CONTRACT INTERPRETATION MANUAL

Article 31 NON-DISCRIMINATION

Interpretation Guidelines

The Supreme Court of Canada decision, Parry Sound (District) Social Services Administration Board v OPSEU, Local 324 (2003) has been interpreted as meaning that "all employment and human rights statutes are incorporated into every collective bargaining agreement". Even if the PCA does not contain specific provisions addressing the protected grounds set out in the Provincial and Federal legislation on human rights, any issue of discrimination can be grieved and dealt with by the arbitration process.

Arbitrators are now required to interpret and apply human rights statutes as part of their role interpreting the PCA.

There is also an increased onus on both Unions and Employers to ensure that the PCA does not contain provisions that could be considered as having a discriminatory effect on any of the groups covered by Human Rights statutes.

Provisions or policies that have been considered to be discriminatory are any of those that contain the application of an automatic penalty or attempt to impose an automatic or pre-determined outcome, for example:

1. Deemed termination clauses
    (a) Clauses that deem an employee who is absent for over two years, as a result of disability, as terminated, cannot be implemented unless the Employer can demonstrate they have made every effort to accommodate the employee.
2. Attendance management programs
    (a) Employers cannot apply an attendance management program in a lockstep fashion, instead Employers have to try to accommodate employees (Article 42, Appendix A and Ready consent award 2013).
3. Seniority
    (a) How seniority is accrued and used.
    (b) A clause limiting the accrual of seniority for people on LTD might be considered discriminatory.
4. Wage scales
    (a) Different pay rates could be seen as discriminatory if they negatively affect a group on a prohibited ground (e.g. age).
5. Work schedules
    (a) Typically the issue that gives rise to a discrimination complaints are the effect of the work schedule on religious minorities.
6. Last chance agreements
    (a) Those dealing with employees who have substance use disorder. Employers have a duty to accommodate all employees who fall under prohibited grounds.
7. Benefit plans
    (a) The primary issue in the past was the application of benefit plans to same sex relationships.

8. Severance plans
    (a) One issue is whether a group is being excluded on a prohibited ground (e.g. employees on LTD).

Discrimination

Discrimination on any of the following grounds is prohibited by the Human Rights Code and should be grieved and in addition, employees have the right to file a complaint with the Human Rights Tribunal:

1. race, colour, ancestry, place of origin
2. political belief
3. family status
4. religion
5. marital status
6. physical or mental disability
7. gender identity or expression
8. sex
9. sexual orientation
10. age
11. having been convicted of a criminal or conviction offence unrelated to employment

The prohibited grounds listed in the Human Rights Code are amended from time to time, as Human Rights law changes rapidly. Contact the BCNU office or the Human Rights Tribunal (www.bchrt.bc.ca).

Human Rights issues can either be addressed through the grievance procedure or by the Human Rights Tribunal. The Supreme Court of Canada ruled that where concurrent jurisdiction exists between a board of arbitration and a statutory tribunal (e.g. human rights tribunal). Close regard must be given to the essential nature of a dispute in order to determine which forum is a "better fit". Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General) (Morin) (2004).

Things to consider when deciding the appropriate forum for dealing with a dispute are:

1. The Human Rights Tribunal has sole authority to determine which cases to accept and reject. So, the first question is whether the Human Rights Tribunal will accept your case.
2. The grievance process is generally faster than the process under the Human Rights Tribunal.
3. Union members often have the benefit of experienced union counsel at an arbitration hearing versus having to retain their own counsel, or represent themselves, for a Human Rights Tribunal hearing.
4. The grievance procedure provides more control over getting the issue adjudicated.
5. The arbitrator now has all the remedial powers of a Tribunal.
6. However, the Human Rights Tribunal is preferable if seeking a remedy that is going to require the alteration or waiver of the provisions of the collective agreement.
7. The Human Rights Tribunal is preferable if seeking systemic remedies.

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Duty to Accommodate (DTA)

DTA matters affecting employees are addressed pursuant to the provisions of the Human Rights Code and the PCA.

Dealing with DTAs is the main activity of the Union in the areas covered by the Human Rights Code. The Supreme Court of Canada "Meiorin decision" dealt with the obligations of both the Employer and the Union in accommodations (BCGSEU and The Government of the Province of BC as represented by the Public Service Employee Relations Commission ("Meiorin"), September 9, 1999).

This decision increased the onus on Employers (and also Unions) to accommodate individual employee characteristics by raising the bar on the test of "undue hardship". The case addressed the "adverse effect" discrimination suffered by Tawny Meiorin who was required to achieve an aerobic test based on a masculine standard in order to become a firefighter.

Contact your LRO if there are questions regarding the DTA process or other accommodation issues such as accommodations related to family status or religion.

Sexual Harassment

Employers are required to act in the event of sexual harassment of an employee by any person including physicians, clients, etc.

Sexual harassment includes:

1. unwelcome sexual advances;
2. requests for sexual favours;
3. displaying offensive pictures or jokes in an unwelcome manner; and
4. other verbal or physical conduct of a sexual nature.

A finding of sexual harassment is not necessarily confined to supervisor and subordinate or male and female relationships.

Employers must have policies and procedures in place to ensure employees work in an environment free from sexual harassment. Such procedures must include a mechanism for investigating complaints.

See your Health Authority's Respectful Workplace Policy for information on reporting any workplace harassment.

Union Membership/Activity

In addition to the PCA, the Labour Relations Code Sections 5(1) (c), 6 (3) and 9 specifically prohibit Employers from discriminating against employees who are members of the Union, who propose to become or seek to induce another employee to become a member of the Union, or participates in Union activities.

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Personal Harassment

Personal harassment is not specifically identified in Article 31. Employers now have policies that set out a process to address harassment complaints and in many cases have designated a specific person to deal with these issues for the Health Authority. This issue can also be addressed through Article 2, which requires a "harmonious and mutually beneficial relationship between the Employer and employees".

Arbitrators typically try to either mediate harassment disputes or appoint an independent investigator to interview witnesses and provide a report.

Arbitration Awards

1. Cranbrook Regional Hospital and BCNU, June 21, 2004, (Gordon). Deals with the failure of the Employer to implement the Consent Award as set out in the above noted arbitration. Arbitrator ruled that the Employer had breached the terms and conditions of the previous award and makes it clear that "the Employer's obligations under the Agreement and Order were not mere priorities amenable to juggling with other priorities".
2. Interior Health Authority (Cranbrook Regional Hospital) and BCNU, September 5, 2004 (Moore). The previous arbitrator on this issue (Gordon) had declared she was unable to deal with some of the allegations, so an alternate arbitrator was appointed. This hearing dealt with preliminary issues that include production of documents and costs.
3. Interior Health Authority (East Kootenay Regional Hospital) and BCNU, September 17, 2004 (Moore). The Consent Award dealt with an alleged breach of the Gordon Consent Award by failing to provide a harassment free workplace.
4. Vancouver Island Health Authority (Cumberland Health Centre) and BCNU, March 1, 2005 & May 6, 2005 (Korbin). Deals with allegations of harassment by the Employer. The arbitrator set terms of reference, appointed an investigator and finally assisted the parties to resolve the matter on the basis of a mediated settlement.

Consent Awards

1. Cranbrook Regional Hospital and BCNU, October 15, 2002 (Gordon). Deals with allegations of harassment by physicians. The arbitrator assisted the parties to come to a mediated settlement that included the requirement that the Employer implement a harassment policy and code of conduct policy that made it clear harassment would not be tolerated and process for dealing harassment complaints that included an independent investigator within a defined period of time. The arbitrator issued a Consent Order November 23, 2002 that was subsequently filed in the BC Supreme Court on May 9, 2003.

Additional Resources

Legislation

1. Human Rights Code (www.ag.gov.bc.ca)
2. Labour Relations Code (www.lrb.bc.ca)
3. WorkSafe BC Respectful Workplace Policy (www.worksafebc.com)-

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Supreme Court of Canada Decisions

1. BCGSEU and The Government of the Province of BC as represented by the Public Service Employee Relations Commission ("Meiorin"), September 9, 1999. This decision increased the onus on Employers (and also Unions) to accommodate individual employee characteristics by raising the bar on the test of "undue hardship".
2. Parry Sound (District) Social Services Administration Board v OPSEU, Local 324 (2003). Ruled that whether or not the subject matter is addressed in the collective agreement5, an arbitrator has concurrent jurisdiction with the human rights tribunal to entertain claims alleging a breach of an employment-related statute. This decision has been interpreted to mean that all employment and human rights statutes are automatically incorporated into every collective agreement. In other words, whether the collective agreement contains specific language regarding issues covered by these statutes, or not, they are still considered by the courts to be grievable.
3. Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General) (Morin) (2004). Human rights issues can either be addressed through the grievance procedure or by the Human Rights Tribunal. The Supreme Court of Canada ruled that where concurrent jurisdiction exists between a board of arbitration and a statutory tribunal (e.g. human rights tribunal), close regard must be given to the essential nature of a dispute in order to determine which forum is a "better fit".

Footnotes

Article	31
Sub-Article	31.0
Last Update	31-03-21
Related Articles	1, 2, 3, 6, 32, 42, Appendix A, Appendix E, Appendix G