



Employment Law Solutions for the Canadian Workplace

RELEASE 162 – MARCH 2021

new and noteworthy

- **Human Rights:** This update consists of revisions to Tab IV of the guide, which addresses the requirements of federal and provincial human rights law as it applies in the employment context in Canada. The entire content of Tab IV has been reviewed to ensure all sections are current.

highlights of this release

- **Tab IV-1.B Human rights Concerns at the Hiring Stage:**
 - Section IV.1.B.1, Advertising and Interviewing Techniques: What Is Permissible: A discussion of *McGregor v. Morelli and Quarterway Hotel*, has been added, in which the BC Human Rights Tribunal found that questioning an applicant about age, marital, and family status in relation to a waitressing position was inappropriate even though the employer did not intend to discriminate but was concerned about availability for shifts.
 - Section IV.1.B.2, Guidelines for Pre-Employment Application and Interview Questioning: A clarification has been added noting that it is generally not permissible to ask whether a candidate is entitled to work permanently in Canada unless the employer is able to show that this requirement is justified.
- **Tab IV-1.C Human Rights Concerns During Employment:**
 - Section IV.1.C.2, The Duty to Accommodate: A note has been added to explain that employees have an obligation to take part in discussions about possible accommodation solutions when asked, and to cooperate with the employer's search for appropriate solutions.
- **Tab IV-1.D Drug and Alcohol Testing:**
 - Section IV.1.D.1, Introduction: The discussion of consideration of privacy in the analysis of a drug and alcohol testing program has been expanded to note the Supreme Court of Canada's recent support of the recognition in common law of a new tort of invasion of privacy.
 - Section IV.1.D.3, The Canadian Approach: A discussion has been added of the recent Alberta case of *Phillips v. Westcan*, to show that where an employment contract includes an express term allowing for random drug testing, the terms of the contract will prevail, especially for safety-sensitive positions—in this case, truck drivers.

release notes

please review

- Section IV.1.D.4, Random Testing: A discussion has been added of the recent federal case of *Mudjatik Thussen Mining Joint Venture v. Billette*, in which the adjudicator upheld two employees' complaints of unjust dismissal upon their refusal to submit to a drug test when asked to do so by management in accordance with the employer's reasonable drug testing policy. Even though their work was dangerous, there was insufficient evidence to suspect impairment. Also, the discussion of *IBEW, Local Union 1620 v. Lower Churchill Transmission Construction Employers' Association Inc.*, concerning an employee in a safety-sensitive position who was terminated on account of risk due to medicinal cannabis use, has been expanded to include a judicial review by the Newfoundland Supreme Court and subsequent appeal to the Newfoundland Court of Appeal, which found that the arbitrator had failed to address key points such as whether the employer had investigated alternative approaches or was applying the same standard to all employees using medicinal cannabis.
- Section IV.1.D.5, Reasonable Cause Testing: A discussion has been added of the recent Manitoba case of *UNIFOR and its Local 100 v Canadian National Railway*, in which an employee and several co-workers were involved in a near-miss accident. CNR's "Policy to Prevent Workplace Drug and Alcohol Problems" called for post-incident mandatory drug and alcohol testing, and the employee tested positive for and admitted to marijuana use. The Manitoba Queen's Bench dismissed the employee's application for judicial review, finding that CNR had provided clear, cogent and convincing evidence that it had just cause to discharge the employee.
- **Tab VI-2.B Prohibited Grounds of Discrimination—Age:**
 - Section IV.2.B.4, Mandatory Retirement: A discussion of the case of *Mullaly v. Nova Scotia (Attorney General)* has been added, in which a Justice of the Peace was subject to mandatory retirement at the age of 70. The Nova Scotia Supreme Court found that the mandatory retirement was enacted to maintain judicial independence and security of tenure of justices of the peace by way of a legislated end date, and, despite being based on age, did not create a disadvantage by perpetuating a prejudice or stereotype.
- **Tab IV-2.C Prohibited Grounds of Discrimination—Race, Colour, Ancestry, and Place of Origin:**
 - Section IV.2.C.3.1, Hiring and Terminating: A discussion has been added of the case of *Ferrence v. Thames Valley District School Board*, in which a high school teacher applicant alleged discrimination with respect to his employment because of colour, ethnic origin and disability. The Human Rights Tribunal of Ontario dismissed the application, finding that while the applicant showed that he had a protected characteristic under the *Human Rights Code*, the assignments of courses were based on the collective agreements and teacher qualification rather than teacher preference. Further, the tribunal found that the successful applicant in the job competition had a necessary qualification for the job that the applicant did not possess. A discussion has also been added of the case of *Shiozaki v. Aboriginal Mother Centre Society and another*, in which the applicant who identified as "Japanese in origin," worked for the respondent Aboriginal Mother Centre Society for about 3 months before being placed on administrative leave and then fired. The BC Human Rights Tribunal found that: the issue of whether Aboriginal people would be represented in leadership positions at the Society was an appropriate topic of debate and discussion given that the Society had a mandate to serve Aboriginal mothers and children; there was no evidence proving that she was treated adversely because she was not Aboriginal; and she was unable to show that her termination was related to prohibited grounds.

● **Tab IV-2.D Prohibited Grounds of Discrimination—Criminal Conviction:**

- Section IV.2.D.3, Selected Case Law Examples: A discussion of the case of *Fennelly v. J. Co Holdings Inc.* has been added, in which the Newfoundland Human Rights Commission concluded that “the suspicion of a criminal charge or a criminal conviction is not a sufficient ground upon which to withdraw an offer of employment even where an employer has hundreds of other applicants for the position.”

● **Tab IV-2.E Prohibited Grounds of Discrimination—Disability:**

- Section IV.2.E.3, Duty to Accommodate Disability: A discussion has been added of the case of *Kvaska v. Gateway Motors (Edmonton) Ltd.*, in which the Alberta Human Rights Tribunal found that the employer knew or ought to have known that the employee’s alcohol addiction might have contributed to an incident at work for which he was fired. Also, a discussion has been added of the case of *Lambourn v. 2471506 Ontario Inc.*, in which a gas station restaurant employee was replaced for missing shifts due to mental illness known to her employer. The Ontario tribunal found that the employer had a duty to accommodate her disability to the point of undue hardship before taking action to terminate her employment. Finally, a note has been added indicating that claims related to COVID-19 may be anticipated from employees over not being properly accommodated to work from home or being denied leaves of absence based on underlying health conditions.

● **Tab IV-2.F Prohibited Grounds of Discrimination—Sex:**

- Section IV.2.F.4, Discrimination Based on Pregnancy: A discussion of the case of *Weihs v. Great Clips and others (No.2)*, has been added, in which the BC Human Rights Tribunal found that a salon’s termination of a stylist 8 days after she announced her pregnancy amounted to discrimination, despite performance issues being a factor. Two Alberta Human Rights Tribunal cases are also noted, finding in favour of the employee on the basis of no serious performance issues in one case, and failure of the employer to provide reasonable accommodation in the other.

● **Tab IV-2.G Prohibited Grounds of Discrimination—Sexual Harassment:**

- Section IV.2.G.3, The Definition of “Conduct of a Sexual Nature”: A discussion of the case of *D’Alesio v. Walker Real Estate Inc.*, has been added, in which the respondent exposed himself to the complainant by changing in her vicinity in a basement office. The Ontario Human Rights Tribunal found that the behaviour was sexual harassment because it was vexatious and the respondent ought to have known it was unwelcome.
- Section IV.2.G.5, Detrimental Effect/Adverse Consequences: A discussion of the case of *Araniva v. RSY Contracting and another (No. 3)* has been added, in which the BC Human Rights Tribunal found that a male employer sexually harassed a female administrative assistant who worked in his home, and then cut her hours after she refused his advances. The tribunal awarded her \$40,000 to compensate for injury to dignity, feelings, and self respect.
- Section IV.2.G.8, Sexual Harassment Claims in the Courts: The discussion of the case of *Merrifield v. The Attorney General* has been removed, as the decision was overturned by the Ontario Court of Appeal, which stated that “the trial judge erred in concluding that the tort of harassment exists in Ontario and we are not persuaded that the tort should be recognized.”

release notes

please review

- **Tab IV-2.H Prohibited Grounds of Discrimination—Sexual Orientation:**
 - Section IV.2.H.4, Selected Case Law Examples: A discussion of the case of *T.M. and Manitoba (Justice), Re* has been added, in which the Manitoba Human Rights Adjudication Panel awarded the complainant \$75,000 due to being subjected to harassment on the basis of his sexual orientation for several years, and the employer not taking reasonable steps to respond when the complaint was made.
- **Tab IV-2.I Prohibited Grounds of Discrimination—Marital or Family Status:** Several clarifications and updates have been made throughout the discussion.
 - Section IV.2.I.5, Selected Case Law Examples: A discussion of the case of *Ziegler v. Pacific Blue Cross (No. 2)*, has been added, in which the BC Human Rights Tribunal found that the facts relating to an employer’s failure to accommodate an employee’s shift preference did not support a finding that “serious interference with a substantial parental duty or obligation took place,” in light of the employee’s unwillingness to consider alternative childcare arrangements.
- **Tab IV-2.J Prohibited Grounds of Discrimination—Political Belief:** Several clarifications and updates have been made in the discussion.
- **Tab IV-2.K Prohibited Grounds of Discrimination—Religion:**
 - Section IV.2.K.4, Selected Case Law Examples: A review of the case of *Syed v. Canada (Attorney General)* has been added, in which the Federal Court of Canada found that the Correctional Service of Canada’s reassignment and discipline of a correctional officer to a different area was not discrimination on the basis of religion.
- **Tab IV-2.L Prohibited Grounds of Discrimination—Gender Identity and Gender Expression:** Citations to additional cases have been added in the footnotes to the discussion.
- **Appendix IV-2.B Prohibited Grounds of Discrimination:** The table of prohibited grounds of discrimination across federal, provincial, and territorial jurisdictions has been updated.
- **Tab IV-3.A Potential Remedies for Human Rights Violations:** Clarifications and updates have been made throughout the discussion.
 - Section VI.3.A.3, Interim Remedies in Human Rights Proceedings: A discussion of the case of *K.Z. v. Cambridge Kips Inc.*, has been added, in which the Ontario Human Rights Tribunal granted an interim remedy permitting the applicant, a 12-year-old girl, to train and compete in the respondent’s gymnastics club, following a dispute between the applicant’s parents and the club’s board members.

did you know?

- **BLG’s COVID-19 Resource Centre:** To keep businesses informed on emerging issues related to COVID-19, the law firm authoring this guide continues to provide regularly updated resources online at <https://www.blg.com/en/insights/covid-19>. The website includes articles addressing labour and employment law.



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