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# Toronto Labour Arbitration and Policy Conference



December 13, 2024

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Friday, December 13, 2024



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## Friday, December 13, 2024

8:00 a.m.	Breakfast
9:00 a.m.	Introduction
9:05 a.m.	<p><b>Panel 1</b>  <b>New and Noteworthy:</b>            Experts examine recent arbitration cases and policy developments</p>
10:20 a.m.	Break
10:35 a.m.	<p><b>Panel 2</b>  <b>Drawing the Line:</b>            Reconciling employee free speech and legitimate employer concerns</p>
11:40 a.m.	Break
11:50 a.m.	<p><b>Fireside Chat with Jennifer Pernfuss:</b>  <b>The Need to Reimagine How We Are Resolving Workplace Complaints – Harassment and more</b></p>
12:30 p.m.	Networking Lunch
1:20 p.m.	<p><b>Panel 3</b>  <b>Invisible Illnesses:</b>            Accommodating poorly understood and episodic disabilities</p>
2:35 p.m.	Break
2:50 p.m.	<p><b>Panel 4</b>  <b>Is it Harassment? Or Isn't It?</b>            An interactive panel seeks answers from actual case studies</p>
4:00 p.m.	Conference ends

## Continuing Professional Development



This program (311274) has been approved for **5.4 Continuing Professional Development (CPD) hours** under Section A of the Continuing Professional Development (CPD) Log of the **Human Resource Professionals Association (HRPA)**.



- Members of the **Law Society of Ontario** may consider counting this program for **5.4 substantive hours; 0 professionalism hours**.

# Panel 1 - New and Noteworthy: Experts examine recent arbitration cases and policy developments

December 13, 2024, 9:05 a.m. – 10:20 a.m. ET

## Panelists

**Daniel Randazzo**, Arbitrator and Mediator, Randazzo Arbitration Services

**Allyson Lee**, Employer Counsel, Sherrard Kuzz LLP

**Laura Johnson**, Union counsel, Ryder Wright Holmes Bryden Nam LLP (RWHBN)

In this session, expert panelists will examine recent arbitration decisions on key workplace issues, exploring the practical takeaways for employers and unions. The panel will address topics such as:

- Privacy;
- Computer access, monitoring, and surveillance
- Substance use testing;
- Discipline and discharge;
- Workplace investigations;
- Discrimination, harassment, and accommodation;
- Defamation and anti-strategic lawsuits against public participation (anti-SLAPP) legislation;
- Issues of jurisdiction as between labour arbitrators and statutory tribunals; and
- Remote work.

The panel will also examine recent legislative and other initiatives, such as:

- Federal legislation banning the use of strike replacement workers;
- Federal legislation requiring companies to report on the risk of and measures taken regarding forced labour and child labour in international supply chains;

- The report of the *Employment Equity Act* Review Task Force and related changes to the Act; and
- The Ontario government's *Working for Workers* legislative series.

**Break**

10:20 a.m. – 10:35 a.m. ET

# Toronto Labour Arbitration and Policy Conference

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### Panel 1 - New and Noteworthy: Experts examine recent arbitration cases and policy developments

#### 1. Privacy

- 1.1 "Ontario public school teachers are protected from unreasonable search and seizure of personal information on workplace computers by s.8 of the *Charter of Rights*, Supreme Court holds, ruling that arbitrators must apply the provisions of the *Charter*," *York Region District School Board v. Elementary Teachers' Federation of Ontario*, 2024 SCC 22 (CanLII), Lancaster's *Public Service and Crown Agency Employment Law*, eAlert No. 194

#### Further Reading:

- 1.2 "Court upholds ruling that employer is not entitled to disclose employee medical information to managers for the purposes of managing the employment relationship," *Canadian Pacific Railway Company v. Teamsters Canada Rail Conference*, 2023 ONSC 5109 (CanLII), Lancaster's *Disability and Accommodation*, eAlert No. 318

#### 2. Discipline and Off-Duty Conduct

- 2.1 "Refusal to reinstate firefighter to his captain role 'unfair and unreasonable,' arbitrator rules," *Ottawa Airport Professional Aviation Firefighters Association v. Ottawa Macdonald-Cartier International Airport Authority*, 2024 CanLII 24973 (CA LA), Lancaster's *Firefighters/Fire Services Employment Law*, eAlert No. 168
- 2.2 "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
- 2.3 "Discharge of Catholic school teacher for 'hateful' e-mail criticizing LGBTQ2S+ lifestyle reduced to suspension because wide circulation unintended, arbitrator holds," *Ontario English Catholic Teachers' Association v. Northwest Catholic District School Board*, 2024 CanLII 6043 (ON LA), Lancaster's *Discharge and Discipline*, eAlert No. 309

## Further Reading:

See also: *Association of Academic Staff University of Alberta v. University of Alberta (Board of Governors)*, 2024 ALRB 43 (CanLII), online: <https://canlii.ca/t/k4d33> [Editors' Note: In this decision, the Alberta Labour Relations Board dismissed an application for review of an arbitrator's decision to uphold the early removal of an associate professor from her appointment as a departmental associate chair, based on his determination that the removal of the professor due to her role as a protagonist in the broader debate over "gender-critical feminist" views and the protection of transgender persons, which the university considered to impair her ability to fulfill her role in an effective manner, was within its broad discretion to make administrative appointments. The Board found no error in the arbitrator's determination that, within this fraught context, 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. An application for leave to appeal to the Alberta Court of Appeal was dismissed: 2024 ABCA 350 (CanLII), online: <https://canlii.ca/t/k7mfj>.]

See also: *Service Employees International Union, Local 1 Canada v. Michael Garron Hospital*, 2024 CanLII 25041 (ON LA), online: <https://canlii.ca/t/k3pj4> [Editors' Note: In this decision, allowing a grievance in part, an arbitrator held that dismissal was justified for a nurse who unilaterally decided to administer a lower dose of a prescribed pain medication to a patient and failed to record it accurately. While the arbitrator accepted that the decision was an error in judgement rather than deliberate misconduct motivated by a discriminatory attitude toward those with drug dependencies, the arbitrator nevertheless held that dismissal was within the realm of reasonable penalties given the grievor's disciplinary history and lack of remorse. However, the arbitrator ruled that the incident did not amount to "wilful misconduct" exempting the employer from paying statutory termination and severance pay.]

See also: *Telecommunications Workers Union, USW Local 1944 v. Telus Communications Inc.*, 2024 CanLII 29328 (CA LA), online: <https://canlii.ca/t/k3xl4> [Editors' Note: In this decision, dismissing a grievance, a B.C. arbitrator held that dismissal was warranted in the case of an employee who used extremely offensive language while facilitating a training session for new employees. Considering the misconduct, which included the use of the n-word and referenced sexual violence against Black women, to be egregious, the arbitrator held that dismissal was not excessive in the circumstances, which included the grievor's trusted position of leadership, extensive training in respectful workplace interactions, and failure to demonstrate any insight into his conduct and lack of genuine remorse, as demonstrated by his continued attempts to minimize his conduct throughout the hearing.]

See also: *Saskatchewan Government and General Employees' Union; Local 4039-03 v. North West College*, 2024 CanLII 34864 (SK LA), online: <https://canlii.ca/t/k3368> [Editors' Note: In this decision, a Saskatchewan arbitrator upheld the dismissal of an IT technician who downloaded cryptocurrency mining software on his employer's computers and the central server, violating

numerous College policies and exposing the College to potentially devastating ransomware attacks. Holding that the misconduct was particularly egregious and undermined the trust necessary for the largely unsupervised position, the arbitrator held that dismissal was not an excessive penalty despite the grievor's 16 years' seniority, particularly given the grievor's failure to appreciate the gravity of his misconduct and continued attempts to minimize his misconduct.]

See also: *Canadian Union of Public Employees, Local 1287 v. The Regional Municipality of Niagara*, 2024 CanLII 6040 (ON LA), online: <https://canlii.ca/t/k2kdz> [Editors' Note: In this decision, an arbitrator ruled that dismissal was the appropriate penalty for a long-serving employee for repeated bullying, harassment, insubordination, and threatening behaviour towards his co-workers and supervisors. Despite finding that management should have responded sooner to this conduct, which contributed to a toxic workplace, the arbitrator held that the grievor's pattern of behaviour and failure to accept responsibility for his actions warranted dismissal.]

See also: *International Brotherhood of Electrical Workers (System Council No. 11) v. Canadian National Railway Company*, 2023 CanLII 99782 (CA LA), online: <https://canlii.ca/t/k0vg9> [Editors' Note: In this decision, upholding a grievance, a federal arbitrator held that an employer had failed to establish just cause for dismissing an employee based on allegations set out in an e-mail from a co-worker that he made threats of violence to himself and others, which the employee denied. Emphasizing that in cases of conflicting evidence, the employer's burden to establish cause for dismissal requires it to demonstrate why the arbitrator should prefer its evidence, the arbitrator held that the employer had provided no evidence as to why the arbitrator should prefer the co-worker's e-mail over the grievor's account. Given his inability to resolve the conflicting evidence based on the evidentiary record before him, the arbitrator allowed the grievance and ordered that the grievor be reinstated with full compensation.]

### **3. Workplace Investigations**

- 3.1 "Award reinstating workers dismissed for workplace harassment was unreasonable, court holds," *Metrolinx v. Amalgamated Transit Union, Local 1587*, 2024 ONSC 1900 (CanLII), Lancaster's *Discharge and Discipline*, eAlert No. 310 [Editors' Note: Leave to appeal this decision to the Ontario Court of Appeal has reportedly been sought, with no decision yet reported: 2024 CanLII 83882 (ON GSB), online: <https://canlii.ca/t/k6npg>.]
- 3.2 "Employer required to disclose details of harassment investigation, including identity of perpetrators and specific corrective measures taken, labour board holds," *S.H. v. Stelco Inc.*, 2024 CanLII 16448 (ON LRB), Lancaster's *Workplace Investigations*, eAlert No. 10
- 3.3 "Arbitrator orders employer to produce harassment investigation report," *Federation of Teachers in Hebrew Schools v. Anne & Max Tanenbaum Community Hebrew Academy of Toronto*, 2024 CanLII 1398 (ON LA), Lancaster's *Workplace Investigations*, eAlert No. 9

## Further Reading:

- 3.4 "Arbitrator awards \$30,000 for employer's failure to investigate workplace harassment and human rights allegations," *Toronto Metropolitan University Faculty Association v. Toronto Metropolitan University*, 2023 CanLII 93288 (ON LA), Lancaster's *Workplace Investigations*, eAlert No. 7

See also: Amanda Finelli & Daniel Attwell, "New Workplace Investigation Ordered Due to Procedural Flaws," *In a Flash*, Mathews, Dinsdale & Clark LLP, May 15, 2024, online:

<https://mathewsdinsdale.com/new-workplace-investigation-ordered-due-to-procedural-flaws/>

[*Editors' Note*: This article addresses the decision in *Marentette v. Canada (Attorney General)*, 2024 FC 676 (CanLII), online: <https://canlii.ca/t/k4f3r>.]

See also: *The Board of School Trustees of School District No. 44 (Re)*, 2024 BCLRB 16 (CanLII), online: <https://canlii.ca/t/k2ttl> [*Editors' Note*: In this decision, the B.C. Labour Relations Board upheld an unfair labour practice complaint, ruling that an employer's investigation into a union steward's statements at a union meeting constituted an unlawful interference with the administration of the union. Adopting the "balancing of interests" approach set out in past cases, the Board held that the employer's interest in determining what the steward said at the meeting as part of an investigation into a complaint made against her was outweighed by the union's interest in protecting the confidentiality of its meetings, since the employer's evidence was insufficient to establish its concern that the statements might have been insubordinate or defamatory.]

## 4. Discrimination, Harassment, and Accommodation

- 4.1 *Buckel v. St. Joseph's Healthcare Hamilton*, 2024 HRTO 1324 (CanLII), online: <https://canlii.ca/t/k7b7x>
- 4.2 "Arbitrator's decision to dismiss complaint of discrimination after finding that race was not predominant reason for adverse treatment was incorrect, court rules," *Association of Management, Administrative and Professional Crown Employees of Ontario v. Ontario*, 2024 ONSC 1555 (CanLII), Lancaster's *Labour Arbitration*, eAlert No. 339
- 4.3 "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 *Human Rights in Employment*, eAlert No. 387

## Further Reading:

See also: *International Brotherhood of Electrical Workers, System Council No. 11 v. Canadian Pacific Kansas City Railway*, 2024 CanLII 57803 (CA LA), online: <https://canlii.ca/t/k5fr9> [*Editors' Note*: In this decision, a federal arbitrator allowed a grievance of a railway employee with attention deficit hyperactivity disorder (ADHD) who was dismissed from her apprenticeship program after failing her second attempt at a written exam. Determining that the employer had

been aware of the employee's diagnosis and her request for a testing environment free from distractions, the arbitrator held that the employer did not satisfy its duty to accommodate when it failed to provide the employee with a suitable environment in which to complete her exam, and ordered the employer to reinstate the employee.]

See also: *Halton Regional Police Association v. Halton Regional Police Services Board*, 2024 CanLII 3402 (ON LA), online: <https://canlii.ca/t/k2df9> [Editors' Note: In this decision, allowing a policy grievance, an arbitrator invalidated as discriminatory a collective agreement provision requiring that employees provide proof that they were either in hospital or receiving home care as prescribed by a physician in order to be eligible to reschedule their vacation days as sick days. Based on evidence that, unlike physical illness, mental illness is very rarely treated with hospitalization or home care, the arbitrator held that these requirements disproportionately impacted those with mental illness. He rejected the employer's argument that hospitalization established certainty, ruling that this argument was insufficient to rebut the *prima facie* case of discrimination.]

See also: *Ontario Nurses' Association v. Health Sciences North*, 2024 CanLII 2777 (ON LA), online: <https://canlii.ca/t/k2c04> [Editors' Note: In this decision, in a preliminary ruling, an arbitrator declined to dismiss a nurse's grievance challenging her probationary release for failing to establish a *prima facie* case of discrimination on the basis of ethnicity and place of origin. Finding that it could be inferred from the particulars alleged by the union, which were assumed to be true for the purposes of the motion, that the employee's language difficulties were a factor in her poor performance resulting in the decision to release her, and holding that language can be linked to one's place of origin or ethnic origin, the arbitrator held that the union had presented sufficient evidence to establish a *prima facie* case of discrimination. Although accepting that the employer might be able to argue that proficiency in English was a *bona fide* occupational requirement for her position, the arbitrator held that this defence was not relevant at an early stage of the proceedings and declined to dismiss the grievance on a preliminary basis.]

See also: Aicha Raeburn-Cherradi & Jeremy Ambraska, "What is Protected Under Human Rights Legislation? Veganism is not protected, caste is," *Newsletters*, Sherrard Kuzz LLP, April 1, 2024, online: <https://www.sherrardkuzz.com/newsletter/what-is-protected-under-human-rights-legislation-veganism-is-not-protected-caste-is/> [Editors' Note: See the article's discussion on *Knauff v. Ontario (Natural Resources and Forestry)*, 2023 HRT0 1729 (CanLII), online: <https://canlii.ca/t/k2n7z>. A request for reconsideration was refused: 2024 HRT0 223 (CanLII), online: <https://canlii.ca/t/k3000>.]

See also: Bryan McHale, "Racist Comments In Team Meeting Not Poisoned Workplace," Bow River LLP via *CanLII Connects*, December 7, 2023, online: <https://canliiconnects.org/en/summaries/93053> [Editors' Note: This article addresses the decision in *Tolentino v. His Majesty the King in right of Alberta (Alberta Justice and Solicitor General)*, 2023 AHRC 112 (CanLII), online: <https://canlii.ca/t/k182w>.]

See also: *Canadian Union of Public Employees, Local 79 v. Toronto (City)*, 2023 CanLII 95296 (ON LA), online: <https://canlii.ca/t/k0ns7> [Editors' Note: In this decision, an arbitrator determined that an employer did not breach the collective agreement or the *Human Rights Code* when it moved a full-time bargaining unit employee to a special "part-time program for permanent full-time employees" in order to accommodate her need for part-time hours, even though the move resulted in inferior benefits to the employee. The arbitrator held that the requirement to provide work in return for compensation is a reasonable and *bona fide* occupational requirement, and that the employer's decision was reasonable in light of the employee's long history of inability to work full-time hours and the medical evidence suggesting that she would not be able to do so. The arbitrator also found that the employer acted in a timely manner to return the employee to full-time hours once the medical evidence subsequently showed that, in fact, she was able to do so.]

See also: *Young Worker v. Heirloom and another*, 2023 BCHRT 137 (CanLII), online: <https://canlii.ca/t/k0qq1> [Editors' Note: In this decision, the British Columbia 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. Finding that the manager's harsh treatment of the teen was more likely than not informed by stereotypical assumptions regarding Black individuals, Black children, and Black women, the Tribunal held that the adverse treatment experienced by the employee was related to factors of race and sex and thus discriminatory. Considering the particular vulnerability of the complainant, as this was her first job, the Tribunal held that the manager and the restaurant were jointly and severally liable for lost wages and expenses, and awarded \$25,000 in damages for injury to her dignity, feelings, and self-respect.]

## **5. Jurisdiction**

- 5.1 "Ontario Human Rights Tribunal shares concurrent jurisdiction with labour arbitrators over human rights claims of unionized employees, court confirms," *London District Catholic School Board and Peel Regional Police Association v. Weilgosh*, 2024 ONSC 3857 (CanLII), Lancaster's *Human Rights in Employment*, eAlert No. 388

## Further Reading:

See also: *The Greater Vancouver Hotel Association (Pinnacle Hotel) v. Unite Here, Local 40*, 2023 CanLII 133062 (BC LA), online: <https://canlii.ca/t/k2pq3> [Editors' Note: In this decision, allowing a union's preliminary objection, a B.C. arbitrator dismissed an employer grievance alleging that a union's rallies protesting its cleaning schedules breached the collective agreement and the duty of good faith, and amounted to intentional interference with contractual relations, nuisance, and unlawful conspiracy. Characterizing the essential character of the dispute as relating to the union's ability to conduct rallies whose purpose was to influence public opinion, the arbitrator held that the employer's challenge to this protest did not arise from the interpretation, application, administration, or violation of the collective agreement, and thus the matter was properly within the court's jurisdiction.]

## 6. Remote Work

6.1 "Employer's limitations on remote work breached collective agreement, arbitrator rules," *Association of Management, Administrative and Professional Crown Employees of Ontario (AMAPCEO) v. The Crown in Right of Ontario (Ministry of Children, Community and Social Services)*, 2024 CanLII 8294 (ON GSB), Lancaster's *Public Service and Crown Agency Employment Law*, eAlert No. 193

## Further Reading:

6.2 "Employee, dismissed after asking to work from home to meet family care obligations, awarded \$25,000 by Tribunal for discrimination based on family status and reprisal," *Cosentino v. Octapharma Canada Inc.*, 2024 HRTO 860 (CanLII), Lancaster's *Gender, Equity and Work-Life Balance*, eAlert No. 185 [Editors' Note: A request for reconsideration was denied: 2024 HRTO 1331 (CanLII), online: <https://canlii.ca/t/k7b6w>.]

See also: *Association of Management, Administrative and Professional Crown Employees of Ontario (Salewski) v. Ontario (Environment, Conservation and Parks)*, 2024 CanLII 106429 (ON GSB), online: <https://canlii.ca/t/k7n8j> [Editors' Note: In this decision, the Board considered a grievance by an employee who had applied for an alternative work arrangement (AWA) to work from home four days per week and been denied. The employee's manager had since retired, and an AWA had been approved under which the employee was permitted to work from home three days per week. The Board found that the issue was not moot, as the three-day-per-week arrangement did not resolve all aspects of the grievance, and found that the employer violated the collective agreement which provided that managers were to consider in good faith both the employee's request and the operational viability for the workplace. The Board found that by interpreting and apply certain memoranda issued to Ontario Public Service staff as restricting the ability to grant an AWA of more than two days from home absent exceptional circumstances, and relying on concerns which were not "operational" concerns, the manager considered irrelevant considerations and improperly fettered her discretion.]

See also: *Association of Management, Administrative and Professional Crown Employees of Ontario (Wildman) v. Ontario (Natural Resources and Forestry)*, 2024 CanLII 62891 (ON GSB), online: <https://canlii.ca/t/k5nq8> [Editors' Note: In this decision, the Board found that the employer breached the collective agreement in denying an AWA requested by an employee. Although memoranda had been issued to all Ontario Public Service staff requiring minimum attendance in-office, the collective agreement required managers to consider in good faith the employee's request and the operational viability of the arrangement. The employee's manager had supported the AWA and thought it was operationally viable. The arbitrator found that the employer did not consider the employee's request in good faith in denying the manager discretion to consider the request, basing the denial on the memoranda without considering the unique circumstances, and actively directing the manager to avoid disclosing the true reasons for the refusal.]

See also: Nick Murray, "Public service union's court challenge of return-to-office order will proceed," *CBC News*, August 30, 2024, online: <https://www.cbc.ca/news/politics/psac-federal-court-decision-return-to-office-1.7309689>

## **7. Legislative and Other Updates**

### **a) Federal**

- 7.1 "Graduated notice of termination provisions now in effect for federally regulated employees," Bill C-86, *Budget Implementation Act, 2018, No. 2*, S.C. 2018, c. 27 and *Order Fixing February 1, 2024 as the Day on Which Certain Sections of the Budget Implementation Act, 2018, No. 2 Come into Force*, SI/2023-17, *Lancaster's Labour Law News*, eAlert No. 522
- 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 employers now required to provide employees with free menstrual products," *Regulations Amending Certain Regulations Made Under the Canada Labour Code (Menstrual Products)*, S.O.R./2023-78, *Lancaster's Labour Law News*, eAlert No. 522
- 7.4 "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

See also: Christopher Pigott, Carl Trudeau, & Andrew Gould, "Replacement Worker Ban, Right to Disconnect and Other Changes Upcoming for Federal Workplaces," *Federal Sector Bulletin*, Fasken Martineau DuMoulin LLP, August 1, 2024, online:

<https://www.fasken.com/en/knowledge/2024/08/replacement-worker-ban>

See also: "Guidance for entities," *Public Safety Canada*, Government of Canada, November 15, 2024, online: <https://www.publicsafety.gc.ca/cnt/cntrng-crm/frcd-lbr-cndn-spply-chns/prpr-rprt-en.aspx> [*Editors' Note*: This guidance provides further information regarding the requirements of the *Fighting Against Forced Labour and Child Labour in Supply Chains Act*, addressed in Document 7.2.]

## **b) Ontario**

7.5 "Ontario Human Rights Commission releases policy statement on caste-based discrimination, says caste is covered by existing Ontario *Human Rights Code* protections," *OHRC's Policy position on caste-based discrimination*, October 26, 2023, Lancaster's *Labour Law News*, eAlert No. 518

See also: "Ontario Government Introduces Working for Workers Six Act," *Briefing Notes*, Sherrard Kuzz LLP, December 2, 2024, online:

<https://www.sherrardkuzz.com/newsblast/ontario-government-introduces-working-for-workers-six-act/> [*Editors' Note*: At the time of writing, this Bill had been ordered for third reading.]

See also: "Working for Workers Five Act Receives Royal Assent," *Briefing Notes*, Sherrard Kuzz LLP, October 30, 2024, online: <https://www.sherrardkuzz.com/newsblast/working-for-workers-five-act-receives-royal-assent/>

See also: Mark Van Ginkel, "At Long Last: New Legislative Framework for Policing in Ontario Coming into Effect April 1, 2024," *Labour & Employment Law Insights*, Fillion Wakely Thorup Angeletti LLP, March 22, 2024, online: <https://fillion.on.ca/insights/at-long-last-new-legislative-framework-for-policing-in-ontario-coming-into-effect-april-1-2024/>

See also: Anthony Kwong, "Ontario Passes Fourth Working for Workers Act," *In a Flash*, Mathews, Dinsdale & Clark LLP, March 21, 2024, online: <https://mathewsdinsdale.com/ontario-passes-fourth-working-for-workers-act/>

See also: Alex Ognibene & Andrew Gould, "The Working for Workers Act, 2023 Now in Force," *Labour, Employment & Human Rights Bulletin | The HR Space*, Fasken Martineau DuMoulin LLP, November 13, 2023, online: <https://www.fasken.com/en/knowledge/2023/11/the-working-for-workers-act-2023-now-in-force>

## 8. Further Reading

### a) Health and Safety

8.1 "Municipality that contracted out roadwork liable as an 'employer' under occupational health and safety legislation, Supreme Court of Canada rules," *R. v. Greater Sudbury (City)*, 2023 SCC 28 (CanLII), Lancaster's *Health and Safety/Workers' Compensation Law*, eAlert No. 277

See also: Daniel Averbach & Luiza Vikhnovich, "A New (Final?) Chapter in the R v. City of Sudbury Saga ~ City acquitted of all OHSa charges because it exercised due diligence," *Briefing Notes*, Sherrard Kuzz LLP, August 28, 2024, online: <https://www.sherrardkuzz.com/newsblast/a-new-final-chapter-in-the-r-v-city-of-sudbury-saga-city-acquitted-of-all-ohsa-charges-because-it-exercised-due-diligence/> [*Editors' Note*: In *R. v. Greater Sudbury*, Document 8.1, having determined that the city was liable as an employer under occupational health and safety legislation and had breached the Act, the matter was remitted back to the Ontario Superior Court to consider the trial judge's finding that the city had established a due diligence defence. This article addresses that decision: *R. v. Greater Sudbury (City)*, 2024 ONSC 3959 (CanLII), online: <https://canlii.ca/t/k6lm1>.]

See also: *International Brotherhood of Electrical Workers, Local 213 v. Fortis BC Energy Inc.*, 2024 CanLII 33103 (BC LA), online: <https://canlii.ca/t/k44cf> [*Editors' Note*: In this decision, a B.C. arbitrator held that an employer did not fail to meet its duty to accommodate when it refused to permit a liquid natural gas operator to remain in his position while wearing a beard, even though this was due to a skin condition. Finding that the requirement to be clean-shaven at all times was mandated by occupational health and safety regulations, the arbitrator held that it would amount to undue hardship to accommodate the grievor by allowing him to shave when an emergency occurred. Moreover, exempting the grievor from emergency duties would also result in undue hardship as this could compromise the planning and execution of the employer's carefully designed safety procedures and have "catastrophic" safety consequences. The arbitrator dismissed the grievance, holding that the employer's offer of additional training for alternative employment was a reasonable accommodation.]

### b) Substance Use Testing

8.2 "Employer breached employee's privacy rights by attending employee's home to demand post-incident drug test, Alberta arbitrator rules," *Canadian Energy Workers Association v. ATCO Electric Ltd.*, 2024 CanLII 37038 (AB GAA), Lancaster's *Labour Arbitration*, eAlert No. 342

See also: *Power Workers' Union v. Canada (Attorney General)*, 2024 FCA 182 (CanLII), online: <https://canlii.ca/t/k7qfw> [Editors' Note: In this decision, the Federal Court of Appeal considered an appeal of an application judge's decision regarding the validity of pre-placement and random alcohol and drug testing imposed by the Canadian Nuclear Safety Commission as a license condition to persons licensed to operate high-security nuclear facilities working within "safety-critical positions." The application judge had found that the requirement did not violate sections 7, 8, or 15 of the *Charter* and dismissed the appellants' administrative law claim. The Federal Court of Appeal upheld the application judge's decision.]

See also: *CUPE, Air Canada Component v. Air Canada*, 2024 CanLII 46083 (CA LA), online: <https://canlii.ca/t/k4sqj> [Editors' Note: In this decision, a federal arbitrator refused to grant a union's request for a cease-and-desist order prohibiting Air Canada from obtaining the results of a hair strand test administered to a flight attendant suspected of having engaged in off-duty marijuana use, contrary to the airline's policies, pending the resolution of a grievance challenging the testing. Emphasizing that an interim order is an exceptional form of relief that requires a party to establish that it would suffer irreparable harm if an order is not granted, the arbitrator held that, in this case, the balance favoured the employer, given legitimate safety concerns arising from reports by the employee's housemates regarding his suspected marijuana use, which warranted testing. Also finding that the use of the hair strand test was minimally intrusive and necessary in this case as it was the only means available of determining whether the employee had used marijuana at the times in question, and noting that the grievor's right to challenge the administration of such testing, and any other aspect of the airline's handling of the case, would occur in dealing with the grievance on the merits, the arbitrator declined to grant the union's request and ordered that the test results be released to the employer.]

### **c) Defamation and Anti-Strategic Lawsuits Against Public Participation Legislation (Anti-SLAPP)**

See: *Pereira v. UNITE HERE Local 40*, 2024 BCCA 27 (CanLII), online: <https://canlii.ca/t/k2fnt> [Editors' Note: In this decision, the B.C. Court of Appeal upheld a lower court ruling dismissing a defamation action filed by an employee against her union, after it pursued through the grievance process allegations by the employee's co-workers that she had engaged in bullying and harassing behaviour toward them. The Court confirmed that the union was immune from civil suits, and the action against it should be struck, because the union was protected by the doctrine of qualified privilege when it pursued the grievances initiated by the employee's co-workers, and it did so without personal malice. The Court also ruled that, in addition to being protected by qualified privilege prior to the filing of a grievance, the union enjoyed absolute privilege in respect of statements or communications made during the grievance process, i.e., after the actual grievance was filed.]

See also: Andrew Monkhouse, "Navigating the Complexities of Workplace Racism: Vac Developments Limited," *CanLII Connects*, February 27, 2024, online: <https://canliiconnects.org/en/commentaries/93582> [Editors' Note: This article addresses the decision in *Williams v. Vac Developments Limited*, 2023 ONSC 4679 (CanLII), online: <https://canlii.ca/t/k08jp>. An appeal was dismissed: 2024 ONCA 713 (CanLII), online: <https://canlii.ca/t/k71dh>.]

#### **d) Employment Standards**

8.3 "Employer's practice of deducting contractual paid sick days from statutory medical leave did not violate employment standards legislation, arbitrator holds," *United Steelworkers Local 14193 v. Cameco Fuel Manufacturing Inc.*, 2023 CanLII 115899 (CA LA), Lancaster's *Employment Standards Law*, eAlert No. 172

See also: Rhonda Levy & Barry Kuretzky, "Canada: Another Arbitrator Considers Interaction Between Canada Labour Code Leave Entitlements and Other Leave Entitlements," *ASAP: Recent Developments*, Littler Mendelson P.C., April 15, 2024, online: <https://www.littler.com/publication-press/publication/canada-another-arbitrator-considers-interaction-between-canada-labour> [Editors' Note: *Teamsters Local Union 987 of Alberta v. Purolator Inc.*, 2024 CanLII 21937 (CA LA), online: <https://canlii.ca/t/k3jv4>.]

See also: *Unifor, Local 5011 c. Wirecomm Systems (2008) Inc.*, 2023 CanLII 121460 (CA LA), online: <https://canlii.ca/t/k1vgg> [Editors' Note: In this decision, a federal arbitrator found that the employer did not infringe mandatory employee break provisions introduced in 2019 amendments to the *Canada Labour Code* when it failed to schedule mandatory break times for its field technicians. The arbitrator held that, while the employer was required under the *Code* to grant breaks, there was no obligation on the employer to schedule mandatory break times rather than allow its employees to take the breaks as gaps in their schedule allowed. Moreover, the arbitrator held that the employer was entitled to count free time between assigned tasks toward break time, with the caveat that any time that was saved by technicians by finishing assignments early was not to be considered as a break, as technicians were considered to be actively working during such periods.]

#### **e) Holidays**

8.4 "Arbitrators split two ways on whether National Day of Mourning is a holiday within the meaning of municipal collective agreements referencing the *Bills of Exchange Act*," *Canadian Union of Public Employees, Local 101 v. London (City)*, 2023 CanLII 25299 (ON LA) and 2024 ONSC 4074 (CanLII) and *Canadian Union of Public Employees, Local 107 v. London (City)*, 2023 CanLII 100239 (ON LA), Lancaster's *Municipal Employment Law*, eAlert No. 165

See also: *Ontario Public Service Employees Union v. Ontario (Treasury Board Secretariat)*, 2024 CanLII 62890 (ON GSB), online: <https://canlii.ca/t/k5nqd> [Editors' Note: In this decision, the Board found that employees were not entitled to the National Day of Mourning as a paid holiday under the applicable collective agreements.]

See also: *Ottawa Police Services Board v. Ottawa Police Association*, 2023 ONSC 6225 (CanLII), online: <https://canlii.ca/t/k110w> [Editors' Note: In this decision, on judicial review, the Ontario Superior Court set aside a grievance arbitrator's ruling ordering an employer to recognize the National Day of Mourning for Queen Elizabeth II as a paid holiday under collective agreements for uniformed and civilian employees of the Ontario Police Service. The Ontario Divisional Court held that the arbitrator's decision was unreasonable, as it failed to consider whether the parties intended that a holiday would be granted every time a "proclamation" was made for symbolic reasons, whether that day was made a holiday under legislation, or whether it was a one-time or recurring holiday. Observing that the arbitrator's approach would require the inclusion of numerous "proclaimed" symbolic days, the Court overturned the decision, holding that the Day of Mourning was not included in the holidays to which employees were entitled.]

#### **f) Benefits**

See: *Unifor, Local 99-P v. GP Northwoods LP*, 2024 CanLII 14002 (ON LA), online: <https://canlii.ca/t/k32qk> [Editors' Note: In this decision, allowing several grievances, an arbitrator held that an employer was liable to compensate four of its employees after the employer's short-term disability benefit provider denied sickness benefits for substantial periods of time. Finding that the benefit provider unlawfully refused to pay benefits to an employee who was plainly disabled, denying her claim and requiring her to appeal by providing further medical information, and that, in the case of the other three employees, the provider unlawfully suspended benefits after the employees failed to provide medical information before dates arbitrarily selected by the insurer, before ultimately restoring the benefits, the arbitrator held that the employer was liable for the provider's misconduct, and was ordered to pay damages in compensation for the significant mental distress and financial hardship caused by those actions.]

See also: *Central York Professional Firefighters Association, Local 2511 v. Newmarket (Town)*, 2024 CanLII 19323 (ON LA), online: <https://canlii.ca/t/k3ck1> [Editors' Note: In this decision, an arbitrator ruled that a municipality breached its firefighters' collective agreement when it unilaterally introduced a pre-authorization process that required employees' physicians to complete an online form satisfying the employer's insurer that it was medically appropriate to substitute a brand name drug for a generic drug. Finding that the collective agreement language made clear that the employee's physician, and not the insurer, was intended to be the final decision-maker with respect to whether a drug would be medically appropriate, the arbitrator held that by giving the insurer the right to decline a claim, the pre-authorization process violated the collective agreement. In addition to the collective agreement language, the arbitrator also

relied on the normative standard in the fire service sector that, absent express collective agreement language, the introduction of such a pre-authorization process is not permitted.]

See also: *Canadian Union of Public Employees (CUPE-OSBCU) v. Council of Trustees' Association*, 2023 CanLII 122852 (ON LA), online: <https://canlii.ca/t/k1x7r> [Editors' Note: Under Ontario's *School Boards Collective Bargaining Act*, the central terms of the collective agreement, which applied across the province, provided for sick leave and short-term disability days, while the local terms, negotiated separately at the board level, provided for long-term disability benefits with different waiting periods for different boards. The union brought grievances asserting that, where employees became eligible for long-term disability under the local terms, they nonetheless had the right to exhaust all sick days and short-term disability benefits under the central terms before switching over to long-term disability. In this decision, the arbitrator rejected this position, holding that the terms of the collective agreements made it clear that employees could not continue collecting sick leave or short-term disability benefits once they became eligible for long-term disability benefits.]

#### **g) COVID-19 Policies**

See: *Ontario Public Service Employees Union v. Fanshawe College*, 2024 CanLII 104392 (ON LA), online: <https://canlii.ca/t/k7kkg> [Editors' Note: In this decision, the arbitrator found that the employer "erred in its decision in failing to include the subjective component of the applicable test when assessing the Grievor's creed exemption request" and that the employer should have granted the grievor's request for an exemption.]

See also: *Canadian Union of Public Employees and its Local 145 v. William Osler Health System*, 2024 CanLII 76299 (ON LA), online: <https://canlii.ca/t/k6b34> [Editors' Note: In this award, the arbitrator upheld the termination for cause of employees at a hospital who failed to comply with the employer's vaccination policy, but found that those employees were entitled to termination and severance pay pursuant to the province's *Employment Standards Act*.]

See also: *Ottawa (City) v. Ottawa-carleton Public Employees' Union, Local 503*, 2024 CanLII 67071 (ON LA), online: <https://canlii.ca/t/k5v78> [Editors' Note: In this decision, the arbitrator found that the employer's mandatory vaccination policy was reasonable, noting that other alternatives were not sufficient and that it was within the employer's management rights to direct that work be performed in-person absent a duty to accommodate under human rights legislation. The arbitrator found that the policy was reasonable even insofar as it applied to remote workers, given that the city was subject to specialized legislation and emergency orders that raised a reasonable prospect workers may be required to return in-person in certain situations, and that it was reasonable to maintain the policy in specific, high-risk settings later in the pandemic.]

See also: *United Food and Commercial Workers, Local No. 401 v. Cargill Limited*, 2024 CanLII 52128 (AB GAA), online: <https://canlii.ca/t/k53tj> [Editors' Note: In this decision, an Alberta arbitrator concluded that the employer met its obligations under the province's *Occupational Health and Safety Act* through its precautions taken in response to the COVID-19 pandemic, which were adopted largely based on public health guidance. The arbitrator further found that the employer met its obligations under the collective agreement to engage with the union regarding safety issues, but did not fully meet its obligations under *OHSA* and the collective agreement to consult with the joint health and safety committee.]

See also: Shane Todd & Rebecca Rossi, "Humber River Health successful in upholding mandatory vaccination policy," *Client Work*, Fasken Martineau DuMoulin LLP, June 2024, online: <https://www.fasken.com/en/solution/clientwork/2024/07/humber-river-health-successful-in-upholding-mandatory-vaccination-policy> [Editors' Note: This article addresses the decision in *National Organized Workers Union (NOWU) v. Humber River Hospital*, 2024 CanLII 52386 (ON LA), online: <https://canlii.ca/t/k555q>.]

See also: Erin Porter et al., "Arbitrator Finds Non-Compliance with Hospital's Vaccination Policy Grounds for Discipline," *HR Space*, Fasken Martineau DuMoulin LLP, July 25, 2024, online: <https://www.fasken.com/en/knowledge/2024/07/hr-space-arbitrator-finds-non-compliance-with-hospitals-vaccination-policy-grounds-for-discipline> [Editors' Note: This article addresses the decision in *Unifor Local 27 v. London Health Sciences Centre*, 2024 CanLII 48714 (ON LA), online: <https://canlii.ca/t/k4xkw>.]

See also: *Union of Postal Communications Employees (PSAC) v. Canada Post Corporation*, 2024 CanLII 38829 (CA LA), online: <https://canlii.ca/t/k4fkh> [Editors' Note: In this decision, a federal arbitrator found that the employer's vaccination policy was unreasonable to the extent that it applied to employees who worked exclusively remotely. The arbitrator rejected the argument that the employer acted unreasonably in placing unvaccinated employees who *could have done* their work remotely on unpaid leaves of absence, holding that management rights included the ability to direct where employees performed their work and that it did not amount to a failure to accommodate.]

See also: *Rehibi v. Deputy Head (Department of Employment and Social Development)*, 2024 FPSSLREB 47 (CanLII), online: <https://canlii.ca/t/k3rf5> [Editors' Note: In this decision, the Federal Public Sector Labour Relations and Employment Board held that the imposition of leave without pay for failing to comply with the employer's vaccination policy did not constitute disguised discipline and was an administrative measure, meaning that the adjudicator did not have jurisdiction. The Board found that the policy was adopted to address legitimate operational considerations and to comply with the employer's legal obligations to its employees. Note that the grievors were not represented by a bargaining agent.]

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 disclose proof of vaccination, holding that to permit discipline in these circumstances would "be a significant departure from long-standing arbitral principles" holding that discipline is not "an appropriate response to an employee's exercise of the right to determine whether to consent to medical treatment or disclosure of medical information." The arbitrator further found that the hospital had not established that there were justifiable grounds to terminate the grievors' employment on non-culpable grounds, such as due to staffing needs or there being "no reasonable likelihood the grievors would be able to work in the foreseeable future."]

See also: *Ontario Nurses Association v. Quinte Health*, 2024 CanLII 14991 (ON LA), online: <https://canlii.ca/t/k34gz> [Editors' Note: In this decision, allowing a policy grievance in part, 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. Holding that, in treating termination as a pre-determined outcome for non-compliance, the hospital employer failed to balance the interests of the employees against its own interests and failed to respect the principle of just cause, the arbitrator found no evidence to indicate that the employer's health and safety or operational interests required it to terminate the employment of nine non-compliant nurses rather than allow them to take an unpaid leave. Accordingly, the arbitrator upheld the policy grievance with respect to penalty and ordered the employer to reinstate the grievors.]

See also: *Ontario Public Service Employees Union, Local 110 v. Fanshawe College*, 2024 CanLII 11422 (ON LA), online: <https://canlii.ca/t/k2wn7> [Editors' Note: In this decision, allowing a grievance, an Ontario arbitrator held that an employer's decision to place a remote worker on unpaid leave because he failed to comply with a COVID-19 vaccination mandate was not reasonable. Finding that the employer had provided no evidence to support its contention that the employee, a college professor who taught courses in an entirely online program, would ever be required to attend campus, the arbitrator held that the grievor's interest in his bodily integrity outweighed the interests of the employer and allowed the grievance.]

See also: *Canadian Union of Public Employees, Locals 905-20 (Hourly), 905-21 (F/t) And Local 905-22 (P/t) v. Corporation of the City of Vaughan*, 2024 CanLII 8991 (ON LA), online: <https://canlii.ca/t/k2r15> [Editors' Note: In this decision, the arbitrator concluded that the employee had not made a valid claim for religious exemption from vaccination based on creed and accordingly was not discriminated against by the city through her suspension and subsequent termination of her employment.]

See also: *Teamsters Local Union No. 31 v. Purolator Canada Inc.*, 2023 CanLII 120937 (CA LA), online: <https://canlii.ca/t/k1tvz> [Editors' Note: In this decision, a federal arbitrator concluded that, while the employer's vaccination mandate was reasonable when implemented, the improvement in workplace safety achieved by the policy became nominal by the late spring of 2022 such that the continued application of the policy was unreasonable. The arbitrator further found the employer's failure to verify whether third-party vaccination requirements continued to apply at that time was unreasonable and did not find that the policy was justified in light of public health communications at the time.]

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 the employer's vaccination policy was reasonable, that the grievor was insubordinate in refusing to disclose his vaccination status, and that his suspensions were proportional. The arbitrator declined to award backpay from the date of his termination to the date of his employer-initiated reinstatement.]

#### **h) Contracting In**

See: *Labourers' International Union of North America, Local 183 v. Nova Services Group Inc. – Compass Group Canada Ltd.*, 2023 CanLII 137069 (ON LA), online: <https://canlii.ca/t/k3hf8> [Editors' Note: In this decision, allowing a grievance, an Ontario arbitrator held that an employer violated the collective agreement by engaging temporary agency workers to perform bargaining unit work alongside its unionized employees and ordered the employer to pay union dues for all hours worked by the agency workers for part of the duration of the pandemic.]

#### **i) Contempt**

See: *Teamsters Canada Rail Conference v. Canadian Pacific Railway Company*, 2024 FCA 136 (CanLII), online: <https://canlii.ca/t/k6qf0> [Editors' Note: In this decision, the Federal Court of Appeal found that the Federal Court erred in finding Canadian Pacific Railway Company in contempt of court for failing to comply with a labour arbitration award registered with the court. The Court of Appeal found that the lower court "erred in finding contempt in the absence of intent, effectively treating contempt as a strict or absolute liability offence" and noting that there was "no evidence of deliberateness, wilful blindness, recklessness or serious indifference on the part of CP."]

## **j) Miscellaneous**

See: *Ontario Provincial Police Association v. Ontario Provincial Police*, 2023 CanLII 85881 (ON LA), online: <https://canlii.ca/t/k08gb> [Editors' Note: In this decision, upholding a union's policy grievance, an arbitrator ruled that an employer wrongly interpreted a red circling provision in a collective agreement, which was meant to preserve the rate of pay of civilian members when they assumed uniform positions. Determining that the employer's interpretation, that "rate of pay" referred to annual salary rather than hourly wage, was not plausible or workable, as it required making a calculation to transform an hourly rate of pay based on variable part-time hours into an annual rate, the arbitrator ruled that the provision for "rate of pay" was properly interpreted to refer to an hourly rate of pay. Moreover, the fact that this interpretation provided for a more generous red circling benefit was also consistent with the purpose of the provision, the intention of which was to encourage civilian employees to accept employment as uniform recruits.]

## **Panel 2 - Drawing the Line: Reconciling employee free speech and legitimate employer concerns**

December 13, 2024, 10:35 a.m. – 11:40 a.m. ET

### **Panelists**

**Heather Ann McConnell**, Arbitrator and Mediator

**Alex Treiber**, Employer Counsel, Treiber Law

**Megan Reid**, Union Counsel, Dewart Gleason LLP

How can employers balance freedom of expression under the *Charter* with the need to maintain a productive and respectful workplace? In this session, panelists will address:

- Do employees have the right to express their views on potentially controversial and/or political matters at work?
- What criteria should employers and unions consider when determining whether an employee's speech or actions pose a legitimate concern to the organization's reputation or operations? What actions should employers or unions take when employees' expressions may border on being disrespectful or offensive, but are not overtly harmful?
- Can employers monitor employee expressions outside the workplace or on social media? Can employers discipline employees for such expressions?
- What is the extent of a union's duty to represent members who face work-related consequences for potentially polarizing beliefs or actions? When will a union's decision not to represent a member constitute a breach of the duty of fair representation?
- How can employers and unions effectively communicate expectations regarding employee expression, appropriate workplace conduct, and appropriate off-work conduct?

### **Break**

11:40 a.m. – 11:50 a.m. ET

# Toronto Labour Arbitration and Policy Conference

Friday, December 13, 2024



LancasterHouse

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- 1.2 "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
- 1.3 "Dismissal too harsh a penalty for firefighter's offensive tweet, arbitrator rules," *Toronto Professional Fire Fighters' Association, Local 3888 v. Toronto (City)*, 2014 CanLII 62879 (ON LA), Lancaster's *Discharge and Discipline*, eAlert No. 205

See also: Emily McCrary-Ruiz-Esparza, "How global companies handle political talk at work," *BBC*, May 9, 2024, online: <https://www.bbc.com/worklife/article/20240508-how-global-companies-handle-political-talk-at-work>

See also: Dexter Tilo, "The politics of discussing politics at work," *Human Resources Director Canada*, April 10, 2024, online: <https://www.hcamag.com/ca/specialization/employee-engagement/the-politics-of-discussing-politics-at-work/484544>

See also: Peter McSherry, "Can you be fired for sharing your political opinions?," *GuelphToday.com*, 2024, online: <https://www.guelphtoday.com/spotlight/can-you-be-fired-for-sharing-your-political-opinions-7714287>

See also: Ece Yildirim, "Employees want to talk about politics at work, study finds—but it's a 'double-edged sword'," *CNBC*, November 9, 2023, online:

<https://www.cnbc.com/2023/11/09/employees-want-to-talk-about-politics-at-work-but-it-comes-with-risks.html>

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

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

See also: John Hyde, "Political Speech in the Workplace," *Hyde HR Law*, September 21, 2020, online: <https://hydehrlaw.com/blog/post/political-speech-in-the-workplace>

See also: Andrew Montague-Reinholdt, "Can I be fired for my opinions: cancel culture and free speech in the workplace," *Nelligan Law*, July 8, 2020, online: <https://nelliganlaw.ca/blog/can-i-be-fired-for-my-opinions-cancel-culture-and-free-speech-in-the-workplace/>

See also: Kenneth Jenero, "Politics in the Workplace: What Must Employers Allow?," *Holland & Knight Alert*, Holland & Knight LLP, July 19, 2016, online:

<https://www.hklaw.com/en/insights/publications/2016/07/politics-in-the-workplace-what-must-employers-allow>

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. What criteria should employers and unions consider when determining whether an employee's speech or actions pose a legitimate concern to the organization's reputation or operations? What actions should employers or unions take when employees' expressions may border on being disrespectful or offensive, but are not overtly harmful?**

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

- Bulletin Boards (7.3.5)
- Excerpts from: Protection Against Discrimination – Applicable Legislation (19.1)

See also: "IV. Human rights issues at all stages in employment," Ontario Human Rights Commission, online: <https://www.ohrc.on.ca/en/book/export/html/4266>

See also: "Balancing Employee Expression and Organizational Policies in the Modern Workplace," *Edge Legal LLC* via LinkedIn, May 22, 2023, online:

<https://www.linkedin.com/pulse/balancing-employee-expression-organizational-policies-modern/>

See also: Charlotte Garden, "Was it something I said?," *Worker Stories*, Economic Policy Institute, May 5, 2022, online: <https://www.epi.org/unequalpower/publications/free-speech-in-the-workplace/>

See also: John Hyde, "Political Speech in the Workplace," *Hyde HR Law*, September 21, 2020, online: <https://hydehrlaw.com/blog/post/political-speech-in-the-workplace>

See also: "Is it Harassment? A Tool to Guide Employees," Government of Canada, August 21, 2015, online: <https://www.canada.ca/en/government/publicservice/wellness-inclusion-diversity-public-service/harassment-violence/harassment-tool-employees.html>

See also: Jessica Bungay, "Appearance in the Workplace: Can it be regulated by the Employer?," *Articles & Insights*, Cox & Palmer, May 22, 2015, online: <https://coxandpalmerlaw.com/publication/appearance-in-the-workplace-can-it-be-regulated-by-the-employer/>

See also: "Value and Ethics Code for the Public Sector," *Policies, Directives, Standards and Guidelines*, Government of Canada, December 15, 2011, online: <https://www.tbs-sct.canada.ca/pol/doc-eng.aspx?id=25049>

### **3. Can employers or unions set policies governing conduct for off work or social media expression? If so, what are best practices for ensuring these policies respect individual freedoms and the reputation and operations of the workplace?**

3.1 "Ontario government introduces *Working for Workers Five Act, 2024*," Bill 190, *Working for Workers Five Act, 2024*, 1st Sess., 43rd Parl., Ontario, 2024 (assented to October 28, 2024), Lancaster's *Employment Standards Law*, eAlert No. 173

See also: Carolyn Denault, "Online, off duty, off the hook?," *Human Resources Director Canada*, May 9, 2024, online: <https://www.hcamag.com/ca/specialization/employment-law/online-off-duty-off-the-hook/488613>

See also: "Code of Conduct and professionalism," Government of Ontario, September 13, 2021 (last updated April 16, 2024), online: <https://www.ontario.ca/page/code-conduct-and-professionalism>

See also: "Social Media Employee Policy," Canada Post Corporation, 2024, online: <https://infopost.ca/social-media-employee-policy/> [*Editors' Note*: Provided as an example of an existing company social media policy.]

See also: Zena Olijnyk, "Employers must have clear policies on employee social media use: Mathews, Dinsdale & Clark lawyer," *Canadian Lawyer Magazine*, September 15, 2022, online: <https://www.canadianlawyermag.com/practice-areas/labour-and-employment/employers-must-have-clear-policies-on-employee-social-media-use-mathews-dinsdale-clark-lawyer/369903>

See also: Meghan Payment, "Why every workplace needs a social media policy: Part I," Fillmore Riley LLP, July 29, 2022, online: <https://www.fillmoreriley.com/publication/why-every-workplace-needs-a-social-media-policy>

See also: Ian Pickard & David Fraser, "3 Steps to an Effective Workplace Social Media Policy," *Publication*, McInnes Cooper, June 5, 2019 (updated September 19, 2024), online: <https://www.mcinnescooper.com/publications/managing-social-media-work-3-steps-to-an-effective-workplace-social-media-policy/>

#### **4. Can employers monitor employee expressions outside the workplace or on social media? Can employers discipline their employees for private statements and/or expressions made outside the workplace?**

- 4.1 Mort Mitchnick & Brian Etherington, *Leading Cases on Labour Arbitration, 2nd ed.* (Toronto: Lancaster House, 2024, online),
  - Off-Duty Conduct (11.6)
  - Public Criticism of Employer Policies (12.4)
- 4.2 "B.C. Human Rights Tribunal summarily dismisses teacher's complaint alleging religious discrimination following dismissal for posting videos on YouTube expressing views against abortion, homosexuality, and non-Christian religions," *Glebov v. Fraser International College*, 2024 BCHRT 19 (CanLII), Lancaster's *Human Rights in Employment*, eAlert No. 387
- 4.3 "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 in *Metrolinx v. Amalgamated Transit Union, Local 1587*, 2024 ONSC 1900 (CanLII), online: <https://canlii.ca/t/k3tj8>.]
- 4.4 "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
- 4.5 "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

See also: "Getting Fired for Social Media Posts," Sultan Lawyers, April 29, 2024, online: <https://sultanlawyers.com/blog/getting-fired-for-social-media-posts/>

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

- 5.1 Mort Mitchnick & Brian Etherington, *Leading Cases on Labour Arbitration, 2nd ed.* (Toronto: Lancaster House, 2024, online), Scope of the Duty: General (9.1)
- 5.2 "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
- 5.3 "Union did not violate its duty of fair representation when it declined to grieve a mandatory COVID-19 vaccination policy before the policy came into effect, labour board rules," *Tiffany Bloomfield, Danielle Hurding, Mel Lewis, Lexi L. Bezzo, and Jaclyn Wagner v. Service Employees International Union*, 2022 CanLII 2453 (ON LRB), *Lancaster's Labour Board Law*, eAlert No. 154
- 5.4 "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
- 5.5 "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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## **6. How can employers and unions effectively communicate expectations regarding employee expression, appropriate workplace conduct, and appropriate off-work conduct?**

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**Fireside Chat with Jennifer Pernfuss:  
The Need to Reimagine How We Are Resolving  
Workplace Complaints – Harassment and more**

December 13, 2024, 11:50 a.m. – 12:30 p.m. ET

**Panelists**

**Jennifer Pernfuss**, Certified Restoration Practitioner, Consultant and Coach, RESPECT:  
Conciliation & Education

**Networking Lunch**

12:30 p.m. – 1:20 p.m. ET

## **Panel 3 - Invisible Illnesses: Accommodating poorly understood and episodic disabilities**

December 13, 2024, 1:20 p.m. – 2:35 p.m. ET

### **Panelists**

**Odelia Bay**, Ph.D. Candidate, Osgoode Law, York University

**Erin Porter**, Employer Counsel, Fasken Martineau DuMoulin LLP

**Wade Poziomka**, Union Counsel, Ross & McBride LLP

Disabilities are diverse. Many employees may experience disabilities that are hidden, fluid, or poorly understood by medical professionals. Employers are required to provide reasonable accommodation to employees with disabilities — of all kinds — to enable their full participation in the workplace. In this panel, experts will discuss the duties of employers and unions in accommodating employees with disabilities that may be hidden, episodic, or not widely understood. Panelists will explore:

- What are common medical conditions that are difficult to diagnose or understand? Why does "Long COVID-19" fall within this list?
- What are common challenges and best practices in accommodating employees who may experience disabilities that are hidden, episodic, or not fully understood by medical professionals? How should employers and unions respond when there is a lack of available medical practitioners with the requisite knowledge to provide information about a disability?
- What types of accommodations have generally been helpful for employees experiencing hidden, episodic, or poorly understood disabilities (e.g., flex time or working from home)?
- What are best practices for communicating during the accommodation process? For example, how should employees and employers maintain communication about accommodation needs, which may change frequently, while respecting employee privacy? What role do unions play in such communications?
- When have adjudicators found that employers or unions have successfully accommodated or failed to accommodate employees with hidden or episodic disabilities?

- How do disability-related stereotypes and stigmas play a role in complicating the accommodations process? What can employers and unions do to dismantle these stigmas and stereotypes and create an inclusive, barrier-free workplace?
- What steps must unions take to assist in accommodation and satisfy their duty of fair representation of members with hidden or episodic disabilities?

**Break**

2:35 p.m. – 2:50 p.m. ET

# Toronto Labour Arbitration and Policy Conference

Friday, December 13, 2024



LancasterHouse

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1.1 Mort Mitchnick & Brian Etherington, *Leading Cases on Labour Arbitration Online, 2nd ed.* (Toronto: Lancaster House, 2024, online), Accommodation of Disabilities – Definition of "Disability" (15.3.2)

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<https://www.forbes.com/sites/dianewiniarski/2023/10/17/visible-vs-invisible-disabilities-why-it-matters-in-the-workplace/>

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See also: Emily Mertz, "High levels of stigma experienced by COVID-19 long-haulers, Alberta research shows," *Global News*, January 16, 2023, online: <https://globalnews.ca/news/9413659/covid-stigma-long-haulers-alberta-research/> [Editors' Note: For the study, see: Ronald Damant et al., "Reliability and validity of the post COVID-19 condition stigma questionnaire: a prospective cohort study" (January 2023), 55:101755 *eClinical Medicine*, online: <https://doi.org/10.1016/j.eclinm.2022.101755>.]

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See also: Stuart Morris et al., "The Dynamics of Disability: Progressive, Recurrent or Fluctuating Limitations," *Canadian Survey on Disability Reports*, Statistics Canada, December 3, 2019, online: <https://www150.statcan.gc.ca/n1/pub/89-654-x/89-654-x2019002-eng.htm>.

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See also: "Tinnitus," Yale Medicine, online: <https://www.yalemedicine.org/conditions/tinnitus>

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[Editors' Note: The above resources are meant to provide a high-level introduction to the conditions canvassed and are not intended to provide a conclusive or comprehensive outline of symptomology, diagnostic criteria, treatments, etc.]

## **2. What are common challenges and best practices in accommodating employees who may experience disabilities that are hidden, episodic, or not fully understood by medical professionals? How should employers and unions respond when there is a lack of available medical practitioners with the requisite knowledge to provide information about a disability?**

2.1 Jeffrey Sack & Peter Neumann, *Unionized Workplaces in Canada: Labour Laws and Contract Clauses* (Toronto: Lancaster House, 2024, online), Human Rights and Workplace Privacy (19)

- Accommodating Employees With Disabilities - Applicable Legislation (19.4)
- Medical Certificates and Examinations (19.5)

2.2 Mort Mitchnick & Brian Etherington, *Leading Cases on Labour Arbitration, 2nd ed.* (Toronto: Lancaster House, 2024, online), Leaves Of Absence (24)

- Illness, Disability, Emergency, and Family Responsibility Leave (24.3.1)
- Employer's Entitlement to Proof of Illness (24.2.3)

2.3 Dr. Mike Condra & Meryl Zisman Gary, *Mental Health Disabilities at Work* (Toronto: Lancaster House, 2019),

- Must someone have a diagnosis of a recognized mental illness in order to be considered a person with a disability attracting the protection of human rights legislation? (4.2)
- How might a mental health or addiction disability interfere with an employee's ability to fully meet obligations arising from the accommodation process? (4.5)
- Are employers justified in being skeptical of medical information related to mental health disabilities on the basis that it is based largely on self-reporting? (6.4)
- Appendix 5: Sample letter from employer to physician
- Appendix 6: Sample form to be filled out by physician

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<https://www.iwh.on.ca/newsletters/at-work/101/workplaces-face-many-complex-challenges-when-managing-episodic-disabilities-study>

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<https://www.aclrc.com/blog/2019/5/15/disabilities-and-addiction-in-the-workplace>

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See also: "15. Other limits on the duty to accommodate," *Policy on preventing discrimination based on mental health disabilities and addictions*, Ontario Human Rights Commission, June 18, 2014, online: [https://www.ohrc.on.ca/en/policy-preventing-discrimination-based-mental-health-disabilities-and-addictions/15-other-limits-duty-accommodate-256#\\_ednref259](https://www.ohrc.on.ca/en/policy-preventing-discrimination-based-mental-health-disabilities-and-addictions/15-other-limits-duty-accommodate-256#_ednref259)

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<https://www.mentalhealthworks.ca/resources/when-an-employee-has-a-substance-related-problem-2/>

### **3. What types of accommodations have generally been helpful for employees experiencing hidden, episodic, or poorly understood disabilities (e.g., flex time or working from home)?**

#### **a) General**

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See also: "Job Demands and Accommodation Planning Tool (JDAPT)," Institute for Work & Health, March 2023, online: <https://www.iwh.on.ca/tools-and-guides/job-demands-and-accommodation-planning-tool-jdapt>

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See also: "Invisible Disabilities in the Workplace," *Our Insights*, Canadian Equality Consulting, January 8, 2021, online: <https://canadianequality.ca/invisible-disabilities-in-the-workplace/>

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## **b) Long COVID**

See: "Long Covid Resources Canada: Directory of resources, research and support," Long COVID Resources Canada, online: <https://longcovidresourcescanada.ca/>

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See also: Jamie Ducharme, "Back-to-Office Pressure Is Creating a Crisis for Long COVID Patients," *TIME*, March 28, 2022, online: <https://time.com/6160010/long-covid-patients-back-to-work/>

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### **d) Chronic Fatigue Syndrome**

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### **e) Tinnitus**

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<https://askjan.org/limitations/Ringing-in-the-Ears.cfm>

### **f) Multiple Chemical Sensitivities/Environmental Sensitivities**

3.3 "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 *Health Care Employment Law*, eAlert No. 172

See also: "Accommodation of Environmental Sensitivities," Human Rights Commission Newfoundland and Labrador, online: <https://thinkhumanrights.ca/resources/legal-guidelines/accommodation-of-environmental-sensitivities/>

See also: *Klewchuk v. City of Burnaby (No. 6)*, 2022 BCHRT 29 (CanLII), online:

<https://canlii.ca/t/jmd77> [Editors' Note: The B.C. Human Rights Tribunal found that, despite the unusually complex accommodation required for an employee's garlic and latex allergies, the employer had acted reasonably.]

See also: "About Multiple Chemical Sensitivity," Job Accommodation Network (JAN), online:

<https://askjan.org/disabilities/Multiple-Chemical-Sensitivity.cfm> [Editors' Note: This article, though referencing the *Americans with Disabilities Act*, is cited for its accommodation guidance.]

**4. What are best practices for communicating during the accommodation process? For example, how should employees and employers maintain communication about accommodation needs, which may change frequently, while respecting employee privacy? What role do unions play in such communications?**

- 4.1 Jeffrey Sack & Peter Neumann, *Unionized Workplaces in Canada: Labour Laws and Contract Clauses* (Toronto: Lancaster House, 2024, online), Confidentiality of Health Information (19.5.3)
- 4.2 Dr. Mike Condra & Meryl Zisman Gary, *Mental Health Disabilities at Work* (Toronto: Lancaster House, 2019),
- How, where, and when should you ask someone who appears to have a mental health disability if support and/or accommodation is needed? (3.4)
  - How should managers and union representatives engage with someone who is reluctant to discuss a possible mental illness or disability? (3.5)
  - What measures or practices should be in place at an organizational level to ensure successful accommodation planning and implementation? (4.7)
  - When is it appropriate for an employer to ask for an independent medical examination (IME)? (6.6)
- 4.3 Mort Mitchnick & Brian Etherington, *Leading Cases on Labour Arbitration, 2nd ed.* (Toronto: Lancaster House, 2024, online), Accommodation of Disabilities – The Employee's Duty (15.3.5)
- 4.4 "Medical absence report form seeking diagnosis and consent to communicate with health care providers is unreasonable and violates *PHIPA*, arbitrator rules," *Society of United Professionals v. Inergi LP*, 2020 CanLII 36047 (ON LA), Lancaster's *Disability & Accommodation*, eAlert No. 290 [*Editors' Note*: An Ontario arbitrator found it unreasonable that the employer sought employees' diagnoses at first instance for a medical absence report form.]

See also Document 2.2: Mort Mitchnick & Brian Etherington, *Leading Cases on Labour Arbitration, 2nd ed.* (Toronto: Lancaster House, 2024, online), Employer's Entitlement To Proof Of Illness (24.2.3)

See also: Benjamin Laker, "The Invisible Challenge: Making Workplaces Welcoming For All Abilities," *Forbes*, February 5, 2024, online:

<https://www.forbes.com/sites/benjaminlaker/2024/02/05/the-invisible-challenge-making-workplaces-welcoming-for-all-abilities/>

See also: Meghan Payment, "Navigating innocent absenteeism of ill employees or employees with disabilities: The employer's right to request medical documentation limited by privacy laws," Fillmore Riley LLP, December 7, 2022, online:

<https://www.fillmoreriley.com/publication/navigating-innocent-absenteeism-of-sick-or-employees-with-disabilities-the-employer-s-right-to-request-medical-documentation-limited-by-privacy-laws>

See also: "Older workers not prone to ask for employer support, citing ageism and other issues," *Plain-language summaries*, Institute for Work & Health, November 7, 2022, online:

<https://www.iwh.on.ca/newsletters/at-work/110/older-workers-not-prone-to-ask-for-employer-support-citing-ageism-and-other-issues>

See also: *Unifor Local 1115 v. Cariboo Pulp & Paper Company*, 2022 CanLII 3222 (BC LA), online: <https://canlii.ca/t/jlxn7> [Editors' Note: A B.C. arbitrator ruled that an employer's request that an employee undergo an IME by an addiction specialist, after an initial cognitive assessment revealed a history of frequent alcohol and cannabis use, was reasonable.]

See also: "Personal Information Retention and Disposal: Principles and Best Practices," Office of the Privacy Commissioner of Canada, August 13, 2021, online:

[https://www.priv.gc.ca/en/privacy-topics/business-privacy/safeguards-and-breaches/safeguarding-personal-information/gd\\_rd\\_201406/](https://www.priv.gc.ca/en/privacy-topics/business-privacy/safeguards-and-breaches/safeguarding-personal-information/gd_rd_201406/)

See also: Monique Gignac et al., "Does it matter what your reasons are when deciding to disclose (or not disclose) a disability at work? The association of workers' approach and avoidance goals with perceived positive and negative workplace outcomes" (February 2021), 31 *Journal of Occupational Rehabilitation* 638–651, online:

<https://link.springer.com/article/10.1007/s10926-020-09956-1> [Editors' Note: A PDF copy is available for download at this link.]

See also: "People's reasons for disclosing episodic disabilities linked to support they receive," Institute for Work & Health, February 2, 2021, online: <https://www.iwh.on.ca/newsletters/at-work/103/peoples-reasons-for-disclosing-episodic-disability-linked-to-support-they-receive>

See also: Dwayne Van Eerd et al., "Online resources supporting workers with chronic episodic disabilities: an environmental scan" (December 2020), 14:2 *International Journal of Workplace Health Management* 129–148, online: [https://www.researchgate.net/profile/Julie-Bowring-2/publication/347674531\\_Online\\_resources\\_supporting\\_workers\\_with\\_chronic\\_episodic\\_disabilities\\_an\\_environmental\\_scan/links/6294e0fac660ab61f852a176/Online-resources-supporting-workers-with-chronic-episodic-disabilities-an-environmental-scan.pdf](https://www.researchgate.net/profile/Julie-Bowring-2/publication/347674531_Online_resources_supporting_workers_with_chronic_episodic_disabilities_an_environmental_scan/links/6294e0fac660ab61f852a176/Online-resources-supporting-workers-with-chronic-episodic-disabilities-an-environmental-scan.pdf) [Editors' Note: Clicking this link may download a PDF to your device.]

See also: Rachel Desjourdy, "Responding to Disclosures of Disability, Mental Health, and/or Chronic Illness," *Equity at McGill*, McGill University, September 14, 2020, online: <https://www.mcgill.ca/equity/article/responding-disclosures-disability-mental-health-and-or-chronic-illness>

See also: "Employer perspectives on communication challenges when supporting episodic disabilities," *Plain-language summaries*, Institute for Work & Health, September 2020, online: <https://www.iwh.on.ca/summaries/research-highlights/employer-perspectives-on-communication-challenges-when-supporting-episodic-disabilities>

See also: "Workplaces face many complex challenges when managing episodic disabilities: study," *Plain-language summaries*, Institute for Work & Health, August 11, 2020, online: <https://www.iwh.on.ca/newsletters/at-work/101/workplaces-face-many-complex-challenges-when-managing-episodic-disabilities-study>

See also: *Ontario Public Service Employees Union – Local 518 v. Interim Place*, 2020 CanLII 17782 (ON LA), online: <https://canlii.ca/t/j5q9j> [Editors' Note: The arbitrator found that the employee had failed to provide medical information sufficient to establish a mental disability, as she had refused to allow her doctor to disclose information about her symptoms and as the medical reports simply requested a particular form of accommodation without identifying her functional restrictions. See, in particular, paras. 239–255.]

See also: "Doctor's Notes: When Should An Employer Ask For One?," go2HR, 2020, online: <https://www.go2hr.ca/legal/doctors-notes-when-should-an-employer-ask-for-one>

See also: Chelsea Rasmussen, "Invisible Disabilities and the Duty to Accommodate," Dentons LLP, October 28, 2019, online: <https://www.dentons.com/en/pdf-pages/-/media/231d8264234f4d0e91ac6f3d781b1079.ashx> [Editors' Note: Clicking this link may download a PDF to your device.]

See also: "At-a-glance: ACED first-phase findings," *Accommodating and Communicating about Episodic Disabilities*, Institute for Work & Health, October 2019, online: <https://aced.iwh.on.ca/resources/glance-aced-first-phase-findings>

See also: Myrna El Fakhry Tuttle, "Privacy and Medical Information in the Workplace," *LawNow*, Legal Resource Centre of Alberta, March 5, 2019, online: <https://www.lawnow.org/privacy-and-medical-information-in-the-workplace/>

See also: "Episodic Disability Toolkit of Resources," Episodic Disabilities Network, January 2015, online: <https://episodicdisabilities.ca/docs/EpisodicDisabilityToolkitofResourcesFinal.pdf> [Editors' Note: Clicking this link may download a PDF to your device.]

## 5. When have adjudicators found that employers or unions have successfully accommodated or failed to accommodate employees with hidden or episodic disabilities?

- 5.1 "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 & Accommodation*, eAlert No. 304
- 5.2 "Arbitrator orders reinstatement of employee unjustly dismissed during prolonged mental-health-related absence," *Professional Institute of the Public Service of Canada v. Canadian Museum of History*, 2022 CanLII 37248 (CA LA), Lancaster's *Disability & Accommodation*, eAlert No. 305 [*Editors' Note*: See, in particular, paras. 251–258 and 276–282 of the decision, where the arbitrator discussed the sufficiency of the information provided and the weight to be placed on the employee's self-reported symptoms: <https://canlii.ca/t/jp494>.]
- 5.3 "City's limited efforts to contact employee with a disability prior to dismissal breached duty to accommodate, despite employee's lack of cooperation, arbitrator rules," *Ottawa-Carleton Public Employees Union, Local 503 v. City of Ottawa*, 2019 CanLII 103859 (ON LA), Lancaster's *Disability & Accommodation*, eAlert No. 286
- 5.4 "Employer's failure to reassess applicant's performance in light of new information about her disability was discriminatory, board rules," *CN v. Deputy Minister of Employment and Social Development*, 2019 FPSLRB 9 (CanLII), Lancaster's *Public Service and Crown Agency Employment Law*, eAlert No. 146

See also: *Rodgers v. Lowest Rates Inc.*, 2023 HRTO 468 (CanLII), online: <https://canlii.ca/t/jwgqv> [*Editors' Note*: The applicant alleged that his employment had been terminated because he suffered from depression and post-concussion syndrome. The Ontario Human Rights Tribunal reiterated that an employee is not required to provide the employer with a precise diagnosis, but ultimately found that the employer had not discriminated against the employee. See, in particular, paras. 51–52.]

See also: *Tartal v. Starbucks Coffee Canada Inc.*, 2022 AHRC 102 (CanLII), online: <https://canlii.ca/t/js4ms> [*Editors' Note*: Decision to dismiss employee overturned and matter referred to the Chief of the Commission and Tribunals to address the complaint when a Starbucks barista was dismissed for failure to accommodate her inability to wear a mask for medical reasons. Specifically addressed was that there was no evidence the employer explored alternate work duties or undue hardship. The director erred in exercising discretion to dismiss without a hearing.]

See also: *Moveup – Canadian Office and Professional Employees' Union, Local 378 v. FortisBC Energy Inc.*, 2021 CanLII 141081 (BC LA), online: <https://canlii.ca/t/jm2tx> [Editors' Note: The arbitrator held that it was discriminatory for an employer to establish a requalification period for short-term sick leave benefits.]

See also: *International Union of Operating Engineers, Local 115 v. Inland Kenworth*, 2020 CanLII 89929 (BC LA), online: <https://canlii.ca/t/jbp90> [Editors' Note: A B.C. labour arbitrator ruled that the employer breached its duty to accommodate by failing to clarify medical information when refusing to return an employee to work.]

See also: *Unifor Local 890 v. Procon Miners (Esterhazy) Inc.*, 2020 CanLII 91869 (SK LA), online: <https://canlii.ca/t/jbrs9> [Editors' Note: A Saskatchewan arbitrator ruled that the employer failed in its duty to accommodate after misinterpreting medical records and delaying the grievor's return to work.]

See also: *Zellstoff Celgar Limited Partnership v. Public and Private Workers of Canada, Local 1*, 2020 CanLII 69343 (BC LA), online: <https://canlii.ca/t/j9rvj> [Editors' Note: A B.C. labour arbitrator ruled that the employer breached its duty to accommodate by failing to seek further medical information prior to transferring an employee with anxiety to a lower-paying position.]

See also: *Ontario Public Service Employees Union (Grievor) v. Ontario (Community Safety and Correctional Services)*, 2017 CanLII 52722 (ON GSB), online: <https://canlii.ca/t/h5cd9> and 2019 CanLII 12506 (ON GSB), online: <https://canlii.ca/t/hxnb0> [Editors' Note: In these decisions, an Ontario arbitrator ordered the employer to pay the employee \$35,000 as compensation for injury to dignity, finding that the medical evidence clearly indicated that the employee had anxiety-related conditions but that the employer unreasonably refused to accept her doctor's sick notes, denied her claim for sick pay, and harassed her by repeatedly asking her to provide further information and threatening dismissal.]

See also: *Canadian Union of Public Employees, Local 1623 v. Health Sciences North*, 2017 CanLII 10853 (ON LA), online: <https://canlii.ca/t/h0852> [Editors' Note: The arbitrator found it was discriminatory to require employees to use short-term sick leave benefits while at work on modified duties.]

## **6. How do disability-related stereotypes and stigmas play a role in complicating the accommodations process? What can employers and unions do to dismantle these stigmas and stereotypes and create an inclusive, barrier-free workplace?**

6.1 Dr. Mike Condra & Meryl Zisman Gary, *Mental Health Disabilities at Work* (Toronto: Lancaster House, 2019), How does the stigma attached to mental illnesses or disabilities affect the workplace? (1.16)

See also: Kelly Luc, "Disability in the workplace: Barriers to employment and retention," Culture Amp, August 21, 2024, online: <https://www.cultureamp.com/blog/disability-employment-barriers>

See also: "Mental Health – Recognizing and Addressing Stigma at Work," Canadian Centre for Occupational Health and Safety (CCOHS), May 10, 2024, online:

[https://www.ccohs.ca/oshanswers/psychosocial/mh/mentalhealth\\_stigma.html](https://www.ccohs.ca/oshanswers/psychosocial/mh/mentalhealth_stigma.html)

See also: "Research Report: Ableism in Canadian Workplaces," *Respect at Work*, Western University Centre for Research & Education on Violence Against Women & Children, May 2023, online:

[https://www.learningtoendabuse.ca/research/national\\_survey\\_on\\_harassment\\_and\\_violence\\_at\\_work\\_in\\_canada/pdf/230522\\_Ableism-in-Canadian-Workplaces-EN.pdf](https://www.learningtoendabuse.ca/research/national_survey_on_harassment_and_violence_at_work_in_canada/pdf/230522_Ableism-in-Canadian-Workplaces-EN.pdf) [Editors' Note: Clicking on this link may download a PDF to your device.]

See also: Ilija Dobre, "Overcoming Stigma in the Workplace – Inclusion for People with Disabilities," *Medium*, April 25, 2023, online: <https://medium.com/@ilija.dobre/overcoming-stigma-in-the-workplace-employers-inclusion-for-people-with-disabilities-4bc0296a87db>

See also: Jack Tillotson et al., "How to Make Workplaces More Inclusive For People with Invisible Disabilities," *Harvard Business Review*, April 4, 2023, online:

<https://hbr.org/2023/04/how-to-make-workplaces-more-inclusive-for-people-with-invisible-disabilities>

See also: Emily Mertz, "High levels of stigma experienced by COVID-19 long-haulers, Alberta research shows," *Global News*, January 16, 2023, online:

<https://globalnews.ca/news/9413659/covid-stigma-long-haulers-alberta-research/> [Editors' Note: For the study, see: Ronald Damant et al., "Reliability and validity of the post COVID-19 condition stigma questionnaire: a prospective cohort study" (January 2023), 55:101755 *eClinical Medicine*, online: <https://doi.org/10.1016/j.eclinm.2022.101755>.]

See also: Katie Bishop, "The workers keeping their disabilities secret," *BBC News*, November 2, 2021, online: <https://www.bbc.com/worklife/article/20211101-the-workers-keeping-their-disabilities-secret>

See also: K. Mukhida, W. Carroll, & R. Arseneault, "Does work Have to be so painful? A review of the literature examining the effects of fibromyalgia on the working experience from the patient perspective" (December 2020), 4:1 *Canadian Journal of Pain* 268–286, online:

<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7951172/> [Editors' Note: See "Results."]

See also: Robert Muller, "Individuals With Fibromyalgia Face Barriers and Stigmas," *The Trauma & Mental Health Report*, York University, September 20, 2019, online:

<https://trauma.blog.yorku.ca/2019/09/individuals-with-fibromyalgia-face-barriers-and-stigmas/>

See also: Roger Collier, "'Complainers, malingerers and drug-seekers' — the stigma of living with chronic pain" (February 2018), 190:7 *Canadian Medical Association Journal* E204–E205, online: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5828897/>

See also: "Disability Discrimination at Work," *Declaration on Fundamental Principles and Rights at Work*, International Labour Organization, <https://www.ilo.org/media/325506/download> [Editors' Note: Clicking this link may download a PDF to your device.]

See also: "Mental Health, Stigma, and the Workplace," *CAMH News & Stories*, Centre for Addiction and Mental Health (CAMH), online: <https://www.camh.ca/en/camh-news-and-stories/mental-health-stigma-and-the-workplace>

## **7. What steps must unions take to assist in accommodation and satisfy their duty of fair representation of members with hidden or episodic disabilities?**

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

- Scope of the Duty: General (9.1)
- The Impact Of Human Rights Legislation (9.3)
- Accommodation Of Disabilities – The Union's Duty (15.3.7)

See also Document 5.2: "Arbitrator orders reinstatement of employee unjustly dismissed during prolonged mental-health-related absence," *Professional Institute of the Public Service of Canada v. Canadian Museum of History*, 2022 CanLII 37248 (CA LA), Lancaster's *Disability & Accommodation*, eAlert No. 305 [Editors' Note: See paragraph 257 of the original case at <https://canlii.ca/t/jp494>, in which the arbitrator faulted union representatives for not having facilitated the communication of medical information between the grievor's doctor and the employer, commenting that instead the representatives instead "engaged in an email war that was not productive."]

See also: "Union support for accommodation," *Workplace Strategies for Mental Health*, Canada Life, January 1, 2016 (reviewed September 30, 2024), online: <https://www.workplacestrategiesformentalhealth.com/managing-workplace-issues/union-support>

See also: "Doing Things Differently: A Disability Rights at Work Handbook," Canadian Labour Congress, March 2021, online: <https://psacnorth.com/wp-content/uploads/2021/06/DisabilityGuide-LR-2021-05-24-EN.pdf> [Editors' Note: Clicking this link may download a PDF to your device.]

See also: *Lam v. University of Calgary*, 2019 ABQB 923 (CanLII), online: <https://canlii.ca/t/j3rk2> [Editors' Note: The Alberta Court of Queen's Bench found that the union did not breach its duty of fair representation by withdrawing discipline and termination grievances following a lack of cooperation from the employee. Subsequent attempts to appeal this decision were unsuccessful, see: 2021 ABCA 367 (CanLII), online: <https://canlii.ca/t/jk7mz>.]

See also: *Gary Wiebe v. Unifor Canada Local 504*, 2019 CanLII 108854 (ON LRB), online: <https://canlii.ca/t/j3f4b> [Editors' Note: The Ontario Labour Relations Board found that that union did not breach its duty of fair representation because: the union turned its mind to the applicant's mental state before his employment was terminated; the union's decision to not allow the applicant's father to represent him was not in bad faith; and the union made a reasonable decision not to pursue the applicant's grievance when it did not receive requested medical information from the applicant.]

See also: "What is the duty to accommodate?," Canadian Union of Public Employees (CUPE), August 22, 2018, online: <https://cupe.ca/what-duty-accommodate-0>

See also: *Telus Communications Inc. v. Telecommunications Workers' Union*, 2017 BCCA 100 (CanLII), online: <https://canlii.ca/t/gxrk5> [Editors' Note: The B.C. Court of Appeal held that unions do not have an automatic right to notice, information, and consultation in all accommodation cases.]

See also: "Pocket Guide on the Duty to Accommodate," The Professional Institute of the Public Service of Canada (PIPSC), online: <https://pipsc.ca/labour-relations/stewards/pocket-guides/pocket-guide-duty-to-accommodate>

## **Panel 4 - Is it Harassment? Or Isn't It?**

### **An interactive panel seeks answers from actual case studies**

December 13, 2024, 2:50 p.m. – 4:00 p.m. ET

#### **Panelists**

**Nana Yanful**, Lawyer and Workplace Investigator, Yanful Law

**Bonny Mak**, Employer Counsel, Fasken Martineau DuMoulin LLP

**Tyler Boggs**, Union Counsel, Cavalluzzo LLP

In many instances conduct or comments will clearly meet the definition of harassment. However, in other cases debate may arise as to whether the alleged harasser knew or ought reasonably to have known that their behaviour was unwelcome, offensive, or harmful. In this session, panelists will examine the degree to which reasonable minds may disagree about whether comments or conduct constitute harassment, probe the reasons behind such disagreements, and address issues such as:

- 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 personal characteristics – gender and race, for example – play in determining whether certain conduct should reasonably be seen to be offensive?
- Does workplace culture play any role in determining whether conduct or comments amount to harassment?
- Is the analysis of whether conduct constitutes harassment affected by the existence of a friendship or previous romantic relationship between the complainant and respondent? What about power imbalances or lack thereof?
- How is the reasonableness of management's response assessed by arbitrators?

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See also: *Work Place Harassment and Violence Prevention Regulations*, S.O.R./2020-130, online: <https://canlii.ca/t/5554v>

See also: "Work Place Harassment and Violence Prevention (HVP) – 943-1-IPG-104," Employment and Social Development Canada, Government of Canada, modified January 27, 2023, online: <https://www.canada.ca/en/employment-social-development/programs/laws-regulations/labour/interpretations-policies/104-harassment-violence-prevention.html>

## ii. Ontario

See: *Human Rights Code*, R.S.O. 1990, c. H.19, online: <https://canlii.ca/t/568d6> [Editors' Note: See the definition of "harassment" in s.10(1). See also s.5(2) and 7.]

See also: "2. Identifying sexual harassment," *Policy on preventing sexual and gender-based harassment*, Ontario Human Rights Commission, January 27, 2011 (updated May 2013), online: <https://www.ohrc.on.ca/en/policy-preventing-sexual-and-gender-based-harassment/2-identifying-sexual-harassment>

See also: *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1, online: <https://canlii.ca/t/2km> [Editors' Note: See the definitions of "workplace harassment" and "workplace sexual harassment" in s.1(1). See also s.1(4). See also s.32.0.1, 32.0.6-32.0.8, 55.1 and 55.3.]

See also: "Part III.0.1: Workplace violence and workplace harassment," *Guide to the Occupational Health and Safety Act*, Ministry of Labour, Immigration, Training and Skills Development, Government of Ontario, March 14, 2017 (updated January 4, 2024), online: <https://www.ontario.ca/document/guide-occupational-health-and-safety-act/part-iii0i-workplace-violence-and-workplace-harassment>

### 3. Should a complainant's subjective feelings of humiliation or offence be determinative of whether certain conduct constitutes harassment? If not, why not?

3.1 "Award reinstating workers dismissed for workplace harassment was unreasonable, court holds," *Metrolinx v. Amalgamated Transit Union, Local 1587*, 2024 ONSC 1900 (CanLII), Lancaster's *Labour Arbitration*, eAlert No. 341 [Editors' Note: Leave to appeal to the Court of Appeal has reportedly been sought, with no decision yet reported: 2024 CanLII 83882 (ON GSB), online: <https://canlii.ca/t/k6npg>.]

3.2 "No evidence to support grievor's view that she was subjected to discrimination and harassment at work, arbitrator finds," *Canadian Union of Labour Employees v. Public Service Alliance of Canada*, 2021 CanLII 101144 (ON LA), Lancaster's *Human Rights in Employment*, eAlert No. 364

- 3.3 "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

See also: *Canadian Union of Public Employees, Local 79 v. Toronto (City)*, 2022 CanLII 49308 (ON LA), online: <https://canlii.ca/t/jppqt> [Editors' Note: In this decision, allowing a discharge grievance in part, an Ontario arbitrator held that, although an inappropriate and threatening comment made by a municipal bylaw officer to two Black women who were improperly using a public park during the COVID-19 pandemic warranted discipline, discharge was excessive as the evidence did not support the allegation that the comment and subsequent request for identification were solely directed at them and therefore due to their race as they believed. The city had argued that the grievor's comments were harassing and racially motivated in violation of the city's Human Rights and Anti-Harassment/Discrimination Policy, the Ontario *Human Rights Code*, and the city's Public Service By-Law.]

See also: *The Employee v. The University and another (No. 2)*, 2020 BCHRT 12 (CanLII), online: <https://canlii.ca/t/j4z56> [Editors' Note: In this decision, the B.C. Human Rights Tribunal ruled that a university professor did not sexually harass an assistant, whom he worked closely with, when he told her that he was "crazy about her." Accepting that the professor's comment was unwelcome conduct of a sexual nature that caused the employee a great deal of distress, the Tribunal nonetheless found that the comment was not especially egregious and was an isolated incident that the professor immediately and repeatedly apologized for. In reaching this conclusion, the Tribunal noted that "[s]ubjective feelings are not enough to prove that harassment has occurred."]

**4. What role does a complainant's personal characteristics — gender and race, for example — play in determining whether certain conduct should reasonably be seen to be offensive? How might a decision-maker's unconscious bias interfere in the analysis of whether conduct might reasonably be seen to be unwelcome?**

- 4.1 "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 *Human Rights in Employment*, eAlert No. 387
- 4.2 "Human rights tribunal awards damages for harassment and discrimination to Iranian-born truck driver," *Abadi v. TST Overland Express*, 2023 CHRT 30 (CanLII), Lancaster's *Human Rights in Employment*, eAlert No. 387
- 4.3 "'Subtle' yet 'implicitly gendered' acts by coworker constituted sex-based discrimination and harassment of employee, for which employer could not escape liability, Tribunal

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- 4.4 "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
- 4.5 "Dismissal too harsh for long-service employee who made racist comment to Métis co-worker, arbitrator rules," *Power Workers' Union v. Ontario Power Generation*, 2023 CanLII 30400 (ON LA), Lancaster's *Discharge and Discipline*, eAlert No. 303
- 4.6 "Employer's decision to dismiss Black construction worker was 'tainted' by unconscious bias and therefore discriminatory, Ontario Labour Relations Board finds," *Labourers' International Union of North America, Local 183 v. CTS (ASDE) Inc.*, 2022 CanLII 14925 (ON LRB), Lancaster's *Human Rights in Employment*, eAlert No. 368 [*Editors' Note*: A request for reconsideration was denied: 2022 CanLII 35895 (ON LRB), online: <https://canlii.ca/t/jp206>.]
- 4.7 "Tribunal awards employee \$5,000 for employer's failure to conduct a reasonable investigation into harassment complaint," *McDonald v. CAA South Central Ontario*, 2018 HRTO 163 (CanLII), Lancaster's *Human Rights in Employment*, eAlert No. 322 [*Editors' Note*: A request for reconsideration was denied: 2018 HRTO 678 (CanLII), online: <https://canlii.ca/t/hs4kx>.]

See also Document 3.1: "Award reinstating workers dismissed for workplace harassment was unreasonable, court holds," *Metrolinx v. Amalgamated Transit Union, Local 1587*, 2024 ONSC 1900 (CanLII), Lancaster's *Labour Arbitration*, eAlert No. 341

See also: *The Employee v. The University and another (No. 2)*, 2020 BCHRT 12 (CanLII), online: <https://canlii.ca/t/j4z56> [*Editors' Note*: See the editors' note for this decision on page 586.]

See also: *Oliva, Pascoe, and Strong v. Gursoy*, 2024 AHRC 45 (CanLII), online: <https://canlii.ca/t/k3cjt> [*Editors' Note*: In this decision, allowing three complaints filed by former employees alleging that their employer sexually harassed them, the Alberta Human Rights Tribunal held that the owner had subjected all three to sexual harassment, amounting to gender-based discrimination; one complainant to discrimination on the basis of physical disability; and two complainants to retaliation. The Tribunal was critical of the perpetrator's attempt to argue that his conduct was not unwelcome as one of the employees had not taken any "action," observing that this was "nothing more than speculation based on outdated stereotypes about what the victim of sexual harassment 'should' or 'would' do."]

See also *CM v. Jaco Line Contractors Ltd.*, 2022 AHRC 115 (CanLII), online: <https://canlii.ca/t/jsdj0> [Editors' Note: In this decision, the Alberta Human Rights Tribunal awarded lost wages and damages for injury to dignity to an employee who was fired after she was sexually harassed by the company's owner and complained about his conduct. In so doing, the Tribunal rejected the perpetrator's argument that the owner's testimony was not credible because of her actions after the incident, agreeing with the characterization of this submission as "rife with stereotypical assumptions and myths about victims of sexual harassment and sexual assault." A request for reconsideration was denied: 2023 AHRC 2 (CanLII), online: <https://canlii.ca/t/jtszl>.]

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: In this decision, an Alberta arbitrator held that an employer had just cause to dismiss an employee who had persistently sexually harassed female support staff members working in his department. The arbitrator declined to consider the complainants' failure to file a formal complaint to impact their credibility, accepting that their unwillingness was due to their perception that the grievor had authority over them, opining that, as an instructor, the grievor was in a "*de facto* position of authority" that "was enhanced by his ... title, corner office and scheduling powers. He was perceived as having influence and authority by the complainants, and ... [in] fact ... he did."]

See also: *United Food and Commercial Workers Union, Local 175 v. Copper River Inn and Conference Centre*, 2021 ONSC 5058 (CanLII), online: <https://canlii.ca/t/jh239> [Editors' Note: In this decision, allowing an application for judicial review, the Ontario Divisional Court overturned an arbitrator's award of nominal damages of \$1,000 to an employee for the employer's failure to investigate a possible incident of workplace sexual assault. The Court held that the arbitrator's decision was unreasonable for a number of reasons, including that he had misapprehended the evidence and relied on stereotypical assumptions, including in his determination that the employee had not suffered mental distress and his undue emphasis on their failure to lodge a formal complaint.]

## **5. Does workplace culture play any role in determining whether conduct or comments amount to harassment?**

5.1 "Arbitrator orders reinstatement of employee who engaged in egregious harassment, given sincere remorse and that such conduct was rampant and unchecked in the workplace," *Ontario Provincial Police Association v. Ontario Provincial Police*, 2022 CanLII 50619 (ON LA), Lancaster's *Human Rights in Employment*, eAlert No. 371

See also Document 3.3: "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

See also Document 4.2: "'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 Document 4.4: "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

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: See the editors' note for this decision on page 588.]

See also: *United Steelworkers, Local 7916 v. Nutrien Ltd.*, 2019 CanLII 127840 (SK LA), online: <https://canlii.ca/t/j4skc> [Editors' Note: In this decision, a Saskatchewan arbitrator upheld the dismissal of a mine employee who was fired for bullying and harassing a co-worker for many months. In reaching this conclusion, the arbitrator determined that the employee had engaged in a pattern of deliberate conduct that he ought to have known was unacceptable; that he had not shown remorse for his actions, which had deeply affected the bullied employee; and that his long-service was a double-edged sword, since over the years he had received extensive training on workplace harassment. Considering factors relevant to penalty, the arbitrator rejected the union's contention that the mine was a "rougher" workplace where people "do these things," noting that "even in industrial workplaces, bullying and harassment are no longer acceptable, if they ever were," and stating that, in any event, the grievor's conduct was not only "far outside the 'usual'" but that the "nature of the acts themselves suggest malicious intent."]

See also: *USW, Local 9346 v. Teck Coal Limited*, 2018 CanLII 69596 (BC LA), online: <https://canlii.ca/t/ht770> [Editors' Note: In this decision, a British Columbia arbitrator upheld the discharge of an employee for harassment, intimidation, and bullying of fellow employees, considering the employee's failure to improve his behaviour despite several corrective disciplinary measures to indicate that the employment relationship was no longer viable. In determining whether dismissal was warranted, arbitrator rejected the argument that the type of comments made by the employee were part of the workplace culture, holding that there is a basic workplace expectation that employees should not have to "accept harassment and bullying as the price of their employment."]

See also: *Workers United Canada Council v. Levi Strauss & Co.*, 2020 CanLII 44271 (ON LA), online: <https://canlii.ca/t/j8jvr> [Editors' Note: In this decision, an Ontario arbitrator upheld the discharge of an employee who directed multiple racial slurs at a Black co-worker. Finding that

the use of demeaning racial or ethnic slurs fell within the category of serious workplace offences that *prima facie* justifies terminating the employment relationship, the arbitrator held that the employee's actions constituted very serious misconduct for which dismissal was within the range of reasonable disciplinary responses. The arbitrator, in considering whether the conduct constituted "shop talk" attracting a penalty at the "lower end of the scale," the arbitrator noted that "racially demeaning language and racial slurs can never be excused as mere 'shoptalk' or as having a lesser import when not directed at anyone in particular."]

See also: *PB v. Talbot Arm Motel Ltd.*, 2018 CanLII 153095 (YK HRC), online:

<https://canlii.ca/t/jdx8x> [Editors' Note: In this decision, the Yukon Human Rights Board of Adjudication ordered a motel and its co-owners to pay \$5,000 in compensation to an employee as a result of a co-owner's sexual harassment, consisting of repeated attempts to pull down the male employee's pants. Determining that the conduct was unwelcome and was a sexually-oriented practice that created a negative work environment for the employee, the Board held the motel and perpetrator were jointly and severally liable for \$5,000 in general damages. In reaching this conclusion, the Board noted that although "there was evidence of bantering and horseplay taking place in the workplace" and thus that it was possible the co-owner "did not know or did not fully appreciate that his conduct was unwelcome... he certainly *ought to have known*" as "a reasonable person in [the co-owner's] place would know that his conduct in this regard was unwelcome."]

**6. Is the analysis of whether conduct constitutes harassment affected by a friendship or previous romantic relationship between the complainant and the respondent? What about power imbalances or lack thereof?**

- 6.1 "In its highest award to date, Alberta Human Rights Tribunal awards complainant \$50,000 in general damages for workplace sexual harassment," *TY v. Emerson Electric Canada Ltd.*, 2022 AHRC 62 (CanLII), Lancaster's *Human Rights in Employment*, eAlert No. 368
- 6.2 "Employee's undisclosed workplace relationship with subordinate provided just cause for dismissal, arbitrator rules," *International Brotherhood of Electrical Workers, 258 v. British Columbia Hydro and Power Authority*, 2020 CanLII 76271 (BC LA), Lancaster's *Discharge and Discipline*, eAlert No. 288
- 6.3 "Human rights tribunal awards \$15,000 for injury to dignity to worker who was made to feel unwelcome in the workplace by jealous boss," *LL v. DM and The Company*, 2020 BCHRT 129 (CanLII), Lancaster's *Gender, Equity and Work-Life Balance*, eAlert No. 152
- 6.4 "Discharge appropriate for employee who showed photo of his genitals to female supervisor, arbitrator rules," *Canadian Union of Public Employees, Local 37 v. The Corporation of the City of Calgary*, 2019 CanLII 51778 (AB GAA), Lancaster's *Discharge and Discipline*, eAlert No. 260

6.5 "Letter carrier's conduct toward customer was inappropriate but not sexual harassment, arbitrator holds, substituting a one-month suspension for discharge," *Canadian Union of Postal Workers v. Canada Post Corporation*, 2019 CanLII 131168 (CA LA), Lancaster's *Discharge and Discipline*, eAlert No. 284

See also Document 3.2: "No evidence to support grievor's view that she was subjected to discrimination and harassment at work, arbitrator finds," *Canadian Union of Labour Employees v. Public Service Alliance of Canada*, 2021 CanLII 101144 (ON LA), Lancaster's *Human Rights in Employment*, eAlert No. 364

See also: *The Employee v. The University and another (No. 2)*, 2020 BCHRT 12 (CanLII), online: <https://canlii.ca/t/j4z56> [Editors' Note: See the editors' note for this decision on page 586.]

See also: *CM v. Jaco Line Contractors Ltd.*, 2022 AHRC 115 (CanLII), online: <https://canlii.ca/t/jsdj0> [Editors' Note: See the editors' note for this decision on page 588.]

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: See the editors' note for this decision on page 588.]

See also: *PB v. Talbot Arm Motel Ltd.*, 2018 CanLII 153095 (YK HRC), online: <https://canlii.ca/t/jdx8x> [Editors' Note: See the editors' note for this decision on page 590.]

See also: *Lemay v. Canada (Attorney General)*, 2019 FC 608 (CanLII), online: <https://canlii.ca/t/j065w> [Editors' Note: In this decision, a Federal Court judge dismissed an application for judicial review of an adjudicator's ruling that a Royal Canadian Mounted Police (RCMP) officer committed harassment in violation of the RCMP Code of Conduct when he gave a subordinate employee a week of "silent treatment" after she allegedly disregarding his instructions not to discuss an incident. Finding that there was no procedural unfairness and that the evidence before the adjudicator showed a distinct change in the nature of the conversations between the officer and the complainant, the judge held that it was reasonable for the adjudicator to find that the lack of communication by the officer as to why he was angry, after the subordinate employee had indicated that his actions were upsetting her, constituted harassment.]

## **7. How is the reasonableness of management action assessed by arbitrators?**

7.1 "Arbitrator partially sustains wrongful termination grievance given employer's failure to address harassment by co-workers and failure to establish accommodation of disability," *Alberta Union of Provincial Employees v. Alberta Health Services*, 2022 CanLII 19200 (AB GAA), Lancaster's *Disability and Accommodation*, eAlert No. 305

7.2 "Principal's inappropriate classroom interruption was not harassment or discipline, arbitrator rules," *Ontario English Catholic Teachers' Association v. Kenora Catholic*

*District School Board*, 2021 CanLII 3247 (ON LA), *Lancaster's Education Employment Law*, eAlert No. 143

See also Document 3.2: "No evidence to support grievor's view that she was subjected to discrimination and harassment at work, arbitrator finds," *Canadian Union of Labour Employees v. Public Service Alliance of Canada*, 2021 CanLII 101144 (ON LA), *Lancaster's Human Rights in Employment*, eAlert No. 364

See also: *Lemay v. Canada (Attorney General)*, 2019 FC 608 (CanLII), online: <https://canlii.ca/t/j065w> [Editors' Note: See the editors' note for this decision on page 591.]

See also: *Lewis v. Canada (Attorney General)*, 2021 FC 1385 (CanLII), online: <https://canlii.ca/t/jl85k> [Editors' Note: In this decision, the Federal Court dismissed an application for judicial review of a decision of the RCMP Conduct Appeal Adjudicator (CAA), which upheld a finding by a conduct officer (CO) that an RCMP officer engaged in harassment when he yelled at an officer under his supervision for disobeying his order, holding that it was not unreasonable for the CO to have determined that the single incident was sufficiently serious to amount to harassment. The Federal Court of Appeal dismissed an appeal of this decision, and the Supreme Court of Canada refused leave to appeal. See: 2023 FCA 15 (CanLII), online: <https://canlii.ca/t/jv26k> and 2023 CanLII 80888 (SCC), online: <https://canlii.ca/t/k00hj>.]

See also: *Ontario Public Service Employees Union v. Fanshawe College of Applied Arts and Technology*, 2016 CanLII 23226 (ON LA), online: <https://canlii.ca/t/gpq39> [Editors' Note: In this decision, an Ontario arbitrator dismissed a grievance brought by an administrative assistant alleging that she was bullied and harassed by her manager, ruling that the manager's behaviour could not be interpreted as harassment. While the arbitrator recognized that the work environment was hectic and stressful, and that the manager's management style was intense and demanding, he held that the manager's conduct, viewed objectively, was not egregious enough to constitute unreasonable conduct and further, that the specific incidents of alleged harassment were the kind that most employees would have simply "tended to shrug them off."]

# Toronto Labour Arbitration and Policy Conference

Friday, December 13, 2024



LancasterHouse

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## Interactive Scenarios

[*Editors' Note:* The following interactive scenarios are based on real cases but details have been altered or omitted. The scenarios are not intended to serve as case summaries.]

### Scenario #1: The Frontline Supervisor and the Temporary Employee

KR was acting as the frontline supervisor for another employee, JH, with whom she had been acquainted for several years. Both employees were members of the same bargaining unit and subject to a collective agreement.

In a conversation between the two women in the cafeteria, JH disclosed that she was a citizen of the Métis Nation of Ontario. During the same conversation, commenting on a company project that was not going ahead because the local Indigenous community had voted against it, KR stated that the project should "never have been allowed to be decided by a binding vote" and that the power company had "spent a lot of money courting the Métis Nation for the ... project." JH responded by agreeing that there were a lot of internal politics in Métis Councils. She did not tell KR that anything in the conversation had offended or upset her, but she was, in fact, offended.

Later, KR stated, "Why don't we get a white history month?" in response to a TV commercial regarding Black History Month while in the cafeteria in the presence of JH and other employees. A couple days later, KR made the same comment in response to the same commercial but followed her comment with the statement, "I'm not prejudiced," while looking at JH.

#### 1. Did KR's comments constitute harassment?

## Scenario #2: The Principal and the Teacher

DD, a Northern Studies teacher who travelled from school to school teaching his subject, was assigned to teach a Grade 5/6 split class. DD was teaching a lesson for only the Grade 5 students. The Grade 6 students were seated at a table at the back of the room doing a math assignment with two education assistants. An occasional teacher was replacing the regular class teacher that day. Prior to his lesson, DD instructed some of the Grade 5 students who were still filling out a worksheet to continue with their work while he delivered the lesson.

While DD was delivering the lesson, the school principal, MF, entered the classroom unannounced and sat at the front of the room. Shortly thereafter, MF stood up and asked to speak with DD outside, interrupting his lesson. DD claimed that during this conversation, which was held with the door open, MF asked what he was trying to teach because a group of students were sitting at the back and not paying attention to him. DD said that he informed her that the Grade 6 students were not part of the lesson.

They returned to the classroom. Within a few minutes, MF loudly told the students to put their pencils down and to listen to the teacher. After she left, the students appeared to be confused, as these instructions were contrary to DD's.

DD filed a harassment complaint. Subsequently, MF explained to DD that she had visited his classroom in a "supportive role" because the class had a reputation for being disrespectful to occasional staff. She claimed that she had called him outside to provide coaching, not discipline, and stated that she was sorry if he had interpreted her behaviour as discipline or harassment.

### 1. Did MF's conduct constitute harassment?

## Scenario #3: The Rail Employees

JY worked for a federal railway company as a locomotive attendant. It was a historically male-dominated work environment.

JY alleged that she experienced several inappropriate encounters with another locomotive attendant: her male co-worker, KS. Among these incidents, JY alleged that KS:

- Raised his voice and swore at her when she asked him to move out of a cab while she was conducting a train movement;
- Monitored and watched her while she performed her duties;
- Spoke to her in a demeaning and unprofessional manner about how she should conduct a train manoeuvre;
- Complained about her radio voice not being loud enough for him to hear;
- Ignored her communications and insisted that she communicate with him only via radio;
- Insisted upon leaving an engine cab door open during winter on two occasions, despite JY's objections, and then commented to a supervisor that JY needed to dress more appropriately for the weather;
- Instructed JY to move a train and then admonished her over the radio when she did so; and
- Pulled his vehicle up directly behind her and refused to move away on one occasion when she was required to bend over in order to align a coupling between two train cars.

JY lodged complaints with the employer regarding KS' conduct. Eventually, she filed a human rights complaint.

At the hearing, some witnesses testified that KS behaved more aggressively toward women who disagreed with him than he did men, while other witnesses denied this or testified that they had not observed that behaviour.

**1. Did JY's conduct constitute harassment?**

**2. Did JY's conduct constitute sexual harassment?**