YEAR IN REVIEW 2024

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ALEXANDER HOLBURN

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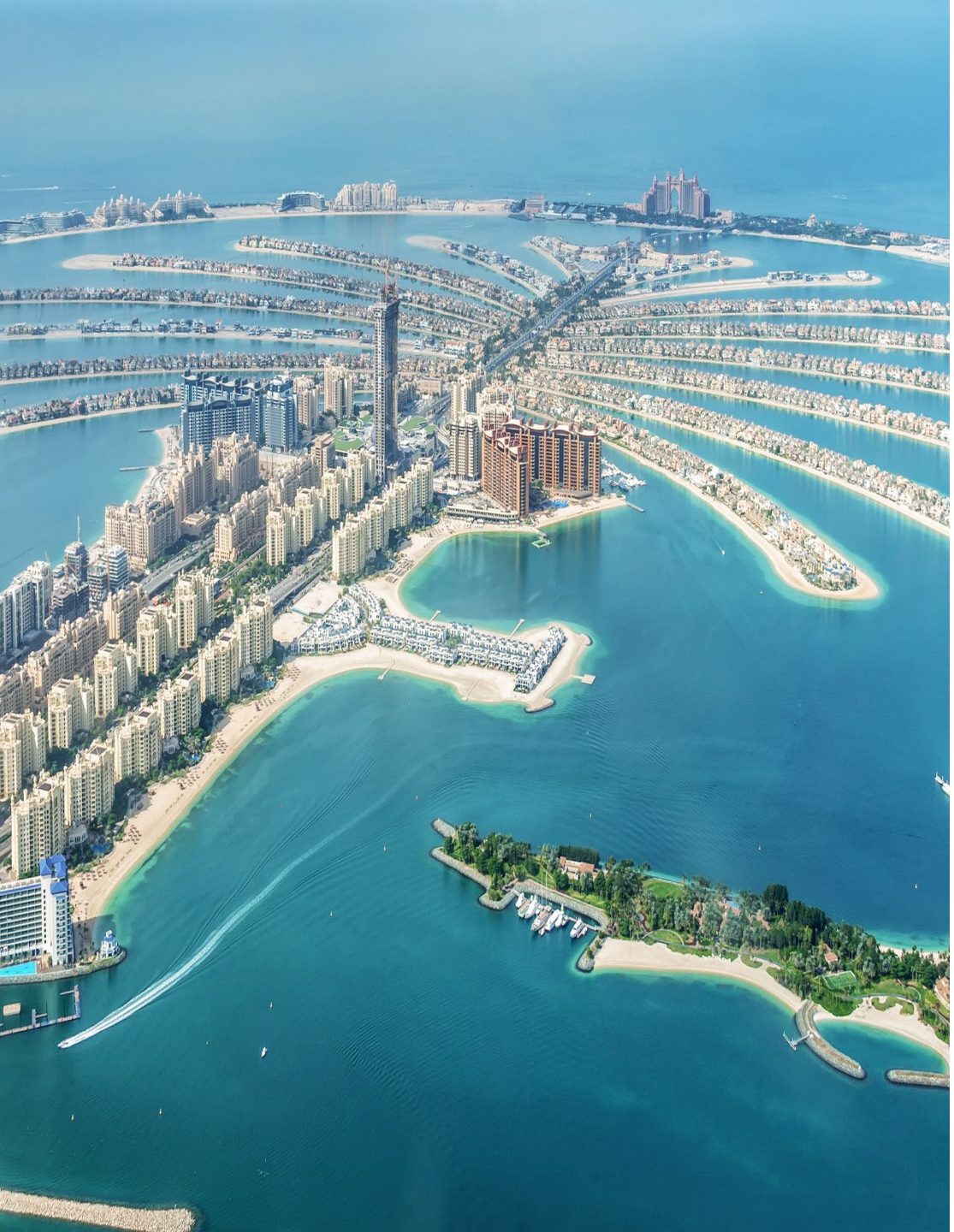

Today we will cover:

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2	**Important Cases from 2024**
-	Employment Contracts
-	Wrongful Dismissal Claims
-	Human Rights Complaints
-	Restrictive Covenants and Interlocutory Injunctions
-	Employee Class Actions
3	**Looking ahead for 2025**

LEGISLATIVE UPDATE

Legislative Update – ON

Working for Workers Five Act, 2024

IMPORTANT CASES FROM 2024

EMPLOYMENT CONTRACTS

Adams v Thinkific Labs Inc., 2024 BCSC 1129

Facts:

- Defendant employer offered Plaintiff employee via email stating material terms. Initial Offer was not conditional on Plaintiff signing new documents.
- Hours after Plaintiff accepted the e-mail offer, Defendant provided Plaintiff with a written contract which included a termination clause amongst other restrictive terms not mentioned in the Initial Offer email.
- Defendant terminated Plaintiff's employment 20 months later.

Adams v Thinkific Labs Inc., (cont'd)

Legal Issues:

- Whether the initial e-mail offer, once accepted, constituted a full and binding employment contract without a termination clause, entitling the Plaintiff to reasonable notice pay in lieu of notice at common law?
- Whether the subsequent written contract with the termination clause enforceable?

Finding:

- Court sided with the Plaintiff, finding that:
  - Initial Offer had all terms necessary to be a full offer of employment.
  - The new contract imposed new terms without consultation or additional consideration.
  - Continued employment is not fresh consideration for the new contract.
- Employee awarded severance at common law and a notice period of five months of pay.

Main Takeaways from *Adams v Thinkific Labs Inc.,*

- Employers cannot rely on continued employment as sufficient consideration for new terms after initial offer has been accepted.

- If initial offer has all key terms and is accepted, any modifications require new consideration.

Sui v Hungry Panda Tech Ltd., 2024 BCSC 1856

Facts:

Defendant employer offered Plaintiff employee employment through emails that contained important details. Importantly the emails contained the following: “After your confirmation, we will provide you with an official employment agreement for your signature.”

Day after Defendant provided Plaintiff with an Employment Agreement containing a termination clause.

After 18 months the Defendant terminated the Plaintiff without cause.

The Plaintiff brought a claim arguing that the termination clause within it is unenforceable.

Sui v Hungry Panda Tech Ltd., 2024 BCSC 1856

Issues:

- Whether the emails were a binding offer of employment?
- If the emails are binding, whether there was fresh consideration for the employment agreement?

Sui v Hungry Panda Tech Ltd. (Cont'd)

Finding:

- The Judge decided that the emails were a valid offer of employment that was accepted, because it contained all the necessary elements to form an employment contract, including job title, place of employment, start date, salary, pay periods, equity (stock options) and three-month probationary term.

- Further that the termination clause was unenforceable.

Why Was the Termination Clause Unenforceable?

The Judge relied on factors *from Krieser v Active Chemicals:*

Did the Employment Agreement contain new terms which were detrimental to the Plaintiff? **Yes.**

If it did, what is required at law to provide adequate consideration for such change to the employment relationship? **Some material advantage.**

Has the defendant established adequate consideration on the facts here? **No.**

Main Takeaways from *Sui*

What Was Emphasized?	The emails making the offer conditional on one requirement, meant that it was not conditional on other requirements.
What was the effect?	In this case the court concluded that, because the offer was conditional on the Plaintiff demonstrating an ability to work in Canada, it must not have been conditional on the Plaintiff accepting the Employment Agreement.

Egan v Harbour Air Seaplanes LLP, 2024 BCCA 222

Facts:

- Plaintiff was the VP of the Defendant, and he was terminated without cause.
- The Employment Agreement contained the following clause: “The [employer] may terminate your employment at any time without cause so long as it provides appropriate notice and severance in accordance with the requirements of the Canada Labour Code.”
- The employee brought an action for wrongful dismissal claiming reasonable notice at common law.

At Summary Trial

The Plaintiff Argued:

- The termination clause was unenforceable;
- It did not define with certainty his termination entitlement; and
- As a result was too vague and ambiguous.

Trial Judge ruled not too vague and dismissed the claim.

Plaintiff Appealed.

At Court of Appeal

The Court of Appeal:

- Held that parties intentions must be assessed by applying a practical, common-sense approach to contractual interpretation based on the time the contract was formed.

- Found that the Plaintiff knew his termination entitlement would be governed by the Canada Labour Code.

- Held that employers may provide termination clauses that convert statutory minimum into a floor.

Important Comments from the Court of Appeal

- The Court was careful to note the conflicting caselaw on necessary language to displace entitlement under common law notice.

- The Court noted that it was not resolving conflicting authorities on interpretation of termination provisions across the country.

Klyn v Pentax Canada Inc., 2024 BCSC 372

Facts:

- The Plaintiff was hired by the Defendant as an employee under an employment agreement which contained termination provision that entitled the employee to the greater of (a) the entitlements under the British Columbia Employment Standards Act; or (b) working notice or payment in lieu of notice equal to four weeks per completed year of service prior to signing the Agreement, plus four weeks under the Agreement, to a maximum of 18 weeks, “subject to [the employee’s] duty to mitigate”.

- Defendant terminated the Plaintiff’s employment without cause in 2022.

What Happened After Termination?

- Defendant only paid the salary and not commission.
- Defendant provided the Plaintiff with a termination letter placing obligations on him.
- Threatened that noncompliance would lead to cessation of payments.
- Plaintiff brought a claim arguing that the Defendant had repudiated the Agreement.
- The Judge agreed. The fact that the Defendant had not paid the required payments meant that they had repudiated the agreement and awarded the Plaintiff common law notice damages.

WRONGFUL DISMISSAL CLAIMS

Marshall v Mercantile Exchange Corporation, 2024 ONSC 4182

Facts:

- Termination of long-term employee
- 26 months notice claimed
- EE: I can’t mitigate due to a mental condition

Marshall v Mercantile Exchange Corporation (cont'd)

- Question at issue in this case: Can IME be ordered?

  Answer: **Yes**

- Why? **Plaintiff put his mental condition into question.**

- "Well beyond the usual adjustment period"

Mechalchuk v Galaxy Motors (1990) Ltd., 2023 BCCA 482

Facts:

- The Plaintiff was dismissed based on just cause.
- The plaintiff was the President of Operations.
- Dinner receipts were submitted as false business expenses.
- Additional false expenses were discovered.

Mechalchuk v Galaxy Motors (cont'd)

At Trial:

- The judge found the Plaintiff to be dishonest.
- Dishonesty in a senior management role justifies loss of faith.
- Termination was for just cause.

Mechalchuk v Galaxy Motors (cont'd)

On Appeal:

- Reaffirmed trial decision.
- The company's employee handbook indicated that "falsifying records or information" constituted a serious offence leading to a dismissal.
- Continuously dishonest.

HUMAN RIGHTS COMPLAINTS

Termination of employee on leave - *Complainant v. Company and others*, 2024 BCHRT 23

Facts

- The Complainant, a female carpenter, was terminated while on sick leave.
- She requested that she do administrative work as an alternative, but did not receive a response from her employer, leading her to file a human rights complaint.
- She alleged that the employer failed to accommodate her disability by providing her with alternative work options during her leave, in violation of the BC Human Rights Code.
- The Employer denied the allegations, arguing that the termination was solely due to a decrease in business, and not her disability.

Termination of employee on leave - *Complainant v. Company and others*, 2024 BCHRT 23

Issues

- Whether the Complainant was discriminated against during her employment due to a delay in benefits, reimbursement issues, and letter of employment issues.
- Whether the Respondent failed to accommodate the Complainant's injury by offering her alternative work.
- Whether the Complainant's physical disability and/or sex were a factor in her termination.

Termination of employee on leave - *Complainant v. Company and others*, 2024 BCHRT 23

Findings

- The Complainant did not suffer any adverse impact during the course of her employment, as alleged.
- The Respondent had no alternative job to offer to the Complainant due to economic constraints.
- The Complainant was terminated due to a decrease in business. Her physical disability and sex were not factors in her termination.

Termination of employee on leave - *Complainant v. Company and others*, 2024 BCHRT 23

Main Takeaways

- Timing alone is insufficient to ground a finding of discriminatory termination.
- In circumstances where most of the evidence is provided through witness testimony, credibility has a heightened level of importance.
- An employer does not have an obligation to undergo undue hardship in order to accommodate an employee.
- An employer can legally terminate an employee that is on sick leave without it amounting to discrimination under certain circumstances.

Accommodation and undue hardship - *McNeil v. Telus Employer Solutions (TES) (No. 2)*, 2024 BCHRT 166

Facts

- Dawn McNeil, an employee of TES, requested to work from home due to suspected allergies.
- TES had a "work from office" policy and denied her request based on its eligibility criteria, which involved evaluating job performance, mobile readiness, and space availability. Ms. McNeil did not provide medical evidence confirming she had an allergy, despite TES' requests.
- Ms. McNeil filed a human rights complaint alleging discrimination on the basis of disability.
- TES brought an application to dismiss, which was granted. Ms. McNeil applied for judicial review of the dismissal decision.
- The BC Supreme Court determined that the matter should be remitted back to the Human Rights Tribunal for reconsideration of specific issues.

Accommodation and undue hardship - *McNeil v. Telus Employer Solutions (TES) (No. 2)*, 2024 BCHRT 166

Issues

- Whether the proposed amendments to the Complaint regarding the fixed-term contract allegations ought to be permitted.
- Whether the Respondent would likely succeed in a bona fide occupational requirement defense.
- Whether the post-contractual medical evidence ought to be considered.

Accommodation and undue hardship - *McNeil v. Telus Employer Solutions (TES) (No. 2)*, 2024 BCHRT 166

Findings

- The fixed-term contract amendment was not allowed.
- TES' policy was rationally connected to job requirements, the denial to Ms. McNeil was made in good faith and was reasonably necessary.
- Evidence provided by the Complainant which was completed after the material time, and outlined her permanent medical condition, could not retroactively affect the reasonableness of TES' actions.

Accommodation and undue hardship - *McNeil v. Telus Employer Solutions (TES) (No. 2)*, 2024 BCHRT 166

Main Takeaways

- Attempts to amend a complaint outside of the procedural rules will be denied by the Tribunal in order to protect procedural fairness.
- Accommodation requires cooperation between the employer and employee.
- After-acquired evidence can not retroactively affect the reasonableness of an employer's decision during material times.

Bona fide occupational requirement - *Disbrow v. University of Victoria Properties Investments Inc. and others*, 2024 BCHRT 235

Facts

- In October 2018, an employer introduced a new system requiring security attendant employees to climb 20 flights of stairs twice per daily shift.
- In November 2018, Ms. Disbrow, a 64-year-old security attendant went on medical leave as she was suffering from arthritis in her knee.
- She underwent knee replacement surgery in February 2019 and attempted a gradual return to work in late 2019. However, she was unable to meet the stair-climbing requirement of her job.
- She requested accommodations such as using an elevator, but her employer stated that it was not feasible due to the nature of the job. She was offered a custodial alternative job but declined the offer.
- In January of 2020, her employment was terminated as she was unable to meet the full job requirements. She then filed a human rights complaint her former employer, alleging discrimination on the basis of physical disability.

Bona fide occupational requirement - *Disbrow v. University of Victoria Properties Investments Inc. and others*, 2024 BCHRT 235

Issue

- Could the Respondent accommodate the Complainant without undue hardship?

Findings

- The Respondent could not grant an exception to use elevators without experiencing undue hardship, because failing to patrol stairways could present safety risks.
- Reducing the Complainant's patrol requirements would have caused undue hardship by increasing the workload of other employees, which the Tribunal found unreasonable.
- Aside from the custodial job presented to the Complainant, there were no other open positions.
- The Respondent exhausted all reasonable possibilities for accommodating the Complainant prior to termination.

Bona fide occupational requirement - *Disbrow v. University of Victoria Properties Investments Inc. and others*, 2024 BCHRT 235

Main Takeaways

- Employers have a duty to explore all reasonable options to accommodate employees with disabilities, which may include adjusting job duties or offering alternative work, provided it does not impose undue hardship on the employer.
- Employers are not required to provide accommodations that would cause undue hardship, which includes factors like significant disruption to the business.
- Employees also have a responsibility to participate actively in the accommodation process by providing relevant medical information and engaging in discussions about potential accommodations that could allow them to continue working.

RESTRICTIVE COVENANTS AND INTERLOCUTORY INJUNCTIONS

Scope of Injunction for breach of non-competition covenant - *Karras v. Wizedemy Inc.*, 2024 BCCA 301

Facts:

Karras provided tutoring services to business students personally and through his company

Karras provided services at Concordia and UBC, and as an independent contractor to clients of SOS Tutoring which was purchased by Wizedemy

Karras and Wizedemy entered non-competition agreement barring from providing competitive services during term and for period of 12 months after

Wizedemy learned that Karras was competing, directed business and used confidential material

Agreement with Karras terminated, and he continued to provide tutoring services

Injunction granted restraining from providing education services at the two universities

Scope of Injunction for breach of non-competition covenant - *Karras v. Wizedemy Inc.*, 2024 BCCA 301

Appeal:

Test for interlocutory injunction are assessment of merits, consideration of whether irreparable harm and assessment of balance of convenience; ultimately question of whether just and equitable in the circumstances

Irreparable harm is harm that cannot be cured such as permanent loss of customers, or possibility of bankruptcy

Irreparable harm found if competitive behaviour allowed to continue, although restriction only for 12 months as per agreement

The analysis of geographical reach, duration and prohibited activities

Irreparable harm found based on required discounting of prices to compete, importance of revenue to survive and retain customers, and Karras altering the status quo by breaching the agreement supported injunction

Non-Competition Clause Enforceability – Employment vs. Commercial - *Dr. C. Sims Dentistry Professional Corporation v. Cooke*, 2024 ONCA 388

Facts:

Purchase of dentistry practice from Dr. Cooke for $1.1M in July 2017

Dr. Cooke agreed to stay for two years, and to non-solicitation/non-competition as part of share purchase and in stand-alone agreement

Restriction was from engaging in practice of dentistry for 5 years within 15 km of clinic

Dr. Sims ended role in early 2020 and started to work in clinic 3.3 km away

Interlocutory injunction issued on basis that restriction was reasonable

Non-Competition Clause Enforceability – Employment vs. Commercial - *Dr. C. Sims Dentistry Professional Corporation v. Cooke*, 2024 ONCA 388

Appeal:

Courts will give more scrutiny to a restrictive covenant in the employment context, while applying a presumption of validity where negotiated as part of the sale of a business

Parties negotiating the sale of assets have greater freedom of contract than parties negotiating a contract of employment, and it is only in ‘exceptional circumstances’ that the parties will be overruled by the court

Despite Dr. Cooke intending to work for 3 to 5 years, and thus needed to continue elsewhere, no such provision was included in the deal

Considerations of patients planning to leave were not relevant

Generally, the geographic territory is limited to where the business is carried on at the time of sale – but the court in considering whether the covenant is reasonable may look to other markers (such as how far a patient may drive)

Takeaways

Granting of injunction will be fact specific based on circumstances of each case

Best practice is including separate restrictions in different agreements as scrutiny may differ if employment versus commercial agreement

Enforceability of restrictive covenant will be considered differently in business purchase

WORKSAFEBC PROHIBITED ACTION COMPLAINTS

WorksafeBC prohibited action complaint - A2300479 (Re), 2024 CanLII 43014

Facts:

Worker at medical clinic complained that doctor made sexual advances towards her, including unwanted touching

Worker asked doctor to stop this behaviour, and when he did not, worker reported activity to employer

Worker told that she was at fault for wearing inappropriate clothing, and employment terminated short time later

Employer said that worker was let go at end of probation period after complaints from patients about tight clothing, and by doctor about conversing inappropriately

WorksafeBC prohibited action complaint - A2300479 (Re), 2024 CanLII 43014 (cont'd)

Employer denied worker making complaint of sexual harassment, and said that did not learn of concerns until 3 months post termination

Worker subsequently filed complaint with RCMP

Co-worker also confirmed misconduct of doctor towards her as well

WorksafeBC prohibited action complaint - A2300479 (Re), 2024 CanLII 43014

Decision:

Officer only to consider if worker raised a safety issue with the employer, and not to determine whether the worker actually suffered harassment or sexual assault

Test is whether worker suffered negative employment consequences, engaged in type of safety activities protected under WCA, and there is a casual connection; this is not an onerous task

It then falls on the employer to disprove this case, namely that it was in no way motivated by anti-safety animus in its actions; this means that it was in no way a reason ‘tainting’ the termination

WorksafeBC prohibited action complaint - A2300479 (Re), 2024 CanLII 43014 (cont'd)

The 'poor fit' explanation when no reason was given at the time of termination at end of probation was not persuasive explanation for dismissal; further work deficiencies for a new worker were not surprising

The worker had purchased new, less 'tight' clothing to satisfy any concerns; a memo regarding performance improvements was not viewed as 'forceful' enough

Employer found to have been aware and failing to conduct investigation or to inquire

Worker filed mental disorder claim and received ongoing benefits, such that no further monetary remedy; in some cases a remedy may top up benefits

WorksafeBC prohibited action complaint - A2302616 (Re), 2024 CanLII 98996 (BC WCAT)

Facts:

Safety coordinator at construction company claimed she was terminated for raising concerns about sexual harassment by co-workers, and intimidation and coercion

Worker claimed that she was sexually harassment by way of comments by coworkers, which resulting in her being provoked into an outburst (sexual and racial comments, and profanity)

Two HR managers called the worker about the incidents, and further meetings were held with her project manager; her employment was ended

WorksafeBC prohibited action complaint - A2302616 (Re), 2024 CanLII 98996 (BC WCAT)

Decision:

The employer argued that it terminated the worker's employment following an investigation, and based on the extent and nature of the breeches and her safety role

It was significant that the worker only raised her safety concerns after the employer contacted her about her co-worker's complaints

The evidence was that the employer investigated the complaint and found it was substantiated

It was found that 'two wrongs do not make a right', and the officer did not need to determine whether the worker was harassed where the termination was based on her misconduct

Takeaways

Safety concerns need to be investigated, findings made and steps taken

The Board will uphold employer decision making which leads to conclusion that decision in part tainted, even in circumstances where safety issues are raised

Failing to investigate will put employer at risk of not being able to prove is decision making is untainted by a safety concern

EMPLOYEE CLASS ACTIONS

Class actions in employment law – what will constitute a common issue? – *Linza v. Metric Modular*, 2023 BCSC 1196 (CanLII)

Facts:

Part of business in financial hardship sold to BC employer

BC employer operates business in BC, while sister company in separate business operates in Alberta

BC employer operated business for three years before closing down and going bankrupt

Employee seeks to be appointed as representative plaintiff to bring action on behalf of workers to claim sister Alberta company is also their employer

Class actions in employment law – what will constitute a common issue? – *Linza v. Metric Modular*, 2023 BCSC 1196 (CanLII)

Decision:

The *Class Proceedings Act* is available for use to determine common issues on behalf of a class of individuals pursuing claims

There must be a cause or causes of action, an identifiable class and a common issue or issues, and that is preferable to determine the claims by a class proceeding for judicial economy, access to justice and behaviour modification

A common issue is one that can be determined based on evidence of one person, and the decision apply to the entire group

The Court adjourned the application for certification subject to the employee reapplying with plan for how court could determine the issue of their claim to an employment relationship with the Alberta employer on a class wide basis

Takeaways

- Employers should be aware of the possibility of class or group proceedings before tribunals (employment standards; human rights) as well as court actions

- Examples of certified class actions have included incentive plan claims against parent company; pension plan claims applicable to all employees; employment/contractor status of junior hockey players; claims of temporary foreign workers)

LOOKING AHEAD FOR 2025

Looking ahead for 2025

- More challenges to statutory minimum contract termination provisions – group notice / *Forbes v. Glenmore Printing*?
- WorksafeBC return to work enforcement – orders / penalties?
- New class action certification decision – *Linza*
- GIG economy workers as employees – claims / class claims?

ANY QUESTIONS?

THANK YOU

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