5893191/> [Editors' Note: This article addresses the decision in *Cho v. Café La Foret Ltd.*, 2023 BCCA 354 (CanLII), online: <https://canlii.ca/t/k03cl>. Note that this decision was rendered in a non-unionized context.]

See also: *Public Service Alliance of Canada v. Saskatchewan Gaming Corporation (Casino Regina)*, 2023 CanLII 52568 (SK LA), online: <https://canlii.ca/t/jxpq8> [Editors' Note: In this decision, an arbitrator upheld the dismissal of a casino employee for theft, finding that there was clear, cogent, and compelling evidence that the employee intentionally waived the GST and service fees in three separate ticket transactions for friends and families, amounting to \$34. Also finding that the employee had failed to accept responsibility, the arbitrator determined that there was no basis to mitigate the penalty of discharge and dismissed the grievance.]

3. Discrimination, Harassment, and Accommodation

- 3.1 *Oliva, Pascoe, and Strong v. Gursoy*, 2024 AHRC 45 (CanLII), online: <https://canlii.ca/t/k3cjt> [Editors' Note: Please access this decision through the CanLII link. For the costs award, see 2024 AHRC 81 (CanLII), online: <https://canlii.ca/t/k4q1q>.]
- 3.2 "Despite ethnic slur used during video meeting, human rights tribunal did not find poisoned work environment," *Tolentino v. His Majesty the King in Right of Alberta*, 2023 AHRC 112 (CanLII), Lancaster's *Human Rights in Employment*, eAlert No. 385 [Editors' Note: For the disciplinary decision referenced in this eAlert, see Document 2.3.]

See also: Megan Kheong & Arooj Tulli-Shah, "Latest AB Human Rights Tribunal decision awards record amounts for general damages," MLT Aikins LLP, March 14, 2024, online: <https://www.mltaikins.com/labour-employment/latest-ab-human-rights-tribunal-decision-awards-record-amounts-for-general-damages/> [Editors' Note: This article addresses the decision in *Oliva, Pascoe, and Strong v. Gursoy*, Document 3.1.]

Further Reading:

- 3.3 "Transgender man awarded \$18,000 for gender identity-based harassment in the workplace," *DB v. SA, AC and NC Tractor Services Inc.*, 2023 CHRT 43 (CanLII), Lancaster's *Gender, Equity and Work-Life Balance*, eAlert No. 180
- 3.4 "Employer's failure to inquire into employee's condition before dismissal constituted discrimination, human rights tribunal rules," *JC v. Broadview Homes (Alberta) Ltd.*, 2023 AHRC 45 (CanLII), Lancaster's *Human Rights in Employment*, eAlert No. 382
- 3.5 "Failure to follow accommodation agreement and monitor accommodations was discriminatory, arbitrator finds," *United Nurses of Alberta v. Alberta Health Services*, 2023 CanLII 17662 (AB GAA), Lancaster's *Disability and Accommodation*, eAlert No. 315
- 3.6 "Employer breached its duty to accommodate after failing to work collaboratively with employee to find suitable accommodation, tribunal holds," *HP v. Alberta Health Services*, 2023 AHRC 30 (CanLII), Lancaster's *Disability and Accommodation*, eAlert No. 316
- 3.7 "'Subtle' yet 'implicitly gendered' acts by coworker constituted sex-based discrimination and harassment of employee, for which employer could not escape liability, Tribunal holds," *JY v. Via Rail Canada Inc.*, 2023 CHRT 25 (CanLII), Lancaster's *Human Rights in Employment*, eAlert No. 384

See also: *Young Worker v. Heirloom and another*, 2023 BCHRT 137 (CanLII), online: <https://canlii.ca/t/k0gq1> [Editors' Note: In this decision, the B.C. Human Rights Tribunal held that a 13-year-old Black girl experienced discrimination on the basis of race and sex after her manager accused her of theft and then relegated her to non-cashier duties, ultimately causing her to resign. The Tribunal found the harsh treatment was more likely than not informed by stereotypical assumptions regarding Black individuals, Black children, and Black women.]

See also: *Abadi v. TST Overland Express*, 2023 CHRT 30 (CanLII), online:

<https://canlii.ca/t/k1lbn> [Editors' Note: In this decision, the Canadian Human Rights Tribunal awarded an employee of Iranian origin substantial damages after finding that he experienced years of harassment from co-workers and supervisors based on his race and ethnic origin, and was ultimately terminated from his employment due to a disability. Determining that the employer did not have an effective anti-harassment policy in place, the Tribunal held that it could not be absolved of liability due to the employee's failure to report the harassment.]

See also: *Seaspan Marine Corporation v. Smolik*, 2023 FC 856 (CanLII), online:

<https://canlii.ca/t/jxq08> [Editors' Note: In this decision, the Federal Court upheld as reasonable a decision of the Canadian Human Rights Tribunal holding that the employer discriminated against an employee on the basis of his family status by failing to accommodate his request for a work schedule that would allow him to meet his childcare duties after he became the sole caregiver for his two young children. Note that Alberta Court of Appeal set out the provincial test in Alberta for family status discrimination in *United Nurses of Alberta v. Alberta Health Services*, 2021 ABCA 194 (CanLII), online: <https://canlii.ca/t/jq2fl>, with an application for leave to appeal dismissed: 2022 CanLII 3791 (SCC), online: <https://canlii.ca/t/jm07s>. The test for family status in other jurisdictions may differ.]

See also: *Bhangu v. Inderjit Dhillon and Others*, 2023 BCHRT 24 (CanLII), online:

<https://canlii.ca/t/jwp29> [Editors' Note: In this decision, the B.C. Human Rights Tribunal held that two workers discriminated against another when they referred to him by a slur used to insult individuals of a certain caste in India. The Ontario Human Rights Commission recently introduced a policy on caste-based discrimination: see "OHRC's Policy position on caste-based discrimination," Ontario Human Rights Commission, October 26, 2023, online: https://www.ohrc.on.ca/en/news_centre/ohrc%E2%80%99s-policy-position-caste-based-discrimination.]

4. Substance Use and the Workplace

- 4.1 "No discrimination in revoking job offer for failing pre-employment drug test where employer was unaware of disability, tribunal rules," *JG v. Inter Pipeline Limited*, 2023 AHRC 31 (CanLII), Lancaster's *Human Rights in Employment*, eAlert No. 381

Further Reading:

- 4.2 "Federal Court of Appeal grants injunction to stay implementation pending appeal of random drug and alcohol testing of workers in nuclear industry," *Power Workers' Union v. Canada (Attorney General)*, 2023 FCA 215 (CanLII), Lancaster's *Federal Labour and Employment Law*, eAlert No. 162 [Editors' Note: For the Federal Court decision dismissing the application for judicial review of the regulatory document, see 2023 FC 793 (CanLII), online: <https://canlii.ca/t/jxlr4>.]

See also: *The Estate of DM v. South Country Co-op Limited*, 2023 AHRC 115 (CanLII), online: <https://canlii.ca/t/k18p2> [Editors' Note: In this decision, the Alberta Human Rights Tribunal allowed a human rights complaint alleging discrimination on the basis of mental disability brought by an employee who had been fired for attending work while intoxicated. Allowing the employee's estate to maintain the complaint after the complainant died by suicide, the Tribunal held that the employer had a duty to inquire into whether alcohol addiction was a factor in his misconduct given his out-of-character behaviour and his disclosure at an investigation meeting that he was suffering from mental health issues. In the Tribunal's view, the employer had not only breached this duty but frustrated the employee's numerous efforts to seek accommodation. However, the Tribunal determined that it was unable to grant general damages to the employee's estate and the remedy was limited to an order that the employer refrain from engaging in similar contraventions in the future.]

5. Privacy

- 5.1 *ATCO Electric Ltd. (ATCO) v. Canadian Energy Workers Association (CEWA)*, 2024 CanLII 37038 (AB GAA), online: <https://canlii.ca/t/k4b5z> [Editors' Note: Please access this decision through the CanLII link.]

See also: Chris Jones, "Unreasonable Employer Actions Violate Employee Rights," Bow River Law LLP via *CanLII Connects*, May 14, 2024, online: <https://canliiconnects.org/en/commentaries/93928> [Editors' Note: This article addresses the decision in *ATCO Electric Ltd. (ATCO) v. Canadian Energy Workers Association (CEWA)*, Document 5.1.]

Further Reading:

- 5.2 "Biometric attendance system reasonable in light of minimal intrusion on employee privacy, arbitrator rules," *United Steelworkers Local 1-2017 v. Canadian Forest Products Ltd. (Plateau Sawmill Division)*, 2023 CanLII 5478 (BC LA), *Lancaster's Workplace Privacy Law*, eAlert No. 55

See also: Melanie Harmer, Saadia Naim, & Khaleed Mawji, "Secret Recordings Won't Fly: BC Court of Appeal Rules on Surreptitious Recordings by Employees in the Workplace," McMillan LLP, November 1, 2023, online: <https://mcmillan.ca/insights/secret-recordings-wont-fly-bc-court-of-appeal-rules-on-surreptitious-recordings-by-employees-in-the-workplace/> [Editors' Note: This article addresses the decision in *Shalagin v. Mercer Celgar Limited Partnership*, 2023 BCCA 373 (CanLII), online: <https://canlii.ca/t/k0hxx>. Note that this decision was rendered in a non-unionized context.]

See also: *Joseph v. Canada (Attorney General)*, 2023 FC 456 (CanLII), online: <https://canlii.ca/t/jwhkb> [Editors' Note: In this decision, on judicial review, the Federal Court upheld as reasonable the Office of the Privacy Commissioner of Canada's determination that two of seven complaints filed by an employee alleging that her employer had breached the federal *Privacy Act* through inappropriate disclosures of her personal information were unfounded. The Court found no reason to interfere with the determination that the employer was authorized to disclose the employee's name, date of birth, and address to the police as part of an investigation into a possible security threat and that its ombudsman was justified in reporting a co-worker's allegation that the employee had made threats of violence against co-workers to security, as there was a "sufficiently direct" connection between the purpose for which the information was compiled — security and the use for which it was disclosed by the employer — to investigate security concerns.]

6. Labour Board Law

- 6.1 "Labour board rules that picketing activity was lawful, finding that client's office was place of employment for striking remote workers," *Bioware ULC v. United Food and Commercial Workers Canada Union, Local 401*, 2023 ALRB 7 (CanLII), Lancaster's *Labour Board Law*, eAlert No. 175
- 6.2 "Decision that employer was authorized by collective agreement to contract out entirety of bargaining unit work during statutory freeze period was unreasonable, court rules," *AUPE v. Optima Living Alberta Ltd.*, 2023 ABCA 273 (CanLII), Lancaster's *Labour Board Law*, eAlert No. 173

Further Reading:

- 6.3 "Labour board orders suspension of dues payable to union which encouraged illegal strike," *Alberta Health Services v. Alberta Union of Provincial Employees*, 2023 ALRB 2 (CanLII), Lancaster's *Labour Board Law*, eAlert No. 170
- 6.4 "Labour board refuses to amend collective agreement pension language in sale of business case," *DynaLIFEDX v. Health Sciences Association of Alberta*, 2023 CanLII 10143 (AB LRB), Lancaster's *Labour Board Law*, eAlert No. 166
- 6.5 "Appellate court upholds labour board's decision that panel member was not required to recuse himself as there was no reasonable apprehension of bias," *International Brotherhood of Electrical Workers, Local 2038 v. Stuart Olson Industrial Contractors Inc.*, 2023 SKCA 115 (CanLII), Lancaster's *Labour Board Law*, eAlert No. 174
- 6.6 "RCMP's unilateral decision to civilianize positions normally held by RCMP members violated statutory freeze, Federal Court of Appeal confirms," *Canada (Attorney General) v. National Police Federation*, 2023 FCA 75 (CanLII), Lancaster's *Labour Board Law*, eAlert No. 164

See also: *United Food and Commercial Workers Canada Union, Local No. 401 v. Sobeys Capital Incorporated*, 2024 ALRB 4 (CanLII), online: <https://canlii.ca/t/k2551> [Editors' Note: In this decision, the Alberta Labour Relations Board declined to find that the employer had violated the *Labour Relations Code* by banning employees from wearing buttons in the workplace with messages about the employer's alleged "greed," low wages, and high prices, and by investigating three employees who appeared in a commercial expressing similar sentiments and suspending those employees pending investigation.]

See also: *National Police Federation v. Treasury Board (Royal Canadian Mounted Police)*, 2023 FPSLRB 115 (CanLII), online: <https://canlii.ca/t/k28bb> [Editors' Note: In this decision, the Federal Public Sector Labour Relations and Employment Board held that the Royal Canadian Mounted Police (RCMP) violated the statutory freeze set out in the *Federal Public Sector Labour Relations Act* by unilaterally implementing a new recruitment program after notice to bargain was served. Although the Board accepted that the program was necessary to address recruitment and retention problems, it held that the significant changes clearly affected the terms and conditions of employment and did not amount to "business as usual." However, the Board declined to rule that the RCMP engaged in bad faith bargaining contrary to the Act by failing to bring the program to the bargaining table.]

See also: *Saskatoon Co-operative Association Limited v. United Food and Commercial Workers, Local 1400*, 2023 SKCA 72 (CanLII), online: <https://canlii.ca/t/jxvmg> [Editors' Note: In this decision, the Saskatchewan Court of Appeal upheld a Labour Relations Board decision in which the Board held that the employer committed unfair labour practices by failing to recognize the union and remit union dues for employees at two newly acquired retail stores. The Board ruled that the parties' province-wide bargaining unit automatically included employees at the new location.]

7. Legislative Updates

a) Alberta

7.1 "Alberta legislation requiring union members' consent to spending on political, social, or charitable activities comes into force," *Restoring Balance in Alberta's Workplaces Act*, 2020, S.A. 2020, c. 28, Lancaster's *Labour Law News*, eAlert No. 507

See also: Michelle Bellefontaine, "Province reviewing opt-in clause for Alberta union dues after charitable donations take a hit," *CBC News*, July 8, 2023, online: <https://www.cbc.ca/news/canada/edmonton/province-reviewing-opt-in-clause-for-alberta-union-dues-after-charitable-donations-take-a-hit-1.6900711>

See also: "Modernizing compensation governance," Government of Alberta, online: <https://www.alberta.ca/modernizing-compensation-governance>

See also: Michael Aasen, Timothy Mitchell, & Stephanie Lawless, "The Public Sector Employers Amendment Act," McLennan Ross, December 6, 2023, online: <https://www.mross.com/what-we-think/article/the-public-sector-employers-amendment-act>

b) Federal

- 7.2 "Federal legislation requiring disclosure of measures to prevent forced labour and child labour in supply chains in force as of January 1, 2024," *Fighting Against Forced Labour and Child Labour in Supply Chains Act*, S.C. 2023, c.9, Lancaster's *Labour Law News*, eAlert No. 521
- 7.3 "Federal government releases Task Force report on employment equity legislation, recommending designation of Black and 2SLGBTQI+ workers," *A Transformative Framework to Achieve and Sustain Employment Equity – Report of the Employment Equity Act Review Task Force*, Lancaster's *Labour Law News*, eAlert No. 521
- 7.4 "Federal government introduces legislation to ban the use of strike replacement workers," Bill C-58, *An Act to amend the Canada Labour Code and the Canada Industrial Relations Board Regulations, 2012*, 44th Parl., 1st Sess., Federal (second reading completed February 27, 2024), Lancaster's *Labour Law News*, eAlert No. 519 [*Editors' Note*: At the time of writing, this Bill was undergoing consideration in committee.]

See also: "Second update on guidance for the *Fighting Against Forced Labour and Child Labour in Supply Chains Act*: Deadline approaching," Dentons, April 11, 2024, online: <https://www.dentons.com/en/insights/articles/2024/april/11/second-update-on-guidance-for-the-fighting-against-forced-labour-and-child>

See also: "Menstrual products now available at no cost to employees in federally regulated workplaces," Employment and Social Development Canada, Government of Canada, December 15, 2023, online: <https://www.canada.ca/en/employment-social-development/news/2023/12/menstrual-products-now-available-at-no-cost-to-employees-in-federally-regulated-workplaces.html>

8. Further Reading

a) Arbitral Procedure and Causes of Action

See: *Extendicare Canada Inc. Fairmont Park v. Alberta Union of Provincial Employees Local 048/005*, 2023 CanLII 65795 (AB GAA), online: <https://canlii.ca/t/jz98j> [*Editors' Note*: In this decision, the arbitrator noted his view that a videoconference hearing could not "match the personal connectivity provided by an in-person hearing" and that "when the balance is not tipped towards any one approach and both approaches are equal or have minor scheduling issues that can be easily accommodated, the balance should tip in favour of the grievor's position."]

See also: *Alberta Health Services v. Johnston*, 2023 ABKB 209 (CanLII), online: <https://canlii.ca/t/jwlr3> [Editors' Note: In this decision, the Court of King's Bench of Alberta recognized a new tort of harassment. Note that this decision was rendered outside of the labour and employment context.]

b) Interest Arbitration

- 8.1 "Arbitration board awards moderate pay increase to Edmonton police officers to maintain their position among other police services," *Edmonton Police Association v. Edmonton (City)*, 2023 CanLII 49309 (AB GAA), Lancaster's *Interest Arbitration/Essential Services*, eAlert No. 3

See also: *Canadian Merchant Service Guild v. Canada (Treasury Board)*, 2023 CanLII 122849 (CA LA), online: <https://canlii.ca/t/k1x7k> [Editors' Note: In this decision, the arbitrator took note of recruitment and retention concerns in arriving at an award.]

See also: *Public Interest Commission – Public Service Alliance of Canada and Canadian Forces*, 2023 CanLII 113278 (PSLREB), online: <https://canlii.ca/t/k1fzf> [Editors' Note: In this decision, the arbitrator took note of recruitment and retention concerns in arriving at an award.]

See also: *VIA Rail v. TCRC*, 2023 CanLII 78973 (CA LA), online: <https://canlii.ca/t/jzww5> [Editors' Note: In this decision, the interest arbitrator took into account inflation, noting that it "appears to show signs of stabilizing but still shows no signs of abating."]

c) COVID-19 Vaccination Policies

- 8.2 "Employer's decision to place remote worker on unpaid leave for failure to comply with COVID-19 vaccine mandate unreasonable, arbitrator rules," *Ontario Public Service Employees Union, Local 110 v. Fanshawe College*, 2024 CanLII 11422 (ON LA), Lancaster's *Health and Safety/Workers' Compensation Law*, eAlert No. 279
- 8.3 *Calgary (Corporation of the City) v. Amalgamated Transit Union, Local 583*, 2023 CanLII 78847 (AB GAA), online: <https://canlii.ca/t/jzwq2> [Editors' Note: Please access this decision through the CanLII link. In this decision, the arbitrator determined that a "very significant" level of discipline was warranted for an employee who refused both to get vaccinated or to take rapid antigen tests, but found that termination was excessive, reinstating the grievor without backpay.]
- 8.4 "Arbitrator upholds dismissal for refusal to comply with vaccinate-or-test policy," *Amalgamated Transit Union, Local 569 v. Edmonton (City)*, 2023 CanLII 69574 (AB GAA), Lancaster's *Municipal Employment Law*, eAlert No. 159
- 8.5 "Employer's 'automatic application' of its 'vaccinate or test' policy to terminate the employment of two non-compliant employees was unreasonable, arbitrator rules," *Unifor, Local 594 v. Consumers' Co-Operative Refineries Ltd.*, 2023 CanLII 88216 (SK LA), Lancaster's *Discharge and Discipline*, eAlert No. 306

8.6 "Arbitrator upholds discipline for non-compliance with mandatory vaccine policy, but rules that appropriateness of termination is an issue for individual grievance arbitration," *CUPE, Local 966 v. Central West Local Health Integration Network*, 2023 CanLII 58388 (ON LA), *Lancaster's Health and Safety/Workers' Compensation Law*, eAlert No. 278

See also: *ATCO Electric Ltd. v. Canadian Energy Workers Association*, 2023 CanLII 120961 (AB GAA), online: <https://canlii.ca/t/k1trd> [Editors' Note: In this decision, an Alberta arbitrator found that, though ATCO reasonably administered the medical exemption process and the grievor did not have a valid medical reason not to be vaccinated, the employer's policy provided that employees in those circumstances would be placed on an unpaid leave of absence and the grievor did not fall under a resolution agreement permitting termination in such circumstances. The arbitrator found that the employer did not have just cause to terminate the grievor's employment and reinstated him.]

See also: *Humber River Hospital v. Teamsters Local Union No. 419*, 2024 CanLII 19827 (ON LA), online: <https://canlii.ca/t/k3d7g> [Editors' Note: In this decision, an Ontario arbitrator found that the employer did not have just cause to discipline the grievors for failing to get vaccinated and/or failing to disclose private medical information and had not established that there were justifiable grounds to terminate the grievors' employment on a non-culpable basis given how quickly the employer had made the decision to terminate after imposing its vaccination mandate.]

See also: *Quinte Health v. Ontario Nurses Association*, 2024 CanLII 14991 (ON LA), online: <https://canlii.ca/t/k34qz> [Editors' Note: In this decision, an Ontario arbitrator held that, while the mandatory vaccination requirement in a hospital's COVID-19 policy was reasonable, its automatic termination penalty was not, and that non-compliant employees should have been placed on indefinite leaves of absence instead.]

See also: Todd Humber, "Purolator's extension of COVID vaccine mandate beyond June 2022 a 'poor decision': Arbitrator," *OHS Canada*, December 21, 2023, online: <https://www.ohscanada.com/purolators-extension-of-covid-vaccine-mandate-beyond-june-2022-a-poor-decision-arbitrator/> [Editors' Note: This article addresses the decision in *Teamsters Local Union No. 31 v. Purolator Canada Inc.*, 2023 CanLII 120937 (CA LA), online: <https://canlii.ca/t/k1tvz>.]

See also: *United Food and Commercial Workers, Local 175 v. Coca-Cola Canada Bottling Limited*, 2023 CanLII 109733 (ON LA), online: <https://canlii.ca/t/k19bl> [Editors' Note: In this decision, an Ontario arbitrator found that a grievor's refusal to disclose his vaccination status was insubordinate and that "the health and safety concerns and operational challenges presented by the pandemic in this case significantly outweighed the minimal impairment of the Grievor's privacy interests." The arbitrator upheld the grievor's one, three, and five day suspensions and refused to grant backpay for the portion of the period from the date of his termination to the date of his reinstatement following the policy's withdrawal.]

See also: *Canadian Union of Public Employees, Local 122-1 v. Corporation of the City of North Bay*, 2023 CanLII 83430 (ON LA), online: <https://canlii.ca/t/k03s9> [Editors' Note: In this decision, an Ontario arbitrator dismissed a policy grievance relating to the disciplinary provisions of the employer's vaccination policy, finding that while the policy provided for termination for non-compliance it did not stipulate that termination would automatically occur without consideration of individual circumstances or notice of alternatives.]

d) Defamation

See: *Unite Here, Local 40 v. Civeo Corporation*, 2023 BCLRB 37 (CanLII), online: <https://canlii.ca/t/jwbcz> [Editors' Note: The B.C. Labour Relations Board dismissed a union's application for review of a labour arbitration award in which the employer was awarded \$500,000 in damages for the union's defamatory statement that the employer had "broken promises" to First Nations people. In the Board's view, the arbitrator's finding that the union engaged in wrongful conduct to achieve collective bargaining goals was consistent with the established principle that parties have a duty of good faith in the context of collective bargaining. An application for leave and reconsideration of this decision was dismissed: 2023 BCLRB 141 (CanLII), online: <https://canlii.ca/t/k0q78>.]

Plenary #3 - Off-Duty, Off-Base? Balancing employees' freedom of speech and employers' interests

June 14, 2024, 10:15 a.m. – 11:20 a.m. MT

Panelists

Melissa Luhtanen, Senior Legal Counsel, Alberta Human Rights Commission

Dan Scott, Union Counsel, Seveny Scott Lawyers

Kelly Nicholson, Employer Counsel, Field Law

Tensions sometimes arise between employee free speech and an employer's duty to ensure a safe and respectful workplace. How can these arguably competing rights and obligations be balanced? In this session, a panel of experts will address these questions:

- What is the line between safeguarding employee free speech and ensuring a respectful and safe work environment? Do employees have the right to express their views on potentially controversial and/or political matters at work?
- Can employers discipline employees for private statements and/or expressions made outside the workplace?
- To what extent will arbitrators consider *Charter* rights and values such as freedom of expression in the context of off-duty conduct?
- What is the extent of a union's duty to represent members who face work-related consequences for their potentially polarizing beliefs? When will a union's decision not to represent a member constitute a breach of the duty of fair representation?

Break

11:20 a.m. – 11:35 a.m. MT



42nd Annual Labour Arbitration and Policy Conference

Calgary, Friday, June 14, 2024



LancasterHouse

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- 1.1 "Arbitration board upholds dismissal of employee who engaged in a pattern of anti-Asian racist and sexist workplace harassment," *Health Sciences Association of Alberta v. Alberta Health Services*, 2023 CanLII 37831 (AB GAA), Lancaster's *Discharge and Discipline*, eAlert No. 303
- 1.2 "Arbitrator reinstates public servant who used N-word during meeting, with two-week suspension," *Alberta Union of Provincial Employees v. Government of Alberta*, 2023 CanLII 2834 (AB GAA), Lancaster's *Discharge and Discipline*, eAlert No. 302
- 1.3 "Arbitrator upholds dismissal of long-serving employee who wore mask with Islamophobic statement at work after making discriminatory comments," *Teamsters Local Union No. 987 v. Federated Co-operatives Ltd.*, 2022 CanLII 78226 (AB GAA), Lancaster's *Discharge and Discipline*, eAlert No. 300
- 1.4 "Tribunal awards \$30,000 to transgender employee who was subjected to deliberate misgendering in the workplace," *Nelson v. Goodberry Restaurant Group Ltd. dba Buono Osteria and Others*, 2021 BCHRT 137 (CanLII), Lancaster's *Human Rights in Employment*, eAlert No. 360
- 1.5 "Arbitrator rules that dismissal was excessive penalty for employee who wore a Confederate flag bandana at work," *Teamsters, Local Union 213 v. Coca Cola Canada Bottling Inc.*, 2021 CanLII 16916 (BC LA), Lancaster's *Discharge and Discipline*, eAlert No. 282

- 1.6 "Dismissal too harsh a penalty for long-service employee who made racist comments to Indigenous co-worker, arbitrator rules," *Saskatchewan Polytechnic Faculty Association v. Saskatchewan Polytechnic*, 2020 CanLII 78471 (SK LA), Lancaster's *Discharge and Discipline*, eAlert No. 281
- 1.7 "Lecturer's flippant remark about welfare cheque in Indigenous Studies course did not warrant discipline, arbitrator rules," *Canadian Union of Public Employees, Local 3287 v. University of Saskatchewan*, 2017 CanLII 85788 (SK LA), Lancaster's *College and University Employment Law*, eAlert No. 106

See also: David McKechnie & David Fanjoy, "When Political Theatre Becomes Workplace Drama: Political Speech and Work," McMillan LLP, May 23, 2023, online:

<https://mcmillan.ca/insights/when-political-theatre-becomes-workplace-drama-political-speech-and-work/>

See also: David Mangan, "A Platform for Discipline: Social Media Speech and the Workplace" (2015), 11:2 *Osgoode Legal Studies Research Paper Series*, online:

<https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1084&context=olsrps>

2. Can employers discipline their employees for private statements and/or expressions made outside the workplace?

- 2.1 Mort Mitchnick & Brian Etherington, *Leading Cases on Labour Arbitration*, 2nd ed. (Toronto: Lancaster House, 2024, online), Off-Duty Conduct (11.6)
- 2.2 Mort Mitchnick & Brian Etherington, *Leading Cases on Labour Arbitration*, 2nd ed. (Toronto: Lancaster House, 2024, online), Public Criticism of Employer Policies (12.4)
- 2.3 "Comments made by employees on private WhatsApp chat group not subject to discipline, arbitrator rules," *Amalgamated Transit Union – Local 1587 v. The Crown in Right of Ontario (Metrolinx)*, 2023 CanLII 72192 (ON GSB), Lancaster's *Discharge and Discipline*, eAlert No. 305 [Editors' Note: This decision was recently overturned by the Divisional Court, please see the Rayaz Khan article on page XX discussing *Metrolinx v. Amalgamated Transit Union, Local 1587*, 2024 ONSC 1900 (CanLII), online: <https://canlii.ca/t/k3tj8>.]
- 2.4 "Arbitrator upholds university's removal of professor from associate chair position on the basis that her gender-critical views compromised her effectiveness," *Association of Academic Staff: University of Alberta v. University of Alberta*, 2023 CanLII 45765 (AB GAA), Lancaster's *Gender, Equity and Work-Life Balance*, eAlert No. 174
- 2.5 "Dismissal warranted for bus driver who sexually harassed and assaulted co-worker while off duty, arbitrator rules," *Amalgamated Transit Union, Local 583 v. Corporation of the*

City of Calgary, 2023 CanLII 20867 (AB GAA), Lancaster's *Municipal Employment Law*, eAlert No. 154

- 2.6 "University violated collective agreement by issuing letter of discipline directing professor not to identify his employment on social media, arbitrator rules," *University of Saskatchewan Faculty Association v. University of Saskatchewan*, 2022 CanLII 89314 (SK LA), Lancaster's *Labour Arbitration*, eAlert No. 330
- 2.7 "Despite finding dismissal was excessive, arbitration board declines reinstatement after disgruntled employee posts angry Facebook message about manager," *Canadian Union of Public Employees, Local 38 v. Calgary (City)*, 2015 CanLII 43613 (AB GAA), Lancaster's *Municipal Employment Law*, eAlert No. 84

See also: *York University Staff Association v. York University*, 2018 CanLII 41354 (ON LA), online: <http://canlii.ca/t/hrxxj> [Editors' Note: Employer's dismissal of grievor for anti-Semitic Facebook posts upheld by arbitrator.]

See also: Rayaz Khan, "Ontario Divisional Court Finds Arbitrator's Decision to Reinstatement Terminated Grievors Was 'Fatally Flawed,'" Hicks Morley Hamilton Stewart Storie LLP, April 3, 2024, online: <https://hicksmorley.com/2024/04/03/ontario-divisional-court-finds-arbitrators-decision-to-reinstatement-terminated-grievors-was-fatally-flawed/> [Editors' Note: This article discusses the Divisional Court decision mentioned in the *Editors' Note* at Document 2.3.]

See also: "Can an employee's involvement in the Freedom Convoy protests result in their termination of employment?," Siskinds Law Firm, June 22, 2022, online: <https://www.siskinds.com/can-freedom-convoy-involvement-result-in-termination/>

See also: Sarah Dobson, "Angry off-duty tweets challenge employers," *Canadian HR Reporter*, March 16, 2020, online: <https://www.hrreporter.com/employment-law/news/angry-off-duty-tweets-challenge-employers/326985>

See also: Isabelle Keeler, "Disciplining Employees for Off-duty Social Media Use: When is it Appropriate?," Cox & Palmer, May 7, 2019, online: <https://coxandpalmerlaw.com/publication/disciplining-employees-for-off-duty-social-media-use-when-is-it-appropriate/>

3. How have adjudicators/the courts considered *Charter* rights and values such as freedom of expression in the context of off-duty conduct?

- 3.1 "Remedial training order reasonable, given psychologist's demeaning public statements, court rules," *Peterson v. College of Psychologists of Ontario*, 2023 ONSC 4685 (CanLII), Lancaster's *College and University Employment Law*, eAlert No. 158

- 3.2 "Dismissal not justified for public servant who made inappropriate posts on Twitter using his personal account," *Alberta Union of Provincial Employees v. Alberta*, 2021 CanLII 56919 (AB GAA), Lancaster's *Public Service and Crown Agency Employment Law*, eAlert No. 170
- 3.3 "Court of appeal overturns ruling that nurse who criticized patient care on Facebook committed professional misconduct," *Strom v. Saskatchewan Registered Nurses' Association*, 2020 SKCA 112 (CanLII), Lancaster's *Human Rights in Employment*, eAlert No. 353
- 3.4 "Union official's sexist blog comments about female manager protected from charge of harassment by freedom of speech and association, appeal court confirms," *MT-B v. Ontario Public Service Employees Union*, 2015 ONCA 495 (CanLII), Lancaster's *Public Service and Crown Agency Employment Law*, eAlert No. 109 [Editors' Note: Application for leave to appeal denied: see 2016 CanLII 34004 (SCC), online: <https://canlii.ca/t/qs0s5>. The Ontario Court of Appeal declined to consider whether this case was wrongly decided on the necessity of considering *Charter* values when interpreting legislation: see *Ontario Nurses' Association v. Participating Nursing Homes*, 2021 ONCA 148 (CanLII), online: <https://canlii.ca/t/jdmc1> at para. 85.]
- 3.5 "Teachers have a *Charter* right to display political materials in schools, appeal court rules," *British Columbia Teachers' Federation v. British Columbia Public School Employers' Association*, 2013 BCCA 241 (CanLII), Lancaster's *Labour Arbitration*, eAlert No. 173
- 3.6 "Supreme Court refuses to review ruling that nurse's suspension for off-duty picketing unjustifiably limited his freedom of expression," *Saskatchewan Association of Licensed Practical Nurses v. Whatcott*, 2008 SKCA 006 (CanLII), Lancaster's *Labour Law News*, eAlert No. 213

4. What is the extent of a union's duty to represent members who face work-related consequences for their potentially polarizing beliefs? When will a union's decision not to represent a member constitute a breach of the duty of fair representation?

- 4.1 "Disagreement with union's handling of employer's COVID-19 vaccination policy does not establish deficient representation, Saskatchewan Labour Relations Board rules," *Allan Klippenstein v. Canadian Union of Public Employees*, 2022 CanLII 44759 (SK LRB), Lancaster's *Health Care Employment Law*, eAlert No. 164
- 4.2 "Union did not breach duty of fair representation by sharing member's offensive posts with employer, labour board holds," *Kenwood Green v. Canadian Union of Public Employees, Local 700*, 2017 CanLII 84798 (BC LRB), Lancaster's *Labour Board Law*, eAlert No. 112

- 4.3 "Local union's handling of sexual harassment grievances constituted a breach of the duty of fair representation, labour board rules," *CB, HK, & RD v. Canadian Union of Public Employees, Local No. 21*, 2017 CanLII 68786 (SK LRB), Lancaster's *Gender, Equity and Work-Life Balance*, eAlert No. 120
- 4.4 "Employee's hurtful blogging justified firing, arbitrator holds, but award quashed because union representation clause violated," *Alberta Union of Provincial Employees v. Alberta*, 2009 ABQB 208 (CanLII), Lancaster's *Labour Arbitration*, eAlert No. 115
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Concurrent Session #1

Investigations under the Magnifying Glass: Examining current practices and recent caselaw

June 14, 2024

Panelists

Dev Chankasingh, Labour Arbitrator, Mediator, Workplace Investigator, Employment Adjudicator, Dev A. Chankasingh Professional Corporation

Alison Adam, Employer Counsel, McLennan Ross LLP

David Mercer, Union Counsel, Nickerson Roberts Holinski & Mercer

In this session, expert panelists will examine recent caselaw addressing workplace investigations and will explore key principles and best practices in conducting fair, adequate, and effective investigations into human rights-related allegations. The panel will address questions including:

- What lessons can be learned from recent cases as to what constitutes a fair and adequate investigation process? What procedural flaws have been found to render an investigation unfair or inadequate?
- When is retaining a third-party investigator necessary? What other alternatives are possible?
- Can the grounds for an investigation be expanded after the investigation has already been commenced – for example, if an investigation reveals issues of systemic discrimination?
- What are best practices for countering unconscious and implicit bias and otherwise ensuring stereotypes and discrimination do not impact the investigatory process? How should investigatory meetings be approached where the person being interviewed has or is suspected to have a disability?
- How much latitude do employers have to order investigations into off-duty conduct? May workplace investigators demand to examine employees' personal devices, such as laptops or cellphones, which employees use exclusively or primarily for personal purposes?
- How should employers and unions approach investigations into workplace conduct which may have a criminal element?
- What legal avenues are available to employees who wish to challenge what they believe to be an unfair or improper investigation into their human rights allegations?



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1. **What lessons can be learned from recent cases as to what constitutes a fair and adequate investigation process? What procedural flaws have been found to render an investigation unfair or inadequate?**
 - 1.1 Peter Neumann & Jeffrey Sack, *Wrongful Dismissal & Employment Law eText* (Toronto: Lancaster House, 2024, online),
 - Employer's Duty to Investigate Human Rights Violations (5.2.3.3)
 - Liability for Employee Human Rights Violations (5.3.1)
 - 1.2 "Employer does not owe a duty of care to employee when conducting a workplace investigation into alleged misconduct, court rules," *Salina v. Investors Group Financial Services Inc.*, 2023 BCSC 86 (CanLII), Lancaster's *Workplace Investigations*, eAlert No. 6
 - 1.3 "Comments made by employees on private WhatsApp chat group not subject to discipline, arbitrator rules," *Amalgamated Transit Union – Local 1587 v. The Crown in Right of Ontario (Metrolinx)*, 2023 CanLII 72192 (ON GSB), Lancaster's *Public Service and Crown Agency Employment Law*, eAlert No. 189 [Editors' Note: see Arbitrator Gordon Luborsky's analyses on employee communications falling outside the employer's scope of disciplinary authority, and an employer's right to access an employee's personal cellphone. On April 2, 2024, in *Metrolinx v. Amalgamated Transit Union, Local 1587*, 2024 ONSC 1900 (CanLII), online: <https://canlii.ca/t/k3tj8>, the Ontario Divisional Court found on judicial review that the decision of the arbitrator to reinstate the five grievors was flawed.]

- 1.4 "Despite ethnic slur used during video meeting, human rights tribunal did not find poisoned work environment," *Tolentino v. His Majesty the King in Right of Alberta*, 2023 AHRC 112, Lancaster's *Human Rights in Employment*, eAlert No. 385 [Editors' Note: in this case, the adjudicator comments on the employer's prompt and effective investigation of a complaint of discrimination.]
- 1.5 "Arbitration board awards female truck driver three years' lost wages and general damages of \$75,000 for sexual harassment and discrimination," *Canadian Union of Public Employees, Local 37 v. Corporation of the City of Calgary*, 2018 CanLII 53482 (AB GAA), Lancaster's *Gender, Equity and Work-Life Balance*, eAlert No. 125

See also: Clea Parfitt, "Respectful Workplaces: A Guide to Best Practices in Internal (and Other) Investigations," Pacific Legal Education and Outreach Society, November 9, 2020, online: <https://www.pacificlegaloutreach.com/news/internal-workplace-processes-addressing-sexual-harassment-and-misconduct-in-the-present-moment>

2. When is retaining a third-party investigator necessary? What other alternatives are possible?

- 2.1 Jeffrey Sack & Peter Neumann, *Unionized Workplaces in Canada: Labour Laws and Contract Clauses* (Toronto: Lancaster House, 2024, online),
- Sexual Harassment (19.2.1)
 - Anti-Harassment Training (19.2.5)
 - Prohibition of Discrimination and/or Harassment (19.3.4)
 - Anti-Discrimination/Harassment (22.2.2)
- 2.2 Peter Neumann & Jeffrey Sack, *Wrongful Dismissal & Employment Law eText* (Toronto: Lancaster House, 2024, online), Obligations of Employers (5)
- Duty to Provide a Safe Work Environment (5.1.3)
 - Standards in Respect of Workplace Conduct: Workplace Harassment and Violence (5.2.1.5)
- 2.3 "University entitled to withhold e-mails respecting complaint involving faculty member, based on solicitor-client privilege, Information and Privacy Commissioner holds," *Thompson Rivers University (Re)*, 2023 BCIPC 101 (CanLII), Lancaster's *Workplace Investigations*, eAlert No. 8
- 2.4 "Employer directed to appoint external investigator in order to satisfy impartiality requirement in workplace violence investigation," *Employment and Social Development Canada v. Canada Employment and Immigration Union*, 2018 OHSTC 11 (CanLII), Lancaster's *Federal Labour and Employment Law*, eAlert No. 123

See also: "Mitigating Bias in Investigations," Alberta's Public Interest Commissioner, May 2023, online: <https://yourvoiceprotected.ca/wp-content/uploads/2023/05/Mitigating-Bias-FINAL.pdf>

See also: Yola Ventresca & Andrea Levstik, "When Should Employers Engage an External Investigator?," Lerner's, February 16, 2023, online: <https://www.lerners.ca/lernx/when-should-employers-engage-an-external-investigator/>

See also: Lisa Corrente, "Key Reasons for Hiring an External Investigator," Association of Workplace Investigators, online: https://www.awi.org/page/External_Investigate

See also: "When should I hire a third-party investigator?," Siskinds LLP, August 29, 2022, online: <https://www.siskinds.com/when-should-i-hire-a-third-party-investigator/#:~:text=If%20the%20employer%20does%20not,third%2Dparty%20investigator%20is%20required>

See also: Jeff Bzowey, "Alberta's Underregulated Investigations Industry," Canadian Institute of Workplace Bullying Resources, online, <https://instituteofworkplacebullyingresources.ca/albertas-underregulated-investigations-industry/>

See also: "When is an Investigation Report Privileged? Simply Hiring a Lawyer is not Enough," Nelligan Law, March 25, 2015, online: <https://nelliganlaw.ca/blog/when-is-an-investigation-report-privileged-simply-hiring-a-lawyer-is-not-enough/>

3. Can the grounds for an investigation be expanded after the investigation has already been commenced – for example, if an investigation reveals issues of systemic discrimination?

See: Kimberly Horiuchi, "The Scope Of Investigation: The Importance Of A Clearly Defined Scope, How To Prepare One & And [sic] When to Expand The Scope," Liebert Cassidy Whitmore Workplace Investigations via LinkedIn, November 28, 2023, online: <https://www.linkedin.com/pulse/scope-investigation-importance-clearly-defined-furfc/>

See also: Andrea Levstik & Yola Ventresca, "Mastering Workplace Investigations: The Foundation for a Successful Investigation," Lerner's, September 19, 2023, online: <https://www.lerners.ca/lernx/mastering-workplace-investigations/>

See also: Ann Fromholz, "What To Do When A Workplace Investigation Jumps The Tracks," LinkedIn, June 14, 2017, online: <https://www.linkedin.com/pulse/what-do-when-workplace-investigation-jumps-tracks-ann-fromholz/>

4. What are best practices for countering unconscious and implicit bias and otherwise ensuring stereotypes and discrimination do not impact the investigatory process? How should investigatory meetings be approached where the person being interviewed has or is suspected to have a disability?

- 4.1 "'Subtle' yet 'implicitly gendered' acts by coworker constituted sex-based discrimination and harassment of employee, for which employer could not escape liability, Tribunal holds," *JY v. Via Rail Canada Inc.*, 2023 CHRT 25 (CanLII), Lancaster's *Human Rights in Employment*, eAlert No. 384
- 4.2 "Discharge of Canadian Armed Forces member for workplace sexual assault upheld as reasonable and procedurally fair," *EZ v. Canada (Attorney General)*, 2023 FC 1119 (CanLII), Lancaster's *Discharge and Discipline*, eAlert No. 307 [Editors' Note: see Arbitrator Guy Régimbald's analysis of a reasonable apprehension of bias as defined as a "closed mind."]
- 4.3 "Federal government releases Task Force report on employment equity legislation, recommending designation of Black and 2SLGBTQI+ workers," Lancaster's *Labour Law News*, eAlert No. 521

See also: Muznah Naeem, "9 Consequences of Biased Workplace Investigations," Polonious Systems, August 29, 2023, online: <https://www.polonious-systems.com/9-consequences-of-biased-investigations/>

See also: Suhaib Ibrahim, "Ways to reduce unconscious bias at the workplace," Bernardi Law, February 2, 2021, online: <http://hrlawyers.ca/2021/02/02/ways-to-reduce-unconscious-bias-at-the-workplace/>

See also: "The 10 Point Checklist for Eliminating Bias in Workplace Investigations," PersuasionPoint Inc., online: <https://persuasionpoint.com/eliminate-bias-checklist/>

See also: Jennifer Doiron, "Addressing Bias in the Workplace: How a Third-Party Investigator Can Help," Cenera, August 15, 2021, online: <https://cenera.ca/blog/addressing-bias-in-the-workplace-how-a-third-party-investigator-can-help/>

See also: Christopher Zou et al. "Experiences of Discrimination at Work," Environics Institute for Survey Research & Future Skills Centre and Diversity Institute, June 30, 2020, online: <https://fsc-ccf.ca/research/experiences-of-discrimination-at-work/>

See also: Alden Habacon, "Unconscious Bias in Workplace Investigations," Canadian Bar Association B.C. Branch Discussion, May 5, 2020, online: <https://vimeo.com/418312459/dda4750ea5>

See also: "Is Your Investigator More Biased Than You Think? Part II: How to Keep Truthiness Out of Your Workplace Investigations," Ogletree Deakins, July 18, 2017, online: <https://ogletree.com/insights/is-your-investigator-more-biased-than-you-think-part-ii-how-to-keep-truthiness-out-of-your-workplace-investigations/>

See also: "Is Your Investigator More Biased Than You Think? Part I: How Unconscious Bias Can Disrupt Your Workplace Investigations," Ogletree Deakins, July 17, 2017, online: <https://ogletree.com/insights/is-your-investigator-more-biased-than-you-think-part-i-how-unconscious-bias-can-disrupt-your-workplace-investigations/>

See also: Ashley Lattal, "The Hidden World of Unconscious Bias and its Impact on the 'Neutral' Workplace Investigator," (2016), 24:2 *Journal of Law and Policy* 411–466, online: <https://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=1510&context=jlpl>

5. How much latitude do employers have to order investigations into off-duty conduct? May workplace investigators ask to examine employees' personal devices, such as laptops or cellphones, which employees use exclusively or primarily for personal purposes?

5.1 "Erasure by employee of contents of employer-owned cell phone during investigation into harassment allegations reviewed by arbitrator," *Canadian Union of Public Employees, Local 2086 v. District of Houston*, 2019 CanLII 104260 (BC LA), Lancaster's *Discharge and Discipline*, eAlert No. 275

See also: Victoria Merritt, "Privilege in workplace investigations: The 'spectre of compelled disclosure,'" Dentons LLP, April 5, 2024, online: <https://www.employmentandlabour.com/privilege-in-workplace-investigations-the-spectre-of-compelled-disclosure> [Editors' Note: This article interprets *Prosser v. Industrial Alliance Insurance*, 2024 ABKB 87 (CanLII), online: <https://canlii.ca/t/k2ws9>.]

See also: Kiersten Crane, "Chapter 6: Evidence," *Workplace Investigations for the Human Resources Professional*, open education Alberta, 2022, online: <https://openeducationalberta.ca/workplaceinvestigationshr/chapter/chapter-6-evidence/>

See also: *Vancouver Firefighters' Union, Local 18 v. City of Vancouver Fire and Rescue Services*, 2022 CanLII 91094 (BC LA), online: <https://canlii.ca/t/js7cc> [Editors' Note: In this decision, the arbitrator found that an employee's failure to respond in a meeting with an employer is not itself cause for discipline, and an employee who believes that disclosure will expose them to discipline may evoke the right to remain silent until they can seek out advice from a union representative.]

See also: *Wepruk v. Deputy Head (Department of Health)*, 2021 FPSLREB 75 (CanLII), online: <https://canlii.ca/t/jhvggs> [Editors' Note: In this decision, the Board held that an employee's decision to remain silent during an administrative investigation and disciplinary hearing did not constitute misconduct, but took into account the employee's failure to express remorse in assessing the discipline imposed.]

See also: *Paglia v. Canada Revenue Agency*, 2020 FPSLREB 67 (CanLII), online: <https://canlii.ca/t/j9ffz> [Editors' Note: In this decision, the Board found that the employee had been obligated to cooperate with an investigation pursuant to the CRA's Code of Ethics and disciplinary and investigations policies, and that his failure to do so violated his obligations as an employee, such that it was proper for the employer to include it as a factor in deciding a disciplinary penalty.]

6. How should employers and unions approach investigations into workplace conduct which may have a criminal element?

- 6.1 Peter Neumann & Jeffrey Sack, *Wrongful Dismissal & Employment Law eText* (Toronto: Lancaster House, 2024, online), Criminal Acts (7.2.3.2)
- 6.2 "On judicial review, B.C. court upholds employer's decision to proceed under collective agreement in dismissing officer for off-duty conduct," *Meneray v. British Columbia Society for the Prevention of Cruelty to Animals*, 2023 BCSC 442 (CanLII), Lancaster's *Public Service and Crown Agency Employment Law*, eAlert No. 188

See also: Kiersten Crane, "Workplace Investigations for the Human Resources Professional," NAIT Library in partnership with The University of Alberta 24–25, June 2022, online: <https://era.library.ualberta.ca/items/f92179de-40dd-40bf-8d19-8ad9d3238b0e/view/6fab8cf3-b30a-4844-bd8e-ad841087ffaa/Workplace-Investigations-for-the-Human-Resources-Professional-1658259458.pdf>

See also: "When Workplace Investigations Involve Law Enforcement," Employment Practices Solutions, June 7, 2022, online: <https://www.epspros.com/news-resources/white-papers/2022/when-workplace-investigations-involve-law-enforcement.html>

See also: Gillian Shearer & Peter Israel, "The Law and Practice of Workplace Investigations," Emond Professional, 2017, online: <https://emond.ca/Emond/media/Sample-chapters/wi-sample.pdf>

7. What legal avenues are available to employees who wish to challenge what they believe to be an unfair or improper investigation into their allegations?

- 7.1 Jeffrey Sack & Peter Neumann, *Unionized Workplaces in Canada: Labour Laws and Contract Clauses* (Toronto: Lancaster House, 2024, online),
 - Grievance Procedure (11.2)

- Arbitration (11.3)
- 7.2 Peter Neumann & Jeffrey Sack, *Wrongful Dismissal & Employment Law eText* (Toronto: Lancaster House, 2024, online), Reprisals (5.2.2.6)
- 7.3 Elaine Newman, *Preventing Violence and Harassment in the Workplace* (Toronto: Lancaster House, 2012),
 - How can the employer ensure that there is a fair investigation process? (11.2)
 - How can the employer ensure that there is a thorough investigation process? (11.3)
 - Is a complainant or alleged offender in a harassment or violence investigation entitled to union representation? (11.13)
 - Is a worker entitled to have a lawyer present at the investigation? (11.14)
- 7.4 "Human rights tribunal awards former female employee \$15,000 for employer's failure to investigate harassment," *RL v. Canadian National Railway*, 2021 CHRT 33 (CanLII), Lancaster's *Gender, Equity and Work-Life Balance*, eAlert No. 165

Concurrent Session #2
Disciplinary Dilemmas:
When is coaching discipline? When is union representation
required? When is there a right to remain silent?
June 14, 2024

Panelists

Gordon Nekolaichuk, Vice-Chair, Alberta Labour Relations Board

Dan Bokenfohr, Employer Counsel, McLennan Ross LLP

Karen Thibault, Union Representative, Disputes and Arbitrations, Alberta Union of Provincial Employees (AUPE)

Rights and responsibilities differ when engaging in job "coaching" or performance management as opposed to imposing formal discipline. In this session, expert speakers will examine key issues pertaining to disciplinary processes, addressing questions such as:

- How can parties clearly differentiate job coaching and training, performance management, and discipline? When and to what extent can management take action to improve worker performance without amounting to a formal warning or disciplinary act?
- What circumstances trigger an employee's right to union representation? How have arbitrators distinguished meetings or discussions which are merely "investigatory" or otherwise non-disciplinary from those which are disciplinary and attract procedural protections?
- Do employees have a right to remain silent in investigative meetings where they reasonably believe a disclosure may expose them to discipline? May employees be disciplined solely due to their decision to remain silent? When employees are or may be subject to criminal charges in relation to the factual circumstances underpinning an investigatory or disciplinary meeting, how can those employees protect themselves against self-incrimination?
- What ought an employer do to ensure fairness toward an employee in the course of a disciplinary meeting or process? Where an employer fails to follow procedural requirements in relation to a disciplinary meeting, will this impact an arbitrator's willingness to uphold a disciplinary measure?
- Where a union representative participates in a disciplinary meeting, what is the scope of that representative's role?

- How may an employee's conduct during a disciplinary meeting impact an arbitrator's assessment as to whether to uphold the discipline?



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1. How can parties clearly differentiate job coaching and training, performance management, and discipline? When and to what extent can management take action to improve worker performance without amounting to a formal warning or disciplinary act?

- 1.1 Jeffrey Sack & Peter Neumann, *Unionized Workplaces in Canada: Labour Laws and Contract Clauses* (Toronto: Lancaster House, 2024, online), Discharge and Discipline (10.1)
 - Notice and Reasons (10.1.3)
 - Excerpt from: Adverse Reports (10.1.6)
 - Failure to Grieve (10.1.8)
- 1.2 Excerpt from: *Amalgamated Transit Union Local 569 v. Edmonton (City)*, 2022 CanLII 94359 (AB GAA), online: <https://canlii.ca/t/jscjw> [Editors' Note: In this decision, the arbitrator found that the requirement for city bus operators to pay certain fines they incur is disciplinary and must be an individualized process. An application for review was dismissed: 2023 CanLII 16166 (AB LRB), online: <https://canlii.ca/t/jvxwq>, with leave to appeal denied: 2023 ABCA 241 (CanLII), online: <https://canlii.ca/t/jzww2>.]
- 1.3 "University violated collective agreement by issuing letter of discipline directing professor not to identify his employment on social media, arbitrator rules," *University of Saskatchewan Faculty Association v. University of Saskatchewan*, 2022 CanLII 89314 (SK LA), Lancaster's *College and University Employment Law*, eAlert No. 153
- 1.4 "Employer permitted to use only calls scored against objective criteria for performance management purposes, arbitrator rules," *Unifor Atlantic Communication Locals v. Bell Canada*, [2021] C.L.A.D. No. 84 (QL), Lancaster's *Labour Arbitration*, eAlert No. 312

See also: *Trillium Health Partners v. Canadian Union of Public Employees, Local 5180*, 2021 ONSC 1045 (CanLII), online: <https://canlii.ca/t/jd58n> [Editors' Note: In this decision, the Ontario Divisional Court found that an arbitrator reasonably concluded that the compulsory transfer of an employee was disciplinary and that the transfer amounted to double discipline.]

See also: *Ontario English Catholic Teachers' Association v. Kenora Catholic District School Board*, 2021 CanLII 3247 (ON LA), online: <https://canlii.ca/t/jcrfi> [Editors' Note: In this decision, the arbitrator ruled that a principal's interruption of a teacher's class did not constitute harassment or discipline – no sanction was imposed on the teacher, and the principal had explicitly advised the teacher at a subsequent meeting that he was not being disciplined.]

See also: *Society of United Professionals v. Independent Electricity System Operator*, 2020 CanLII 105641 (ON LA), online: <https://canlii.ca/t/jcfsk> [Editors' Note: In this decision, the arbitrator held that, while a counselling letter was an appropriate response to the employee's conduct and could be fairly considered non-disciplinary, placing the counselling letter in the employee's file where it could be relied on in support of future discipline was not appropriate.]

See also: *Bergey v. Canada (Attorney General)*, 2017 FCA 30 (CanLII), online: <https://canlii.ca/t/gxgmm> [Editors' Note: In this decision, the Federal Court of Appeal held that the adjudicator erred in deciding that she was without jurisdiction to review the merits of the revocation of the grievor's reliability status as the adjudicator had unreasonably determined that the employer's actions were not "disguised discipline." An application for leave to appeal was dismissed: 2018 CanLII 5949 (SCC), online: <https://canlii.ca/t/hqf6d>.]

See also: *University of Saskatchewan Faculty Association v. University of Saskatchewan*, 2015 CanLII 27479 (SK LA), online: <https://canlii.ca/t/qj429> [Editors' Note: In this decision, the arbitrator held that letters placed on the grievors' personal files regarding an investigation into a complaint regarding comments made by them at a staff meeting were administrative rather than disciplinary, given that they contained no direct disciplinary language and constituted an exculpatory reply to an already limited investigation.]

2. What circumstances trigger an employee's right to union representation? How have arbitrators distinguished meetings or discussions which are merely "investigatory" or otherwise non-disciplinary from those which are disciplinary and attract procedural protections?

2.1 Jeffrey Sack & Peter Neumann, *Unionized Workplaces in Canada: Labour Laws and Contract Clauses* (Toronto: Lancaster House, 2024, online),

- Right to Union Representation (7.3.12)
- Union Representation (10.1.2)

- 2.2 Mort Mitchnick & Brian Etherington, *Leading Cases on Labour Arbitration Online*, 2nd ed. (Toronto: Lancaster House, 2024, online), Obligation to Advise of Union Representation Rights (10.6.4)
- 2.3 *General Teamsters, Local Union No. 362 v. Diversified Transportation Limited*, 2023 CanLII 32700 (AB GAA), online: <https://canlii.ca/t/jwtcj> [Editors' Note: In this decision, the arbitrator found that the right to union representation does not extend to a meeting where the employer collected a statement from an employee following a workplace incident. The arbitrator emphasized that even if this meeting was disciplinary in nature, the language of the relevant collective agreement provision makes it so that the employee is only entitled to representation provided they request it.]
- 2.4 *Labatt Brewing Company Ltd. Edmonton Brewery v. UNIFOR, Local 250-A*, 2021 CanLII 25255 (AB GAA), online: <https://canlii.ca/t/jf24c> [Editors' Note: Please access this decision using the CanLII link. In this decision, the arbitrator interpreted collective agreement language regarding the right to union representation for meetings "when discipline is possible."]
- 2.5 *Mistahia Health Region (Re)*, [1997] Alta. L.R.B.R. 635 (QL), online [via QuickLaw](#) [Editors' Note: In this decision, the Board set out principles regarding the scope of an employee's right to union representation, finding that the employee's fear of disciplinary consequences was not objectively reasonable such that the right to the union's assistance was engaged. A QuickLaw subscription is required to access the online formatted version and headnote summary of this case.]
- 2.6 *Vancouver Firefighters' Union, Local 18 v. City of Vancouver Fire and Rescue Services*, 2022 CanLII 91094 (BC LA), online: <https://canlii.ca/t/js7cc> [Editors' Note: In this decision, the arbitrator found that the collective agreement in question provided for union representation at meetings where the express purpose of investigating an employee's conduct for disciplinary purposes or issuing discipline was within the employer's reasonable contemplation; meetings convened merely for fact-finding and with no reasonable contemplation of discipline did not meet that test unless and until the meeting assumed a disciplinary component. See paras. 14–24.]

See also: *Toronto Professional Fire Fighters' Association v. Toronto (City)*, 2022 CanLII 325 (ON LA), online: <https://canlii.ca/t/jlnkg> [Editors' Note: In this decision, the arbitrator held that a municipality's new protocols for union representation at non-disciplinary investigation meetings complied with the collective agreement. The arbitrator rejected the position that all employees must be given notice of their right to have a representative present at all investigation meetings as they could later lead to disciplinary consequences, holding that the representation clause limited representation only to meetings where discipline, or potential discipline, could arise.]

See also: *International Union of Elevator Constructors, Local 82 v. KONE Inc.*, 2020 CanLII 96008 (BC LA), online: <https://canlii.ca/t/jbxxq> [Editors' Note: In this decision, the arbitrator declined to find that the employee had a right to union representation at certain meetings, finding that the right had not been specifically bargained and holding that the B.C. Labour Relations Code did not stipulate a requirement for union representation. However, the arbitrator found that the employee's characterization of the meetings had been disingenuous, noting that the employer had "cross[ed] the fine line between fact-finding and disciplinary action." See pp. 26–27 of the PDF version of the decision.]

See also: *CUPE, AC Component v. Air Canada*, 2019 CanLII 96 (CA LA), online: <https://canlii.ca/t/hwtxq> [Editors' Note: In this decision, the arbitrator found that under the collective agreement, meetings pursuant to a performance evaluation program triggered the contractual entitlement to union representation.]

3. Do employees have a right to remain silent in investigative meetings where they reasonably believe a disclosure may expose them to discipline? May employees be disciplined solely due to their decision to remain silent? When employees are or may be subject to criminal charges in relation to the factual circumstances underpinning an investigatory or disciplinary meeting, how can those employees protect themselves against self-incrimination?

3.1 Mort Mitchnick & Brian Etherington, *Leading Cases on Labour Arbitration Online*, 2nd ed. (Toronto: Lancaster House, 2024, online), Discharge and Discipline: General Principles (10)

- Employee's Failure to Provide an Explanation (10.3.1)
- Sources of Union Representation Rights (10.6.2)

See also Document 2.6: *Vancouver Firefighters' Union, Local 18 v. City of Vancouver Fire and Rescue Services*, 2022 CanLII 91094 (BC LA), online: <https://canlii.ca/t/js7cc> [Editors' Note: See paras. 52–62.]

See also: *Government of Alberta v. Alberta Union of Provincial Employees*, 2014 CanLII 4246 (AB GAA), online: <https://canlii.ca/t/q307v> [Editors' Note: In this decision, the arbitrator accepted cases put forward by the union as suggesting that a refusal to cooperate with an employer's investigation should not be treated as a standalone additional ground for discipline. See pp. 36–37 and 45–46 of the PDF version of the decision.]

See also: *Health Sciences Association of Alberta v. Alberta Health Services*, 2010 CanLII 96481 (AB GAA), online: <https://canlii.ca/t/fpdmq> [Editors' Note: In this decision, the arbitrator noted that employees faced with discipline "may choose to remain silent for a number of reasons" and that "[n]ot all reasons for remaining silent logically imply a lack of understanding or contrition" and declined to consider the grievor's silence an aggravating factor in assessing the disciplinary penalty. However, the arbitrator noted that "[a]n employee who does not admit fault or tender an apology during an investigation foregoes the advantages of doing so...." See para. 116.]

See also: *Jurkus v. Ontario (Solicitor General)*, 2022 CanLII 31358 (ON PSGB), online: <https://canlii.ca/t/jnsjf> [Editors' Note: In this decision, the employee had been terminated from his employment for cause, with one of the allegations being that the employee failed to cooperate during an investigation into his conduct by failing to participate in an interview on the advice of legal counsel in the face of outstanding criminal charges related to the incident. The Board found that the employee was not entitled to decline to participate, and that the employer had cause to discipline him for declining to participate, but that the circumstances were relevant for assessing penalty. See paras. 150–159. Note, however, that this case was decided in the context of a statutory investigation.]

See also: *Wepruk v. Deputy Head (Department of Health)*, 2021 FPSLREB 75 (CanLII), online: <https://canlii.ca/t/jhvgs> [Editors' Note: In this decision, the Board held that an employee's decision to remain silent during an administrative investigation and disciplinary hearing did not constitute misconduct, but took into account the employee's failure to express remorse in assessing the discipline imposed. An application for judicial review was dismissed: 2024 FCA 55 (CanLII), online: <https://canlii.ca/t/k3lwp>.]

See also: *Amalgamated Transit Union Local 113 v. Toronto Transit Commission*, 2021 CanLII 44947 (ON LA), online: <https://canlii.ca/t/jg43x> [Editors' Note: In this decision, the arbitrator found that a bus driver who had remained silent on the advice of counsel when asked by his employer about a serious accident should not be faulted for following that advice; the consequence that naturally resulted was that he did not get to present his side of the story or express remorse to the employer. See pp. 23–24 of the PDF version of the decision.]

See also: *Oakville Professional Fire Fighters' Association, Local 1582 v. Oakville (Corporation of The Town)*, 2020 CanLII 70468 (ON LA), online: <https://canlii.ca/t/j9t8p> [Editors' Note: In this decision, the arbitrator noted that the association's advice to the firefighters that they remain silent during the disciplinary proceedings was "problematic," as it prevented each of them from making an early and sincere apology, but took the association counsel's conveyance of remorse on their behalf into consideration.]

See also: *Paglia v. Canada Revenue Agency*, 2020 FPSLRB 67 (CanLII), online: <https://canlii.ca/t/j9ffz> [Editors' Note: In this decision, the Board found that the employee had been obligated to cooperate with an investigation pursuant to the CRA's *Code of Ethics* and disciplinary and investigations policies, and that his failure to do so violated his obligations as an employee, such that it was proper for the employer to include it as a factor in deciding a disciplinary penalty.]

See also: Evan Campbell, "Failure To Cooperate During Investigation Justifies Suspension," *Mondaq* via Miller Thomson LLP, March 3, 2020, online: <https://www.mondaq.com/canada/trials-amp-appeals-amp-compensation/899784/failure-to-cooperate-during-investigation-justifies-suspension> [Editors' Note: This article discusses the decision in *Ontario English Catholic Teachers' Association v. Brant Haldimand Norfolk Catholic District School Board*, 2019 CanLII 95001 (ON LA), online: <https://canlii.ca/t/j2t3w>.]

See also: *Manitoba Government v. Province of Manitoba*, 2016 CanLII 61642 (MB LA), online: <https://canlii.ca/t/qtr9f> [Editors' Note: In this decision, concerning the discharge of a grievor who had been involved in a serious accident while driving and declined to answer his employer's questions on the advice of legal counsel, the arbitrator held that such silence did not constitute separate grounds for discharge but noted that where "an employee, faced with an allegation of a serious breach of employment obligations, declines to explain his position to his employer, he may be exposed to discipline, based on the unanswered allegations." See paras. 101–106.]

See also: *Hughes and Titcomb v. Parks Canada Agency*, 2015 PSLRB 75 (CanLII), online: <https://canlii.ca/t/gl7w5> [Editors' Note: In this decision, the Board took into account the grievors' refusal to answer questions during the employer's investigation into their conduct, on the advice of their criminal lawyer and bargaining agent, in assessing the appropriateness of the discipline imposed. See paras. 142–143.]

4. What ought an employer do to ensure fairness toward an employee in the course of a disciplinary meeting or process? Where an employer fails to follow procedural requirements in relation to a disciplinary meeting, will this impact an arbitrator's willingness to uphold a disciplinary measure?

4.1 Mort Mitchnick & Brian Etherington, *Leading Cases on Labour Arbitration Online*, 2nd ed. (Toronto: Lancaster House, 2024, online), Discharge and Discipline: General Principles (10)

- Union Representation and Other Protections: Is the Language Mandatory Or Directory? (10.6.1)
- Sufficiency Of The Representation (10.6.5)
- Breach Of Notice Requirements And Other Procedural Defects (10.6.6)
- Waiver (10.6.7)

- Reimposition Of Discipline (10.6.8)
- Remedial Discretion (10.6.9)
- Delay In Imposing Discipline (10.7)

4.2 "Saskatchewan Court of Appeal restores arbitrator's award declaring termination null and void due to employer's non-disclosure of documents during investigation," *Teamsters Canada Rail Conference v. Canadian National Railway Company*, 2021 SKCA 62 (CanLII), Lancaster's *Discharge and Discipline*, eAlert No. 286

4.3 "Employee's honest but mistaken application of discount policy did not constitute theft warranting discharge, arbitrator holds," *Union of Calgary Employees v. Calgary Co-operative Association Limited*, 2018 CanLII 80023 (AB GAA), Lancaster's *Discharge and Discipline*, eAlert No. 256

See also Document 1.3: "University violated collective agreement by issuing letter of discipline directing professor not to identify his employment on social media, arbitrator rules," *University of Saskatchewan Faculty Association v. University of Saskatchewan*, 2022 CanLII 89314 (SK LA), Lancaster's *College and University Employment Law*, eAlert No. 153

See also Document 2.1: Jeffrey Sack & Peter Neumann, *Unionized Workplaces in Canada: Labour Laws and Contract Clauses* (Toronto: Lancaster House, 2023, online), Right to Union Representation (7.3.12) and Union Representation (10.1.2)

See also: *NAIT Academic Staff Association v. Northern Alberta Institute of Technology*, 2022 CanLII 5035 (AB GAA), online: <https://canlii.ca/t/jm2q0> [Editors' Note: The arbitrator found that, while the grievor was mistakenly led to believe that an investigation was being conducted according to a particular employer policy, this did not "seriously detract from the fairness" of the approach, as the grievor was provided with the investigation report and had opportunities to take responsibility for his conduct, yet failed to do so. In addition, the arbitrator held that the policy was external to the collective agreement and that the employer was not bound to apply it in the circumstances, and that any procedural unfairness was cured by the arbitration process.]

See also *Labatt Brewing Company Ltd. Edmonton Brewery v. UNIFOR, Local 250-A*, 2021 CanLII 25255 (AB GAA), online: <https://canlii.ca/t/jf24c> [Editors' Note: In this decision, the arbitrator interpreted collective agreement language regarding the right to union representation for meetings "when discipline is possible."]

See also: *EZ v. Canada (Attorney General)*, 2023 FC 1119 (CanLII), online:

<https://canlii.ca/t/jzqfx> [Editors' Note: In this decision, the Federal Court upheld a decision that the Canadian Armed Forces acted reasonably in releasing a member who was found to have sexually assaulted a colleague. Finding that allegations of procedural unfairness and bias lacked a sufficient evidentiary basis, the Court held that decision-makers had considered the seriousness of the misconduct and determined that it outweighed any mitigating factors. Note that this decision is unique to the Canadian Armed Forces disciplinary process.]

See also: *United Food and Commercial Workers, Local 175 & 633 v. ADM Milling Co. Port Colborne*, 2022 CanLII 92003 (ON LA), online: <https://canlii.ca/t/js8qd> [Editors' Note: In this decision, the arbitrator found that the employer violated the union representation clause but held that no prejudice to the employee resulted.]

See also: *Northern Interior Woodworkers' Association v. West Fraser Mills Ltd.*, 2020 CanLII 88356 (BC LA), online: <https://canlii.ca/t/jbm3q> [Editors' Note: In this decision, the arbitrator emphasized that union representation at disciplinary meetings is an important substantive right, but noted that a breach does not lead to the automatic voiding of discipline in B.C., instead considering the breach in the assessment of mitigating factors when determining just cause.]

See also: *Ambulance Paramedics of British Columbia CUPE, Local 873 v. British Columbia Emergency Health Services*, 2020 CanLII 47160 (BC LA), online: <https://canlii.ca/t/j8nrl> [Editors' Note: In this decision, the arbitrator rejected the union's argument that the dismissal of two grievors should be voided based on the employer's failure to comply with the timelines set out in the collective agreement. Although acknowledging the importance of avoiding undue delay, the arbitrator found that the time limit was discretionary and that actual prejudice had not resulted.]

See also: *Paglia v. Canada Revenue Agency*, 2020 FPSLREB 67 (CanLII), online: <https://canlii.ca/t/j9ffz> [Editors' Note: In this decision, the arbitrator acknowledged that a delay "can indeed vitiate the employer's right to discipline an employee" and held that, in that case, the employer's delay was a mitigating factor in determining the appropriate disciplinary measure.]

See also: *Canadian Union of Public Employees, Local 498 v. Port Coquitlam (City)*, 2020 CanLII 76280 (BC LA), online: <https://canlii.ca/t/jb2pw> [Editors' Note: In this decision, the arbitrator determined that an employer had met its obligations to provide notice of a disciplinary interview and that the employee's right to union representation was fulfilled. See paras. 423–433.]

See also: *United Steelworkers – Local 1976 v. Central Maine & Quebec Railway*, 2019 CanLII 3303 (CA LA), online: <https://canlii.ca/t/hx4sm> [Editors' Note: The arbitrator voided the dismissal of a grievor involved in a train derailment after ruling that the employer failed to conduct a "fair and impartial" disciplinary investigation as required under the collective agreement.]

See also: *Ontario Nurses' Association v. Humber River Hospital*, 2018 CanLII 115718 (ON LA), online: <https://canlii.ca/t/hwdxk> [Editors' Note: The arbitrator found that the hospital did not advise the grievor of her right to union representation or provide advance notice of a termination meeting, in breach of the collective agreement. However, noting that there was no consensus as to whether such a breach is substantive or procedural where a grievor is in fact represented, and that the union knew the purpose of the meeting, he remitted the remedy to the parties.]

See also: *Whitby Professional Fire Fighters' Association, Local 2036 of the International Association of Fire Fighters v. Corporation of the Town of Whitby*, 2018 CanLII 68402 (ON LA), online: <https://canlii.ca/t/ht5q1> [Editors' Note: In this decision, an Ontario arbitrator found that an employer failed to inform the grievor that an investigation meeting was disciplinary, failed to notify him of his entitlement to union representation, and failed to provide him with a copy of the written complaint against him before the discipline was implemented, ruling that the grievor did not have a meaningful opportunity to respond to the allegations before the investigation concluded, rendering the discipline null and void.]

5. Where a union representative participates in a disciplinary meeting, what is the scope of that representative's role?

- 5.1 Jeffrey Sack & Peter Neumann, *Unionized Workplaces in Canada: Labour Laws and Contract Clauses* (Toronto: Lancaster House, 2024, online), Duty of Fair Representation (5.6)
- The Scope of the Duty (5.6.1)
 - The Essential Elements of the Duty (5.6.2)
- 5.2 Excerpt from: *Complainant v. Canadian Union of Public Employees, Local 38*, 2023 CanLII 118976 (AB LRB), online: <https://canlii.ca/t/k1rg0> [Editors' Note: In this decision, the arbitrator noted that the union's duty of fair representation does not impose an obligation on unions to challenge or speak out against employer representations at every opportunity during disciplinary meetings.]
- 5.3 *The Government of the Northwest Territories v. The Union of Northern Workers*, 2024 CanLII 2353 (BC LA), online: <https://canlii.ca/t/k2b3d> [Editors' Note: In this decision, the arbitrator found that the union has the right to request a rescheduling of a proposed disciplinary meeting on behalf of the employee.]

See also page 944: Jeffrey Sack & Peter Neumann, *Unionized Workplaces in Canada: Labour Laws and Contract Clauses* (Toronto: Lancaster House, 2023, online), Union Representation (10.1.2)

See also Document 2.6: *Vancouver Firefighters' Union, Local 18 v. City of Vancouver Fire and Rescue Services*, 2022 CanLII 91094 (BC LA), online: <https://canlii.ca/t/js7cc> [Editors' Note: See paras. 25–41.]

See also: *Canadian Union of Public Employees, Local 498 v. Port Coquitlam (City)*, 2020 CanLII 76280 (BC LA), online: <https://canlii.ca/t/jb2pw> [Editors' Note: The arbitrator dismissed concerns regarding the adequacy of union representation, noting that if the union stewards required more time to prepare for the meeting, they should have requested it.]

See also: *Nova Scotia Union of Public & Private Employees, Local 13 v. Halifax Regional Municipality*, 2019 CanLII 83530 (NS LA), online: <https://canlii.ca/t/j2b6k> [Editors' Note: In this case, the arbitrator found that the language of the relevant collective agreement provision regarding union representation did not include the right of the union representation to speak in place of the employee. This decision was upheld on judicial review: 2022 NSSC 54 (CanLII), online: <https://canlii.ca/t/jmk1w>.]

6. How may an employee's conduct during a disciplinary meeting impact an arbitrator's assessment as to whether to uphold the discipline?

- 6.1 Mort Mitchnick & Brian Etherington, *Leading Cases on Labour Arbitration Online*, 2nd ed. (Toronto: Lancaster House, 2024, online),
- Factors Affecting Penalty (10.9.1)
 - General: Honesty and the Employment Relationship (11.1)
- 6.2 *ATCO Electric v. Canadian Energy Workers Association*, 2023 CanLII 46716 (AB GAA), online: <https://canlii.ca/t/jxg2z> [Editors' Note: In this decision, the arbitrator considered the employee's conduct in an investigation interview as a factor in deciding whether termination was warranted in the circumstances, but found that the employee had reacted in stress and fear.]
- 6.3 "Foreperson who scavenged refundable containers, failed to wear personal protective equipment, and refused to follow his supervisor's directions justly discharged, arbitrator rules," *Canadian Union of Public Employees Local 709 v. Corporation of the City of Calgary*, 2021 CanLII 134634 (AB GAA), Lancaster's *Discharge and Discipline*, eAlert No. 294
- 6.4 "Applying for hunting licence while subject to a firearms prohibition in breach of legislation did not justify dismissal of conservation officer, arbitrator rules," *The Newfoundland and Labrador Association of Public and Private Employees v. Her Majesty the Queen in Right of Newfoundland and Labrador*, 2022 CanLII 48647 (NL LA), Lancaster's *Discharge and Discipline*, eAlert No. 298

See also: Jessica Bungay, "Secretly Recording Workplace Conversations Can Result in Termination," Cox & Palmer, April 22, 2022, online: <https://coxandpalmerlaw.com/publication/secretly-recording-workplace-conversations-can-result-in-termination/> [Editors' Note: This decision was made for a non-unionized context.]

See also: *Chalk River Nuclear Security Officers' Association v. Canadian Nuclear Laboratories*, 2021 CanLII 20914 (CA LA), online: <https://canlii.ca/t/jdsvf> [Editors' Note: In this decision, the arbitrator determined that an employee's dishonesty during a workplace investigation was cause for discipline.]

See also: *CUPE, Local 181 v. Corporation of the City of Brantford*, 2020 CanLII 56203 (ON LA), online: <https://canlii.ca/t/j95zl> [Editors' Note: In this decision, the employee's vehement denial of his misconduct throughout was considered an aggravating factor in assessing the disciplinary penalty.]

See also: *Amalgamated Transit Union, Local 113 v. Toronto Transit Commission*, 2020 CanLII 71739 (ON LA), online: <https://canlii.ca/t/j9w2h> [Editors' Note: In this decision, the arbitrator took into account the employee's dishonesty during an investigatory interview in assessing the appropriateness of the discipline imposed.]

See also: *CUPE, Local 181 v. Corporation of the City of Brantford*, 2020 CanLII 56203 (ON LA), online: <https://canlii.ca/t/j95zl> [Editors' Note: In this decision, the arbitrator took into account the employee's dishonesty during an investigation into his misconduct in assessing the appropriateness of discipline.]

See also: Marie-Yosie Saint-Cyr, "Employee Angry Outburst Leads to Short Lived Termination," *Slaw*, October 1, 2020, online: <https://www.slaw.ca/2020/10/01/employee-angry-outburst-leads-to-short-lived-termination/>

Concurrent Session #3

Neurodiversity at Work: Strategies for creating and fostering inclusive workplaces

June 14, 2024

Panelists

Sarah Taylor, Project Manager, Spectrum Advantage; Chief Executive Officer, Next Level ASD Consulting

April Kosten, Employer Counsel, Dentons

Jake Axelrod, Union Counsel, Nugent Law Office

Tonie Minhas, Project Manager, Neuroinclusion Services, AUTICON

On a societal level, there is increasing recognition that neurodivergence is a strength, not a deficit, and building inclusive, neurodivergent workplaces makes a positive impact. In this panel, experts will examine how employers can effectively recruit, retain, and accommodate neurodivergent employees, and how unions can support their neurodivergent membership. Specifically, the panel will address the following:

- What does neurodivergence mean? What should workplace parties know about specific conditions such as Autism Spectrum Disorders (ASD), Attention-Deficit/Hyperactive Disorder (ADHD), and learning disabilities falling under the umbrella of neurodivergence? Do these conditions share any similarities? How might they affect an employee's work performance?
- How can businesses benefit from hiring neurodivergent employees?
- What measures can employers put in place to effectively recruit neurodivergent employees? How can employers support/accommodate neurodivergent applicants throughout the recruitment process?
- Considering the emphasis on self-identification in the neurodiverse community, must employees who identify as neurodivergent provide evidence of a medical diagnosis to access initiatives designed to recruit diverse employees? How should employers respond to these disclosures when they occur?
- How do common stereotypes hinder the inclusion and accommodation of neurodivergent employees in the workplace? What can be done to guard against these stereotypes?
- What are the signs an employee may be struggling with work performance or workplace relationships because of a neurological difference such as ASD or ADHD? When does

the employer have a duty to inquire as to whether the employee in question requires accommodation?

- What are some examples of appropriate and effective accommodations for neurodivergent employees?
- What accommodations should unions provide to neurodivergent members accessing union services and using union processes?
- What kind of medical information can employers request from employees seeking accommodation on the basis of neurodivergence? Can a detailed neuropsychological evaluation report be required? How often, if ever, should updated medical information be requested from a neurodivergent employee, who, by definition, has a lifelong condition?



Calgary Labour Arbitration and Policy Conference

Friday, June 14, 2024



LancasterHouse

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- 1.1 Dr. Mike Condra & Meryl Zisman Gary, *Mental Health Disabilities at Work* (Toronto: Lancaster House, 2019), A note about terminology: mental illness and mental disability (1.1)
- 1.2 "Federal government launches first full-scale review of *Employment Equity Act* since 1986," *Task force to review the Employment Equity Act*, Lancaster's *Labour Law News*, eAlert No. 491
- 1.3 "Ontario Human Rights Commission issues new policy on ableism and discrimination based on disability," *Policy on ableism and discrimination based on disability*, Lancaster's *Labour Law News*, eAlert No. 412
- 1.4 "Employer has duty to ensure non-discriminatory environment for Autistic workers, Canadian Human Rights Tribunal rules," *MD v. Canada Post Corporation*, 2008 CHRT 41 (CanLII), Lancaster's *Disability and Accommodation*, eAlert No. 128

See also: "Disability, illness, and injury," Alberta Human Rights Commission, online:

<https://albertahumanrights.ab.ca/issues-at-work/disability-illness-and-injury/#:~:text=The%20Alberta%20Human%20Rights%20Act%20prohibits%20discrimination%20at%20work%20based,disability%2C%20injury%2C%20or%20illness.>

See also: Elyse Bouvier, "The key to innovation in the workplace? Embracing neurodiversity," *UCalgary News*, University of Calgary, March 14, 2023, online:

<https://www.ucalgary.ca/news/key-innovation-workplace-embracing-neurodiversity>

See also: Julie Sobowale, "Making room for neurodiversity in law," *National Magazine*, The Canadian Bar Association, October 3, 2023, online: [https://nationalmagazine.ca/en-](https://nationalmagazine.ca/en-ca/articles/the-practice/workplace/2023/making-room-for-neurodiversity-in-law)

[ca/articles/the-practice/workplace/2023/making-room-for-neurodiversity-in-law](https://nationalmagazine.ca/en-ca/articles/the-practice/workplace/2023/making-room-for-neurodiversity-in-law)

See also: Monika Mahto, Susan Hogan, & Brenna Sniderman, "A rising tide lifts all boats: Creating a better work environment for all by embracing neurodiversity," *Deloitte Insights*, January 18, 2022, online: <https://www2.deloitte.com/us/en/insights/topics/talent/neurodiversity-in-the-workplace.html>

See also: "What is ADHD?," Learning Disabilities Association of Ontario, online:

<https://www.ldao.ca/introduction-to-ldsadhd/what-is-adhd/>

See also: "Learning Disabilities: A Snapshot," Learning Disabilities Association of Ontario, online: https://www.ldao.ca/documents/snapshots/Learning_Disabilities.pdf

See also: "Adult ADHD," CADDRA Canadian ADHD Resource Alliance, online:

<http://www.caddra.ca/public-information/adults?showall=1&limitstart>

See also: "Introductory Information on Autism and Asperger Syndrome," adapted from *Beyond the Wall: Personal Experiences with Autism and Asperger Syndrome*, by Stephen Shore, online: <http://www.autismasperger.net/intro.htm>

See also: "What are LDs?," Learning Disabilities Association of Ontario, online:

<https://www.ldao.ca/introduction-to-ldsadhd/what-are-lds/>

See also: Robert Austin & Gary Pisano, "Neurodiversity as a Competitive Advantage," *Harvard Business Review*, May–June 2017, online: <https://hbr.org/2017/05/neurodiversity-as-a-competitive-advantage>

See also: Lynne Wallis, "Autistic workers: loyal, talented ... ignored," *The Guardian*, April 6, 2012, online: <https://www.theguardian.com/money/2012/apr/06/autistic-workers-employers-ignorance>

2. What measures can employers put in place to effectively recruit neurodivergent employees? How can employers support/accommodate neurodivergent applicants throughout the recruitment process?

- 2.1 "Failure to follow accommodation agreement and monitor accommodations was discriminatory, arbitrator finds," *United Nurses of Alberta v. Alberta Health Services*, 2023 CanLII 17662 (AB GAA), Lancaster's *Disability and Accommodation*, eAlert No. 315

See also: "Duty to accommodate at work," Alberta Human Rights Commission, online:

<https://albertahumanrights.ab.ca/issues-at-work/duty-to-accommodate-at-work/>

See also: Breanna Sniderman et al., "Building the neuroinclusive workplace," *Deloitte Insights*, Deloitte Centre for Integrated Research, December 2023, online:

<https://www2.deloitte.com/us/en/insights/topics/value-of-diversity-and-inclusion/creating-neuroinclusive-workplace.html>

See also: Jennifer Palumbo, "How To Build An Inclusive Recruitment Process That Supports Neurodiversity In The Workplace," *Forbes*, December 31, 2022, online:

<https://www.forbes.com/sites/jenniferpalumbo/2022/12/31/how-to-build-an-inclusive-recruitment-process-that-supports-neurodiversity-in-the-workplace/?sh=39ab10633a04>

See also: Michael Bernick, "Is Your Company Inclusive of Neurodivergent Employees?,"

Harvard Business Review, February 16, 2022, online: <https://hbr.org/2022/02/is-your-company-inclusive-of-neurodivergent-employees>

See also: Stephanie Dunn, Krystle Wittevrongel, & Jennifer Zwicker, "How Do We Boost Employment Outcomes for Neurodiverse Albertans?," AIDE Canada, June 2018, online:

<https://aidecanada.ca/resources/learn/communication/how-do-we-boost-employment-outcomes-for-neurodiverse-albertans>

3. How do common stereotypes hinder the inclusion and accommodation of neurodivergent employees in the workplace? What can be done to guard against these stereotypes?

3.1 Mort Mitchnick & Brian Etherington, *Leading Cases on Labour Arbitration*, 2nd ed.

(Toronto: Lancaster House, 2024, online), Definition of "Disability" (15.3.2)

See also: "Building Workplaces Where Neurodivergent Workers Thrive," The Conference Board of Canada, November 10, 2022, online: <https://fsc-ccf.ca/wp-content/uploads/2022/11/Neurodiversity-in-the-Workplace.pdf>

See also: Ludmila Praslova, "Autism Doesn't Hold People Back at Work. Discrimination Does," *Harvard Business Review*, December 13, 2021, online: <https://hbr.org/2021/12/autism-doesnt-hold-people-back-at-work-discrimination-does>

See also: Aiyana Bailin, "Clearing Up Some Misconceptions about Neurodiversity," *Scientific American*, June 6, 2019, online: <https://blogs.scientificamerican.com/observations/clearing-up-some-misconceptions-about-neurodiversity/>

4. Considering the emphasis on self-identification in the neurodiverse community, must employees who identify as neurodivergent provide evidence of a medical diagnosis to access initiatives designed to recruit diverse employees? How should employers respond to these disclosures when they occur?

- 4.1 "Employee not required to show that employer knew or ought to have known of disability to establish discriminatory firing, appeal court holds," *Telecommunications Workers Union v. Telus Communications Inc.*, 2014 ABCA 154 (CanLII), Lancaster's *Disability and Accommodation*, eAlert No. 208
- 4.2 "Dismissal for poor performance following inadequate accommodation was discriminatory, tribunal holds," *RG v. Method Integration Inc.*, 2014 HRTO 1718 (CanLII), Lancaster's *Disability and Accommodation*, eAlert No. 219
- 4.3 *Blakely v. Queen's University*, 2012 HRTO 1177 (CanLII), online: <http://canlii.ca/t/frr19> [Editors' Note: Please access this decision through the CanLII link. Request for reconsideration denied. See: *Blakely v. Queen's University*, 2012 HRTO 2244 (CanLII), online: <https://canlii.ca/t/fv1rv>.]
- 4.4 "Employer liable for failure to accommodate job applicant with learning disability, human rights tribunal rules," *DM v. Toronto District School Board*, 2011 HRTO 400 (CanLII), Lancaster's *Disability and Accommodation*, eAlert No. 148
- 4.5 "Job applicant with learning disability not entitled to different job after failing training program, rights tribunal rules," *MF v. Toronto Transit Commission*, 2009 HRTO 54 (CanLII), Lancaster's *Human Rights in Employment*, eAlert No. 134
- 4.6 "Language aptitude test discriminated against employee with dyslexia," *Green v. Canada (Public Service Commission)*, 2000 CanLII 17146 (FC), Lancaster's *Human Rights in Employment*, September/October 2000

See also: "Legal Rights and Advocacy for Neurodiverse Individuals in the Workplace," Candor Diversity Group, March 20, 2024, online: <https://candorgroup.ca/neurodiversity/legal-rights-and-advocacy-for-neurodiverse-individuals-in-the-workplace/>

5. What are the signs an employee may be struggling with work performance or workplace relationships because of a neurological difference such as ASD or ADHD? When does the employer have a duty to inquire as to whether the employee in question requires accommodation?

- 5.1 Mort Mitchnick & Brian Etherington, *Leading Cases on Labour Arbitration*, 2nd ed. (Toronto: Lancaster House, 2024, online), The Employer's Duty (15.3.6)
- 5.2 "Board orders reinstatement of employee due to employer's failure to accommodate his Asperger syndrome," *NS v. Treasury Board (Canada Border Services Agency)*, 2022

FPSLRB 3 (CanLII), Lancaster's *Disability and Accommodation*, eAlert No. 304 [Editors' Note: The Federal Court of Appeal upheld this decision on judicial review. See: 2023 FCA 14 (CanLII), online: <https://canlii.ca/t/jv1pb>.]

- 5.3 "Hospital discriminated against student with communication problems by ending her placement without inquiring into possible link to Asperger syndrome, tribunal rules," *RM v. London Health Sciences Centre and St. Lawrence College*, 2019 HRT0 1134 (CanLII), Lancaster's *Disability and Accommodation*, eAlert No. 280
- 5.4 "Dismissal of employee with ADHD for breaching safety protocols was discriminatory, arbitrator finds," *Bakery, Confectionary, Tobacco Workers and Grain Millers International Union (BCT), Local 406 v. Bonté Foods Limited*, 2017 CanLII 12517 (NB LA), Lancaster's *Disability and Accommodation*, eAlert No. 246
- 5.5 "Employer could not have known that employee's performance issues were related to a cognitive disability – discrimination complaint dismissed," *Stewart v. Ontario (Government Services)*, 2013 HRT0 1635 (CanLII), Lancaster's *Human Rights in Employment*, eAlert No. 225

See also page 1146: "Dismissal for poor performance following inadequate accommodation was discriminatory, tribunal holds," *RG v. Method Integration Inc.*, 2014 HRT0 1718 (CanLII), Lancaster's *Disability and Accommodation*, eAlert No. 219

6. What are some examples of appropriate and effective accommodations for neurodivergent employees?

- 6.1 "Municipality discriminated against employee by failing to take his unique needs into account with respect to his return to work, tribunal rules," *KG v. Waterloo (Regional Municipality)*, 2017 HRT0 1460 (CanLII), Lancaster's *Municipal Employment Law*, eAlert No. 104
- 6.2 "B.C. Human Rights Tribunal awards medical resident close to \$475,000 in damages, including unprecedented \$75,000 in compensation for injury to dignity," *CK v. University of British Columbia*, 2013 BCHRT 302 (CanLII), Lancaster's *Human Rights in Employment*, eAlert No. 226 [Editors' Note: The damages the tribunal awarded have been the subject of judicial review, culminating in a decision of the British Columbia Court of Appeal: 2016 BCCA 271 (CanLII), online: <http://canlii.ca/t/gs7ds>. Throughout, the reviewing courts upheld the tribunal's finding of discrimination.]
- 6.3 "Offers of accommodation inadequate – employer failed to meet its accommodation obligation to dyslexic worker, board of inquiry rules," *MT v. Nova Scotia (Department of Justice, Correctional Services)*, 2010 NSHRC 1 (CanLII), Lancaster's *Disability and Accommodation*, eAlert No. 138

- 6.4 *B.C. Pavilion Corp. v. British Columbia Government and Service Employees' Union (P.B Grievance)*, [2016] B.C.C.A.A.A. No. 121 (QL)
- 6.5 "Untreated learning disability and attention deficit disorder did not affect employee's ability to distinguish right from wrong, arbitrator finds – discharge for breaching safety rules upheld," *Communications, Energy and Paperworkers Union, Local 16-0 v. Sifto Canada Corporation*, 2010 CanLII 69490 (ON LA), Lancaster's *Discharge and Discipline*, eAlert No. 147

See also Document 5.4: "Dismissal of employee with ADHD for breaching safety protocols was discriminatory, arbitrator finds," *Bakery, Confectionary, Tobacco Workers and Grain Millers International Union (BCT), Local 406 v. Bonté Foods Limited*, 2017 CanLII 12517 (NB LA), Lancaster's *Disability and Accommodation*, eAlert No. 246

See also: "Attention Deficit/Hyperactivity Disorder (ADHD)," *Accommodation and Compliance Series*, Job Accommodation Network, online: <https://askjan.org/disabilities/Attention-Deficit-Hyperactivity-Disorder-AD-HD.cfm>

See also: "Autism Spectrum," *Accommodation and Compliance Series*, Job Accommodation Network, online: <https://askjan.org/disabilities/Autism-Spectrum.cfm>

See also: "Executive Functioning Deficits," Job Accommodation Network, online: <https://askjan.org/articles/Executive-Functioning-Deficits.cfm>

See also: "Learning Disability," *Accommodation and Compliance Series*, Job Accommodation Network, online: <https://askjan.org/disabilities/Learning-Disability.cfm>

See also: "Including Neurodivergent Workers: Workspace, Work Schedules, and Other Accommodations," Employer Assistance and Resource Network on Disability Inclusion, online: <https://askearn.org/page/neurodiversity-accommodations>

See also: Janet Barbieri & Ryan Walsh, "Creating a Neuro-Inclusive Supervisory Style," Association for Autism and Neurodiversity, February 3, 2022, online: <https://aane.org/autism-info-faqs/library/creating-a-neuro-inclusive-supervisory-style/>

7. What accommodations should unions provide to neurodivergent members accessing union services and using union processes?

- 7.1 "Is the duty of fair representation dependent on full disclosure?," *C.M. v. Vancouver Police Union and Vancouver Police Board*, 2001 CanLII 32936 (BC LRB), Lancaster's *Police Employment Law*, May/June 2001

7.2 Excerpt from: *Groh v. Waterloo (Regional Municipality)*, 2017 HRTO 1460 (CanLII), online: <https://canlii.ca/t/hn8c5> [Editors' Note: Please access this decision through the CanLII link. See paragraphs 122–147 for the arbitrator's decision and analysis. This excerpt is from the decision summarized in Lancaster's *Municipal Employment Law*, eAlert No. 104 at page 1214.]

See also: Sally Lindsay et al., "Disclosure and workplace accommodations for people with autism: A systematic review" (2021), 33:5 *Disability and Rehabilitation* 597–610, online: https://tspace.library.utoronto.ca/bitstream/1807/110487/1/Disclosure_and_workplace_2021_T_Space.pdf

See also: Roland Gérard Keepseeyuk Troke-Barriault, "Online Dispute Resolution and Autism Spectrum Disorder: Levelling the Playing Field in Disputes Involving Autistic Parties" (2016), 6:2 *Western Journal of Legal Studies*, 2016 CanLIIDocs 312, online: <https://canlii.ca/t/29nf>

See also: Janine Booth, "What your union can do," *Autism in the workplace*, Trades Union Congress (UK), May 2014, pp. 41–44, online: <https://www.tuc.org.uk/sites/default/files/Autism.pdf#page=41>

8. What kind of medical information can employers request from employees seeking accommodation on the basis of neurodivergence? Can a detailed neuropsychological evaluation report be required? How often, if ever, should updated medical information be requested from a neurodivergent employee, who, by definition, has a lifelong condition?

8.1 Mort Mitchnick & Brian Etherington, *Leading Cases on Labour Arbitration*, 2nd ed. (Toronto: Lancaster House, 2024, online),

- Medical Examinations, Procedures and Information (13.2.5)
- The Employee's Duty (15.3.5)
- Independent Medical Examinations (15.4.2)

8.2 "Ontario Human Rights Commission offers guidance on medical documentation related to disability-based discrimination," *Policy position on medical documentation to be provided when disability-related accommodation request is made*, Lancaster's *Labour Law News*, eAlert No. 408

8.3 "Lack of diagnosis did not disentitle ailing employee to disability benefits under collective agreement, arbitration board rules," *Alberta Union of Provincial Employees v. Alberta Health Services*, 2012 CanLII 60197 (AB GAA), Lancaster's *Public Service and Crown Agency Employment Law*, eAlert No. 82

8.4 Excerpt from: *Dawson v. Canada Post Corporation*, 2008 CHRT 41 (CanLII), online: <http://canlii.ca/t/21hf6>

See also page 1179, "Board orders reinstatement of employee due to employer's failure to accommodate his Asperger syndrome," *NS v. Treasury Board (Canada Border Services Agency)*, 2022 FPSLRB 3 (CanLII), Lancaster's *Disability and Accommodation*, eAlert No. 304

See also: *Blakely v. Queen's University*, 2012 HRT0 1177 (CanLII), online: <http://canlii.ca/t/fr19> [Editors' Note: Request for reconsideration denied. See *Blakely v. Queen's University*, 2012 HRT0 2244 (CanLII), online: <https://canlii.ca/t/fv1rv>.]

See also: Melanie Whetzel, "Documentation of a Learning Disability," 5:3 *Consultants' Corner*, Job Accommodation Network, online: <https://askjan.org/publications/consultants-corner/vol05iss03.cfm>

Plenary #4 - Is it Harassment or Not?

An interactive panel with case studies and scenarios

June 14, 2024, 3:00 p.m. – 4:15 p.m. MT

Panelists

Kait Carey, Lawyer and Workplace Investigator, Southern Butler Price

Jackie Laviolette, Employer Counsel, Matthews Dinsdale & Clark LLP

Ella Henry, Counsel, Canadian Union of Public Employees (CUPE)

In Alberta, workplace harassment is defined as "any single incident or repeated incidents of objectionable or unwelcome conduct, comment, bullying or action by a person that the person knows or ought reasonably to know will or would cause offence or humiliation to a worker, or adversely affects the worker's health and safety." In many instances conduct or comments will clearly meet this definition. In many instances impugned conduct or comments will clearly meet this definition, but in other cases debate may arise as to whether the alleged harasser ought reasonably to have known that certain comments or conduct would be unwelcome.

- Should a complainant's subjective feelings of humiliation or offence be determinative of whether certain conduct constitutes harassment? If not, why not?
- What role does a complainant's lived experience as someone of a particular gender, race, or ethnicity play in determining whether certain conduct should be reasonably seen to be offensive? How might a decision-maker's unconscious bias interfere in the analysis of whether conduct could reasonably be seen to be offensive or humiliating?
- Does workplace culture play any role in determining whether conduct ought reasonably to have been known to be offensive?
- Is the analysis of whether conduct constitutes harassment affected by a friendship or previous romantic relationships between complainant and respondent? What about power imbalances or lack thereof?
- How is the reasonableness of management action assessed to determine whether or not it constitutes harassment?

Closing Remarks

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42nd Annual Calgary Labour Arbitration and Policy Conference

Friday, June 14, 2024



LancasterHouse

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See also: *Occupational Health and Safety Code*, Alta. Reg. 191/2021, online: <https://canlii.ca/t/bb6q> [Editors' Note: See Part 27.]

See also: "Workplace harassment and violence," Government of Alberta, online: <https://www.alberta.ca/workplace-harassment-violence>

See also: "Harassment," Alberta Human Rights Commission, online: <https://albertahumanrights.ab.ca/what-are-human-rights/about-human-rights/harassment/>

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See also: Walter Pavlic & Arooj Tulli-Shah, "'Harassment' is now actionable in Alberta," July 4, 2023, online: <https://www.mltakins.com/labour-employment/harassment-is-now-actionable-in-alberta/> [Editors' Note: This article addresses the decision in *Alberta Health Services v. Johnston*, 2023 ABKB 209 (CanLII), online: <https://canlii.ca/t/jwlr3>.]

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- 4.1 "Arbitration board upholds dismissal of employee who engaged in a pattern of anti-Asian racist and sexist workplace harassment," *Health Sciences Association of Alberta v. Alberta Health Services*, 2023 CanLII 37831 (AB GAA), Lancaster's *Discharge and Discipline*, eAlert No. 303
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See also Document 3.2: "Reinstatement and \$20,000 in aggravated damages awarded to female employee who was fired based on unsubstantiated allegations of sexual harassment of male co-workers," *United Food and Commercial Workers, Local 401 v. Vision Loss Rehabilitation Alberta*, 2021 CanLII 5490 (AB GAA), *Lancaster's Discharge and Discipline*, eAlert No. 290

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rendered her workplace intolerable. Note that this decision was rendered in the unionized context.]

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