Human rights issues arise frequently in the workplace, posing a significant risk of liability to employers. Employers bear the burden of accommodating employees in order to achieve full and meaningful participation in the workplace. Employers in breach of legislated human rights protection face a range of potential remedies that may affect the workplace and incur significant financial consequences.

Human Rights at Work

An introduction to human rights and the insurance risks arising out of the employment relationship

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I. Introduction: the Employment Relationship

Various human rights issues arise out of the business relationship between employers and employees. Employers may be liable for human rights breaches that occur prior to, during, and at the end of employment. This broad scope of potential liability makes human rights a significant area of risk for employers and their insurers.

The employment relationship between employer and employee is founded in contract law. The employment contract governs the creation, terms, duration, and termination of every relationship between employer and employee. Many of the rights, obligations and remedies flowing from these contracts are based in common law. There are also numerous statute-based rights, obligations and remedies, including those mandated under human rights legislation.

Human rights legislation is designed to ameliorate and prevent discrimination in specific areas of daily interaction, including the workplace. The employment provisions in human rights legislation across the country prohibit employers from discriminating against employees and potential employees on the basis of enumerated grounds. These include age; ancestry; citizenship; colour and race; creed or religion; disability; ethnic or place of origin; family status; marital status; criminal background; and sex. Some provinces also expressly prohibit harassment in the workplace. This prohibition catches the harassing conduct of the employer, its agent, and other employees.

Human rights legislation is remedial and given a broad and purposive interpretation.[1] Called the "final refuge of the disadvantaged and the disenfranchised,"[2] human rights legislation is interpreted to protect and advance those rights enshrined in the words of the statute. As such, the defences that are available in response to complaints of discrimination are interpreted narrowly. Employers often base their decisions on advancing legitimate business interests. Nonetheless, legitimate job requirements and qualifications, employment decisions, and workplace standards must all be justified if they have a discriminatory effect on individuals protected under the legislation. Discriminatory decisions are justified if they are based on a *bona fide* occupational requirement.

II. The Scope of Risk

An employee's human rights are first engaged and protected at the hiring stage. This means all potential employees have a right to full participation in the application process and throughout various interview stages. Even advertisements for employment may trigger human rights violations. These initial protections continue throughout the duration of the employment contract, including the dissolution of the relationship.

Many complaints arise in the fraught period of a dissolving employment relationship. As such, extra attention is owed to the risk of human rights complaints in the context of dismissal. Employment relationships come to an end for a variety of reasons, including resignation and retirement. The most

[1] *British Columbia (Public Service Employee Relations Commission v BCGSEU,* [1999] 3 SCR 3, 1999 SCC 652 ["*Meiorin*"].
[2] *Zurich Insurance Co v Ontario (Human Rights Commission*), [1992] 2 SCR 321 at para 339, 1992 CanLII 67 (SCC).

common types of dissolution to trigger human rights complaints are termination and constructive dismissal.

Termination is often straightforward, while constructive dismissal requires clarification. An employee is constructively dismissed when an employer makes a fundamental change to the terms of employment. The change must be imposed unilaterally such that the employee treats the contract as at an end. Whether a change amounts to constructive dismissal is a matter of fact. It depends on whether a reasonable person in the same position as the employee would consider the essential terms of the employment contract to have been substantially altered. When faced with constructive dismissal, an employee may choose to accept the new terms of employment or reject them.

Fundamental changes to employment are different for each job and all employees. Types of changes that have amounted to constructive dismissal include those to remuneration and benefits; job duties; geographical relocation; working conditions, including the prestige associated with a certain position; and forced resignation or retirement. It is the *degree* of change that determines whether an employee has been constructively dismissed.

Even well-intentioned changes to terms of employment can amount to constructive dismissal. When an employment relationship comes to an end, even unintentionally, there is a heightened risk of human rights complaints. The following sections discuss the elements required to bring and defend against such complaints. Later sections survey various examples of these complaints common to the workplace.

III. Establishing the Complaint

A human rights complaint requires that an employee show that he or she has been the subject of discrimination and has suffered for it. Three elements must be established by the employee:

(1) he or she belongs to a protected group enumerated in the legislation;

(2) he or she received adverse treatment prohibited under the legislation; and

(3) the protected characteristic (e.g. disability) factored into the adverse treatment.

The employee must have suffered an adverse impact as a result of the discrimination, in light of all the circumstances.[3] Typically, the bar to prove that discrimination has occurred is not high. Once a *prima facie* case of discrimination is established, the onus shifts to the employer to extricate itself with a defence.

IV. Defending Against the Complaint

Defending against human rights complaints requires showing that the impugned conduct is justified as a *bona fide* occupational requirement. Certain discriminatory workplace decisions may be justified if they

[3] *Boehringer Ingelheim (Canada) Ltd v Kerr,* 2011 BCCA 266

are reasonably necessary for the accomplishment of a purpose rationally connected to the performance of a job.[4] This justification is set out in detail below.

A. *Bona Fide* Occupational Requirement

Human rights tribunals and commissions across the country apply a three-step test to determine whether an employer's discriminatory treatment is based on a *bona fide* occupational requirement,[5] and thus justified. The test poses three specific questions:

1. whether the standard was adopted for a purpose rationally connected to the performance of the job;

2. whether the standard was adopted in an honest and good faith belief that it was necessary to the fulfillment of a legitimate work-related purpose; and

3. whether the standard is reasonably necessary to the accomplishment of the legitimate work-related purpose.

Grounds for establishing a *bona fide* occupational requirement have included safety, expenses, and efficiency. However, these are not blanket justifications for discriminatory employment decisions. Employers must be able to justify their decisions, standards and policies by meeting the three-part test on all of the particular employment circumstances. The standard of proof is on the balance of probabilities.

The third part of the test, reasonable necessity, is a question of threshold. It asks whether the employer can accommodate persons with the characteristics of the employee without incurring undue hardship. For example, has an employer investigated alternative approaches that do not have a discriminatory effect? If so, why have no alternative approaches been implemented? And if no alternative approaches have been considered, tribunals will inquire for themselves whether there are alternative ways to perform a job that accommodate the employee, while still accomplishing an employer's legitimate purpose. If there are, and implementing them will not impose undue hardship on the employer, the discriminatory standard is not saved as a *bona fide* occupational requirement, and the employer is liable for discrimination.

The reasonableness and necessity of a discriminatory standard is balanced against an employer's duty to accommodate its employees. Accordingly, while employers have a right to pursue legitimate business interests, that pursuit cannot outweigh employees' full and meaningful participation in a work environment free of discrimination.

[4] *Meiorin, supra* note 1.
[5] *ibid*

V. The Employer's Duty to Accommodate

The duty to accommodate is a positive obligation on employers. It demands awareness of the "various ways in which individual capabilities may be accommodated [and] the possibility that there may be different ways to perform the job while still accomplishing the employer's legitimate work-related purpose."[6] While the duty to accommodate is most commonly associated with disabled employees, the duty is in effect in relation to all protected grounds of human rights legislation.

Employers must take reasonable measures to accommodate employees, up to the point of incurring undue hardship.[7] The duty to accommodate is meant ensure employers provide employees with an equal opportunity to perform a job for which they are otherwise qualified. Every accommodation process is unique, and the burden of undertaking it is shared by both the employer and the employee.

Employees are expected to assist their employers in finding and developing appropriate accommodation. When an employer has initiated a proposal that is reasonable and would, if implemented, fulfill its duty to accommodate, the employee also has a duty to facilitate the implementation of that proposal. Where an employee fails to take reasonable steps, refuses to cooperate, and causes the proposed accommodation to founder, the complaint against the employer may be dismissed. An employer's duty to accommodate is also discharged where a proposal, which is reasonable in all the circumstances, is turned down by the employee.[8]

A. Limits on the Duty to Accommodate

Employers often view the duty to accommodate as onerous. While it does require investigation and often some creativity, the duty only requires accommodation to the point of undue hardship on the employer. As such, the duty to accommodate will not override the employer's right to conduct its business in a safe, economic, and efficient manner. However, employers must expect to incur some hardship in accommodating employees. While the exact parameters of "undue hardship" remain unsettled, employers must put in more than "mere negligible effort" to satisfy their duty.[9] What constitutes reasonable measures of accommodation is a question of fact and will vary with the circumstances of each employee.[10]

Undue hardship to an employer may be established on such factors as financial cost, disrupted operations, interchangeability of the employer's workforce, and health and safety concerns. These factors must be quantifiable and connected to accommodating an employee, as well as prohibitive to the employer's business.[11] The size of an organization, its financial situation, and whether outside funding is available all factor into whether accommodation is cost prohibitive to an employer. Undue hardship cannot be founded on 'business inconvenience,' workplace morale or customer preference.

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[6] *Ibid.*
[7] *Central Okanagan School District No 23 v Renaud,* [1992] 2 SCR 970, 1992 CanLII 81 (SCC) ["*Renaud*"].
[8] *ibid.*
[9] *ibid.*
[10] *ibid.*
[11] See *Jardine v Costco Wholesale Canada,* 2014 BCHRT 214.

Employers are not required to displace other employees in order to create a vacancy for employees with special needs. The duty to accommodate does not require employers to create a tailor-made job in its efforts to accommodate an employee. When accommodation efforts are frustrated, or where a company is required to pay for work an employee cannot perform, continuing efforts may not further satisfy the duty to accommodate.[12]

VI. Terminating the Employment Relationship

Some of the protected grounds that commonly trigger human rights complaints in the workplace are discussed briefly below. The most likely complaint in the workplace,[13] discrimination on the basis of disability, is addressed in more depth in later sections.

A. Age

Perhaps the most common age-related employment issue is retirement. Mandatory retirement has been eliminated in British Columbia since 2008, when amendments to the province's human rights code extended protection against age discrimination to those aged 65 and over. There are exceptions. The Supreme Court of Canada recently held that partnerships are not traditional employment relationships, and thus may still be governed by mandatory retirement policies.[14]

Age may be a genuine impediment to certain employment. If so, employers must still be able to establish that age-related restrictions on employment are a *bona fide* occupational requirement of the job. Where employers are concerned about the physical capacity of employees and job safety in a certain work environment, the physical standard expected of its employees must be reasonably necessary.[15] Employees capable of the work assigned to them cannot be terminated simply because of assumptions about health and age.

Employers must be able to point to documented records of performance concerns, productivity problems, or safety issues. Otherwise, where termination is based on stereotypical assumptions, tribunals will draw an adverse inference that age wrongly factored into termination.[16] Where older employees are replaced or terminated over younger and less experienced or newly hired workers, tribunals have often inferred age discrimination as the underlying reason for termination.[17]

B. Race, Colour, Ancestry or Place of Origin

Tribunals are not concerned about the actual racial or cultural makeup of a complainant. Rather the employer's perception of these characteristics and the employment decisions made based on them may trigger liability under human rights legislation. Employers may also be responsible for the discriminatory acts of other employees where there is a failure to implement cultural training within the workforce.

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[12] *Wilcox v University of British Columbia,* 2014 BCHRT 228; *Dotchin v Simply Computing (No 2),* 2013 BCHRT 189.
[13] British Columbia Human Rights Tribunal, Annual Report 2013-2014, at page 3, available online: http://www.bchrt.bc.ca/shareddocs/annual_reports/2013-2014.pdf
[14] *McCormick v Fasken Martineau Du Moulin LLP,* 2014 SCC 29.
[15] See *Comeau v Cote and Murphy Pipeline Inc,* 2003 BCHRT 32.
[16] *Price v Top Line Roofing Ltd,* 2013 BCHRT 306.
[17] *see e.g. Vantage Contracting Inc v Marcil,* [2004] AJ 368, 2004 ABQB 247 (CanLII).

Unlike age, there is never a justified basis on which to terminate employment for race, colour, ancestry or place of origin. Even in service-based employment, clientele preferences cannot justify termination on the basis of an employee's physical characteristics or ethnic background.[18] Tribunals will find liability even where a prohibited ground, such as an employee's race, is but one factor of many informing the discriminatory conduct.[19]

C. Sexual Harassment

Discrimination on the basis of sex is prohibited. The meaning of "sex" includes not only gender but also sexual harassment, pregnancy, sexual orientation, transsexuality, and potentially alternative sexual preferences. Additionally, terminating an employment relationship for reasons related to sexual harassment is not necessarily straightforward.

Employers are responsible for sexual harassment in the workplace.[20] Sexual harassment is any unwelcome conduct of a sexual nature that also detrimentally affects the work environment or leads to negative consequences related to the complainant's job.[21] Employers will be liable for the sexual harassment of their employees, managers, clients and customers where the employer is ignorant of or does not efficiently and effectively take steps to redress the harassment.

It is the employer's obligation to ensure a workplace free of sexual harassment. Employers must implement and promote a sexual harassment policy in the workplace, including a framework to respond to allegations of harassment. This includes thoroughly investigating allegations of sexual harassment in an objective and confidential manner. Depending on the seriousness of the allegations, an independent investigator may be an important step to mitigating the potential damages awarded against the employer.

Liability for termination related to sexual harassment arises in more than one way. Where an employee establishes that she suffered sexual harassment in the workplace and the employer did not adequately respond, she may be awarded damages based on constructive dismissal if she leaves her employment as a consequence.[22] Alternatively, where an employee is terminated for her sexually harassing behaviour toward another, the employer must first have completed a fair investigation to avoid liability. Further, deciding to dismiss the harassing employee must be proportionate to the severity of the harassment investigated.[23] Lastly, and perhaps most clearly, employers will be liable where they terminate an employee who complains about having experienced sexual harassment.[24]

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[18] *Varma v GB Allright Enterprises Inc,* [1998] BCCHRD 14.
[19] *Premakumar v Air Canada,* 2002 CanLII 23561 (CHRT), 42 CHRR 63; *Lee v British Columbia (Attorney General),* 2004 BCCA 457.
[20] *Robichaud v Canada (Treasury Board)* [1987] 2 SCR 84, 1987 CanLII 73 (SCC).
[21] *Janzen v Platy* [1989] 1 SCR 1252, 1989 CanLII 97 (SCC).
[22] *Chiang v Kejo Holdings Ltd,* 2005 BCSC 414;
[23] *Brazeau v International Brotherhood of Electrical Workers,* 2004 BCCA 645.
[24] *Paananen v Scheller (No 2),* 2013 BCHRT 257.

D. Criminal Background

Employees with criminal convictions and charges are a protected group under human rights legislation. The protection from discrimination based on their criminal background is balanced against every employer's fundamental interest in maintaining a company's trustworthiness and reputation. The balance is struck by allowing employers to treat employees with criminal charges or convictions differently only if those convictions or charges are *unrelated to the employment* of the individual.

Criminal charges or convictions are related to employment where:[25]

1. the conduct precipitating the charge or conviction, if repeated, poses a threat to the employer's ability to carry on business safely and efficiently;

2. the context and particulars of the offence, including the individual's age and other extenuating circumstances, are sufficiently linked to the individual's position and job duties;

3. little time has elapsed between the charge and the employment decision, and the individual's conduct during that period suggests recidivism as opposed to rehabilitation.

Relying on the above factors, an employer may show that there is a sufficient link between the nature of the conviction or charges and the individual's position. That link demonstrates that terminating the employment relationship is based on a *bona fide* occupational requirement.

E. Family Status

Family status is an increasingly important protected ground under human rights legislation. It is also a growing area of potential liability for employers, as more Canadian families consist of two working parents and technology facilitates the ease of working outside traditional office spaces. Most recently, the Federal Court of Appeal imposed an obligation to accommodate employees' childcare responsibilities.[26] This legal obligation is likely to be accepted into provincial human rights frameworks before long.

Prior jurisprudence required that a change to an employment term or condition result in a "serious interference" with a substantial parental or other family duty or obligation before a *prima face* case of discrimination arose.[27] However, the Federal Court of Appeal acknowledged this test has fallen out of favour. Instead, a broader approach has been taken to the scope of "family status", which now includes parents' childcare obligations.

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[25] *Woodward Stores (British Columbia) Ltd v McCartney* (1983), 43 BCLR 314 (BC SC), 1983 CanLII 444 (BCSC).
[26] *Canada (Attorney General) v Johnstone,* 2014 FCA 110 ["*Johnstone*l"]; *Seely v Canadian National Railway,* 2014 FCA 111.
[27] *Health Sciences Association of British Columbia v Campbell River and North Island Transition Society,* 2004 BCCA 260.

In order to establish a *prima facie* case of workplace discrimination on the basis of family status and childcare responsibilities, the employee must show:[28]

1. that a child is under his or her care and supervision;

2. that the childcare obligation at issue engages the individual's legal responsibility for that child, as opposed to personal choice;

3. that he or she has made reasonable efforts to meet that childcare obligation through reasonable alternative solutions, and that no such alternative solution is reasonably accessible; and

4. that the impugned workplace rule interferes in a manner that is more than trivial or insubstantial with the fulfillment of the childcare obligation.

Incorporating childcare responsibilities into the meaning of "family status" affirms it is a growing area of human rights protection. The new test, which makes a distinction between "legal responsibility" and "personal choice" in parental obligations, is likely to be a debated point before tribunals in years to come. However, requiring "more than trivial or insubstantial" interference should provide some protection to employers from frivolous complaints arising out of the parental whims of employees.

F. Disability

In British Columbia, disability is the most common ground of discrimination in the employment context. The prohibition against discrimination on the basis of disability is broad, and protects employees who suffer from physical and mental disabilities, including those that range from allergies to depression, Post-Traumatic Stress Disorder, psychiatric instability, addiction, and so on.

There is no codified definition of disability. To qualify as a "disability" before a tribunal, the condition must be ongoing and must prevent a person from performing significant functions that most other people can perform,[29] or from carrying out the essential duties of his or her position.[30] There must also be some degree of permanence.[31] Discrimination on the basis of disability can include discrimination on the basis of perceived disability.[32] Overall, whether an employee is disabled under human rights legislation is an "open question to be determined on the facts and circumstances of each case."[33]

Employers are obligated to assist employees with disabilities so that they may have full and meaningful participation in the workforce. When medical leave extends from months to years, employers are faced with fairly managing an employee's disability at risk of liability before a human rights tribunal.

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[28] *Johnstone, supra* at para 42.
[29] *Nielson v Sandman Four Ltd* (1986) 7 CHRR D/3329 (BCCHR).
[30] *Beznochuk v Spruceland Terminals Ltd* (1990), 37 CHRR D/259 (BCHRT).
[31] *Ouimette v Lily Cups Ltd* (1990), 12 CHRR D/19 (Ont Bd Inq).
[32] *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Montreal* and *Boisbriand (Cities)*, [2000] 1 SCR 665, 2000 SCC 27.
[33] *Quinlan v Marina Restaurant Ltd* (1986), 7 CHRR D/3391 at para 27076.

1. The Duty to Inquire

Investigating and assessing an employee's fitness for work ought to be every employer's priority when dealing with a disabled employee. Employers cannot expect to escape liability where they have made no effort to understand an employee's abilities and restrictions as a result of an illness or disability. However, employees must first bring certain facts to an employer's attention, such as the nature of the illness or disability. An employer must know, or ought reasonably to know, that an employee is suffering from a disability before the duty to accommodate arises.[34]

Once an employee has provided an employer with information about a disability, the employer's duty to inquire is triggered. Even without being directly notified of a disability, unusual behaviour that persists over time may still, in appropriate circumstances, trigger the duty to inquire into the presence of a disability.[35] Tribunals will consider whether an employee's behaviour is such a departure from the ordinary norms of human behaviour that it should have alerted the employer to the possible presence of a disability.[36] At that point, any failure to make inquiries into the health of an employee, before taking steps that adversely affect that employee's employment, may be found to be discriminatory. This is especially the case where an employer is advised of an employee's medical condition that may impact his or her ability to work.

The duty to inquire continues even after an employee takes medical leave from employment. An employer is obligated to inquire into the current condition of an employee who wishes to return from disability leave before denying his return to work on the grounds that he is unable to perform any available jobs.[37] The duty to inquire imposes an obligatory dialogue between employer and employee.

2. Accommodating Disabilities

Accommodating employees with disabilities is an individualized process. It depends on the nature of the disability and the nature of the workplace. Accommodation may include forgiving absenteeism, reducing hours of work or targets, altering the nature of job duties, transferring employees into different departments, providing employees with special equipment, and so on.

Employers may consider ending the employment relationship only where evidence suggests that an employee is not able to work for the foreseeable future. If accommodation efforts have been exhausted to the point of undue hardship, the employment contract may be frustrated or breached based on non-culpable absenteeism. However, employers should take a long view to the accommodation process before considering that the employment relationship with an ill or disabled employee has been effectively frustrated.

3. Terminating the Disabled Employee

Termination of an employee on medical leave must be supported by medical evidence and other documentation that the employee is unable to work for the foreseeable future. Employers must not

[34] *Gardiner v Ministry of Attorney General,* 2003 BCHRT 41.
[35] *Rezaei v University of Northern British Columbia (No 2),* 2011 BCHRT 118 at para 49.
[36] *ibid* at 51.
[37] *Rozon v Barry (cob "Barry Marine")*, 2000 BCHRT 15; [2000] BCHRT D/18.

prevent employees from a graduated return to work by requiring a "complete recovery."[38] Further, employers cannot terminate an employee based on a past record of absenteeism or an inference that an employee returning to work will inevitably be absent again in the future.[39] Perceived disability and discrimination as a result of that perception is as discriminatory as if there were actual disabilities. Similarly to age and race, disability is not a justified ground for termination based on customer complaints or preferences.[40]

Prior to termination, employers must take care to dialogue with an employee about the pending decision. Warning employees allows them an opportunity to provide further or updated medical information to the employer prior to termination. This information may be crucial to the termination decision. Further, employees must have the opportunity to prepare for losing their employment. This may include the opportunity for the employee to express his or her perspective about the end of the employment relationship.

G. Retaliation

Employers are prohibited from retaliating against employees who file or assist in complaints under human rights legislation. Retaliation includes terminating, suspending, intimidating, coercing and imposing penalties or denying benefits as a result of an employee's involvement with a human rights complaint.[41] In order to terminate an employee for cause while a human rights complaint is underway, employers must be able to rebut all inferences that the termination is related to the complaint. Warnings to the employee, meetings regarding performance evaluations, complaint investigations, and any warning or termination letter must be devoid of references to the human rights complaint. Where significant performance concerns or complaints are not well documented, tribunals may conclude that the employer is in fact retaliating against its employee's complaint. This may result even where the employee would not have likely continued in her employment in any event because of the complaint.[42]

VII. Remedies

An important purpose of human rights legislation is to provide a means of redress for those persons who are discriminated against. Tribunals have the discretionary power to enforce their decisions with a variety of remedies, which are often creatively constructed to suit the specific needs of the complainant. They range from requiring a specific remedial action of the respondent to monetary compensation paid to the complainant.

A. Remedial Steps

Tribunals' remedial discretion includes ordering an employer to cease contravention of the given human rights legislation, which also includes refraining from committing the same or similar contravention in

[38] *Wilson v Solis Mexican Foods Inc,* 2013 ONCSC 5799.
[39] *Saunders v Syncrude Canada Ltd,* 2013 AHRC 11.
[40] *De Jong v Horlacher Holdings Ltd* (1989), 10 CHRR D/6283 (BC HR).
[41] British Columbia *Human Rights Code* RSBC 1996, c 210, section 43.
[42] *Macklem v Cambie Malone's,* 2014 BCHRT 56.

future.[43] Tribunals can also order employers to take a specific action in the workplace to remedy the contravention. For example, employers may be ordered to adopt a harassment policy; implement compassion, sensitivity or equality training; post specific signage; or make an announcement about an employer's commitment to human rights protection, among other things.

B. Compensation

Tribunals may also award successful complainants financial compensation. The amount of compensation is meant to remediate the human rights violation, putting the employee back in the place he or she would have been, had the violation never occurred. Compensatory awards may be in the form of general damages for injury to dignity, feelings, and self-respect, as well as specific damages for lost wages and expenses incurred.

Tribunals have a broadly remedial purpose in awarding damages to a successful complainant. Compensation is not meant to be punitive to the employer. However, damages awards for injury to dignity, feelings, and self-respect have increased significantly in recent years, particularly in British Columbia. Recently in *Kelly v University of British Columbia (N0 4),*[44] the British Columbia Human Rights Tribunal awarded $75,000 in compensation of injury to dignity, feelings, and self-respect after finding that the university discriminated against one of its medical residency students with Attention Deficit Hyperactivity Disorder. The Tribunal justified this unprecedented award on the "unique and serious" circumstances of the complaint. Mr. Kelly, who was significantly delayed in his opportunity to complete his medical residency program as a result of the discrimination, suffered "deep humiliation and embarrassment", including depression, suicidal ideation, loss of identity and self-esteem, and feelings of worthlessness and despair.

Other factors that contribute to the assessment of damages for injury to dignity, feelings, and self-respect include the nature of the discrimination and the degree of aggressiveness. [45] The ongoing nature or duration of the discrimination, its frequency, the age and vulnerability of the victim, as well as the psychological impact of the discrimination are also considered.[46]

Damages may also include any lost wages or expenses incurred as a result of the discrimination.[47] Lost wages are typically assessed from the end of the employment relationship until the individual secures alternative employment. Terminated employees must mitigate their losses by searching for alternative employment. Where an employee fails to show he reasonably attempted to mitigate his losses, tribunals may make deductions from the lost wages award. Part-time income earned while searching for full-time employment may also be deducted from the lost wages award.

Lastly, expenses may be awarded as specific damages. For example, expenses incurred while job-hunting may be payable by the employer. Costs of preparing for and attending a hearing before the tribunal may also be awarded to the complainant. These costs include, for example, compensation for time off work

[43] BC *Code, supra* note 40, section 37(2)(a).
[44] *Kelly v UBC (No 4),* 2013 BCHRT 302.
[45] *Bro v Moody (No 2),* 2010 BCHRT 8, upheld on judicial review in 2012 BCSC 657 (CanLII).
[46] *ibid.*
[47] the BC *Code, supra* note 40, section 37(2)(d)(ii).

and additional childcare required while the hearing is underway. Legal costs may also be awarded against a party. However, this type of award arises only rarely when a party has engaged in improper conduct during the course of the investigation or hearing.[48]

VIII. Conclusion

Liability for human rights violations arise prior to, during, and at the end of employment. There is a significant scope of risk for employers and their insurers, particularly where the terms of an employment relationship are drawing to an end. Liability is based under the employment provisions in human rights codes across the country. Employers are prohibited from discriminating against employees and potential employees on the basis of specific grounds without a *bona fide* occupational requirement to do so.

A human rights complaint only arises where an individual can show that she has been discriminated against and suffered an adverse result as a consequence. The onus then shifts to the employer to provide a defence. In the employment context, defending against a complaint requires proof that the conduct complained of is justified because it is a *bona fide* occupational requirement.

Many human rights complaints arise where employers have not adequately accommodated the individual needs of employees. There is a positive duty on employers to accommodate employees, which may include providing special equipment, rescheduling work shifts, adopting alternative standards, and a variety of other creative and individualized solutions. Where employers fail to accommodate their employees and are shown to have discriminated against them, tribunals have a discretionary power to enforce a variety of remedies, including not insignificant financial compensation.

[48] *Stein v Vancouver Coastal Health Authority (No 2),* 2014 BCHRT 227.