

# First Nations Employment Law

## LEGAL NEWS:

### Dismissal for Lying about Affair Upheld on Appeal

An employer that fired its branch manager for lying about his office romance with a subordinate had just cause for dismissal, the BC Court of Appeal recently concluded.

The manager carried on a surreptitious three-year sexual affair with the employee, during which time he conducted performance reviews, gave her raises and promoted her. When asked by his superiors whether he had a relationship with the woman, he repeatedly denied it. The affair ended bitterly and other employees were affected by the obvious deterioration in the personal and working relationship of the branch manager and his former lover.

The situation was exacerbated when the manager began a relationship with a new female employee. The tense atmosphere of the office disrupted the work and business of the branch. When again confronted by his superiors, the branch manager again denied the three-year affair, until it became clear the truth was already out.

At trial, Mr. Justice Curtis found that the branch manager's actions were deliberately deceitful and that he knew or ought to have known his employer would want to know about the relationship to avoid the obvious conflict of interest. Mr. Justice Curtis concluded that the employer had just cause for dismissal, as

no company could reasonably be expected to renew its faith in an employee who had so deliberately and repeatedly deceived it over an extended period of time.

On appeal, the Court of Appeal rejected the employee's argument that the employer's offer to him of another job showed that his dishonesty did not lead to a break down in the employment relationship. The Court found that the new job which was offered had much lower responsibility.

*Carrol v. Emco Corporation*, 2007 BCCA 186 ●



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Dean, a partner at Harris & Company, advises clients on a broad range of employment law matters, including discipline and termination, employment standards, human rights, workers' compensation and labour relations. Dean founded and co-chairs Harris & Company's First Nations employment law group. He regularly advises several band councils, First Nations social service agencies and First Nations businesses. He has successfully represented band councils in defending unjust dismissal complaints filed against them under the *Canada Labour Code*. Dean frequently provides employment law seminars to First Nations employers and managers across British Columbia.



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Kirsten joined Harris & Company in 1999, after practising general civil litigation with another Vancouver firm. She acts as counsel for a number of First Nations and aboriginal agencies and is co-chair of Harris & Company's First Nations employment law group. Kirsten's practice is focused on employment law matters, including wrongful dismissal, and she is co-author of the second edition of *An Employer's Guide to Dismissal*, a valuable resource for managers and human resources personnel involved in employee termination. Kirsten has appeared at all levels of court in British Columbia and has acted as counsel in a variety of administrative tribunals.



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An associate at Harris & Company, Scott received a B.A. (Honours) in Criminology from Simon Fraser University in 1999 and received his law degree from the University of British Columbia in 2002. Scott was formerly a project manager for a demolition company and operated an asbestos removal company while attending university. A lawyer with employment, labour, administrative and civil litigation experience, Scott works for a wide range of clients in both the private and public sectors. Scott also acts as counsel for a number of First Nations in British Columbia and the Yukon and is a member of Harris & Company's First Nations employment law group.

# First Nations Employment Law



Welcome to our seventh issue of First Nations Employment Law. Our newsletter takes on a new look with a revised format and additional content.

In this issue, we review provisions of the *Canada Labour Code* which provide an adjudicator with discretion to reinstate an employee where just cause did not exist for the dismissal. As most First Nations employers, including band councils, are regulated by the *Code* for employment law purposes, the possibility of the employee winning reinstatement must be weighed carefully by First Nations employers when contemplating a dismissal.

We hope you enjoy the new format. Feel free to contact any members of Harris & Company's First Nations practice group, listed on the back page, should you wish further information.

## Employment Law Primer: Reinstatement for Unjust Dismissal

One of the most significant features of the *Canada Labour Code* is the possibility that an adjudicator may order an employer to reinstate an employee if the adjudicator concludes that the employee was unjustly dismissed. As described in previous issues of this newsletter, most First Nations employers are regulated under the *Canada Labour Code* for employment law purposes.

Under the *Code*, a dismissed employee has the option of filing a complaint of "unjust dismissal". If the claim succeeds, the employee may be reinstated to his or her former position, with back pay, as part of a "make whole" remedy.

By contrast, should a dismissed employee commence an action for wrongful dismissal in the courts or make a claim under *British Columbia's Employment Standards Act*, the court or the Employment Standards Branch may only

award monetary remedies and cannot reinstate the employee.

In reviewing a request for reinstatement, an adjudicator must weigh the considerations for and against such an award.

### FACTORS CONSIDERED

If an adjudicator finds that the employee was unjustly dismissed, he or she will consider several factors in deciding whether to order reinstatement, including:

- the personal relations between the employee and employer and other employees;
- whether the element of trust in the employment relationship can be restored;
- the attitude of the employee;

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- whether the employee's former position still exists;
- the actions of the employee that led to the termination;
- availability of alternate employment;
- the size of the work environment; and
- other events that may make reinstatement impossible such as bankruptcy or layoffs.

The reinstatement of an employee that the employer had previously dismissed can lead to an uncomfortable and unproductive work environment. Given the potential impact of an order for reinstatement on the workplace, employers should take care to ensure that they consider this possibility if they are unsure whether they can prove just cause for dismissal. ●

# First Nations Employment Law

## HARRIS & COMPANY - LABOUR & EMPLOYMENT LAWYERS

Harris & Company is the largest firm in Western Canada practising exclusively in labour and employment law. Our First Nations employment law practice group is made up of lawyers with considerable experience representing band councils, First Nations schools, health centres, housing departments, social service agencies and First Nations owned businesses.

Our lawyers offer the following services to our First Nations clients:

**Litigation – defending claims for wrongful dismissal and human rights complaints.**

**Employment Policies – preparing and advising on policies in such areas as conflict of interest, privacy, confidentiality, email communication and harassment.**

**Pre-termination Issues – advice to employers on each step in the process of preparing for and conducting an employee dismissal.**

**Severance Packages – advice on the amount of severance or reasonable notice and assistance in preparing letters of termination and designing severance packages.**

**Employment Contracts – advising, designing writing, negotiating and implementing employment contracts and assistance with interpretation and monitoring of employment contracts.**

**Investigation of Employee Conduct – investigating employee misconduct, substance abuse, fraudulent activities, workplace violence and misuse of property and equipment.**

**Seminars – delivery of specialized seminars for managers of First Nations employers, covering a wide spectrum of employment issues managers face on a regular basis.**

## FEATURED CASE SUMMARY

### Lack of Alternate Employment Results in Reinstatement of Two Employees to Band

*Wally v. Carcross/Tagish First Nation*, [2003] C.L.A.D. No. 598

This decision exemplifies the difficulties First Nations employers in small communities may face when an adjudicator orders reinstatement of dismissed employees. In this case, two employees filed unjust dismissal complaints against the Carcross/Tagish First Nation (“CTFN”) after they were each terminated for a breach of the duty of confidentiality.

The employer alleged that the two employees, Wally and Huebschwerlen, had disclosed confidential information about clients to other clients and to members of the public and that they counseled a client to make a false allegation of sexual harassment against a senior employee. The employer also alleged that Huebschwerlen released confidential information about employee salaries to a client.

The employer relied primarily on hearsay evidence to support the allegations and the adjudicator found that the employer did not prove that the employees had breached their duty of confidentiality. The adjudicator concluded that the employees had been unjustly dismissed. In determining whether reinstatement was an appropriate remedy, the adjudicator noted:

*There are negligible opportunities for employment, in Carcross, for persons with the experience of Wally and Huebschwerlen. I am not satisfied that damages would provide an adequate remedy for the employer's breach of the employment contract. The Code provides for a make whole remedy, involving compensation and reinstatement.*

The employer argued that reinstatement was

not appropriate because of friction within the workplace and ‘community views’. The adjudicator found, however, that:

*The views of the community are not a relevant consideration. Some of those persons are bound to support their reinstatement, and some are bound to oppose reinstatement. In my view, it would be unfair to provide only a monetary remedy because the employer views “reinstatement as a problem”. A monetary remedy would not make Wally or Huebschwerlen “whole”. In my view it would be dangerous to accept the management view of “community perspective” as any real indication of the likelihood that Huebschwerlen and Wally will succeed in integration back into the workplace. It would be a completely inadequate remedy.*

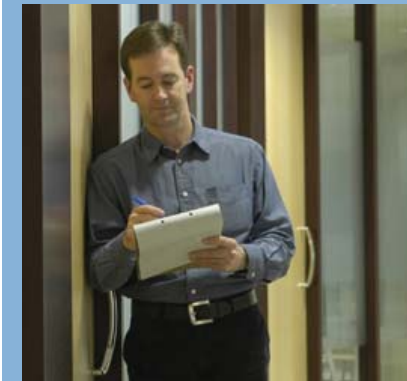
The adjudicator also rejected the argument that other employees would have a problem with the reinstatement of Wally and Huebschwerlen. Instead, the adjudicator found that:

*...The staff at the CTFN should have serious questions about how Wally and Huebschwerlen were treated. The complaints made by clients of the CTFN Health and Social Services Department were serious allegations, but the allegations were not subject to any critical examination by Ravensdale or the management board. There was no investigation prior to dismissal. There was no attempt to get Wally's and Huebschwerlen's side of the story prior to dismissal. They were dismissed without just cause.*

The adjudicator also noted that “workplaces in small first nations communities have complexities which are not found in other larger communities.



# First Nations Employment Law



## YOU MATTER

Harris & Company's lawyers would be pleased to speak to you about employment law matters you or your organization need to address.

For further information please contact:

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There is a need for the CTFN to have access to skilled human resources advice. I note that at the time of the termination the CTFN did not have a human resources advisor on staff”.

The adjudicator ordered that both employees be reinstated and that each employee receive compensation from the date of their unjust dismissals to the date of their reinstatement.●

breached his employment contract. On appeal, though, the BC Court of Appeal found that the Supreme Court had unduly narrowed the arbitrator's mandate and had erred by substituting its judicial opinion for that of the arbitrator. The Court of Appeal restored the arbitration award, concluding that the decision to reinstate the employee was not patently unreasonable.

*Canadian Broadcasting Corp. v. Canadian Media Guild*, 2007 BCCA 232 ●

## Legal News:

### Contaminated Chocolates did not Justify Dismissal

The British Columbia Court of Appeal recently put a radio reporter back to work after he sent a critic a box of chocolates that the reporter had contaminated with dirt and raw chicken.

The victim was the head of an activist organization who had publicly attacked the reporter's journalistic integrity. After mailing the chocolates, the reporter realized his mistake and warned the victim before any injury was caused. The reporter was discharged after he confessed to his employer. The termination was replaced with a three-month suspension at arbitration and the reporter was directed to attend an anger management course. The employer then applied for judicial review of the arbitrator's decision.

The BC Supreme Court reinstated the dismissal, finding that the employee had damaged his reputation as a journalist and fundamentally

### “Failure to Hire” Action Rejected

The Supreme Court of British Columbia has dismissed a claim by a plaintiff who alleged he and the University of British Columbia entered into a binding employment contract when he responded to an advertisement for an assistant professor.

The plaintiff, who was not successful in his application, alleged that a contract was formed when he responded to the advertisement. The court disagreed, holding that the mere act of advertising a job vacancy and the submission of a resume does not indicate an intention to form a legally binding relationship. Rather, the advertisement for a job is merely an invitation to negotiate.

The court also rejected the plaintiff's argument that UBC had committed a tort by not fulfilling its “duty of fairness” to him. It held that there is no free-standing duty of fairness on a potential employer when advertising an opening. The court concluded that to extend liability in tort to

the pre-employment hiring process would lead to the courts “scrutinizing the minutiae of pre-contractual conduct” and that the courts should not intrude into the process of determining who is the most appropriate person for a particular job.

*Roback v. University of British Columbia*, 2007 BCSC 334 ●

### Resignation from Upset Employee Invalid

After six years of employment in sales, the plaintiff's performance and attitude began to deteriorate. When coaching failed to resolve the problems, her employer wrote a formal letter directing her to improve her performance. On receipt of the letter, the employee became angry and distraught. She responded with an e-mail to management asking to be dismissed immediately with an “appropriate generous severance”.

Her employer wrote a second letter, clarifying that the employee was not dismissed and identifying two options: she could accept the performance improvement letter or submit her resignation. After sending another e-mail declaring that these options were unacceptable, she packed her personal belongings and informed other staff members by e-mail that it was her last day of work. Management then asked her to return company property including her keys and office passes. When she later failed to attend work the employer concluded that she had resigned. The plaintiff denied that she had resigned and sued for wrongful dismissal.

The court allowed the plaintiff's action, finding that although she had signalled an intention to resign, she had done so while she was upset. The employer was aware of her emotional state but failed to inform her that she had options other than resignation. The court also noted that she never told management that she intended to resign. As a result, when the employer demanded that she return company property, it effectively terminated her access to the workplace and dismissed her without notice.

*Lelievre v. Commerce and Industry Insurance Company of Canada*, 2007 BCSC 253. ●