

Privacy Law, Mental Health and Discrimination

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Agenda

- Privacy Rights
- Access to Information
- Discrimination and Prohibited Grounds
- Mental Health: Human Rights Obligations

PIPA
requires
organizations
to

Collect, use and disclose personal information with consent (with limited exceptions)

Protect personal information with safeguards

Provide individuals with access to personal information and information about how their information is being used and disclosed

Retain personal information only as needed and destroy it securely and promptly

Access to Information

- *FIPPA* applies to “records” in the custody or control of public bodies: anything on which information is recorded or stored
- Public has a general right of access
- “Custody OR control” broadly interpreted:
 - Records in possession of a third party
 - Exception: personal records of an employee

What is Personal Information?

- Information about an identifiable individual

name

home telephone
number

benefits card
number

social insurance
number

home e-mail
address

employee personal
information

- What does “personal information” really mean?

PIPA: Employee Personal Information

Employee Personal Information

- Employee personal information is information reasonably required to establish, manage or terminate an employment relationship
- *PIPA* permits employers to collect, use and disclose employee personal information with notice instead of consent

Employee Personal Information

What is not employee personal information?

- Contact information: information to enable an individual to be contacted at a place of business
- Work product information: prepared or collected as a part of work responsibilities or activities
- Personal information that is not about an individual's employment

Employee Personal Information

Retention of employee personal information:

- If used to make a decision that directly affects the employee, must retain for a least one year
- Otherwise, must destroy securely once the purpose for which the information was collected is no longer served by keeping it and retention is not necessary for legal or business purposes



Security of Personal Information

Security of Personal Information

- What's "sensitive personal information" is in the eye of the beholder
- Medical information is always sensitive
- Financial information / identity theft

Security of Personal Information

- *PIPA* and *FIPPA* require reasonable security arrangements to protect against unauthorized access, collection, use, disclosure or disposal

Rights Regarding Personal Information

FIPPA and *PIPA*: Access to Information

- Individuals presumptively entitled to their own “personal information”
- “Personal Information”:
information about an identifiable individual
- *FIPPA*: Does not include “contact information”:
information to enable an individual to be contacted at work
- Some exemptions to this right of access

Examples of Discretionary Exceptions to Access - *PIPA*

- Solicitor client privilege
- Collected for an investigation or proceeding that has not concluded, including any appeals
- Confidential commercial information where disclosure reasonably expected to harm to competitive position of organization

Examples of Mandatory Exceptions to Access - PIPA

- Disclosure would reveal personal information of another individual
- Disclosure could reasonably be expected to threaten health, safety of another individual
- Disclosure could reasonably be expected to cause immediate, grave harm to safety, health of applicant
- Third party identity without consent

FIPPA Part 2 Exceptions – Examples

Solicitor client privilege

Third party personal information

Advice or recommendations prepared by or for a public body

Harm to individual or public safety

Harm to public body or third party business

Ensuring Information is Correct

- Individuals have the right to challenge the accuracy and completeness of their information.
- May have the information amended if inaccurate, incomplete or out of date.

Employee Background Checks

Employee Background Checks

- Giving and getting references: collecting and disclosing personal information
- Pre-employment credit checks
- Pre-employment criminal record checks

Social Media – The New Frontier

- OIPC does not consider the internet “public” for the purposes of privacy legislation, regardless of settings
- Social media background checks?
- Be careful about your own web presence

Discrimination and Prohibited Grounds

Human Rights Statutes

- In all jurisdictions in Canada – federal, provincial & territorial
- Apply to public and private sector employers
- Characterized as quasi-constitutional
 - Takes precedence over other statutes
 - To be read and applied in a broad fashion

BC *Human Rights Code*

S. 3 – Purposes:

- To foster a society in British Columbia in which there are no impediments to full and free participation in the economic, social, political and cultural life of British Columbia
- To promote a climate of understanding and mutual respect where all are equal in dignity and rights

BC *Human Rights Code*

S. 3 – Purposes

- To prevent discrimination prohibited by this *Code*
- To identify and eliminate persistent patterns of inequality associated with discrimination prohibited by this *Code*
- To provide a means of redress for those persons who are discriminated against contrary to this *Code*

BC *Human Rights Code*

- Covers employment, accommodation, and services ordinarily available to the public (among other things)

13(1) A person must not

- a) refuse to employ or refuse to continue to employ a person, or
- b) discriminate against a person regarding employment or any term or condition of employment because of (a prohibited ground).

Race

Sex

Religion

Ancestry

Age

Place of
origin

Marital
status

Prohibited Grounds

Sexual
orientation

Political
belief

Physical or
mental
disability

Criminal
conviction**

Family
status

Colour

The Duty to Accommodate

Anatomy of a Discrimination Claim

- Is there a *prima facie* case of discrimination?
 - Must be a link between the disability and the employer's conduct
- Is discrimination the result of a “*bona fide* occupational requirement” (BFOR)?

British Columbia (PSEERC) v. BCSGEU *(“Meiorin”)* (SCC)

- Three part test for BFOR- employer must show:
 1. Rational connection to the job
 2. Good faith reason for the standard
 3. Reasonably necessary and impossible to accommodate without undue hardship
- Part 3 is the “duty to accommodate”

Duty to Accommodate

Step 3 – Accommodation to the point of undue hardship

“ . . . standard incorporates every possible accommodation to the point of undue hardship, whether that hardship takes the form of impossibility, serious risk or excessive cost”

Superintendent of Motor Vehicles) v. B.C. (Council of Human Rights) (Re Grismer), [1999] 3 S.C.R. 868

When Does it Arise?

- May arise as early as the job interview

Brady v. Interior Health Authority,
2007 BCHRT 233

- Pharmacist applicant interviewed
- Disclosed addiction to drugs
- Denied position because pharmacy manager did not want to deal with addiction

When Does it Arise?

Brady v. Interior Health Authority,
2007 BCHRT 233

- Referral to Human Resources
- Rapid reversal and offer to investigate accommodation options
- Applicant refused to provide medical information

When Does it Arise?

Brady v. Interior Health Authority,
2007 BCHRT 233

- Duty to accommodate exists at point of hiring
- Hiring managers need to know about duty
- Prospective employer entitled to inquire
- Prospective employee has duty to respond

What Must be Accommodated?

Accommodation is only required where one or more of the prohibited grounds is involved.

What Must be Accommodated?

No requirement to accommodate, for example:

- A lack of skills
- Education
- Personal preference
- Clothing
- Experience
- Intelligence
- Jewelry, *etc.*

unless those things can be related to a prohibited ground

What Must be Accommodated?

“Disability”

- Not defined in BC *Human Rights Code*
- Involuntary
- Some degree of permanence
- Some impairment of ability to carry out normal functions of life

What Must be Accommodated?

Some examples:

- Drug or alcohol dependency
- Depression
- Physical symptoms of “stress”
- Chronic fatigue syndrome

The Employer's Obligations

- Employer is expected to initiate accommodation process
- Must accommodate employee to the point of “undue hardship”

Point of Undue Hardship

- Difficult question
- Key is 'reasonable' accommodation, not perfect
- Some hardship is contemplated
- Number of factors must be considered in the context of the employer's operations

Hydro-Québec (SCC)

Establishing undue hardship

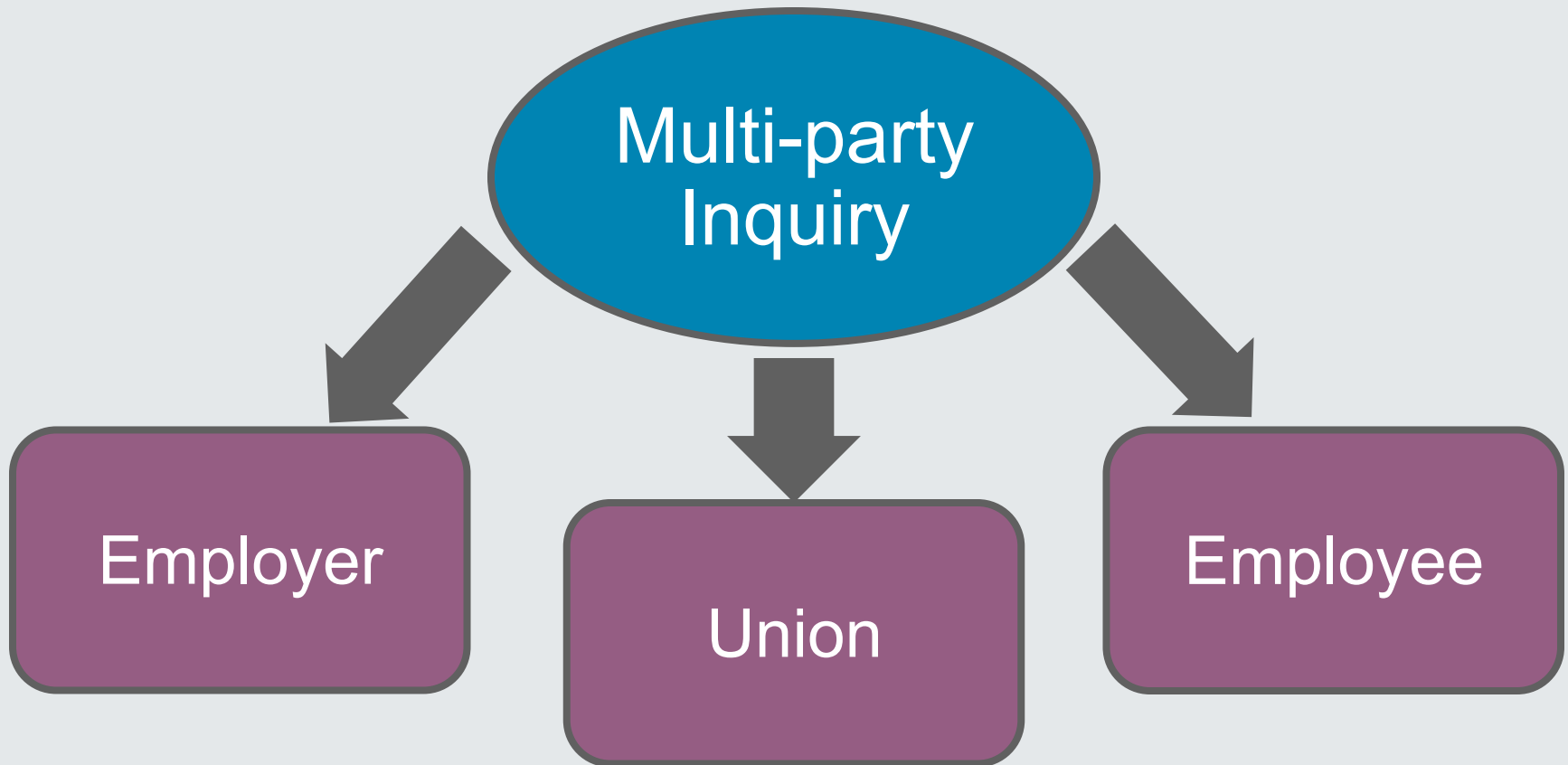
- Test is not whether it is impossible to accommodate employee's characteristics
- Accommodation must ensure the employee can work without causing undue hardship to employer
- Consider all of the circumstances

Hydro-Québec (SCC)

Implications

- Emphasis is reasonableness
- Meeting undue hardship in cases of excessive absenteeism
 - Past attempts at accommodation have failed
 - Prospect of improved attendance unlikely

Duty to Accommodate



Employee's Role

Employee must facilitate the search, i.e. disclose disability

- Failure to participate (i.e. failure to provide medical information)
- Refusal to accept reasonable accommodation

Employee's Role: Failure to Provide Medical Information

- Obligation to show fitness to work
 - Evidence not confirming fitness
 - Conflicting or equivocal evidence

Your employer does not have to:

- Satisfy unreasonable demands
- Create job where none exists
- Assign “make work” duties
- Ignore qualifications or safety

Mental Health: Invisible Disabilities

Mental Illness – Introduction

- What is the nature of the obligation to accommodate mentally ill employees?
- What types of accommodation may be required?

Duty to Enquire

- Positive obligation to seek further information
- Must not “turn a blind eye”
- Be aware of more subtle signs of mental illness

Morris v. BC Rail

- Employee with depression
- Cleared to return to work
- Occupational health department kept medical information confidential
- Managers not aware of diagnosis or continued symptoms

Morris v. BC Rail

- Employee laid off during major restructuring with 20 months severance
- Tribunal found layoff attributable to performance problems caused by depression
- Managers “should” have known about depression
- Awarded salary for 2 more years to bridge to early retirement

Understanding the Mental Disability

- The disability in general
- The employee's experience of the disability in particular
 - Relapse or recurrence
 - Risk to others
 - Work performance

Employee Obligations

- Reciprocal obligation of employee
- Must disclose information about their disability to employer
- If employee does not provide information, employer is relieved of the duty to accommodate

Accommodation

The duty to accommodate must be considered with other obligations:

- Common law duty of care
- Safety and violence in the workplace regulations
- Collective agreement duty to provide harassment free workplace

Mental Illness as Defense to Misconduct

- Is this non-culpable or hybrid conduct?
- Need to determine whether there is a connection between the illness and the misconduct
- If non-culpable/hybrid, goal of accommodation is to prevent further misconduct
- Employer not required to accommodate unacceptable misconduct

Spectrum of Conduct

Non-culpable



Non-culpable



Culpable



School District
No. 36 (Surrey)
The *Deol* Case

- Example where mental illness not connected to the misconduct
- Teacher accessed and used 17 co-workers' email accounts
 - Reviewed applicant's resume
 - Reviewed interview questions
 - Reviewed emails and sent offensive emails
 - Deleted emails

School District
No. 36 (Surrey)
The *Deol* Case

- Employer concluded teacher was dishonest
- Teacher provided medical reports stating he has bipolar disorder
- Employer terminates teacher after obtaining expert medical advice

School District
No. 36 (Surrey)
The *Deol* Case

- Arbitration:
 - 3 psychiatrists testified (2 for union, 1 for employer)
- Arbitrator concluded:
 - Union failed to show causal connection between bipolar disorder and misconduct

School District
No. 36 (Surrey)
The *Deol* Case

- Union's psychiatrists relied on grievor's self-reports and assumed he was in a hypomanic episode at time of misconduct
- Evidence about grievor's behaviour at the time not consistent with a hypomanic episode
- Bipolar disorder could not explain all of the misconduct in any event (e.g. lying)

School District
No. 36 (Surrey)
The *Deol* Case

- Conduct was culpable
- Serious misconduct and dishonesty
- Grievance dismissed

Questions?

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