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 CONIFER

Human Rights Law Update:
 Duty to Accommodate Other Prohibited Grounds

Thomas A. Roper, Q.C.
 604.806.3850
troper@ropergreyell.com

The purpose of this presentation is to provide an overview of these areas of the law. This does not by any means constitute a full analysis of the law or an opinion of Roper Greyell LLP or any member of the firm on the points of law discussed.
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rg ***Evraz Inc. and USW Local 5890, [2015] SLAA No. 2 (Stevenson)***

- Grievance over bumping rights
- Junior Shipping Clerk in accommodated position
- Grievance dismissed
- Contract not “sacrosanct”
- No other position available for accommodated employee

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rg ***Seaspan ULC v. ILWU, [2014] BCCAAA 108 (Lanyon)***

- Deckhand subject to Last Chance Agreement
- Tested positive while off-duty
- Grievance allowed
- Undue hardship not established
- Grievor never impaired at work

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rg *Stewart v. Elk Valley Coal Corp.* 2015 ABCA 225

- Court concluded that employer's Drug and Alcohol Policy constituted accommodation
- Loader driver impaired at work
- Termination for violation of Policy not because of addiction
- No discrimination

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rg *Stewart v Elk Valley*

- In alternative if there was discrimination termination justified
- Policy constituted accommodation to point of undue hardship
- Reasonable to require disclosure of addiction before accommodation

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rg *BCTF and TFEU, [2014] BCCA 103 (Kinzie)*

- Grievor dismissed for threats to "go postal"
- History of difficulty and depression accommodated in past
- Accommodation ended with IME
- Grievor had no control over conduct

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BCTF and TFEU

- Should have treated as non-culpable
- In any event accommodated to point of undue hardship
- Decision to dismiss could be sustained
- But reinstated for sole purpose of applying for LTD

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Halton District School Board v. OSSTF, [2015] O.L.A.A. No. 23 (Albertyn)

- Secondary school teacher at home pending certified fit to RTW
- Psychological assessment cleared him to work
- Grievor failed to attend meetings to facilitate RTW

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Halton District School Board and OSSTF

- Suspended and then terminated for disobeying orders
- Employer later learned grievor not forthright with medical examiner
- Disability caused lack of insight
- Evidence at hearing indicated total disability since attempt to RTW

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Halton District School Board and OSSTF

- Grievor failed to cooperate in accommodation
- Grievance allowed in part
- No prognosis of likely return to work
- Reinstatement not appropriate
- Records to be sealed
- General damages \$40,000

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Petrar v TRU, 2014 BCHRT 193

- Advised employer of MS diagnosis and side effects of medication
- Employee had performance issues
- Employer requested medical information
- Employee refused claiming request was discriminatory

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Petrar v TRU

- Employee was not seeking accommodation
- Employer obliged to get medical information before addressing performance issues
- Information necessary for accommodation

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Rajigadu v UBC, 2014 BCHRT 157

- Medical restrictions included no cold, damp environments and no interactions with former co-workers
- UBC offered position that met restrictions
- Union agreed

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Rajigadu v UBC

- Employee refused to RTW except in different department or night shift
- UBC determined this was inconsistent with restrictions and would have required bumping
- Employee refused to RTW and was terminated

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Rajigadu v UBC

- Complaint dismissed
- Employee refused reasonable accommodation

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TELUS v TWU, 2015 BCSC 1570

- Arbitrator concluded the union was entitled to notice and consultation whenever accommodation requested
- Exclusive bargaining authority
- Accommodation proposals were "bargaining"

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TELUS v TWU

- Award was overturned
- Many aspects of business do not amount to "bargaining"
- Employer has the right to direct employees
- Arrangement of accommodation is management right

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Canada (Attorney General) v Hicks, 2015 FC 599

- Transferred to Ottawa from N.S.
- Wife stayed in N.S. to care for her mother
- Claim for Temporary Dual Residency Assistance denied

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Canada (Attorney General) v Hicks

- BFOR not established
- Family status discrimination established
- \$15,000 for pain and suffering and \$20,000 for reckless conduct

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Canada (Attorney General) v Hicks

- Judicial review denied
- Court concluded the Tribunal applied appropriate test for *prima facie* discrimination on basis of family status
- Conclusion with respect to BFOR reasonable

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Kenworthy v Brewers' Distributors (No 2), 2016 BCHRT 54

- Discrimination based on family status
- Duty to accommodate childcare schedule
- Employer accommodated for two years with straight day shifts
- Complainant failed to participate by looking for alternate childcare

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Kenworthy v Brewers' Distributors

- Campbell River test is not exhaustive but applied in this case
- Complaint had no reasonable prospect of success
- Employer met its duty to accommodate
- Family status complaint dismissed

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Flatt v Canada, 2015 FCA 250

- Leave to appeal to SCC denied May 2016
- Wanted to telework for one year to allow for breastfeeding
- Duty to accommodate family status
- Grievance and judicial review dismissed

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Flatt v Canada

- Applied test from *Canada v. Johnstone*, 2014 FCA 110
- No reasonable effort by the grievor to find viable solution
- Personal choice
- No *prima facie* discrimination

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Durham College and OPSEU, [2015] O.L.A.A. No. 58 (Davie)

- Request for personal leave with pay denied
- Grievor at home to care for sick children
- These were not extenuating circumstances
- Denial of pay not discriminatory

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Miraka v ACD Wholesale Meats, 2016 HRTO 41

- Terminated for 3 days AWOL
- Absences related to illness of children and hernia suffered by complainant
- Discrimination on protected grounds
- No evidence of undue hardship
- \$10,000 for injury to dignity

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SMS Equipment v Unifor, 2015 ABQB 162

- Arbitrator's conclusion that employer required to accommodate child care responsibilities was reasonable
- Judicial review denied
- No evidence of undue hardship if grievor worked all day shifts
- Co-worker was willing to work all night shifts

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Dawson v VPD, 2015 BCHRT 54

- “Roller Girl” wins \$15,000 for injury to dignity
- Transgendered woman discriminated against
- Refused medical treatment required after gender reassignment surgery

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Dawson v VPD

- Referred to her as “Jeffrey” and used male pronouns
- Refusal to treat her as a woman was hurtful
- VPD also ordered to adopt policies to prevent discrimination of transgender people

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Gender Expression

- Human Rights Code amended
- Grounds of “sexual orientation” and “gender identity or expression”
- Effective July 28, 2016

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rg Questions?

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