



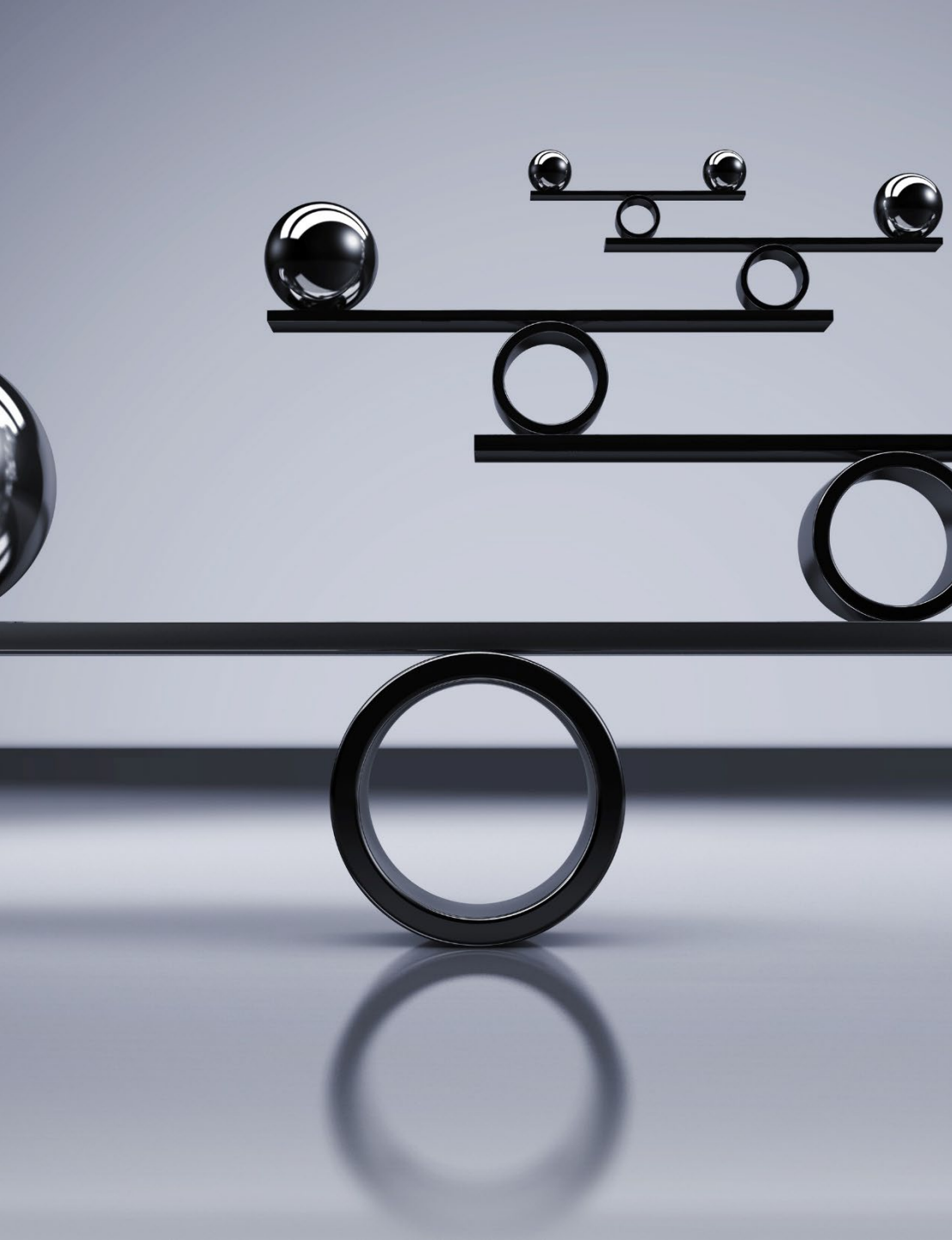
# HUMAN RIGHTS – UPDATES ON BCHRT PROCEDURES & DEFENDING CLAIMS

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## Today we will cover:

1	Legislative Updates – Federal, BC, & ON
2	Current challenges and delays at the BCHRT Tribunal
3	Effective strategies for pursuing applications for dismissal
4	Tactics for handling complaints where individual employees are named alongside the company
5	Recent trends in case law regarding injury to dignity awards
6	Recent considerations in wage loss awards
7	Non-monetary remedies highlighted in recent case law

## Legislative Update - Federal

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Federal – Pay  
Equity  
Regulations

# Legislative Update - BC

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BC – Gig workers regulations effective September 3, 2024

BC – Labour Relations Board monthly unionization reports


BC – pay transparency reporting tool (by November 1 of each year)

BC – Accessible BC Act Standards engagement opportunities

BC – minimum wage \$17.40/hr as of June 1

BC – Anti-Racism Act (not yet in force)

# ONT – Working for Workers Five Act



**CURRENT CHALLENGES AND DELAYS  
AT THE BCHRT TRIBUNAL**

# Challenges and Delays at the BCHRT

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BCHRT received 8,000 complaints during the past 3 years (3x normal)



Now receiving 250 complaints per month



Government doubled BCHRT funding in the past year – 20 new staff / 17 new contract mediators

# Challenges and Delays at the BCHRT - Continued

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November 2023: 8 new Tribunal Members appointed



As a result, backlog of complaints is decreasing



# Challenges and Delays at the BCHRT - Continued

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Changes to Mediations are:



Now requires responses to be filed prior to mediation



Mediations handled by contract mediators vs. Tribunal Members



Parties required to opt-out

# Challenges and Delays at the BCHRT - Continued

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Service of Complaints is still an issue



Complaints are often emailed to address for respondent given by complainant or found online



Initial notice contains time limits for filing response and for mediation



Service on Respondent (and first notice of Complaint) may occur months or over a year after Complaint was filed

# Challenges and Delays at the BCHRT - Continued

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BCHRT addressed access to justice concerns for Indigenous Peoples in January 2020 report



January 2021: appointment of 3 Indigenous Tribunal Members



March 2023: hiring of 4 Indigenous Navigators to help guide Indigenous Peoples through the Tribunal's process



An Indigenous party may request traditional ceremony as part of mediation, Indigenous mediator or dispute resolution approach

# Challenges and Delays at the BCHRT - Continued

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May 2024: BCHRT restarts scheduling hearings after temporary pause related to backlog strategy – oldest to newest



Further changes expected later this month



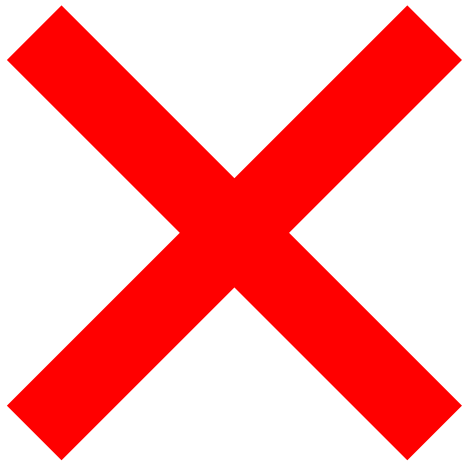
**EFFECTIVE STRATEGIES FOR  
PURSUING APPLICATIONS FOR  
DISMISSAL**

# Application to Dismiss Complaint – Grounds

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As a respondent in a human rights complaint, you can apply to dismiss the complaint in certain circumstances:

- Complaint involves a federally-regulated matter
- Complaint about conduct outside BC
- Complaint does not allege a contravention of the Human Rights Code
- Complaint has no reasonable prospect of success
- Proceeding will not benefit the complainant
- Respondent provided a remedy
- Respondent has made a reasonable settlement offer
- Parties settled the complaint
- Dismiss complaint against individual
- Proceeding would not further the purposes of the Code (other)
- Complaint made for improper purposes or in bad faith
- Another proceeding dealt with the complaint
- Complaint filed after the time limit



# Application to Dismiss Complaint – Case Path Pilot

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- Put into effect May 6, 2022. Extended on May 1, 2024 for a further year pending ongoing review
- After the parties complete document disclosure, the Tribunal will review the complaint and response(s), to determine the process or “path”:
  1. **Default path: proceeding directly to hearing.** The Tribunal will notify the parties by letter, schedule a case conference with the parties to set down hearing dates and discuss next steps.
    - Request to file Dismissal Application based on new information or circumstances.
      - Within 14 days of:
        - » letter advising complaint will be schedule for a hearing
        - » the date on which new information or circumstances that form the basis of an application come to the respondent’s attention
      - 4 months before date set for hearing
  2. **Submissions:** When the Tribunal assesses that submissions under s. 27(1) of the *Code* may further the just and timely resolution of the complaint, it will provide instructions to the parties, including a deadline for submissions.

# Application to Dismiss Complaint – Time Limit

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- When?
  - Within 70 days of filing a response to the complaint - Rule 19(2)
  - within 35 days from the date on which the new information or circumstances that form the basis of the application came to the respondent's attention - Rule 19(3)
  - Where the basis of the application to dismiss is the complainant's refusal to accept a reasonable with prejudice offer to settle the complaint, the respondent must apply at least 4 months before the date set for the hearing: Rule 19(4)
  - If Respondent requires more time to file an application for dismissal, then
    - must first obtain the consent of the other parties and file a notice that the other parties consent and the date on which they will file the application; or
    - apply for an order extending the time in Form 7.2



# Application to Dismiss Complaint – Recent Stats

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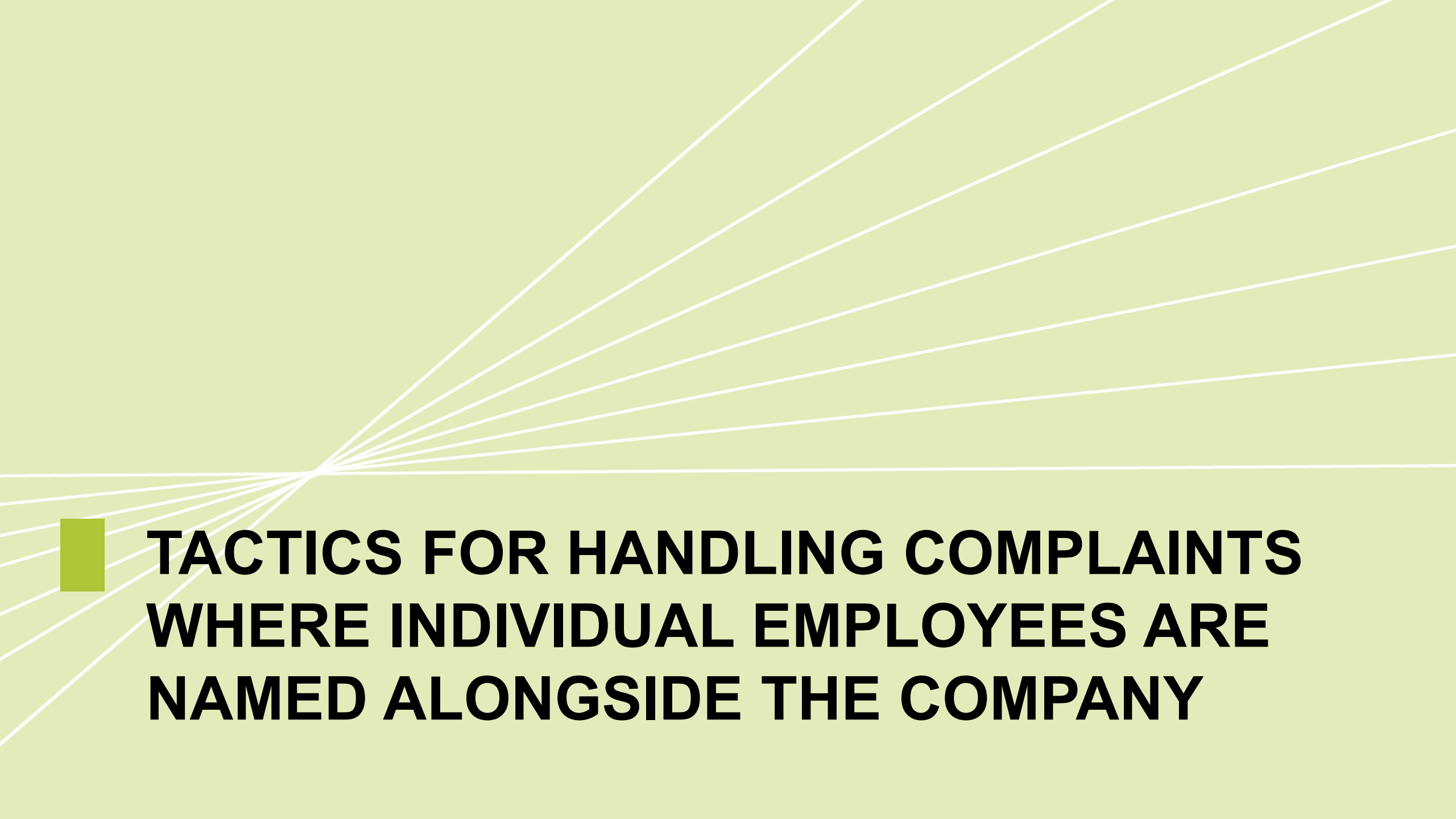
- Cases dismissed at preliminary stage:



Over the course of 2021-2022 fiscal year, the Tribunal issued a total of 113 dismissal application decisions, of which 49 cases were dismissed, representing 4% of the overall number of cases closed.



Over the course of the 2022-2023 fiscal, the Tribunal issued a total of 59 dismissal application decisions, of which 31 cases were dismissed, representing 2% of the overall number of cases closed.



**TACTICS FOR HANDLING COMPLAINTS  
WHERE INDIVIDUAL EMPLOYEES ARE  
NAMED ALONGSIDE THE COMPANY**

# Dismiss Complaint Against Individual

The respondent must show three things:

- 1. The complaint names the person's employer who is responsible for the conduct**
  - Employers are responsible for their employees' conduct when they are acting as employees. The legal term is "liable".
  - The employer should say it agrees that it is liable for the person's conduct.
- 2. The employer can fulfil any remedies that the Tribunal might order**
  - The Tribunal will consider:
    - Does the employer say it will fulfil any remedies that the Tribunal might order?
    - Can the employer fulfil any remedy?
    - For example, does it have the resources to pay any compensation?
- 3. Proceeding against the individual would not further the purposes of the Code**
  - The Tribunal will consider the conduct that the complaint alleges about the individual.
    - How responsible is the individual?
    - Is a remedy against them important?



**RECENT TRENDS IN CASE LAW  
REGARDING INJURY TO DIGNITY AWARDS**

# Injury to Dignity Awards (“I2D Awards”) - Introduction

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Compensation for injury to a complainant’s dignity, feelings, and self-respect



Injury to dignity awards may be awarded by the BCHRT in any case



Not punitive, rather intended to compensate complainants for the harm they have suffered

# Injury to Dignity Awards - Factors Considered by the BCHRT

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## Effect on the complainant

- Seriousness of discrimination
- Vulnerability of the complainant
- Consequences to the complainant

## Size of awards in similar cases

# Trends in Recent I2D Awards - Increasing Awards in Employment Cases

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<u>Year</u>	<u>Average I2D Award (Employment cases only)</u>
2005	\$3,900
2010	\$7,600
2019-2023	\$23,500

# Injury to Dignity Awards – Top 10 Awards

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Range: \$35,000 - \$175,000



Most common grounds of discrimination: sex (4), race (4)



Themes in higher awards:

Abuse of power

Genuine fear for safety

Termination

Retaliation



# Injury to Dignity Awards – Highest Awards

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Francis v. BC Ministry of Justice (No. 5), 2021  
BCHRT 16 - \$176,000

- Grounds: race, colour
- “Poisoned work environment”
- Severe impact on employment, health, marriage, and social life.

Ms. L v. Clear Pacific Holdings Ltd. and others,  
2024 BCHRT 14 - \$100,000

- Grounds: sex, disability
- Harassment and assault, rooted in an abuse of power
- Impact on physical and mental health

# Injury to Dignity Awards – Highest Awards cont.

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## A.B. v. Joe Singer Shoes Limited, 2018 HRTO 107

- Grounds: sex, place of origin
- Repeated sexual assault and harassment of a vulnerable claimant
- Enduring affects to mental health

# Avoiding human rights complaints in employment law:

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Take preventative measures



Institute comprehensive investigation processes



Avoid hostility toward complainants during complaint process



# **RECENT CONSIDERATIONS IN WAGE LOSS AWARDS**

# Wage Loss Awards – Introduction

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Restore the complainant to the position he or she would have been in had discrimination not occurred



Past and/or future wage loss



Not limited to a “notice period”

# Determining Wage Loss Awards

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Did the complainant lose work?

Terminated from job

Lost shifts

Denied a pay raise

Not offered a job

Causal connection between lost work and discrimination

How much would the complainant have earned if there was no discrimination?

How much did the complainant earn after the discrimination?

# Limitation on Wage Loss Awards – Mitigation

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Did the complainant try to find other work to reduce their lost wages?




Complainant must provide evidence of mitigation:

List of places applied to

Copies of application

Pay stubs

Income tax returns, etc.



Employer should provide evidence of failure to mitigate

# Limitation on Wage Loss Awards – Contingencies

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*Christensen v. Save-a-Lot Holdings Corp.* (No. 3), 2023 BCHRT 125 - Award reduced because the employer experienced financial difficulties



*Cyncora v. Axton Inc.*, 2022 BCHRT 36 - Award reduced because the complainant was unhappy with his employment regardless of discrimination



*Mr. D. v. Path General Contractors and another*, 2023 BCHRT 46 - Award reduced because employee was only employed for two weeks



*Harder v. Tupas-Singh and another*, 2022 BCHRT 50 - Award reduced because complainant likely to be terminated due to scheduling concerns





**NON-MONETARY REMEDIES  
HIGHLIGHTED IN RECENT CASE LAW**

# Non-monetary Remedies under the Code

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## Cease and refrain order

- This orders the person who discriminated to stop the discrimination and not to commit the same or similar discrimination again. The Tribunal must make this order if it finds the complaint justified.

## Declaratory order

- This says that the conduct complained of or similar conduct is discrimination.

## Steps or programs to address the discrimination

- If the discrimination is part of a pattern or practice, the Tribunal can order the respondent to take action or adopt a program to fix the discrimination.

## Getting what the complainant was denied

- For example, a complainant can ask for their job back, for a licence or benefit that was denied, or for the chance to compete for a job without discrimination.

## Mediations

- May result in agreed to change that is beyond the scope of remedies available under the *Human Rights Code* after a hearing.

# *Bauer v. Uber Canada Inc. and others, 2024 BCHRT 62*

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## Facts

- Uber did not provide wheelchair accessible transportation services in the Lower Mainland.
- As a wheelchair user, the complainant could not use Uber's services

# *Bauer v. Uber Canada Inc. and others, 2024 BCHRT 62*

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## Findings

- Uber's 's lack of wheelchair accessible services found to violate the *Code*
- **Uber ordered to cease and refrain from committing the same or a similar contravention of the *Code*.**
- **Uber must provide a wheelchair accessible option in the Lower Mainland within one year of this decision.**

# *Cyncora v. Axton Inc.*, 2022 BCHRT 36

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## Facts

- Worker was diagnosed with generalized anxiety disorder and major depressive disorder in early 2018, but a year later he felt his mental health was improving and he joined Axton
- Axton had an attendance policy requiring employees to notify their supervising foreman if they were going to be absent
- Worker had frequent absences, some with notice, but increasingly without notice
- Worker was reluctant to reveal his mental health issues and usually gave other reasons for his absences, but shortly before he was terminated, he explained his mental health condition to HR and offered to provide medical information
- Absences without notice were negatively impacting Axton's projects. Employer terminated employee during probationary period

# *Cyncora v. Axton Inc.*, 2022 BCHRT 36

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## Findings

- Employer discriminated against worker when it terminated him for absenteeism after it should have known that a mental disability was in play
- Axton ordered to:
  - pay \$20,000 for damages to injury to dignity, feelings and self-respect;
  - pay \$3,000 in compensation for lost wages; and
  - **implement a written accommodation policy**

# *Nelson v. Goodberry Restaurant Group Ltd. dba Buono Osteria and others, 2021 BCHRT 137*

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## Facts

- Nelson was a non-binary, gender fluid person who used they/them pronouns who worked at a restaurant on the Sunshine Coast in BC.
- Throughout their employment, the bar manager referred to Nelson using gendered nicknames such as “sweetheart,” “sweetie,” and “honey,” and also referred to them using she/her pronouns.
- Nelson requested on several occasions for the manager to use their proper pronouns, or at the very least use their name, but there was no improvement.
- Nelson also talked to the employer and asked them to speak to the manager. After inaction from the employer, Nelson again attempted to talk to the manager to request that he use their correct pronouns. That interaction became heated and culminated in Nelson slapping the manager on the back. Shortly after, the employer terminated Nelson without cause.

# *Nelson v. Goodberry Restaurant Group Ltd. dba Buono Osteria and others, 2021 BCHRT 137*

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## Findings

- BCHRT concluded that the manager's actions and the employer's response amounted to discrimination against Nelson based on gender identity and expression.
- Employer's response to Nelson's concerns fell short of reasonable and appropriate and was partly responsible for the final argument between Nelson and manager, which led to Nelson's termination. Nelson's gender expression and identity were factors in their termination.
- Restaurant ordered to pay \$30,000 in damages due to discriminatory conduct **and implement a pronoun policy and mandatory training for all staff and managers about diversity, equity and inclusion.**





 **ANY QUESTIONS?**

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Presenter(s) contact details are on next slide.

# THANK YOU



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