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WINTER 2023 VOLUME 21, NO. 1

Is It Time for a Change at Work?

Think before you jump

Nathaly Pinchuk
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Executive Director

Perspective

The easiest thing in the world is to get stuck in a rut at work. That is great if it is a nice comfortable groove. However, if you find yourself constantly unhappy, irritated or angry, then you need to look at what's going on. Maybe it is time for a change.

Here are a few signs that you should consider. The first one is that you think about what is bugging you at work all the time. You may be fantasizing or daydreaming that you are not there anymore or obsessing over the problem.

Warning signs that you need a change

You daydream about being somewhere else, having another job or having a different life. Those daydreams turn into complaining about what you don't have to your family, friends and potentially some of your colleagues.

You alternate between being bored and overwhelmed. Being overwhelmed is actually the easy part. You have some options here that include delegating or asking for help. Boredom at work is an indication that the job now holds little interest for you. So why are you still there?

You do not feel supported or valued. If you are in a job where you feel you are sinking and no one will throw you a life jacket, then you are in trouble. If you feel you are undervalued or unappreciated, that is not good either. We all need certain things from work and you're obviously not receiving these things.

What to do next

So now you have assessed that you are in trouble. What happens next? You could decide to leave but you somewhat like a few things about the career you've built. You really don't want to start all over again. Here are a few tips to think about instead of throwing in the towel on your current job.

Take a close look in the mirror

Where does the actual problem lie? Is it you or is it them? Perhaps you have stuff going on in your life that is affecting your job or your performance at work. Could it be the other way around? This is an important distinction because you want to be happy. Taking the action to move on won't help if you are the problem; you will just carry the problem with you wherever you go. You should also consider what has changed since you became dissatisfied at work. Have they changed or was it you and your attitude or approach?

Any change is good

When you are unhappy or stuck, almost any change, large or small, will move you towards a better place. Can you shift, transfer or move around in the organization where you work now and would that make a difference? Can your job be redesigned or refocussed to make it more interesting and appealing to you? You can also change the way you work by doing certain things in different ways or at different times of day. Consider saving some enjoyable tasks for the afternoon when you often feel low. Do the tasks you dislike first and get them out of the way, same as you would do with a particular vegetable you don't like.

Like the ones you're with

Maybe there are some people with whom you simply cannot get along. Can you move away from them physically and/or emotionally? We may have to work with some people because they are on the same team or in the same department, but if they are people who make your job or your life unpleasant, reduce all nonessential contact. Utilize your time and energy at work and in the social interactions around the workplace with people whom you enjoy and who bring you positive energy. Some of them may even be able to help you with your work by giving you advice and suggestions. Even if they do not give you the right insights, you're still likely to go home happier after being around them.

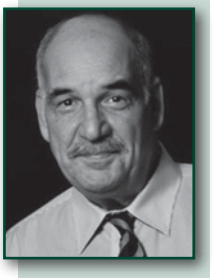
Turn down the whine volume

No one wants to hear you complain about work-not at work and not at home. You may be tired of hearing yourself whine about it. This advice is particularly relevant when it comes to your colleagues at work. Complaints that are made in confidence in one area may show up again in another area high above you. Keep in mind how you feel when you listen to the constant complainer at work. It makes you feel bad too. Excessive whining brings everyone down and achieves little but giving you a headache to go along with your other problems.

Nathaly Pinchuk is Executive Director of IPM [Institute of Professional Management].

Personal Goals at Work or Home

Stick to the plan



Brian W. Pascal
RPR, CMP, RPT
President

President's Message

We all need a plan. Without one, especially at work, we can float around for a while, but sooner or later we end up drifting aimlessly. This is true whether you work in a traditional office or remotely. Perhaps it is even more crucial to set some priorities when the boss isn't physically looking over your shoulder.

The basics are the same when it comes to individual priorities. Start by choosing the right goals- SMART goals. You know the drill: Specific, Measurable, Achievable, Realistic and Timely. Pick some that are within your ability and enthusiasm range. You might want to run a full marathon, but a 2K race would be more your speed and within your capacity. Then write them down. There's something about putting things on paper that makes them more real like your to-do list. If it doesn't get on the list, it may never get done.

Take one step towards the first goal on your list. It's amazing what happens when we take that action. Our goals become one step closer and they start to become achievable. Then keep at it, reassessing as you go along and find a way to be accountable, even if you're working on personal goals. Talk to your managers or close friends who know you well and get their feedback and support. This may be crucial to your success.

All this works well when you're in an office environment. How would that work if you are part of a remote team or teleworking? Probably the biggest difference is that at home, you must manage your own time. That is when you can get the kids and the dog out of your workspace. It is most important to identify your actual workspace when working from home. If all you have is the kitchen table, then that area must be off-limits to everyone else while you're working. They can come get a snack and then leave.

Learn not to procrastinate or delay and keep a 'task list' that allows you to track the progress on your goals. Break down bigger jobs into smaller, more manageable chunks so you can make the most of small gaps in your schedule. Do one thing at a time and try to avoid multitasking. Sometimes that leads to what you think is greater productivity, but you can also miss important things if your attention is scattered.

When you work from home, you also need to find a balance between work and the rest of your life. Set fixed hours and allow yourself regular breaks. You must clock out at the end of the day. Put your smart phone and laptop away and enjoy your evening. You can enjoy your life and achieve your personal and professional goals. At home, you're the boss- at least until the kids get home from school.

Brian Pascal is President of IPM [Institute of Professional Management].

"Before I show you where you'll be working, let me just say that some companies use money as an incentive... I use Vito here."

INSIDE THIS ISSUE

Ontario Court of Appeal: Rahman Overturned

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Feature

Employment agreements must meet minimum ESA requirements

On June 8, 2022, the Ontario Court of Appeal released its much-anticipated decision in *Rahman v Cannon Design Architecture Inc.,* 2022 ONCA 451. In doing so, the Court overturned the Ontario Superior Court's finding that the validity of a "just cause" termination provision could depend on the factual context. The three-judge panel unanimously concluded that an unenforceable "just cause" termination provision would not be saved by subjective considerations or by the employee's level of sophistication.

Facts

In February 2016, the plaintiff, Ms. Rahman, entered into an employment agreement with the defendant, Cannon Design Architecture Inc. ("CDAI"), after having sought legal advice and having negotiated several elements of her employment. There were two employment contracts: an Offer Letter and an Officer Agreement. The Offer Letter provided that it would prevail in the event of a conflict with the Officer Agreement.

Both employment contracts included a "just cause" provision. The Offer Letter provision stated that no notice was to be given if there was a just cause to terminate, whereas the Officer Agreement provision stated that the employee would receive one month's notice in the case of a termination for cause. Since the two provisions were conflicting, it was determined that the just cause provision in the Offer Letter would govern the termination of Ms. Rahman's employment.

In April 2020, Cannon terminated Ms. Rahman's employment without notice and without cause. Ms. Rahman claimed damages against CDAI, Cannon Design Ltd., and The Cannon Corporation ("Respondents") for wrongful dismissal. She sought a declaration from the Court that the termination clauses were void because they conflicted with the *Employment Standards Act* ("ESA"), and that the respondents were her common employers.

Motion Court Decision

The Motion Judge concluded that the termination clauses were valid based on its interpretation that their wording would uphold ESA minimum standards. It also took into consideration the fact that Ms. Rahman sought independent legal advice prior to contracting into the employment agreements, and the fact that she had relatively equal bargaining power when she entered into the contract. The Court also concluded that CDAI alone was Ms. Rahman's employer and not the respondents. It therefore dismissed the action against Cannon Design and The Cannon Corporation.

Court of Appeal Decision

On appeal, the Court of Appeal had to determine whether the Motion Judge erred in concluding that the termination provisions were valid, and in concluding that the respondents were not all Ms. Ramon's employers. The Court found that the termination provisions contained in Ms. Rahman's employment contract were void and unenforceable since they did not comply with the ESA. In doing so, the Court also held that the Motion Judge should not have taken into consideration Ms. Rahman's level of sophistication, nor the fact that independent legal advice was sought prior to finalizing the employment contract.

With regard to the common employer issue, the Court found that the respondents were in fact Ms. Rahman's employers since they were identified as such in the Officer Agreement, and since they had a significant role in establishing Ms. Rahman's compensation. Based on the common employer doctrine, the Court also concluded that there was sufficient evidence to show that the respondents had the intention of being an interrelated corporate group and that they had exercised enough control over Ms. Rahman's employment to be considered common employers.

Takeaways for Employers

This decision confirms that the courts are closing the door on the possibility of using contract principles in employment disputes. Any attempt to contract out of the ESA will be at the employer's risk.

Here are a few key takeaways employers should consider when drafting and engaging in termination clauses in employment contracts:

First, this decision confirms that the factual context is not relevant when determining if a termination clause is enforceable. Evidence related to the parties' subjective intention, their level of sophistication, or whether or not they are receiving legal advice prior to contracting into the employment agreement will not save a termination provision that contravenes the ESA.

Rahman is also a reminder that the Court's decision in *Waksdale v Swegon North America Inc.*, 2020 ONCA 391 prevails in the context of employment disputes. That is, an employment agreement must adhere to the ESA's minimum

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Assessing Religious Beliefs: Employers Beware

There is no "one size fits all" approach

Tom Ross
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Feature

Employers are sometimes called upon to accommodate the religious beliefs of their employees. This can occur when a workplace rule or requirement conflicts with the sincere religious beliefs of employees.

Recently, the Alberta Human Rights Chief of the Commission and Tribunals (the "**Chief**") found that people claiming discrimination and accommodation based on "religious beliefs" under the *Alberta Human Rights Act* (the "***Act***") must do more than assert a sincerely held religious belief.

This request for review decision provides guidance for service providers and employers who have implemented health and safety mandates in response to COVID-19 and who have or will face related accommodation requests.

While the facts of the decision relate to restrictions implemented in response to COVID-19, the principles apply more generally.

David Pelletier (the "**Complainant**") attended Community Natural Foods (the "**Respondent**"). On arrival, he was told that he would be required to put on a face mask in order to enter the store. He objected and said that he was medically exempt from wearing a face mask. The following day, he escalated his concern to the store's General Manager, who confirmed that the Respondent's new policy was that all persons over the age of 2 years old entering the store were required to wear a face mask (the "**Policy**"). Individuals who could not wear a face mask (e.g., due to medical reasons) or chose not to wear a mask were offered alternatives, such as online shopping, home delivery, curbside pickup or the use of a personal shopper who would put together a customer's order.

Thereafter, the Complainant filed a Complaint with the Alberta Human Rights Commission and alleged that the Respondent discriminated against him regarding goods, services and accommodation on the grounds of physical disability and religious beliefs contrary to the *Act*.

Among other allegations, the Complainant alleged that the Policy infringed his religious beliefs and that the accommodations offered by the Respondent were inadequate, unreasonable and did not justify the infringement of his right to be free from discrimination.

The Commission accepted the Complaint only on the ground of disability.

The Respondent argued in response to the Complaint that the Policy was instituted in response to the COVID-19 pandemic and was aimed at protecting the health and safety of staff, customers and the public. It submitted that the Policy was justified in the circumstances, and it provided accommodations for those who could not wear face masks.

The matter was investigated by one of the Commission's human rights officers who recommended that the Complaint be dismissed. The Director of the Commission agreed with the investigation recommendation and dismissed the Complaint.

The Complainant requested a review of the Director's decision (and included arguments that the Director and Respondent failed to address his claim of discrimination on the ground of religious beliefs).

In considering the request for review of the Director's decision, the Chief found that the Policy was justified and that it provided reasonable accommodations, and thus he "… need not decide whether there [was] a reasonable basis in the information to establish a *prima facie* case of discrimination." However, while the decision concerned a medical exemption request, the Chief did make the following observations in respect of the question of discrimination on the ground of religious beliefs:

> [36] It is clear from all of the above that an individual must do more than identify a particular belief, claim that it is sincerely held, and claim that it is religious in nature. This is not sufficient to assert discrimination under the Act. They must provide a sufficient objective basis to establish that the belief is a tenet of a religious faith (whether or not it is widely adopted by others of the faith), and that it is a fundamental or important part of expressing that faith.

The Chief also made some helpful comments on the information requirements to demonstrate a need for medical accommodation:

> [26] … where an individual files a human rights complaint, and seeks to have that complaint adjudicated by a Tribunal in order to obtain monetary and other redress, they require more than the type of note provided here. … the Tribunal would need something more than a

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Feature cont'd

Assessing Religious Beliefs: Employers Beware

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note that indicates the person is "medically exempt because of a medical condition." For example, there should be information that certifies that the individual has been diagnosed with a disability, the nature of the disability, and the nature and scope of the restrictions that flow from that disability. Ideally, it should set out the accommodations the individual requires.

While this decision specifically addressed a masking policy, the analysis has wider application. The Chief's comments support that service providers and employers may request objective information from individuals to establish whether a belief at issue is a religious belief protected under the Act and thus requiring accommodation.

Service providers and employers should tread carefully when faced with religious belief matters and requests. Each matter should be assessed individually on its own facts.

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Feature cont'd

Ontario Court of Appeal: Rahman Overturned

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requirements; otherwise, the entire termination clause could be invalid. This reiterates that termination provisions are often read together as a whole in their plain wording when courts are assessing their enforceability.

To ensure that their employment agreements meet the applicable legislative minimum requirements, employers should draft all contractual provisions carefully and have their employment contracts reviewed regularly by a lawyer. Being vigilant and drafting enforceable provisions will prove to be the best tool for employers to avoid potential costly legal procedures.

Finally, *Rahman* is a reminder that each corporate entity in an interrelated corporate group exercising control over an employee's employment may be held jointly and severally liable for the employee's potential termination rights.

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The Toxic Boss Has Left the Organization: The Aftermath

Establishing the "new normal"

Gail Boone
MPA, CEC

Next Stage Equine Facilitated Coaching

Ask the Expert

Q *You have finally gotten rid of a toxic boss. You notice that the remaining team members aren't as exuberant as you anticipated. How do you make things right?*

A *Toxic workplaces are unfortunately all too common. Their effects are profound. Some employees need a paid or unpaid absence from work to deal with the impact of the toxicity. Others leave work altogether. When a supervisor has fueled the toxicity, it can be challenging for employees to find a safe place to regularly escape the trauma they experience. Typically, the higher the rank of the official, the more difficult it is to get help. How do you go about rebuilding trust and supporting the team that has survived a toxic boss?.*

Learn about trauma and do your own work. Trauma is more than the deeply distressing or disturbing event or series of events that precipitate it. Essentially, you know what it is once you experience it. It can result in an impaired ability to cope, decreased resilience and physiological and psychological illness. Healing trauma is possible with the support of trained trauma professionals.

Understand that employees have experienced trauma. Abuse in the workplace elicits the flight, fight or freeze response and can cause individuals to experience dysregulation of the nervous system, psychological trauma and complex post-traumatic disorders. According to trauma expert Peter Levine, "people who are more in touch with their natural selves tend to fare better when it comes to trauma." Depending on an employee's ability to meet and deal with threats to their well-being, the effects can be severe.

Speak one on one with everyone. Listen deeply and acknowledge your awareness of what happened; account for the lack of psychological or physical safety and commit to leading in a different way.

Expect increased absenteeism. The effects of trauma can be intense, varied and serious. Posttraumatic symptoms can take months to manifest. Employees may experience a disruption in their physiological, psychological, spiritual, emotional, social and mental well-being affecting many areas of their life.

Ensure access to EAP with a professional who is certified to deal with trauma. Trauma healing requires therapists skilled in somatic work. The process from trauma toward healing takes expertise capable of guiding the necessary steps in safety and at a slow pace.

Arrange a grief ritual. Secure the services of a professional to lead a release and reclaim ritual so that individuals and the team as a whole can begin to understand what they have lost, what to reintegrate and how to self-regulate. Do not make this session mandatory. Depending on an individual's response to the trauma, speaking about experiences in a group setting can feel like reliving it. For some, it will be too much to manage as they work through their healing process.

Be mindful of your language, tone and non-verbal communication. Learn as much as you can about your energy and its impact on others. Words matter. Both what you say and how you say it will be noticed. Learn about minimizing language and phrases such as 'well, that shouldn't take so long,' or 'you are too sensitive.' Such expressions are often used to demean others

Work together to establish a positive vision for the team. Use a team-building exercise to generate a comprehensive and compelling outlook. More than a one-liner, this narrative should serve as a guiding light toward the future. Outline, for example, the team's desired outcomes, behaviours, reputation, ways of interacting, approach to customers and what it can be counted on to deliver.

Create agreements between all parties. Start with a question that determines what is reasonable. What is reasonable for the manager to expect of employees, of employees to expect of the manager and then of employees to expect from their peers? Engage each party in answering in the first person.

Provide continuing education on effective interpersonal skills. These should include: establishing and managing boundaries, addressing

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Ask the Expert cont'd

The Toxic Boss Has Left the Organization: The Aftermath

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differences, non-verbal communication, emotional and social intelligence and managing emotion.

Check in frequently. Host one-on-one conversations to ensure employees are getting the help they need. If an employee is absent for an extended period, ensure their place at work for when they can return. Also, make sure to notice changes in how employees are coping.

Address any incivility immediately. Make use of honest and respectful boundary-setting conversations. It's critical to lead by example so that employees can trust your response to difficult situations.

Celebrate the small stuff. Make sure to, as author Ken Blanchard says, "Catch Them Doing Something Right." Make time to communicate positive and productive gains.

Turning the toxic into the terrific will take focused effort and leading from the heart. Healing trauma is possible with time, the right resources and a commitment to improvement.

Check out Peter Levine's books: 'Waking the Tiger', 'Healing Trauma' and 'In an Unspoken Voice'. Also, see Bessel Van der Kolk's work in 'The Body Keeps the Score'.

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Just Cause vs Wilful Misconduct: Overcoming the Statutory Entitlement Hurdle

Standards legislation imposes a higher standard than just cause

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Feature

The ultimate question when terminating employment is: just cause or without just cause. Generally, when termination of employment is without cause, employees are provided with statutory notice or pay in lieu of notice in accordance with the applicable employment standards legislation, and potentially additional notice or pay in lieu. In contrast, where termination of employment is for just cause because of the culpable conduct of the employee, no notice or pay in lieu of notice on termination under employment standards legislation or otherwise is provided. However, in some jurisdictions, employment standards legislation provides extra protection for employees by imposing a higher standard of culpable conduct in order to disentitle the employee from statutory notice of termination or pay in lieu.

The Ontario Court of Appeal recently confirmed that termination for just cause will disentitle an employee from receiving common law reasonable notice, but it will not always disentitle an employee from receiving statutory notice and severance entitlements.

In *Render v ThyssenKrupp Elevator (Canada) Limited*, 2022 ONCA 310, the appellant, Mr. Render, was employed by the respondent, ThyssenKrupp, for approximately 30 years when his employment was terminated for just cause. At the time his employment was terminated, the appellant was an operations manager and was not provided with any notice of termination or pay in lieu of notice at common law or pursuant to the Ontario *Employment Standards Act*, 2000.

Mr. Render's employment was terminated after an incident in which Mr. Render slapped a co-workers' buttock. The incident occurred in the workplace, which was small, with few female employees and where inappropriate jokes were often told. The person whom the appellant slapped at times reported to the appellant, although he was not her direct report. The employer had an anti-harassment and discrimination policy which Mr. Render was aware of, and was responsible for implementing given his managerial role.

On the day in question, Mr. Render's co-worker made a joke about his height and in response, Mr. Render knelt down close to his co-worker and when he came up, his hand slapped his co-worker's buttock. The co-worker immediately told Mr. Render that his conduct was inappropriate. Mr. Render responded that it was a joke and was not deliberate. Mr. Render's co-worker reported the incident to her direct supervisor and although Mr. Render apologized, his co-worker made a formal complaint to human resources. The employer investigated the complaint and during the investigation, Mr. Render made a complaint against his co-worker for comments she had made towards him in the past. As a result of the incident, Mr. Render's employment was terminated for cause.

Mr. Render brought an action for damages for wrongful dismissal against ThyssenKrupp. There was dispute at trial as to what occurred, and how it occurred in terms of whether or not the slap was accidental or deliberate, and what occurred after the incident. At trial, the judge dismissed the action, finding that Mr. Render's conduct was inappropriate and that despite his apology, he was not remorseful and upheld termination for cause. In coming to this conclusion, the trial judge considered Mr. Render's 30-year employment, clean disciplinary record, position of authority over his co-worker, failure to understand the seriousness of the conduct, retaliation against his co-worker, and his responsibility for the anti-harassment and discrimination policy. The trial judge declined to award punitive damages and reduced the amount of costs awarded to the employer by 50% as a result of its misconduct during the trial.

Mr. Render appealed the trial decision arguing that the trial judge erred in finding that just cause was established. Mr. Render also argued that if the trial judge did not err in dismissing his wrongful dismissal claim, he was still entitled to pay in lieu of notice pursuant to the *Employment Standards Act*, *2000*, as well as punitive damages and that the costs awarded should be set aside. The Court of Appeal confirmed that in order to be disentitled from notice of termination under the *Employment Standards Act, 2000*, a standard higher than "just cause" is applied. An employee must have been engaged in wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer. To meet that standard, the subjective intent of the employee must be considered. The employee's conduct must be deliberate: the conduct must amount to "being bad on purpose". Finding that the exemption is narrower than the just cause

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Feature continued

Just Cause vs Wilful Misconduct: Overcoming the Statutory Entitlement Hurdle

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standard at common law, the Court of Appeal found that Mr. Render's conduct did not "rise to the level" of wilful misconduct required to disentitle him from statutory termination pay because although the contact was not accidental, it was not pre-planned and occurred in the "heat of the moment". The Court of Appeal upheld the decision not to award punitive damages but allowed the appeal on costs and declined to award costs to either party.

Employers in jurisdictions like Ontario and Nova Scotia (where the employment standards legislation imposes a higher standard than just cause) should consider the level of culpability, and in particular, the subjective intent, and specific wording of the applicable employment standards legislation before making the decision to decline to provide statutory notice or pay in lieu to employees whose employment they are terminating for just cause.

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Union Organizing on the Post-COVID Rise

Key Considerations for Employers

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Feature

Workers at an Amazon warehouse in Staten Island recently voted in a union. Apple's employees at its flagship Grand Central Terminal store are taking similar steps.

Is this surprising? Not really.

After almost three years of pandemic uncertainty and restrictions, many workplace relationships are frayed. Lockdowns made it more difficult for unions to organize, which has led to some pent-up interest. Added to this, rising inflation is putting real pressure on working families right now. With lockdowns behind us (for now), unions will be looking to harness some workplace frustration and angst.

For many employers, the very notion of a union organizing campaign breeds fear, panic and even anger. Careful planning helps to lower the associated anxiety and reduce the risk of a successful union campaign.

Here are some key considerations for employers:

Accept reality. Every employer is at risk that they may be targeted by a union, especially if they are in a sector that is already heavily unionized. An employer's false sense of security is often its biggest threat.

Stay connected. Employees often turn to a union when the connection with management has been lost. The union process is driven by employees. Employers who have adopted open lines of communication are well positioned, as it also allows them to provide and receive feedback from their own workforce. One of the good things that the pandemic has taught employers is the need for creative engagement with employees, particularly in the digital environment. This engagement must be maintained and developed, as does the need to actually listen to what employees have to say.

Stay competitive. Employees do not necessarily place compensation at the top of the list as to why they chose to support a union. However, money is up there and even more so these days. Given current inflationary pressure, employers are well advised to pay very close attention to (and act upon) market data relating to all terms and conditions of employment. It also helps to track what is happening with competitors who are unionized (most collective agreements are available for access by the public).

Build HR Infrastructure. It is called "organizing" for a reason. Often, employees who support a union are seeking structure to help reduce what they perceive to be arbitrary and discretionary conduct by management. Accordingly, employers are well advised to not only build HR policies, but ensure that these policies are kept up to date (we are living in a time of much regulatory change for workplaces in Ontario).

These HR policies must cover all aspects of HR, including occupational health and safety, human rights, harassment and the various employment standards. In addition, employers should ensure that a dispute mechanism is created for their workplace. This dispute mechanism does not have to be complex, but it needs to be in place.

Support Supervisors. Supervisors are critical to the entire process - as they are the direct and regular point of contact with a workforce. Time and time again, employers overlook the opportunity that exists with a well-trained supervisory team - which includes training around the sensitivities and rules relating to key indicators of a campaign, what can and cannot be done and said during an organizing drive.

Plan. The best way to avoid panic is to accept that union activity or a union application may be made and to prepare for it. In Ontario, an employer only has two days to respond to a certification application, with a vote being held in most cases five days after the application date. Well-managed employers develop plans to provide guidance during the critical days leading to an application or vote. Such plans include reference to communication and messaging, participation by management and key timelines.

The six factors outlined above are merely chapters in the overall story of building and maintaining an effective, competitive and fully engaged workforce. Good employers know this to be true.

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Decoding Termination Provisions - *A simpler way to draft*

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Feature

Termination notice is often tricky territory for employers to navigate, especially when the law in this area continues to evolve. The starting point is that employees are entitled to common law reasonable notice (not just the statutory termination notice) upon termination without cause, which is generally significantly higher than statutory termination notice, unless the employment agreement clearly specifies some other period of notice. Because of this, employers often attempt to provide clarity on an employee's termination entitlements by including a termination provision in the employment agreement. However, such provisions need to find the "Goldilocks zone" for termination notice: not too low that the provision contravenes employment standards, but not too high that it results in overcompensation. A recent Alberta decision indicates that this zone may be easier to find than employers think.

Employment Standards Legislation Sets the Floor

The obvious solution appears to be explicitly limiting termination notice in the employment agreement. However, the notice set out in the limitation provision cannot be so low that it contravenes employment standards. In *Machtinger v. HOJ Industries Ltd.*, [1992] 1 SCR 986 (SCC), the Supreme Court of Canada found that if an employment contract fails to comply with the minimum statutory notice provisions of employment standards legislation, then the presumption of common law reasonable notice will not have been rebutted.

As a result, employers often heed the Supreme Court of Canada's advice in *Machtinger*, which stated, "an employer can readily make contracts with his or her employees which referentially incorporate the minimum notice periods set out in the Act or otherwise take into account later changes to the Act or to the employees' notice entitlement under the Act. Such contractual notice provisions would be sufficient to displace the presumption that the contract is terminable without cause only on reasonable notice."

What about a Ceiling?

However, simply incorporating references to employment standards legislation is not enough. In *Kosowan v. Concept Electric Ltd.*, 2007 ABCA 85, the Alberta Court of Appeal stated that, "As we read it, the term of the agreement provides only that in the event of termination without cause, the Appellant is entitled to severance pay 'in accordance with the Employment Standards Act of Alberta.' (It is conceded here that the reference is to the Code.) The clause does not, on its face, confine the Appellant to compensation pursuant to ss. 56 and 57(1) of the Code." This becomes an issue because common law remedies remain available under most provincial employment standards legislation, such as under section 3 of the Alberta *Employment Standards Code*, which states, "Nothing in this Act affects any civil remedy of an employee or an employer". Because of this, reference to the employment standards legislation only sets a minimum or a floor to termination notice but does not eliminate the right to common law reasonable notice, and additional language must be added to set a maximum or a ceiling on termination notice to address section 3 of the Code.

An Alternative: Removing References to the Code?

A recent Alberta decision suggests there may be a simpler option for employers. In *Bryant v. Parkland School Division*, 2021 ABQB 391, the termination provision at issue stated, "This contract may be terminated by the Board upon giving the Employee sixty (60) days or more written notice." This provision did not reference the employment standards legislation nor did it set a ceiling. However, because the maximum amount of statutory termination notice under the Alberta *Employment Standards Code* is 8 weeks, a floor of 60 days is compliant with the legislation.

The Court found the provision to be enforceable on the basis that, "the common law right to reasonable notice is only implied into an indefinite employment contract if the contract is silent or it is ambiguous". The court found the provision to be clear and unequivocal in setting a notice period for termination.

The Court clarified the "ceiling" issue by stating that, "Section 3 of the Code clarifies that the Code does not affect an employee's common law rights. Therefore, if employers reference the Code, they need to be clear in rebutting the common law presumption if they wish to extinguish it", but since the provision at issue did not reference the Code, and was neither silent nor ambiguous regarding termination notice, it was effective in rebutting the presumption that the employee is entitled to common law reasonable notice.

Takeaway for Employers

Although the *Bryant* decision suggests that termination provisions can be quite simple in rebutting the presumption of common law reasonable notice without using explicit waiver language, employers should nonetheless be careful in drafting termination provisions for without cause terminations and should consult legal counsel. It will be important to consider:

1. Setting a floor for termination notice that is compliant with the applicable employment standards legislation, either by: (a) setting a minimum amount that is higher than the maximum statutory requirements under the applicable employment standards legislation (however, the risk

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remains that the provision may become non-compliant and void if statutory requirements are increased in the future), or (b) making reference to the employment standards legislation and any future amendments as the minimum, and

2. Setting a ceiling for termination notice by either: (a) setting a maximum length of notice (again, there is a risk that this provision may become non-compliant and void if statutory requirements are increased in the future), or (b) being explicit that the employee is waiving their rights to common law reasonable notice to address section 3 of the Alberta Employment Standards Code or similar employment standards legislation.

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Feature

How to Manage Disrespectful Employees

Take corrective action immediately before it affects your workplace culture

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In an ideal world, we would all like to get along with everyone. Unfortunately, it is simply not realistic. Incompatible personalities are part and parcel of today's workplace, whether we are physically together or working remotely.

Disrespectful behaviour in the workplace takes many forms, from subtle comments, raised voices or name-calling to physical fighting. Rude behaviour in the workplace causes problems ranging from lost productivity, increased stress, a negative impact on the workplace environment and employee retention.

Three tips for Dealing with Disrespectful Employees

Treat the Behaviour Problem Like a Performance Problem – Treat disrespectful behaviour seriously as you would confront and correct a significant performance problem. Apply the same measures as you would for recurring errors and unexplained absences or tardiness.

Be Direct – Many employees appreciate and respond to a direct approach. As a Leader, if you are indirect, this will only feed into the employee's belligerence. However, being direct does not mean being aggressive. When addressing the issue, be specific, speak plainly and make it clear as to the expected behaviour change that is required.

Praise Positive Behaviour Change – It may be a challenge for the disrespectful employee to change. Initially, they might resist. As the leader, you should provide positive encouragement to the employee when you see the behaviour change. Slight rare slip-ups may happen, and if things get worse, it will require another correcting conversation.

In a recent study from The Herman Group, 75% of employees who quit their roles admitted that they were not leaving for more money – they were running away from poor leadership. But what happens when you are managing an employee who does not respect the administration – and that cynicism is starting to drift into your workplace culture?

A few tips to help you manage the delicate problem of an employee who seems to resent you passively-aggressively.

Remain calm – A recent survey from TalentSmart found that 90% of top performers are highly skilled at keeping their emotions checked and managing stressful situations. When an employee takes to disrespecting you or being overtly condescending, it can be incredibly tempting to lose your temper. Do not. Resist the urge to shout. Instead, maintain a calm and polite exterior and ask the employee in question if they have an issue they would like to discuss in private. This often is not easy and takes a lot of self-control and resilience.

Create a positive working environment and maintain a positive attitude – Be careful not to lower yourself to the employee's level even when you are tempted by negative comments or insults from them. Check your temper and put forward your professional face. Remember if you reprimand someone in public, that is a form of bullying. Engage the employee in dialogue for suggestions and how to repair the problems. If employees feel their opinions matter, they will feel more positive about the workplace and their manager.

Accept Blame – Sometimes the manager shares the responsibility in forming a state of disrespect. By being too relaxed in your management style, you may be encouraging an atmosphere in the workplace where employees feel that they have little direction. If you are direct and address these issues as you notice them quickly yet privately, you may be able to change the behaviour, improve your management style and gain your whole team's respect.

In the workplace, respect often must be earned. When an employee behaves disrespectfully, you will be more successful by simply communicating directly with that employee. Failure to communicate could lead to an increase in the problem until it impacts the rest of the team.

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Generation Z: The Workers Who Want It All

Managing the most diverse generation in history

Members Quarterly Staff Writer

Feature

Generation Z may be the workforce of the future, but it also presents a whole new set of obstacles and opportunities when it comes to current professional norms in the workplace. Gen Z already represents 25% of the workforce and will likely increase to 30% by 2030. This group were born between the late 1990s and the early 2010's and are also referred to as Zoomers. The COVID-19 pandemic had a dramatic impact on many young professionals and graduates and has forced employers to quickly adapt and develop new approaches to work, growth and collaboration. It remains to be seen what the extent of the damage will be, but it is clear that this will have a lasting impact on the current generation.

Here are some insights into how they think and the skills or coping mechanisms they are likely to use to overcome the challenges they are currently facing.

Their media habits may surprise you

Leave Netflix to Gen X and the boomers. Gen Z consumes less television than previous generations. 55 percent said they use their smartphones 5 or more hours per day and 26 percent use it for 10 or more hours per day which is more than any other type of device. They are also a lot savvier about how they engage online. They grew up wary of marketing and are actively trying to exert some control over the content to which they are exposed. For example, there has been a significant increase in the use of ad-blocking software by young people in the past few years. This attunement speaks to the fact that they value how exterior factors impact their mental health. They will also expect you to care about this.

They are tech-savvy and not afraid of entrepreneurship

As a group, Generation Z could be aptly characterized as having a go-getter attitude, an inclination towards activism and a propensity to dream big. Their digital history from pretty much day one has left them with high expectations when it comes to technology. They are quick to embrace improvements and innovations that help them customize and enhance their online experiences. There is an emerging body of research that suggests they see this mastery of technology as a competitive advantage they have compared to other generations. They are therefore eager to use it to their benefit in order to start their own enterprises and advance professionally.

They are eager to leave their mark

Over 80 percent of Gen Z say that finding themselves creatively is important. This is supported by the fact that over 25 percent post original video on a weekly basis, while 65 percent enjoy creating and sharing content on social media. More so than any previous generation, they're not just looking to consume entertainment - they want to participate in shaping and creating it.

They prioritize pay and stability

Gen Z are actually more money-driven than their Millennial predecessors. More than half emphasize pay as the most important consideration when applying for their first full-time job. They're also motivated by traditional benefits and are looking for things like healthcare coverage, a retirement plan and life insurance. Although perks like snacks, happy hour and gym memberships are appreciated, they will not be enough to pull the wool over a Gen Z's eyes if the rest of the package isn't up to par.

They need direct and constructive performance feedback

Eager to get ahead, Generation Z is looking to work in an environment surrounded by people who will help them chart a path to promotion. Not satisfied to simply get the position and remain static for long periods of time, Gen Z expects to get performance feedback, hands-on training and managers who listen and value their opinions. Less likely to put up with the constraints of a traditional top-down structure, about 50 percent of Gen Z respondents claimed that they would "never" tolerate an unsupportive manager.

They are looking to make strong connections at work

Although Gen Z also appreciates the freedom to work independently, they see the workplace as a field for collaboration. They're inspired to make strong connections at work and will be quick to look elsewhere if they feel their team dynamic is dysfunctional. They want to take a collective view regarding their organization's values and being part of a team where their ideas are heard is of great importance.

The impact of COVID-19

Even prior to the outbreak of COVID-19, Gen Z was having to contend with the fact that they were entering a precarious and competitive job market. Enter a global pandemic and the career journeys they were just starting to embark upon were largely put on hold or seemed to vanish altogether. With an astonishing number of layoffs and furloughs not to mention the many graduates whose prospects seemed to evaporate overnight, employers have an important role to play in rebuilding the workforce and ensuring that its youngest members have the tools and resources they need to recover.

Members Quarterly Staff Writer

Most Avoidable Mistakes Employers Make

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Ask the Expert

Q What in your opinion are the most common easily avoidable mistakes that employers make over and over again?

1. Being scared off by doctors' notes or harassment claims just as the employee is on the verge of being fired.

It is not a coincidence that claims are then launched and it is often at their lawyer's advice. Unless the doctor's note clearly indicates a disability which caused the performance or conduct issues, there is nothing stopping you from proceeding with the dismissal. The same goes for a harassment allegation. Unless it is soundly based, it also should not dissuade you from proceeding. In fact, not proceeding with the next step of discipline when it is warranted will condone it, making it more difficult to terminate later. It will also permit the employee to say that since they were not disciplined for that misconduct, they had no reason to believe that the employer viewed it seriously when they repeat it.

2. Giving salary increases, positive performance reviews or making positive comments about employees who should be receiving warnings instead.

Many employers have difficulty delivering tough news and are all to ready to say positive things about any accomplishment. Remember that to build a case for cause for discharge, it must be very clear to the employee that their conduct or performance was entirely unacceptable. Don't weaken your own case.

3. Failure to require and maintain employment contracts with valid termination provisions.

Especially in Ontario, the case law over the last three years has invalidated almost every existent employment contract. Why pay wrongful dismissal damages when most employees will sign employment contracts upon hiring and, having signed them, most will sign updated ones when the law renders your existing ones invalid? Remember that if you are to have an enforceable contract, you must provide the employee something in return for it. At the commencement of employment, that is the job itself. But after that, you should do it at salary increase or bonus time and make that increase or bonus conditional upon signing the contract.

4. Not complying with the law upon termination.

Issue the ROE in a timely fashion, quickly pay outstanding wages, vacation pay and pay the ESA termination and severance pay when you are required to pay. Too many employers hold off on paying because they believe they are negotiating severance or are just careless. Judges right now are punishing employer after employer in punitive and bad faith damages explicitly because they are not complying with the law upon termination.

5. Making ridiculously low ball offers

Not only does that encourage litigation, but courts have held employers liable for additional bad faith damages because their initial offer was so unreasonable.

6. Not providing a deserved reference when requested.

Courts provide employees additional amounts when that occurs. Also pay attention to that request hidden inside an inflammatory demand letter from legal counsel. You can ignore the rest, but don't ignore that portion. The employee's lawyer is hoping that you don't provide it.

7. Making bogus allegations of cause

Employers are often too quick to allege cause, either because they believe it or they hope that it provides leverage. Smart employee counsel will jump on that because courts award additional bad faith damages specifically based on allegations of cause which they believe are made in bad faith. That should not prevent you from asserting cause if you have a legitimate prospect of success though.

8. Misclassifying employees as independent contractors

Most independent contractors really aren't. Don't confirm that status too quickly because workers request it. Yes, you might avoid paying benefits or even paying them a bit less in return. However, you become vulnerable to overtime claims, wrongful dismissal damages and massive income tax reassessments for not withholding, including penalties if CRA or the employees themselves decide that it is more advantageous to take a different position. Keep in mind that it's a tax fraud and, like many of the points above, discuss this with legal counsel before exposing yourself to risk.

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