

the steward



News & Information for BCGEU Stewards

WINTER 2020

Employees' expectations of privacy Page 2	Applying for long term disability benefits Page 4	Collective agreement STIIP FAQ Page 6	Workers' compensation claims for mental injury Page 8	Discrimination on the basis of family status in B.C. Page 10	Ideas for resolving conflict at the workplace Page 11	Changes to the Labour Relations Code Page 12	EDMP - LTD benefits package Page 13	Dear advocacy Page 14
---	---	---	---	--	---	--	---	---------------------------------

Letter from the president

This has been a year of change for labour relations in B.C. The provincial government recently amended the Labour Relations Code, which governs unionized workplaces, for the first time in many years. The amendments were the result of months of consultation with the labour relations community—including a detailed submission from the BCGEU. While the amendments are generally positive, there is still room for improvement and we continue to work with the government on issues like card check. The winter 2020 issue of The Steward contains highlights of the amendments.

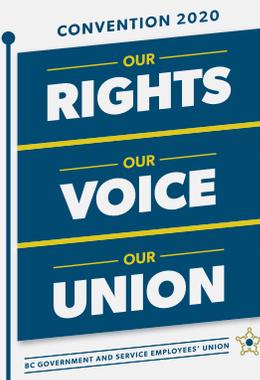
You'll also find articles relating to privacy when using the employer's equipment, such as computers, ideas for resolving workplace conflict, and a look at how the system of mental health claims for workers has evolved in recent years.

I'm so proud of the work our stewards, like yourself, do on the ground week in and week out. I'm sure you'll find this issue's articles useful in your day-to-day work. If there are topics you'd like addressed or you have other suggestions, don't hesitate to email us at steward@bcgeu.ca



In solidarity,

Stephanie Smith
BCGEU president



Hundreds of delegates from all over B.C. will attend your union's triennial convention in mid-June.

Local elections to select delegates will be taking place during the coming months.

Watch the BCGEU website and in your inbox for details.

BCGEU Learning Step Up!

STEP UP, our introductory one-day course, will introduce you to the BCGEU, explore our common values, union culture, and our diverse community of members. Through stories of solidarity and courage, you will gain the strength and support you need to begin your journey as a new or returning steward. **Newly elected and returning stewards will leave feeling more informed, confident and ready to support a member through a Step 1 grievance.**

This course is the first step on our new learning pathway for stewards.

To register for Step Up! and check out the full list of courses visit events.bcgeu.ca or contact your local area office.



Employees' expectations of privacy when using employer's equipment

By: Afifa Hashimi, law co-op student

Do you use equipment owned by your employer? If the answer is yes, make sure you're aware of the privacy laws that apply.

Employers in B.C. must comply with privacy legislation governing their access to employees' personal information and how it's used. Different privacy statutes govern private versus public bodies in B.C., so the identity of your employer is relevant to the privacy laws that apply to your particular workplace.

Privacy legislation

The **Personal Information Protection Act (PIPA)** applies to private sector organizations. Under *PIPA*, organizations include persons, unincorporated associations, trade unions, trusts, and not for profit organizations. The **Freedom of Information and Protection of Privacy Act (FOIPPA)** applies to public bodies. Public bodies are B.C. government ministries, bodies listed in Schedule 2 of *FOIPPA* (including certain tribunals, committees, and marketing boards), and local public bodies.

PIPA and *FOIPPA* set the parameters that are applicable to employers' collection, use, and disclosure of personal information of employees.

Personal information is defined in *PIPA* as "information about an identifiable individual". This includes employee personal information but excludes contact

information or work product information. *FOIPPA* defines personal information as "recorded information about an identifiable individual other than contact information." For example, information about an employee's location and behaviour gathered through GPS and sensor technology is personal information.

Employee personal information is defined in *PIPA* as: personal information about an individual that is collected, used or disclosed solely for the purposes reasonably required to establish, manage or terminate an employment relationship between the organization and that individual. It doesn't include personal information that's not about an individual's employment.

Reasonable expectations of privacy

R. v. Cole, 2012 SCC 53 [*Cole*] is a leading Canadian case on employees' expectations of privacy regarding personal information on employer-owned equipment. In *Cole*, the Supreme Court of Canada held the employee had a reasonable, but diminished, expectation of privacy with respect to personal information on an employer-owned laptop. The court determined employees may reasonably expect privacy in information contained on work computers, at least where personal use of this equipment is permitted or reasonably expected.

The reasonable expectation of privacy in this case existed despite the existence of employer policies stating the employer owned all data and messages created on employer equipment and employees should not assume stored files would be private.

Employer workplace policies and ownership of property are relevant considerations and workplace policies may diminish reasonable expectations of privacy. So, it's important for all of us to be aware of workplace policies regarding usage of employer-owned equipment. However, these factors alone don't determine an employee's reasonable expectations of privacy. The fact that workplace policies state employees should not expect privacy while using such equipment doesn't automatically eliminate employees' entitlement to expectations of privacy. An employee's reasonable expectations are context-specific: the Supreme Court of Canada in *Cole* held the totality of the circumstances must be considered, regardless of the written policies.

Factors including employer expectations and arrangements may play a role in determining an employee's reasonable expectations of privacy. In *BC Hydro & Power Authority v. International Brotherhood of Electrical Workers, local 258 (Petersen Grievance)*, [2017] B.C.C.A.A. No. 135 [*BC Hydro*], the arbitrator determined an employee was entitled to a high level of expectation of privacy regarding personal information on employer-owned mobile



phone. This high level of expectation of privacy arose partially due to a *quid pro quo* arrangement. In this case, the arrangement involved the employee carrying the mobile phone at all times. Additionally, the employer used the mobile phones it provided to employees to contact them after hours.

The purpose of collection of personal information can also be a determining factor. In *Investigation Report F15-01: Use of Employee Monitoring Software by the District of Saanich*, the B.C. Information and Privacy Commissioner held, that under *FOIPPA*, an employer is only authorized to collect personal information from employees that's directly related to and required to protect IT systems.

The *BC Hydro* case also provides us with direction regarding restrictions on an employer's authority to search an employee's information. The arbitrator applied the *Doman* test and determined it was unreasonable for the employer to search the employee's personal information in this case and the employee was at least entitled to notice under *FOIPPA*. The arbitrator confirmed it's unreasonable for an employer to conduct a search that's highly intrusive before considering other, less intrusive means of attaining the information sought.

Consent and notification

Personal information

Under *PIPA*, an employer must obtain consent to collect personal information

that's not employee personal information. As well, the employer must notify the employee of this and the purposes for doing so.

Employers subject to *FOIPPA* aren't required to obtain employee consent for collection of personal information where required and directly related to the public body's activities. Under *FOIPPA*, an employer must notify employees if the employer intends to indirectly collect personal information from employees to manage or terminate the employment relationship.

Employee personal information

Under *PIPA*, an employer may collect, use, or disclose employee personal information without the consent of employees if it meets the requirements under *PIPA* of using this information solely for establishing, managing, or terminating the employment relationship.

This notification must contain some amount of specificity – a general privacy policy without details or context is insufficient notice. In *Zelstoff Celgar Ltd. v. Public and Private Workers of Canada, local 1 (Negreiff Grievance)*, [2017] B.C.C.A.A. No. 28, the arbitrator determined the employer failed to meet its notification obligations under *PIPA* by only informing employees it would collect information regarding who was present at the worksite in certain circumstances. The employer didn't, but should have, informed employees their entrance and exit times at the worksite

For collection, use, and disclosure of employee personal information without consent, *PIPA* requires organizations to notify employees of the types of employee personal information and purposes for collecting, using, or disclosing it.

would be collected and potentially used to support discipline or discharge.

Ultimately, employees are entitled to a reasonable expectation of privacy in many situations regarding usage of employer-owned equipment. The level of expectation of privacy depends on a variety of factors. These include workplace policies that may diminish reasonable privacy expectations.

Members in the B.C. public service: applying for long term disability benefits

By the BCGEU's benefits department

I've applied for long term disability (LTD).

What happens next?

First, be aware it can take up to three months for the insurance carrier to process and adjudicate your LTD application. This is why the BCGEU recommends you submit your LTD application approximately halfway (three months) into the STIIP (Short Term Illness & Injury Plan) period. Making the application early ensures you don't experience gaps in your disability income while you await the decision. So, once you apply, you'll be waiting for the insurance company, Great West Life (GWL), to make a decision on your claim. GWL will advise you whether your LTD application has been approved or denied.

It's common for GWL to communicate with you during the adjudication process to request additional information. This often happens because your application contains insufficient medical documentation or GWL is assessing whether your condition is pre-existing. This is a medically-driven process, and the onus is on you, the applicant, to supply the requested medical documentation. Refer to the collective agreement language below regarding pre-existing conditions.

2.5 Pre-existing conditions

An employee shall not be entitled to long term disability benefits from this plan if their

total disability resulted from an accident, sickness or mental or nervous disorder with respect to which medical treatment, services or supplies were received in the 90-day period prior to the date of hire unless they have completed 12 consecutive months of service after the date of hire during which time they have not been absent from work due to the aforementioned accident, sickness or mental or nervous disorder with respect to which medical treatment, services or supplies were received. This clause does not apply to present employees who have been continuously employed since April 1, 1987.

My LTD claim has been approved. What's next?

BCGEU members on an accepted LTD claim are required to participate in the rehabilitation committee process. Once approved for LTD, the employer will provide you with an application to the rehabilitation committee. This application is referred to as the P7, and it is mandatory for the member to complete and submit. Your LTD benefits will be at risk if you don't participate.

You must complete the two sections on the P7. There's an employee portion to fill out and there's a portion that must be filled out by the member's doctor. Once the application has been submitted, the case will go to the rehabilitation committee.

What is the rehabilitation committee?

The rehabilitation committee, also known as the rehab committee or RHC, is a joint employer and union committee designed to encourage and facilitate the return to work of members who are on an accepted LTD claim. Refer to Appendix 4, Part 3 of your public service collective agreement for more details.

Who is on the rehabilitation committee?

The RHC consists of four parties:

1. An employer representative with the public service agency (PSA), who's referred to as the early intervention return to work specialist (ERTWS);
2. An occupational health nurse (OHN) with the occupational health program (OHP);
3. A BCGEU staff representative with the benefits department; and
4. A corporate advisor with disability benefits administration (DBA).



What does the RHC do? What are their roles?

- Get members back to work
- Review information, including medical, to determine whether there is an ability to return to work
- Provide treatment resources
- Put together return to work trials (RTW) and gradual return to work plans (GRTW)
- Protect collective bargaining agreement (CBA) rights

The RHC meets monthly to review each member's case. Because each case is unique, members have different circumstances affecting their ability to return to work.

The mandate of the RHC is to assist workers to safely return to productive employment. The committee monitors return to work plans and makes recommendations as the member's rehabilitation progresses. In the event that a member has no prognosis to return to work, the RHC must wait for medical clearance before engaging a member in a return to work trial.

The committee also reviews compassionate transfer requests, which are assessed on a medical basis. Refer to Article 12.7 of your public service collective agreement for more details.

- The early intervention return to work specialist (ERTWS) works with the member and their manager/ministry while they have an active case with the RHC. Once the member has been cleared to return to work, the ERTWS liaises with the member's ministry to coordinate a return to work plan that is appropriate considering the member's limitations and restrictions as recommended by the member's physician(s).
- The occupational health nurse (OHN) works with the member and their physician(s) to manage treatment, medical recommendations, assess fitness and obtain a medical clearance to return to work.
- The BCGEU benefits staff representative facilitates the member's safe return to work and ensures their rights and entitlements are in accordance with the collective agreement.
- The corporate advisor oversees the administration of LTD benefits. They liaise with GWL if there are concerns about the LTD claim and adjudication process. They also provide consultation to the ERTWS and ministry.

What must I do if my LTD application is denied or my LTD claim is terminated?

If your LTD claim is denied, please contact the BCGEU benefits department as soon as possible to discuss your right to file an appeal. You can contact us at 1-844-633-4573 or benefits@bcgeu.ca.

Filing an appeal is a negotiated process under the terms of the collective agreement. Please refer to Appendix 4, Part 2, Article 2.13 of your public service collective agreement for further details.

We will have more information about the LTD process in future issues of *The Steward*.



Main public service collective agreement

STIIP FAQ

By Elisabeth Finney

What is STIIP?

STIIP is the name of the short-term illness and injury plan provided to BCGEU members under the main public service collective agreement between British Columbia (the provincial government) and the BCGEU. It provides BCGEU members, who are unable to work due to illness or injury, with up to six months of paid leave.

Details about STIIP can be found in Appendix 4 of the collective agreement.

Who's entitled to STIIP?

Regular employees are entitled to STIIP benefits. However, the extent of the benefit entitlement is dependent on how long you have worked for the employer.

Regular employees are entitled to receive full STIIP benefits after completing six months of service with the employer. The full STIIP benefit is six months of leave, paid at 75 per cent of regular pay.

Regular employees who have completed three to six months of service with the employer are entitled to 15 weeks (75 workdays) of leave. It is broken down this way:

- 75 per cent of regular pay for six days per calendar year and
- two-thirds of regular pay for the remaining 69 days.

Regular employees with less than three months of service with the employer are entitled to 75 per cent of regular pay for six days per calendar year.

Can STIIP benefits be topped up?

Yes. You can use the following banks, in the order listed below, to top up STIIP payments:

1. Accumulated sick leave under the old sick leave plan
2. Compensatory time off
3. Banked earned time off, except where you are scheduled in a shift schedule
4. Earned vacation
5. Unearned vacation, to a maximum of 70 hours

What has to be done to get STIIP benefits?

If you're off work for five consecutive days or less, the employer will automatically put you on STIIP benefits. Usually, you will not be required to provide any additional information. However, if you have three or more separate absences from work in a six month period, you may be asked to provide a doctor's certificate or STO2 form, if the employer is concerned.

If you're absent for six consecutive days of work or longer, the employer will usually ask you to provide a medical certificate or a STO2 form.

If you're asked to provide a medical statement, it must clearly describe why you're unable to work. Entitlement to STIIP benefits is medically-driven. This means your doctor must provide enough information for the employer to understand why you're not able to work. STIIP benefits may be denied if there's insufficient medical information to substantiate the absence.

You may be asked to provide a medical certificate more than once, if your absence continues. As of April 1, 2019, the employer can ask for another doctor's certificate in the following circumstances only:

- Where 30 days have passed since the late medical statement, AND
- You've been on STIIP throughout that period of time; AND
- There's reason to believe your prognosis has changed.

(see Appendix 4, Article 1.4)

What does someone need to know about medical certificates and STO2 forms?

The employer is NOT entitled to all the medical information related to your condition. The employer is only entitled to the following:

- Your prognosis and when you will return to work;
- Your limitations and restrictions—anything that prevents you from doing your job;



- Your treatment plan: the steps your doctor will take to treat your condition. Information provided should not reveal specific medications you're taking or your diagnosis;
- Information on any medical follow-up, such as if you've been referred to a specialist, have follow-up testing scheduled, or if you will be seeing your doctor again for a follow-up appointment(s); and
- When you are ready to return to work, the specifics of any accommodation required.

Until March 31, 2020, you're required to pay the cost of medical certificates or STO2s. However, if the employer requires a medical assessment specifying employment limitations and/or capabilities, the employer will reimburse you for 50 per cent of the cost of the assessment when you provide a receipt.

As of April 1, 2020, the employer will reimburse you for 50 per cent of the cost of all medical documentation requested when you provide a receipt.

Do STIIP benefits ever run out?

Yes. STIIP provides six months of paid leave for illness or injury then it ends. If you're unable to return to work after six months on STIIP, you will need to apply for long term disability (LTD) benefits.

After three months on STIIP benefits, the employer will send you an application package for LTD. It's very important you apply for LTD. Apply even if you don't think you'll need it and even if you think you might not be entitled to it. If you don't apply for LTD within four weeks of your STIIP benefits ending, you'll likely lose your entitlement to apply for LTD at all. It's better to apply and not need the benefits than to not apply, need the benefits and not have them.

Where can one get help with STIIP-related issues?

Contact your steward or your local BCGEU area office.

Enhanced Disability Management Program (EDMP) - LTD benefits package

By Shelly Appleton and Margo Major

Enhanced Disability Management Program (EDMP) and LTD

You're a regular full-time or regular part-time member working in community health and you've completed the probationary period. You are off work due to an illness or injury. You've been absent for the past three months and you don't expect to return to work within the next month. If this is you, it's important that you obtain a long term disability (LTD) package from your employer.

Any BCGEU member enrolled in the Enhanced Disability Management Program (EDMP) who has been absent from work for three months (90 days), and would qualify for LTD benefits, needs to communicate with their disability management professional (DMP) and union representative to discuss their LTD application. On average, it can take up an insurance provider up to two months to adjudicate a claim for LTD benefits. This is why the paperwork needs to be completed early.

WorkSafeBC claim and LTD

A BCGEU member, with regular employment, who is on an accepted WorkSafeBC claim and doesn't expect to return to work within the fourth month of an absence should apply for LTD benefits. We recommend this even if the member expects to continue to be covered by WorkSafeBC. The qualifying period for LTD runs parallel to the WorkSafeBC claim, but you will

only receive WorkSafeBC payments. The qualifying period is five months.

If approved, both the LTD and WorkSafeBC claims will be in effect at the same time. But, the member will receive payments from WorkSafeBC only, which are higher. Health and welfare benefits continue only if the LTD claim is accepted. Otherwise, the employee can opt to continue benefits on their own.

Should the WorkSafeBC claim suddenly stop, the already-approved LTD benefits would be paid to the member. Applying for LTD benefits, while on an accepted WorkSafeBC claim, is your safety net. This is because it can take an insurance provider up to two months to adjudicate a claim for LTD benefits.

A member has 45 days – from the date of eligibility for LTD – to submit an application for LTD, regardless of the type of benefits the member is claiming or receiving before applying for LTD benefits. If the LTD application is not submitted within 45 days, there is a presumption that the LTD claim has been abandoned. To restart the claim, the member will have to demonstrate to the insurance provider there were good reasons for not having applied during the required time frame.

Employer refusal to send LTD package

If an employer or DMP refuses to send the member an LTD application, regardless of an accepted WorkSafeBC claim, the member should speak with their BCGEU representative about filing a grievance.



Workers' compensation claims for mental injury: then, now and in the future

By **Iain McDonald**

Mental, or psychological injury, isn't a recent phenomenon in workers' compensation in British Columbia. Workers' Compensation Board policy has recognized mental injury as something that's entitled for compensation for decades.

In the past, these forms of injuries were referred to by the board as "psychological problems", or "psychological impairment". Such conditions as post traumatic stress disorder (PTSD) and depression were considered in policy to be "personal injury". This is because they arose directly from trauma caused by the employment, or as a consequence of physical injury or occupational disease caused by the employment.

For a traumatic incident, or incidents that caused the psychological injury—claims not involving physical injury—the specific injury had to be identified before a claim could be accepted. The board had concerns about the recognition of chronic stress, or stress occurring over time at work, as a compensable cause of psychological disability. The board feared such recognition would result in a flood of unmanageable claims. The worry was it would be virtually impossible to separate work stress (which every worker has) from non-work stress (which every worker also has) and decide what the entitlement to compensation would be.

As a result, the board didn't recognize any psychological impairment as an occupational disease. Instead, the psychological impairment

had to be "traumatically induced" to qualify for compensation. This means the ongoing stress of work couldn't give rise to psychological injury that would trigger compensation. Stated otherwise:

A state of emotional and physical exhaustion due to the stress of work over time is neither compensable as an injury nor as an industrial disease. It is not compensable as an injury because it is not traumatically-induced; it is not compensable as an industrial disease because the Board does not recognize any psychological or emotional conditions as industrial diseases.¹

In 2002, the government introduced sweeping changes to the Workers' Compensation Act. Included was the introduction of section 5.1, concerning mental stress. This legislated change didn't identify mental stress claims as personal injury claims. But, it specified the mental stress had to be recognized in the current edition of the *Diagnostic and Statistical Manual of Mental Disorders (DSM)*, which contains the diagnostic criteria universally employed by all psychologists and psychiatrists. (The fifth edition of DSM is currently in use.)

The change also specified the disorder had to be diagnosed by a physician (later amended to include a psychologist). Additionally, the

diagnosed condition had to be "an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of the worker's employment". Finally, the legislative change introduced what has been referred to as the "labour relations exclusion". This stated that compensation is payable only if the mental stress "... isn't caused by a decision of the worker's employer relating to the worker's employment, including a decision to change the work to be performed or the working conditions, to discipline the worker or to terminate the worker's employment."

The legislation changes weren't without problems. Post-traumatic stress disorder (PTSD), for example, may not become noticeable for months or years after the event. The requirement the stressor be acute would prevent delayed-onset PTSD being recognized, even though it was caused by a traumatic event at work.

There were other issues. The new policy that imposed an objective test for the worker's perception of the event as traumatic. The board considered whether the event would be generally accepted as traumatic. This was then used to determine whether the worker who had experienced the event had likely been sufficiently traumatized to necessitate the claim being accepted.

¹ Summarized in the Final Report of the Royal Commission on Workers' Compensation in British Columbia, Vol. II, Chapter 2 pp 36 https://www.wcat.bc.ca/research/WorkSafeBC/WSBC_Hist_Rpt/1999-rc-report-2.pdf



Join us as we celebrate our centennial year!

Send us your BCGEU stories & photos: centennial@bcgeu.ca



This policy was finally struck down in 2009 by the court in *Plesner*². The case involved a worker who had experienced great fear for his life when a possible explosion was pending at his workplace. None of his co-workers had suffered the same reaction as he did. While it appeared, in hindsight, all had evacuated to a safe distance away from the potential explosion, that wasn't the case. The experience personally affected Mr. Plesner to the point that his treating physician diagnosed a mental injury listed in the DSM.

The court found the provisions of board policy item #13.30, which set out the examples of what an acute reaction and traumatic event were, and the policy reference to the event being "generally accepted as being traumatic" contravened the Charter. The board's "objective test" as had been applied was patently unreasonable and couldn't be used to deny Mr. Plesner's entitlement to compensation when Mr. Plesner had genuinely perceived the incident as traumatic, while others had not had the same reaction to it.

On July 1, 2012, the government amended section 5.1 of the act. The heading changed from mental stress to mental disorder. As well, a physician was no longer able to provide a DSM diagnosis; it had to be made by a psychologist or psychiatrist. The requirement for the reaction be acute was dropped. The language was expanded to include a reaction to "...one or more traumatic events arising out of and in the course of the worker's employment."

Heralded by the government as a major breakthrough for workers was the inclusion of section 5.1(1)(a)(ii). This enabled acceptance of a claim where the mental disorder "... is predominantly caused by a significant work-related stressor, including bullying or harassment, or a cumulative series of significant

work-related stressors, arising out of and in the course of the worker's employment." Receiving less attention was the imposition of a more onerous "predominant cause" test. This had not previously been contained in the act to establish entitlement to compensation for mental disorder injury.

"Predominantly caused" isn't clearly defined in the policy. While the Board is clear it imposes a higher threshold of proof upon the worker than is imposed by the "causative significance" test employed throughout the rest of the act, the Board is unclear concerning the precise nature of that test.

It is clear that by introducing the predominant cause test, the government sought to limit acceptance of claims for mental disorders caused by stressors occurring over time in the employment. This may well be a response to the long-standing trepidation regarding the potential flood of unmanageable claims should stressors occurring over time be recognized as compensable.

Most recently, there have been a series of positive changes to section 5.1 of the act. They involve the introduction of presumptive language to section 5.1(1.1), covering workers in various occupations that involve many BCGEU members. Presently, if a worker who is or has been employed in an eligible occupation is exposed to one or more traumatic events arising out of and in the course of their employment in that eligible occupation³, and has a mental disorder recognized in the current DSM,:

...the mental disorder must be presumed to be a reaction to one or more traumatic events arising out of and in the course of the worker's employment in that eligible occupation, unless the contrary is proved.

This is a welcome development. But, given the professional shortages in our healthcare system, it may still take time to obtain a diagnosis from a psychiatrist or psychologist. Nevertheless, this will be more beneficial than detrimental to workers.

On July 19, 2019, the BCGEU provided written submissions to the review of the Workers' Compensation Act. Our submissions included recommendations for amendments to section 5.1. We've requested physicians be included again with psychologists and psychiatrists in section 5.1(1)(b). This would allow for more expedited adjudications and faster access to compensation for workers who suffer mental disorder injuries. We also recommended prompt referral for assessment and treatment for workers who develop mental disorder injury as a compensable consequence of physical injury, along with recognition of entitlement for workers who develop psychological impairments due to the stress and financial hardship suffered when adjudication or other claims processes are stalled or interrupted.

We also called for removal of the "predominantly caused" test in section 5.1(1)(a)(ii), and that adjudication for mental disorder claims arising from bullying, harassment, or other stressors occurring over time should have the same threshold for acceptance as all other kinds of claims.

Finally, the BCGEU submission called for the elimination, or substantial revision of the "labour relations exclusion" in section 5.1(1)(c). Decisions of the employer concerning the employment ultimately lead to virtually everything that occurs in the employment. If not removed, the language must be significantly revised. This way it's clear not all consequences of decisions made by the employer are automatically shielded, and that workers will be properly compensated when psychological injury is caused in the workplace.

² *Plesner v. British Columbia Hydro and Power Authority*, 2009 BCCA 188

³ Correctional officer, emergency medical assistant, firefighter, police officer, sheriff, emergency response dispatcher, health care assistant (including certified Care Aide), and nurse (including LPN).



Discrimination on the basis of family status in B.C.

By Dora Tsao

Employees with families often need to rely on their established work schedules and conditions to be able to balance work with family caregiving responsibilities. An employer who changes an employee's work schedule or other conditions of their employment may render the employee unable to provide family caregiving responsibilities. If that's the situation, the employee may be able to establish a case of family status discrimination. It's important for employees to be aware of what's required, at present, to establish family status discrimination.

The starting point is to examine whether the case establishes a *prima facie* (accepted as correct until proven otherwise) case of discrimination according to the three-part test as set out in *Moore v BC (Education)*, 2012 SCC 61. The parts are:

1. The complainant must have a characteristic protected by the *Human Rights Code*
2. The complainant experienced an adverse impact with respect to an area protected by the code
3. The protected characteristic was a factor in the adverse impact

Once a complainant has successfully proved they meet these three parts, the respondent has the opportunity to prove their conduct was justified within the framework of exemptions available under human rights statutes.

In *Health Sciences Association of BC v Campbell River and North Island Transition*

Society, 2004 BCCA 260, the B.C. Court of Appeal ruled an employer's actions in changing an employee's schedule or other conditions of their employment was *prima facie* discrimination if it resulted in a "serious interference with a substantial parental or other family duty or obligation of the employee".

In the Campbell River case, the employee had four children, including a son who had a major psychiatric disorder that required the employee's care after school hours. The employer changed the employee's work schedule from 8:30 a.m. to 3 p.m. to 11:30 a.m. to 6 p.m. The employee argued her attendance to her son's after-school care was medically important to him and the schedule change negatively impacted her ability to provide the care. The Court of Appeal ruled the employee's schedule change was a serious interference with her parental obligations and represented discrimination on the basis of family status.

More recently, in *Envirocon Environmental Services ULC v. Suen*, 2019 BCCA 46, an employee challenged the requirement that the employer's actions "seriously interfered" with an employee's parental obligations in a case for discrimination on the basis of family status. The employee argued the test should be less restrictive, that a term or condition of employment needs to "seriously interfere" with a family duty or obligation. The Court of Appeal ruled against the employee and upheld the ruling in *Campbell River*.

In *Envirocon*, the Court of Appeal held an employee's termination on the basis of his refusal to take an out-of-province assignment shortly after the birth of his first child was not discriminatory. The employer asked the employee, based in Burnaby, to work on a project in Manitoba for eight to 10 weeks and the employee refused the assignment due to his parental obligations towards his four months old baby. The Court of Appeal ruled the employee was no different than "the vast majority of parents" in having parental obligations for a child and "many parents are required to be away from home for extended periods for work-related reasons who continue to meet their obligations to their children".

While *Envirocon* upheld the restrictive test in *Campbell River*, the test for family status discrimination can be viewed as evolving. At present, employees have to establish they have a family duty or responsibility, that they have suffered some form of discipline or impact as a result of a change in term or condition of their employment. As well, they have to establish the change in terms or conditions "seriously" interfered with their family duty or obligation.

Ideas for resolving conflict at the workplace

By Reena Parmar

Conflict is often the result of an unmet need. Some examples of these needs in a work situation are fairness, recognition, predictability, security, understanding, and balance.

You as a steward may be involved in many instances where you're resolving a conflict between coworkers, or between a co-worker and a supervisor. Whatever the situation, you have a responsibility to act respectfully and in good faith to resolve the matter, whether you personally are having a disagreement with a co-worker or supervisor or are acting as a steward.

If you're on the receiving end of questionable behaviour or noticed troubling activity in the workplace, you need to determine whether this behaviour is acceptable and know when to act, if needed.

When you're uncertain about someone's workplace behaviour, try using the "reasonable person" test. Would most people consider the action unacceptable?

Would a reasonable person consider the behavior in question to be discriminatory?

Conflict with a co-worker - talk it out

Talking it out may seem challenging, but it's the best option to sort out these types of situations. Resolution done informally through conversation is always the best option.

Stewards should attempt to ease the situation as soon as they become aware of a conflict by encouraging members to talk to one another directly.

Another tactic is to sit down in private and seek to understand the situation. Ask questions—find out what's necessary for the individual or people involved to move toward a resolution.

Emotions are often high in these situations. Remind co-workers to resist blaming or shaming. Stay on task, focus only on the solution and what changes can be made. Discourage gossip about the other party and any sort of retaliation. These things can escalate the situation. These actions toward the other party can push a decision-maker to determine both parties are at fault if a formal complaint is pursued at a later date.

Stewards must remember some conflicts are sensitive in nature. If the conflict involves two employees, stewards must remain unbiased and understand both parties have equal rights in the workplace.

By using informal approaches, stewards can encourage early resolution. This is preferable to waiting until a conflict becomes so serious a formal complaint is necessary. Important goals are providing an opportunity for the behaviour to be corrected and for the people impacted by the issue to take responsibility for their own behaviour.

Conflict with a supervisor

Conflict between a worker and their supervisor can be a challenging situation. Stewards may not be successful in discussing the matter with the supervisor. If this is the case, the next option would be to ask the next highest level of trusted manager, such as the supervisor's supervisor, for help.

It's a good idea to be prepared for such a meeting by presenting a list of all the actions you, the steward, have taken to resolve the issue. Your purpose is to pursue a resolution in good faith. Stay professional and on task.

Conclusion

Stewards should address situations as soon as they become aware of them. If you can successfully address the issue early, then complications and unnecessary conflict can often be avoided.



Changes to the *Labour Relations Code*

By Rene Nicolas

The B.C. Government has recently passed Bill 30 – The Labour Relations Code Amendment Act, 2019 ("Bill 30") after approximately one year of consultation with the labour relations community. The bill amends the Labour Relations Code, which is the piece of legislation in British Columbia governing unionized workplaces. These amendments are generally positive for workers. Below you'll find relevant highlights of those amendments.

Section 1 - Codification of rights to engage in consumer leafleting

It took nearly two decades, but the code now clarifies that picketing doesn't include consumer leafleting. In 1999, the Supreme Court of Canada held that the code's definition of picketing was too broad because it captured perfectly legal consumer leafleting activities in front of the worksite.

Section 8 - Rebalancing restrictions on employer communications

In 2002, the B.C. Liberal government gave employers broader rights to communicate negative views about unionization. As expected, employers used expanded speech rights to shut down union organizing drives. This is reflected in the dramatic drop in union certifications since 2002.

Bill 30 reverses this expansion and now limits employers to communicating reasonably held facts or opinions about their business.

Section 14 - Attainable remedial certifications

The code allows for automatic remedial certifications in response to employers who commit unfair labour practices during union organizing drives. Remedial certification means automatically being given the certification without a representation vote. It

was difficult under the previous code to obtain a remedial certification because a union had to show it would have won a representation vote but for the unfair labour practice.

Bill 30 lowers the threshold for getting a remedial certification because the Labour Relations Board now has discretion to award remedial certifications where it believes it would be "just and equitable" to do so.

Remedial certifications will also be a factor considered by the board to determine what to do after first collective agreement mediation under section 55.

Section 19 - Restrictions on raiding

Raiding is the process of one union seeking to represent another union's existing organized members. It can be a problem because it distracts from the work of organizing workers who don't belong to a union.

Bill 30 limits raiding activities. Previously, raids could occur every year in the 7th and 8th month of a bargaining unit's collective agreement. Now, raids are limited to:

- The 7th and 8th month of the last year of a collective agreement, where the term of the collective agreement is three years or less; or
- The 7th and 8th month of the third year of a collective agreement and every year thereafter, where the term of the collective agreement is more than three years.

There are also special raiding provisions for the construction sector.

Section 24 - No card check, but shorter vote periods and restrictions on mail-in ballots

Unions were advocating strongly for a return to card check certification whereby unions were automatically certified without the need for a second vote if a certain percentage of

workers signed a union membership card. Bill 30 does not give us card check.

Instead, Bill 30 reduces the number of days before the second vote happens from 10 days to five business days.

This is helpful in reducing the time an employer has to commit unfair labour practices prior to the second vote. However, card check was preferred.

The board, under the previous chair, increased the use of mail-in ballots that resulted in delays in the voting process. This allowed for additional employer unfair labour practices during the course of the vote. Bill 30 limits the use of mail-in ballots to situations where the employer and the union agree or where there are "exceptional circumstances". Exceptional circumstances will be defined by the current board through litigation.

Section 33 - Restrictions on decertification applications

Decertification refers to the process whereby employees vote to get rid of their union.

Previously, 10 months from certification of a union or 10 months from the dismissal of a decertification application had to elapse before a decertification application could be filed. Bill 30 expands this period to 12 months.

Successorship in a "contract flip" for certain sectors

Where a unionized employer sells their business to another employer, a union could assert successorship rights to ensure their certification and collective agreement were transferred to the new purchasing employer.

Employers got around this successorship protection by "flipping" contracts. When a unionized employer lost a contract (i.e: for cleaning services or security services) and a new employer obtained the contract, successorship would not apply. Accordingly, a union's certification and collective agreement



wouldn't be transferred to the new employer who obtained the contract.

Importantly, Bill 30 extends successorship to contract flipping situations for certain sectors. These include: (a) building cleaning services; (b) security services; (c) bus transportation services; (d) food services; and (e) non-clinical services provided in the health sector.

The new successorship protections are limited to these sectors, but the provincial government has the power to add more sectors by regulation.

Extension of the statutory freeze period post-certification

Previously, an employer wasn't allowed to change existing terms and conditions of employment without proper cause for four months following certification of a union. This is called a "statutory freeze". The purpose of the statutory freeze is to provide a period of calm where a first collective agreement can be negotiated.

Four months is insufficient as most first collective agreements aren't negotiated within four months. Bill 30 extends this statutory freeze period to 12 months with the possibility to extend the period in situations where first collective agreement mediation is engaged under section 55.

Consequences if collective agreement is not filed with Labour Relations Board

The modern code has always required filing of collective agreements with the board. Bill 30 now provides for consequences if employers and unions fail to file a copy of its collective agreements and renewed agreements with the board. It's important for stewards and staff to comply with this requirement.

More robust assistance from board mediators/facilitators

Bill 30 creates easier access to the board's mediation services.

Under section 53, parties can now unilaterally request the appointment of board facilitators to help parties build better labour relations.

Parties are able to engage board mediators to assist them when they fail to achieve an adjustment plan under section 54.

First collective agreement mediation is also more easily available because there's no longer a need for the union to obtain an affirmative strike vote mandate before proceeding to first collective agreement mediation at the board.

Section 87 – Immediate access to board mediation for grievances

Bill 30 amends section 87 to allow for immediate appointment of a board settlement officer to assist the parties in settling a grievance. This is akin to expedited (free) mediation at the board with respect to a grievance which has gone through the steps of a grievance procedure. Previously, parties had to wait 45 days before such a request could be made.

Section 88.1 – Grievance arbitration case management

Bill 30 adds new case management requirements for arbitration. Where an arbitrator is appointed to hear a grievance, the arbitrator is now required to conduct a case management conference within 30 days of being appointed. The conference is meant to address: (a) the schedule for exchange of particulars and documents; (b) scheduling hearing dates; (c) the possibility of settling the dispute.

Section 104 – Expedited arbitration

Section 104 allows parties to apply to the board's director of the Collective Agreement Arbitration Bureau for expedited arbitration of a grievance.

In the past, a section 104 application would be accepted if the grievance procedure was exhausted and an application was filed within 45 days of the grievance procedure having been exhausted. Bill 30 shortens the time period for filing a section 104 application to 15 days.

Bill 30 also repeals the requirement that the hearing commence within 28 days of the appointment of an arbitrator by the director. Conceivably, the hearing must now immediately begin upon appointment of an arbitrator.

The director must now appoint a board settlement officer to engage in mediation on the request of either party. Previously, agreement was required by both the union and employer.

An arbitrator appointed under section 104 must now conduct a case management conference within seven days of the appointment and conclude the arbitration within 90 days of the section 104 application being filed.

In terms of issuing decisions, an arbitrator appointed under section 104 must:

- issue an oral decision within one day of completing the hearing, if requested jointly by the parties; or
- issue a written decision not exceeding seven pages within 30 days of completing the hearing.

Bill 130 also provides an arbitrator appointed under section 104 with greater case management tools to force the parties to streamline the adjudication of a grievance.

These changes to section 104 are significant. We encourage you to speak with your staff representative if you have questions about the use of section 104 expedited arbitrations.

Section 123.1 – Provision of information about rights under the code

The board now has a duty to provide public information about rights and obligations under the Labour Relations Code. It may require employers to display this information in the workplace or make it available to employees.

If your employer has had a history of code violations, you may wish to consult your staff representative about utilizing this provision of the code.

Section 158 – Increased fines

Bill 30 increases the fines for a failure to comply with board orders from \$1,000 to \$5,000 for individuals, and from \$10,000 to \$50,000 for corporations.

Conclusion

As these changes to the code are new, and in some cases significant, we anticipate there will be an adjustment period for the board, unions and employers. We anticipate the board will be providing the labour relations community with more information about the adjustment of their internal processes in response to these changes.



Dear Advocacy

By Emily Luther

Imagine receiving this letter:

“

I was fired from my job for yelling at my boss. I had a good reason for yelling. My boss told me to do something that wasn't part of my job duties. I have a grievance about my termination. My staff rep told me the grievance is being sent to the BCGEU's advocacy department. What does that mean and what should I expect to happen next? I'd like to see my boss punished.

Yours truly,
Garfield



Questions can be submitted to Dear Advocacy by emailing steward@bcgeu.ca.

BCGEU's Advocacy department handles grievances that haven't been resolved by the area office and are the primary authors for *The Steward* magazine.



Dear Garfield,

I'm sorry to hear you are going through this. Perhaps it will help to know a bit about the process that happens when a grievance comes to the advocacy department.

Generally, staff representatives in BCGEU's area offices send grievances to advocacy when:

- The grievance hasn't been resolved through the grievance procedure in your collective agreement; and
- The grievance isn't suitable for expedited arbitration under your collective agreement and needs to be sent to full arbitration. This includes termination grievances.

When your grievance arrives in advocacy, it will be assigned to a staff representative in the department. Staff representatives here are usually assigned to one or more components, so who your grievance is assigned to will depend on which component you are in.

The staff representative handling your grievance will work with you to achieve a resolution. They will talk to you and get information and/or documents relating to your grievance. For a termination grievance, this will include information on your efforts to find other employment, so please keep track of these efforts.

The staff representative may also work with your employer or their legal counsel to appoint an arbitrator and set a date for arbitration. Arbitration is a relatively formal process where both sides present their case through argument and evidence. The arbitrator then decides whether the grievance is allowed or dismissed, and what remedies are appropriate.

In an arbitration for a termination grievance, the arbitrator would be looking at:

- Whether the employer had just cause for some form of discipline;
- If so, whether the employer's decision to dismiss is an excessive response in all the circumstances of the case; and
- If so, what alternative measure should be substituted.

If your termination grievance is successful, the usual remedy (with some exceptions) is reinstatement to your former job. Punishment (for your boss or otherwise) isn't generally part of the process.

If a hearing date is set for arbitration, it could be up to a year or longer after your grievance arrived in advocacy. Hearing dates depend on the schedules of your staff representative, the employer and their legal counsel, and the arbitrator.

The setting of a hearing date doesn't guarantee the hearing will proceed. For example, a grievance may not proceed to hearing if:

- It's determined the matter can be successfully resolved without a hearing; or
- Documents, information, and/or legal research indicate there's no substantial likelihood of success at arbitration.

Another option your staff representative might consider is mediation. This is like arbitration but less formal. The mediator/arbitrator will try to assist you, the union and the employer to come to a resolution. Your staff representative in advocacy will work with you to determine the best course of action for your grievance.

I hope this answers your question. You can discuss further questions with your advocacy staff representative once they are assigned, or speak with a steward.

Sincerely,
Advocacy

