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Workplace discrimination and its cost



Legislation that includes B.C.'s Human Rights Code is designed to prevent, or provide remedy for, acts of discrimination or human rights violations. Employment is one area covered by the Code, and it prohibits discrimination based on race, political belief, religion, marital or family status, disability, sex, gender identity, age and other "protected grounds."



By C. Nicole Mangan

In 1924 a young Scottish nursemaid, Janet Smith, was murdered at the home where she worked in the Shaughnessy neighbourhood of Vancouver, B.C. A Chinese houseboy named Wong Foon Sing, who worked in the same house, was later kidnapped by people dressed in Ku Klux Klan-style clothing, and tortured for six weeks. His captors tried to force him to confess to Smith's murder. Put on trial for murder Wong Foon Sing was acquitted for lack of evidence. The Chinese Benevolent Society had hired lawyer John H. Senkler to represent him. Senkler practised law with Albert Norton Richards, a founding partner of the firm known today as Richards Buell Sutton LLP. The case was never solved, but its investigation drew attention

to the lives of Vancouver's wealthy — and the impact of discrimination.

Today, legislation that includes B.C.'s *Human Rights Code* is designed to prevent, or provide a remedy for, acts of discrimination or human rights violations. The Code applies to areas of everyday life such as employment, tenancies and public services. It prohibits discrimination based on race, political belief, religion, marital or family status, disability, sex, gender identity, age and other "protected grounds."

Employers often juggle competing workplace interests, and must ensure they do not discriminate when hiring or promoting employees. This prohibition against discrimination applies even if the employer can't "see" the protected ground that applies — for example, an employee's mental disability.

Emotions often run high for everyone involved when someone complains of discrimination.

For the insurance industry — added to this mix of rights, obligations and emotions — is the impact of policies on

employment practices liability (EPL).

In some policies, the definition of "EPL Wrongful Act" includes "discrimination and harassment adversely affecting any employee." Most policies address discrimination claims in some form.

Coverage for workplace discrimination means that insurers must ask: What are the potential financial consequences of discrimination? Brokers, meanwhile, want to ensure that their clients know how proper coverage can protect them.

The current high mark for a human rights award in B.C. is the case of *Kelly v. University of British Columbia* (No. 4), 2013 BCHRT 302. Dr. Kelly was enrolled in UBC's Family Practice Residency Program, and spent part of his residency at St. Paul's Hospital operated by the Providence Health Care Society. UBC terminated Dr. Kelly's enrollment in its program after trying to accommodate his disability (Attention Deficit Hyperactivity Disorder, a Non-Verbal Learning Disability, and at times he had suffered from anxiety and depression). Correspondingly, Providence terminated his

residency, which was a termination of employment. Dr. Kelly filed a complaint with the B.C. Human Rights Tribunal (BCHRT) alleging discrimination against him both in his employment and in his education, the latter of which would be a “service customarily available to the public.” UBC eventually reinstated Dr. Kelly and he completed the medical program. However, a claim for damages proceeded. Dr. Kelly was awarded \$75,000 for injury to dignity and \$385,194.70 for lost wages. The BCHRT also awarded Dr. Kelly certain expenses, a tax gross-up and interest. This BCHRT decision was upheld by the B.C. Court of Appeal: *University of Brit-*

ish Columbia v. Kelly, 2016 BCCA 271.

Compensation, rather than punishment, is the goal of awards for injury to dignity. The facts of each case will determine the appropriate award for a complainant who has faced discrimination. Included in assessing the impact of the discrimination on the complainant are hurt feelings and damage to self-respect.

The B.C. Human Rights Tribunal usually calculates wage-loss awards from the date of termination to the date new employment is found. Like many forms of damages, however, such awards are subject to the complainant’s mitigation efforts. This method of assessment can

mean very short or very long periods of wage loss depending on the complainant’s individual circumstances.

EPL policies often respond to complex claims, and the damages available from human rights claims are rising. The insurance law team at Richards Buell Sutton LLP includes lawyers who also practise employment and human rights law, strengthening our ability to help insurance clients with any challenges. **IP**

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