

# The Pandemic, Peeping Toms and Poisonous Workplaces: Current Issues in Employment and Labour Law

Presented By: Andrea Raso, Anne Amos-Stewart,  
Catherine Repel and Debbie Preston

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# TODAY'S TOPICS

❖	<b>COVID-19 Pandemic: A retrospective and prospective look at employment issues</b>
❖	<b>Technology and Surveillance</b>
❖	<b>Avoiding "Toxic" Workplaces</b>

# **COVID-19 Pandemic: A retrospective and prospective look at employment issues**

Andrea Raso, Partner

Debbie Preston, Associate

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# COVID-19 Pandemic: A retrospective and prospective look at employment issues

1. Pandemic: What can we do better?
  - a) How to implement layoffs
  - b) COVID-19 Leave of Absence, when it applies
  - c) Working from home
  - d) Employees who don't want to return to the office
2. Changes to Employment Law

# Pandemic: What can we do better?

## 1. How to Implement Layoffs

- Employees are considered laid off when they earn less than 50% of their weekly wages
- Employees are still considered to be employees, any benefits & entitlements are protected
- Employers can't temporarily layoff an employee unless they agree to layoff in advance

# Pandemic: What can we do better?

- **Layoff must be:**
  - Normal and expected in industry; or
  - Part of employment contract; or
  - Agreed to between employer and employee
- Every week an employee earns less than half regular wages counts as a week of layoff
- Layoff must not exceed maximum length
- Unless contractually agreed to in advance, a layoff is a **constructive dismissal**

# Pandemic: What can we do better?

## Recalling Employees:

- Employers must give reasonable notice when employees will be returned to work
- If employer makes substantial changes to employee's conditions of employment while laid off, may be considered constructive dismissal
- If employee refuses to return to work, may be considered quitting their job

# Pandemic: What can we do better?

## 2. When COVID-19 Leave of Absence Applies: Federal

**Federal gov't introduced up to 16 weeks of unpaid, job-protected leave under *Canada Labour Code* for federal employees unable to work due to Covid related reasons:**

- Employee has tested positive for Covid;
- Employee has symptoms of Covid and is required to isolate
- Employee or someone in their care are at high risk for severe illness from Covid
- An employee's family member has tested positive for Covid
- Employee has family-related caregiving responsibilities
- Employee is not equipped to work remotely, and worksite has not opened



# Pandemic: What can we do better?

## 2. When COVID-19 Leave of Absence Applies: Federal

**Employees must provide in writing:**

- Give notice of reason for leave;
- Intended length of leave;
- Any changes to length of leave.

# Pandemic: What can we do better?

## **Employers prohibited from following during job-protected leave:**

- Dismissing
- Suspending
- Laying off
- Demoting
- Disciplining

# Pandemic: What can we do better?

## **When COVID-19 Leave of Absence Applies: Provincial**

Amendments made March 23, 2020 introduced two new, unpaid, job-protected leaves

1. Sick leave
2. Covid-related leave

# Pandemic: What can we do better?

## Sick leave:

- Permanent, not Covid-related
- Employees with 90 or more days of employment
- Entitled up to 3 days unpaid leave each year
- For personal illness or injury

## Covid-related leave:

- Covid-specific, may be repealed once crisis passed

### Applies:

- Employee diagnosed with Covid;
- Employee is in quarantine or self-isolation
- Employer has directed employee not to work
- Employee providing care to eligible person [list]
- Employee cannot return to BC
- Any other prescribed situation (none to date)

# Pandemic: What can we do better?

## **Covid-related leave:**

- Duration of leave: For however long one or more of the circumstances applies
- Requesting proof: Employers can request reasonably sufficient proof from employee, cannot ask for medical note
- Implication: Both sick leave and Covid-related leave are job protected

# Pandemic: What can we do better?

## 3. Working from Home

### Privacy Issues:

**BC's privacy legislation requires organizations to keep records containing personal information safe and secure**

- » Remind employees to log off or shut down computers when not in use
- » Password protect personal devices and USBs
- » Create a new account for work on personal computers
- » Ensure antivirus software is up to date

# Pandemic: What can we do better?

## 3. Working from Home

### Policy Considerations:

- » The HR implications of the workplace transition to WFH are extensive and complex
- » Workplace policies should be reviewed and redeveloped to create framework for rules and expectations for WFH

# Pandemic: What can we do better?

## Policy Suggestions:

- Eligible Positions for WFH
- Equipment and Expenses
- Data Protection
- Hours of Work
- Accountability and Monitoring
- Code of Conduct / Bullying & Harassment
- Occupational Health & Safety
- Limits on Remote Location
- Insurance
- Contractors vs. Employees



# Pandemic: What can we do better?

## 3. Working from Home

### **Duty to Accommodate Caregivers/Parents:**

- » Employers should be mindful of obligation to accommodate parents and other caregivers to the point of undue hardship
- » Obligation is based on the ground of “family status”, protected under human rights law

# Pandemic: What can we do better?

## 3. Working from Home

### **Duty to Accommodate Caregivers/Parents:**

- » Caregiving/parental accommodations could include:
  - Allowing employee to work from home
  - Modifying/reducing employee's schedule
  - Putting employee on unpaid leave should be last option (unless Covid-related leave is available)
- » Acceptable course of action will depend on all unique circumstances

# Pandemic: What can we do better?

## 3. Working from Home

### Home Office Expense:

- » Employers cannot make employees pay for employer's business expense, cannot deduct from payroll
- » Must consider who benefits from expense and purpose of it
- » Less clear who's responsible for costs associated with WiFi, computers and other electronics with fewer employers maintaining workplaces

# Pandemic: What can we do better?

## 3. Working from Home

### Home Office Expense:

- » If expenses paid only for work reasons, employee needs to do their job, likely business expenses
- » If employee likely to incur expense regardless of job, less probable employer required to pay
- » If successful complaint made to Employment Standards Branch, employer may be required to repay employee with interest, may be subject to penalties/fines

# Pandemic: What can we do better?

## 3. When Employees Don't Want to Return

- » If employer has met safety requirements and precautions, as per PHOs, employees must go back to work
- » If employee refuses to return to safe work environment, employer may be within rights to consider that a form of misconduct or a resignation
- » Employees who believe workplace is unsafe, may engage in work refusal

# Changes to Employment Laws

## **Changes include:**

- Workers Compensation Act (Compensation for mental disorder)
- Bonus/Incentive Compensation on Termination
- Overtime

# Changes to Employment Laws

## **Workers Compensation Act (Compensation for mental disorder):**

- Previously, mental distress had to be result of bullying/harassment and wage loss was the compensation
- Amendment allows compensation payable for mental disorder as if mental disorder were personal injury arising out of employment
- One year time limit for submission of a claim

# Changes to Employment Law

## **Bonus/Incentive Compensation on Termination**

### *Matthews v. Ocean Nutrition*

- SCC found dismissed employee entitled to long term incentive plan payment of \$1 million
- Two-step inquiry:
  1. Would the dismissed employee have been entitled to the compensation had they continued to be employed during the reasonable notice period?
  2. If so, does the employment agreement take away that entitlement?



# Changes to Employment Law

## *Matthews v. Ocean Nutrition*

- To ensure answer to the second question is “yes”, employment agreement must contain unambiguous language

An agreement that requires an employee to be “active” to receive a particular payment, or purports to eliminate an employee’s right to damages upon termination in a general way will not be sufficient to ensure incentive compensation does not form part of an employee’s wrongful dismissal damages.

# Changes to Employment Laws

## Overtime

### *Fresco v. Canadian Imperial Bank of Commerce*

- Class action commenced on behalf of 31,000 customer service employees who worked for CIBC during 16-year period
- Allegation: CIBC's OT policy and record-keeping system contravened CLC, thousands not paid overtime
- Conclusion: CIBC breached federal labour law requirements, liable for unpaid OT

# Changes to Employment Law

## *Fresco v. Canadian Imperial Bank of Commerce*

- Policy required pre-authorization of hours, subsequent policy extended requirement with possible “post-approval”
- Section 174 of Code provided that OT hours compensated whenever required or permitted, by prescribing otherwise CIBC OT policy was more restrictive
- Evidence showed actual hours of work not recorded for all class members, system-wide deficiency contravened Code
- More likely than not hours of uncompensated OT was permitted, or not prevented, by CIBC.
- CIBC knew, or ought to have known, employees were not being compensated for OT but did nothing in response = permitting or not preventing OT

# TECHNOLOGY AND SURVEILLANCE

Anne Amos-Stewart, Associate

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# Technology and Surveillance

- EMPLOYERS: limitations for monitoring productivity and technology use
- EMPLOYEES: limitations with respect to surveillance

# Sources of Law

- CRIMINAL LAW
- PRIVACY LAW
- EMPLOYMENT & LABOUR LAW

# Criminal Law

- *Criminal Code of Canada*
- Interception of private communication, without someone's knowledge = illegal.
- BUT: one-party consent exception
  - participation + consent → a participant in a conversation can record it with or without the knowledge of others

# Privacy Law

- *Personal Information Protection Act* (BC)
- *Personal Information Protection and Electronic Documents Act* (Canada)
- *Privacy Act* (BC)



# Employment & Labour Law

- Harassment
- Termination
  - For cause or without
  - Constructive dismissal

# Monitoring

- Key: reasonable expectation of privacy?
- Factors:
  - Policies
  - Ownership of equipment
  - Typical use
  - Circumstances of monitoring

# Video Surveillance

- Key: reason for surveillance



## Case Example:

### *Richardson v. Davis Wire Industries Ltd. (1997)*

- Sleeping on the job report
- Surreptitious video recording
- Termination
- No breach of privacy

Takeaway → surreptitious recording maybe ok for investigations

## Case Example:

### *St. Mary's Hospital v. H.E.U. (1997)*

- Manager surreptitiously recorded meeting with union
- Union grievance alleging harassment
- Consent not required
- BUT = improper exercise of managerial discretion

Takeaway → concealed recording = workplace harassment

## Case Example:

### *TeBaerts v. Penta Builders Group Inc. (2015)*

- Personal emails on employee's work email
- "totality of the circumstances"
- No reasonable expectation of privacy = no breach

Takeway → all the circumstances matter

# Case Example:

## *Durant v. Aviation A. Auto Inc. (2019)*

- Employee took photo and videos of customer
- Termination for just cause
- “improper purpose”; “not work-related”
- Comparison to employer’s security system
- Exposure to liability for employer

### Takeaways

- Privacy of customers worth protection
- Employee recordings of customer can = breach of trust
- Risk of harm to employer reputation sufficient

# Best Practices

- Policies, policies, policies
  - prohibitions, permissions and consequences
- Reasonableness and flexibility
- Training
- Practice
- Consent and confirmation

**“An ounce of prevention is worth a pound of cure.”**



# POISONOUS WORKPLACES

Catherine Repel, Associate

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POISONOUS WORKPLACES

# What is a toxic workplace?

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# What is a toxic workplace?

## Case Law – constructive dismissal

Constructive dismissal can arise in two general types of circumstances:

1. Breach of an express or implied term of the employment contract of such seriousness to constitute constructive dismissal; or
2. Conduct of an employer demonstrating that it no longer intends to be bound by the terms of the contract.

*Potter v. New Brunswick (Legal Aid Services Commission)*, 2015 SCC 10

The effect of a constructive dismissal is that the employee's employment is terminated and they are entitled to notice of the termination and possibly damages.

# What is a toxic workplace?

## **Case Law – constructive dismissal**

It is an implied term of any contract of employment that the employee will work in civil, decent, respectful, and dignified conditions. A toxic work environment will breach that implied term.

The test is whether a reasonable person, in the same situation as the employee would feel that the workplace had become intolerable such that the employee could no longer perform the terms of the contract.

# What is a toxic workplace?

## Human Rights

“Employees are entitled to work in a respectful environment that is free from harassment and discrimination. A toxic or poisoned work environment is one where discrimination or harassment on a prohibited ground becomes a part of a person’s workplace”

*Jones v. BC Clinical and Support Services Society and another, 2020 BCHRT 99*

# What is a toxic workplace?

## Human Rights

Factors have been developed from case law for determining what circumstances might constitute a poisoned work environment:

- A single statement or incident, if sufficiently serious;
- The nature of the comments or conduct and the impact on the individual, rather than the number of times the behaviour occurs;
- The comments or actions of any person, regardless of their position of authority or status in the work environment;
- A person can experience a poisoned environment even if that person is not a member of the group that is the target.

*Francis v. BC Ministry of Justice (No. 3)*, 2019 BCHRT 136 at para. 33, citing *General Motors of Canada Limited v. Johnson*, 2013 ONCA 502

# What is a toxic workplace?

## Human Rights

“Subjective feelings or even genuinely-held beliefs are insufficient to discharge this onus. There must be evidence that, to the objective reasonable bystander, would support the conclusion that a poisoned workplace environment had been created.”

*Francis v. BC Ministry of Justice (No. 3)*, 2019 BCHRT 136 at para. 34, citing *General Motors of Canada Limited v. Johnson*, 2013 ONCA 502

# What is a toxic workplace?

## **Workers Compensation Legislation**

Where someone in a workplace takes an action that they knew or reasonably ought to have known would cause a worker to be humiliated or intimidated. Examples could include: verbal aggression or insults; calling someone derogatory names; harmful hazing or initiation practices; vandalizing personal belongings; and spreading malicious rumours.

It does not include situations where an employer or supervisor takes reasonable action to manage and direct workers.



## POISONOUS WORKPLACES

Examples of conduct that may  
be considered toxic or poisonous

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# What types of conduct are considered toxic or poisonous?

## Social media posts

"...Employers can discipline employees for actions they take in cyberspace, and the [Human Rights] Code may apply to workplace-related postings on the internet."

*Taylor-Baptiste v. OPSEU*, 2012 HRTO 1393

# What types of conduct are considered toxic or poisonous?

## **Sexual harassment**

The complainant worked as a bookkeeper for a used car dealership for approximately 4 years. The owner and manager of the dealership engaged in conduct such as: snapping the applicant's bra strap, slapping her backside, making sexualized jokes, distributing sexualized pictures, making derogatory comments about female customers, making derogatory comments about the complainant's clothing, discussing Chinese people in a manner that reflected a negative stereotype, and making fun of the complainant's accent.

The owner and manager fired the complainant when she told him his actions were unacceptable and had to stop.

*Qiu v. 2076831 Ontario Ltd.*, 2017 HRTO 1432, upheld on appeal, 2018 ONSC 7295

# What types of conduct are considered toxic or poisonous?

## **Rude and abrasive treatment**

Front of house staff and kitchen manager at a pub often had disputes on how to deal with customer complaints about food. The kitchen manager was often rude and hostile with the front of house staff when customer complaints arose, including yelling, swearing, and belittling, often when customers could hear. The owners consistently sided with the kitchen manager.

The front of house manager claimed she had been constructively dismissed and started a claim against the pub for damages.

*Morgan v. Chukal Enterprises Ltd.*, 2000 BCSC 1163

# What types of conduct are considered toxic or poisonous?

## **Rude and abrasive treatment**

“The evidence discloses both that [the kitchen manager] exhibited significant rudeness and hostility to [the front of house manager] over an extensive period of time and that the owners tolerated it in spite of [the front of house manager]’s complaints.”

“Instead of insisting that this behaviour stop, [the owners] concluded that his rudeness would diminish if [the front of house manager] would get “on side”.”

*Morgan v. Chukal Enterprises Ltd.*, 2000 BCSC 1163

# What types of conduct are considered toxic or poisonous?

**...but, it can be a fine line:**

“It is clear that for negative behaviour towards an employee by an employer to constitute a constructive dismissal it must be such as to render continued employment beyond what an employee may reasonably be required to bear. The threshold must be high enough to permit an employer to legitimately express frustration to an employee, make very direct comments about performance, or require the employee to work in a workplace with a degree of discord or conflict.”

*Danielisz v. Hercules Forwarding Inc.*, 2012 BCSC 1155

# What types of conduct are considered toxic or poisonous?

## Relatively high bar:

“Unfriendliness, confrontations between co-workers or even some hostility and conflict will not amount to constructive dismissal where the employee is still able to perform his or her work.”

*Baraty v. Wellons Canada Corp.*, 2019 BCSC 33

POISONOUS WORKPLACES

# Best Practices: Steps Employers Can Take

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# Best Practices

**Policies – have policies in place to set out expectations and requirements for various aspects of the workplace, including:**

- Respectful workplace policy
- Workplace discrimination, bullying, and harassment policy
- Social media policy
- Electronic communications and privacy policy
- Procedures for complaints and investigations

# Best Practices

## Proper investigation procedures:

- “formal” complaint
- appropriate and adaptable procedures for the circumstances
- consider retaining a third party investigator
- address issues quickly upon becoming aware of them – things will rarely (if ever) go away on their own or get better over time

# Best Practices

## **Taking disciplinary or other actions:**

- Warnings
- Performance management plans
- Suspensions
- Reassigning teams or reports
- Mandatory training
- Terminations – without or with cause

# Questions?



**Andrea Raso**  
**Partner, Chair E&L Group**  
604 891 7761  
araso@cwilson.com



**Anne Amos-Stewart**  
**Associate**  
604 891 7756  
aamos-stewart@cwilson.com



**Catherine Repel**  
**Associate**  
604 643 3175  
crepel@cwilson.com



**Debbie Preston**  
**Associate**  
604 891 7779  
dpreston@cwilson.com

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