

**BC Employers' Spring Conference:
Money, Status, Religion & Politics**

Employment & Labour Law Conference
The Vancouver Club
Wednesday, May 24, 2023

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Speakers:
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OUTLINE

1. Employee vs. Independent Contractor
2. Religious and Family Accommodation
3. Enforceability of Contractual Termination Clauses
4. BC's New Pay Transparency Legislation
5. Lessons Learned from Vaccine Mandates
6. Employer Compliance Inspection under International Mobility Program

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**Employee vs.
Independent Contractor**

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Why is this important?

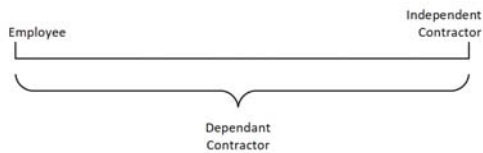
Mischaracterization leads to various sources of liability:

1. *Income Tax Act*
2. *Employment Standards Act*
3. Common Law
4. *Workers Compensation Act*

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The Worker Spectrum



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Who is an Independent Contractor?

Farren v. Elite Service Group Inc., BCSC, Jan 9/20

Factors to Consider

- Level of worker control, including:
 - Company's control over worker's activities, including:
 - o Company's power to select or not select the worker,
 - o Payment of wages,
 - o Company's control over method of work, and
 - o Company's right to suspend or dismiss worker;
 - Exclusive nature of the relationship;
 - Worker's economic dependence on the company; and
 - Whether the worker could hire their own helpers.

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Who is an Independent Contractor?

Farren v. Elite Service Group Inc., BCSC, Jan 9/20

Factors to Consider (cont'd)

- Ownership of equipment or tools;
- Opportunity for profit/loss;
- Business integration, including:
 - Whether the worker was a crucial element of the company's business,
 - Whether the activity of the worker represents the company's business,
 - Permanency and length of the relationship; and
 - Whether the parties rely on each other or closely co-ordinate conduct.

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Who is *not* an Independent Contractor?

- Workers are not necessarily independent contractors because:
 - The company says they are;
 - The worker wants to be an independent contractor;
 - The company charges GST;
 - The worker works at more than one job;
 - The worker submits invoices;
 - The worker doesn't have statutory deductions taken from earnings;
 - The worker works independently without much direct supervision;
 - The worker provides their own tools; or
 - The worker is paid by piece rate or commission.

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Who is an Independent Contractor?

The entirety of the worker's duties and responsibilities and relationship with the business must be considered.

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Who is an Independent Contractor?

Examples

Are they an independent contractor or somewhere else on the spectrum?

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Liability

- *Income Tax Act*
 - Failure to withhold income tax, EI and CPP premiums
 - Penalty can go far back in time
 - Can be excessive if you have more than one "contractor"

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Liability

- *Employment Standards Act*
 - Vacation pay
 - Overtime pay
 - Holiday pay
 - Leaves of absence (e.g. paid sick days)
 - Notice of termination (one to eight weeks)

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Liability

- Common Law
 - Without an enforceable employment agreement limiting notice on termination, notice / pay in lieu based on age, length of service, nature of employment, availability of alternate employment
 - Common law notice is invariably measured in months

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Liability

- *Workers Compensation Act*
 - Failure to pay premiums
 - Worker is injured without coverage; court claim for damages against the company

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Employee vs. Independent Contractor

If in doubt, reach out to one of your friendly Clark Wilson LLP Employment & Labour lawyers!


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**Religious and Family
Accommodation**

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Religious Accommodation



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Religious Accommodation

British Columbia Rapid Transit Co. and CUPE, Local 7000 (Marzhakov), Re, 2022 CarswellBC 2901

- Grievance challenging employer's refusal to grant the Grievor religious-based accommodation to COVID-19 mandatory vaccination policy
- Arbitrator concluded Grievor sincerely, honestly held strong religious belief that vaccinations interfered with his relationship with God, concluded he was entitled to be accommodated

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Religious Accommodation

- Employer had sufficient evidence before it to conclude that Grievor's belief was religious in nature and was sincerely held
 - The Employer just did not believe the Grievor
 - the Employer violated the Grievor's rights both pursuant to the *Human Rights Code* and the collective agreement
 - Arbitrator found Grievor was entitled to accommodation and damages for injury to dignity
- **Doesn't just apply to Covid vaccine

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Family Accommodation

Harvey v. Gibraltar Mines Ltd. (No. 2), 2020 BCHRT 193 - UPDATE

- Worker had returned from maternity leave and requested that she and her husband work different shifts to access childcare
- Proposals rejected by employer
- Brought claim for failure to accommodate

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Family Accommodation



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Family Accommodation

- Tribunal canvassed the recent case law developments in the test for discrimination on the basis of family status
- Tribunal clarified "serious interference" with substantial parental obligation or duty
- Tribunal considered:
 - Complainant and her partner were shift workers whose schedules precluded them from attaining childcare
 - Lived and worked in the Central Interior where childcare options are more limited

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Family Accommodation

- Tribunal rejected employer's argument that Complaint had no reasonable prospect of success
- Tribunal considered whether employer could justify BFOR
 - Employer's materials made it clear they did not believe it had obligation to accommodate

Tribunal held "serious interference" entitling an employee to accommodation based on family status could be established even when there is no change to the employee's terms of employment

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Judicial Review by the British Columbia Supreme Court

- Employer applied for a judicial review, argued Tribunal's interpretation of *Campbell River* was incorrect
- BC Supreme Court agreed, found Tribunal was bound by *Suen* and *Campbell River*
 - Required an employee establish a change in the terms and conditions of employment before a finding of *prima facie* discrimination could be made

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Court of Appeal

British Columbia (Human Rights Tribunal) v. Gibraltar Mines Ltd.,
2023 BCCA 168

- Decision was appealed, Court of Appeal agreed with Tribunal
 - Change to the terms or conditions of employment was not necessary to establish a *prima facie* case of family status discrimination
- *Campbell River* “a change in a term or condition of employment” should not be interpreted as exhaustive statement of applicable test

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Court of Appeal

- Held that *Campbell River* found:
 - family status included the responsibility for childcare arrangement, so long as the interference was serious and the parental duty was substantial
 - a *prima facie* case of discrimination is made out when a change in a term or condition of employment imposed by an employer results in a serious interference with a substantial parental or family obligation

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Court of Appeal

- *Campbell River* not interpreted as holding a change in a term or condition of employment was only circumstance in which *prima facie* case of discrimination could be established
- Concluded that wording of *Human Rights Code* does not require change in term or condition of employment to trigger *prima facie* discrimination

Employer’s decision to change terms of an employee’s employment, or employer’s decision not to change a term of employment to address employee need could result in adverse impact on an employee

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Enforceability of Contractual Termination Clauses

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Why is this important?

- Limit liability on termination
- Provide certainty at time of termination
- Avoid acrimony with departing employees

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Types of Contracts

- Every employee should have a contract:
 1. Offer Letter
 2. Letter Agreement
 3. Formal Contract

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Termination Clauses

- Regardless of form, the wording of the termination clause in the contract is key:
 - The clause must meet minimum employment standards
 - Cannot contract out of notice provisions under the *Employment Standards Act* ("ESA")

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Termination Clauses

- All ESA entitlements will be provided during statutory notice period
 - "wages" includes vacation pay, overtime pay, commission, bonus and incentive compensation
- ESA entitlements cannot be subject to a Release
- The clause must specifically state that the amount set out is the employee's full entitlement
 - Probationary periods cannot exceed 3 months - termination is at the parties' sole discretion
- Contract must be signed **before** employee starts work

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Termination Clauses

If termination clause fails, employee is entitled to common law notice.

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Termination Clauses

Examples:

- "The Company may terminate your employment with cause, or without cause by providing you with 2 weeks of notice or pay in lieu."
- "If you are dismissed from employment, we will provide you with 6 months of salary in exchange for you signing a Release."
- "In the event your employment is terminated without cause, the Company will provide you with notice or pay in lieu of notice as set out in the BC *Employment Standards Act*."

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Limiting Entitlements After ESA Period

To avoid the obligation of providing commission, bonus, equity compensation or benefits during the full notice period, very specific language is needed.

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Limiting Entitlements After ESA Period

Example:

- "In addition to your entitlements under employment standards legislation, you will receive 6 months of pay in lieu of notice. You will not be entitled to participate in the LTIP after the date of termination of your employment."

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Good News

Some recent good news for employers

- *Forbes v. Glenmore Printing Ltd.*, 2023 BCSC 25:
 - A termination clause that does not reference ESA group termination provisions, is still enforceable.

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BC's New Pay Transparency Legislation

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Pay Transparency Act

- Provincial government passed Bill 13, *Pay Transparency Act*, on May 11, 2023
 - As of November 1, 2023 employers must include expected pay or expected pay range for specific job opportunity that they advertise publicly
 - Places new requirements on employers to address systemic discrimination in the workplace
 - Government reports that in 2022, women in B.C. earned 17% less than men

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Pay Transparency Act

- Employers can no longer ask job applicants about what they have been paid at positions with other employers
- However, they can still:
 - Use pay history information they already have about that employee to determine the pay for a new position
 - Rely on publicly accessible information on the pay for similar positions

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Pay Transparency Act

- Employers cannot dismiss, suspend, demote, discipline or harass an employee who:
 - Asks their employer about their pay
 - Reveals their pay to another employee or someone applying to work with their employer
 - Asks the employer about its pay transparency report
 - Gives information to the Director of Pay Transparency about their employer
- Employers above a certain size required to complete and post pay transparency reports

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Lessons Learned from Vaccine Mandates

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Vaccine Mandates: The Verdict Is . . .

- Vaccine mandates were acceptable given the scientific evidence of their effectiveness, and that masking alone was insufficient protection.
- COVID-19 can be distinguished from influenza and other viruses.
- The health and safety of the workplace overrode any privacy concerns.
- Termination for failure to vaccinate is too extreme in most cases. Unpaid leaves of absence or remote work (if sustainable) were appropriate.
- Where the *Charter* applied, s.7 was not violated.

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Employer Compliance Inspection under International Mobility Program

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Employer Compliance Inspection

- Temporary Foreign Worker Program (“TFWP”)
 - LMIA based
- International Mobility Program (“IMP”)
 - LMIA exempt

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International Mobility Program (“IMP”)

- **International Mobility Program (“IMP”)**
 - Obtain Offer of Employment A# at IRCC’s Employer portal
 - Submit work permit application

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Employer Compliance Inspection under IMP

- **Employers’ responsibilities**
 - Be aware of the conditions on work permits
 - Inform foreign workers about their rights on/before the 1st day of work
 - Actively engage in business
 - Comply with federal/provincial/territorial employment and recruitment laws

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Employer Compliance Inspection under IMP

- **How is the inspection initiated?**
 - Known past non-compliance
 - Reason to suspect
 - Random selection

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Employer Compliance Inspection under IMP

- **How are employers being inspected?**
An inspection letter asking you to
 - Show up at a specific time and location to answer questions
 - Provide certain documents
 - Attend on-site inspections

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Employer Compliance Inspection under IMP

- **How are employers being inspected?**
Notice of Preliminary Findings letter explaining the program violations and the possible penalties
 - reply within 30 days
 - extendable

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Employer Compliance Inspection under IMP

- **How are employers being inspected?**
Final Decision
 - Compliant
 - Compliant with Justification
 - Non-Compliant

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Employer Compliance Inspection under IMP

- How are employers being inspected?
 - Penalties
 - Warning
 - Monetary penalties
 - Ban from hiring temporary workers
 - Public list of non-compliant employers
 - Refusing pending work permits/revoking issued work permits

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How to Mitigate

- Employment Agreement
- Offer of Employment at IRCC's Employer Portal
- Voluntary Disclosure
- Keeping documents for 6 years
- Response to the inspection
- Having a representative

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Questions?



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