

ON-LINE INVESTIGATIONS AND LAST CHANCE AGREEMENTS

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Order of Proceeding

- Last Chance Agreements
- Attendance Management Programs
- On-Line Investigations



Last Chance Agreements

- Intersection of labour/employment law and human rights law
- Accommodation of disabilities



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- Source – *Human Rights Code*

“9(1) In this Code, "discrimination" means:

(d) failure to make reasonable accommodation for the special needs of any individual or group, if those special needs are based upon any characteristic referred to in subsection (2).

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Human Rights Code

9(2) The applicable characteristics for the purposes of clauses (1)(b) to (d) are:

(l) physical or mental disability or related characteristics or circumstances...

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Disability defined:

- ...differential treatment based on 'normal ailments' ...will not usually be considered discrimination when applying a purposive and contextual interpretation of The Code. 'Normal ailments' include commonplace and transitory conditions that last for a short period of time, have no ongoing or long-term effects, and have minimal or no impact on an individual's opportunities to take part in life's important functions or activities on an equal level with others. The flu and common cold would usually fall in this category.
- Source - Human Rights Commission Policy # I-4

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But...

“Physical or mental disability” may include actual or perceived previous or existing or potential dependence on alcohol, drugs, or addictive substances, and may include addiction to gambling.

• Source - Human Rights Commission Policy # I-4

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- Reasonable Accommodation
- *Meiorin* analysis for determining if prima facie discriminatory standard is BFOR:
 1. Rational connection
 2. Adopted in good faith belief it is necessary to fulfill the work-related purpose
 3. Undue hardship

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\$64,000 Question:

- What is undue hardship?

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- Multi-party obligation
- Employee has corresponding duty to facilitate accommodation
- Must accept reasonable accommodation
- Need not be perfect

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- Employer's obligation:
 - More than negligible effort
 - Some hardship must be borne
 - Question of fact
 - Variable from case to case

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- Last Chance Agreement = Individualized Accommodation Agreement (*CUPE Local 133 v. Corporation of the City of Niagara Falls*)

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- An LCA is a document negotiated between an employer and a union to save the job of someone whose employment would otherwise be terminated. The employer and the union choose to acknowledge an employee's addiction and negotiate terms that they and the employee can live with. It is a way to accommodate the disability of an employee with an addiction but it is still a compromise. The grievor has the certainty of getting his job back, which he would not have if he had to pursue a grievance to arbitration...

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- ...However, in exchange, he has to agree to some terms and conditions of employment that other employees are not subject to. That is the *quid pro quo* for the employer to take another chance on an employee whose behaviour it has already determined was worthy of termination. The LCA gives the employer comfort that the grievor has made a commitment to rehabilitation and good behaviour. However, it also usually provides that termination will be the result of a violation of those terms. (*CUPE Local 133 v. City of Niagara Falls*, 2014 CarswellOnt 1851 para. 29)

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- Hybrid Aspect to discipline
- Culpable vs. non-culpable
- Consideration of mitigating factors
- Employee Obligation to seek/accept treatment

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Examples of Standard Terms for LCAs:

1. Abstinence from drugs/alcohol
2. Participation in treatment/AFM/Counselling
3. Access to medical updates/records
4. Submitting to drug/alcohol testing
5. How to respond to relapse
6. Consequences for breach

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Relapse

- Part of disease of addiction
- Accepted as part of duty to accommodate

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Seaspan ULC v. CMSG (Westmoreland)

[2016] C.L.A.D. No. 244

- Docking company – barges and tugboats
- Grievor – Tugboat Captain
- 55 years old
- 6 years' service
- "competent employee liked by everyone"
- Extensive treatment for various addictions

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Seaspan ULC v. CMSG (Westmoreland)

[2016] C.L.A.D. No. 244

- Hired April 2007
- Relapsed May 2007 (missed shift)
- IME
- Company arranged 7 day treatment program for Grievor
- Returned to work pursuant to RTW Agreement

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Seaspan ULC v. CMSG (Westmoreland)

[2016] C.L.A.D. No. 244

- Terms included:
 - 24 month duration
 - Abstinence
 - Comply with terms from physician/therapist
 - Authorization to disclose relevant medical information
 - Must report to each shift in “fit and reliable” condition

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Last Chance Agreements

Seaspan ULC v. CMSG (Westmoreland)

[2016] C.L.A.D. No. 244

- Terms included:
 - Reasonable cause testing
 - If relapse – must notify employer, withdraw from work and be reassessed by physician
 - Relapse results in 24 month extension
 - Any breach – results in review of file to determine if involvement of LR is required

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Seaspan ULC v. CMSG (Westmoreland)

[2016] C.L.A.D. No. 244

- Complied for 2 years
- Relapsed in 2010 – missed shift
- Sent for residential treatment
- Then to Toronto for “behavioural disorder”
- On weekly indemnity throughout

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Seaspan ULC v. CMSG (Westmoreland)

[2016] C.L.A.D. No. 244

- Received “Gold Standard” treatment
- Returned to work with RTW Agreement LCA and Relapse Monitoring Agreement
- Terms of RTW/LCA largely the same as before

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Last Chance Agreements

Seaspan ULC v. CMSG (Westmoreland)

[2016] C.L.A.D. No. 244

- Relapse Monitoring Agreement Terms
 - Abstention
 - 3 meetings per week
 - Regular contact with sponsor
 - Daily call-ins between 7:30 and 9:00 am
 - Access to Doctor and Relapse Monitor for support

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Last Chance Agreements

Seaspan ULC v. CMSG (Westmoreland)

[2016] C.L.A.D. No. 244

- Relapse Monitoring Agreement Terms
 - Attend Monitor’s office for weekly meetings
 - Random urine/blood testing
 - Access to medical files
 - Non-compliance = Disciplinary consequences up to termination

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Seaspan ULC v. CMSG (Westmoreland)

[2016] C.L.A.D. No. 244

- Stopped going to treatment
- Started using
- No call/No show
- Discloses relapse to employer
- Monitor declines to continue working with him

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Seaspan ULC v. CMSG (Westmoreland)

[2016] C.L.A.D. No. 244

- Sent for IME
- “further offers of treatment will not alter his prognosis and may, in fact, increase his likelihood of future relapse”
- Terminated

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Seaspan ULC v. CMSG (Westmoreland)

[2016] C.L.A.D. No. 244 (para. 67)

– *Hydro Quebec (SCC)*:

- “The test is not whether it was impossible for the employer to accommodate the employee’s characteristics. The employer does not have a duty to change working conditions in a fundamental way...”

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Last Chance Agreements

Seaspan ULC v. CMSG (Westmoreland)

[2016] C.L.A.D. No. 244 (para. 67)

– *Hydro Quebec (SCC)*:

- “...but does have a duty, if it can do so without undue hardship, to arrange the employee’s workplace or duties to enable to employee to do his or her work”

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Seaspan ULC v. CMSG (Westmoreland)

[2016] C.L.A.D. No. 244 (para. 67)

– *Hydro Quebec (SCC)*:

- Not total unfitness, but the employee’s ability to fulfill the fundamental obligations arising from the employment relationship

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Seaspan ULC v. CMSG (Westmoreland)

[2016] C.L.A.D. No. 244 (para. 68)

- **Considerations:**
 - Financial cost
 - Disruption to collective agreement
 - Problems of morale
 - Interchangeability of workforce
 - Size of employer’s operation
 - Magnitude of risk and those who bear it

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Last Chance Agreements

Seaspan ULC v. CMSG (Westmoreland)

[2016] C.L.A.D. No. 244

- **Termination upheld**
 - Safety sensitive position
 - Multiple relapses (more than one or two)
 - Conduct of employer not “precipitous or uncaring”
 - Medical evidence – likelihood of response to treatment’
 - Grievor’s conduct

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Seaspan ULC v. CMSG (Westmoreland)

[2016] C.L.A.D. No. 244 (para. 102)

- LCA should not be set aside lightly
- **Closing:**

“The test is not whether anything else could be done... The Human Rights Code does not demand that disabled employees be given every conceivable opportunity. It demands that the employee be accommodated to the point of undue hardship by the employer”

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Seaspan ULC v. ILWU (H(G))

2014 CarswellNat 4087

- Deckhand
- 4 relapses prior to final Recovery Agreement
- 57 years old
- RTW/Monitored Recovery Agreement
- Relapsed again

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Last Chance Agreements

Seaspan ULC v. ILWU (H(G))

2014 CarswellNat 4087

- No evidence of:
 - Financial cost of accommodation
 - Disruption to collective agreement/other workers
 - Problems of morale
 - Interchangeability of workforce

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Last Chance Agreements

Seaspan ULC v. ILWU (H(G))

2014 CarswellNat 4087

- Employer's duty to accommodate satisfied regarding Grievor's current position
- But should have looked for non-safety sensitive position

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Last Chance Agreements

Seaspan ULC v. ILWU (H(G))

2014 CarswellNat 4087

- Considerations:
 - Self-disclosed
 - Did not report to work while under influence
 - Did not use while at work
 - No workplace incidents arising from use

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Mosaic Potash v. Unifor 2016 SKCA 68

- Duty to Accommodate Not Met
- LCA
- Positive test for alcohol
 - 30 years with satisfactory work record
 - No workplace injuries
 - No attendance issues
 - Reinstated

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Last Chance Agreements

Fanshawe College v. OPSEU

2017 CarswellOnt 4903

- Drug addicted professor
- Hired with knowledge of addiction
- Encouraged to seek treatment
- Given reduced workload
- Relapse after 4 years – reinstated on LCA
- Breached LCA – termination upheld

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Attendance Management Programs

Basics

- From duty to accommodate
- Used to manage employees' non-culpable absences

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Attendance Management Programs

Basics

- Series of steps
- Escalating
- Warnings of consequences

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Attendance Management Programs

Basics

- Obligation to notify of consequences
- Showing employee path to success

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Attendance Management Programs

4 Principles of AMP likely to be upheld:

1. Do not mix culpable and non – culpable
2. Establish a reasonable threshold
3. Room for employer discretion
4. Take into account duty to accommodate

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Attendance Management Programs

- *Health Employers Association of BC v. Hospital Employees' Union*
 - Effective program will be:
 - Constructive in tone
 - Designed to assist employees reduce absenteeism
 - Be consistent with CBA/Policy manual
 - Allow for reasonable accommodation

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ON-LINE INVESTIGATIONS

- Do you google job applicants?
- Check their Facebook accounts?
- Twitter?
- Instagram?

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ON-LINE INVESTIGATIONS

- Potential pitfalls of social media background checks:
 - Human rights laws – cannot use protected grounds as a basis for denying an applicant a job
 - Fake friend requests to gain access to accounts raise exposure for privacy breach lawsuits
 - Beware *The Personal Investigations Act*, which applies to pre-employment enquiries

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ON-LINE INVESTIGATIONS

- *Personal Investigations Act*:
 - No case law yet
 - Pro Tip: Get consent before searching
 - Consent must inform subjects:
 - Purpose for obtaining information and how it will be used
 - Personal information to be collected
 - Sources for collection
 - Date consent is effective/expires

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PIA – consent can be withdrawn at any time
PIPEDA – not applicable to private sector employers in Manitoba
...but – may be amended to cover

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Expectations of Privacy

- Not dissimilar to case law re: video surveillance
- What are the employee's expectations of privacy?

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Expectations of Privacy

- Expressing this through privacy settings
- Stronger settings = greater expectation

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ON-LINE INVESTIGATIONS

DO:

Have a Social Media Policy

- Best practice
- Informs expectation of privacy
- Useful for imposing discipline

DO NOT:

- Create fake on-line profiles to spy on your employees

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ON-LINE INVESTIGATIONS

Public Sector Employer:

- FIPPA
- Caution – collection of personal information must be directly from the individual the information is about
- *Quaere* whether collecting from a social media account is collecting from the individual him or herself

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Private Sector Employer:

- PIPEDA does not apply
- Employer – employee relationship (not federally regulated) is outside application of PIPEDA

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ON-LINE INVESTIGATIONS

Canada Post Corp v. CUPW 2012 CarswellAlta 449

- Negative remarks on Facebook
- No privacy settings
- Co-workers/supervisors could all see
- “Employees cannot shield themselves from the consequences of inappropriate postings by claiming an expectation of privacy”

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ON-LINE INVESTIGATIONS

Lougheed Imports v. UFCW Local 1518 2010
CarswellBC 3021

- Group of employees
- Posting derogatory remarks
- Private – but 477 friends among the group
- “Employees could not have a serious expectation of privacy”

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Monitoring for Malingering

- Overriding consideration is expectation of privacy
- Instagram account with hundreds of followers is not likely to be viewed as private
- Employer has a genuine interest to protect

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ON-LINE INVESTIGATIONS

- “Where the employment identity is linked to off-duty conduct that is sufficiently abhorrent or reprehensible, harm can be presumed, provided of course, there is public access to the conduct.”
- *EV Logistics v. Retail Wholesale Union Local 580*

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Questions?

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