IPM ASSOCIATIONS

Find us on:

Visit **www.workplace.ca** to follow us.

MEMBERS QUARTERLY

Celebrating 41 YEARS

News, Updates and Events

APRC

Association of Professional Recruiters of Canada

CPTA

Canadian Professional Trainers Association

CAAS

Canadian Association of Assessment Specialists

CMPA

Canadian Management Professionals Association

WINTER 2024 VOLUME 22, NO. 1

Brian Faller
RPR, CMP
Manager, Administration

Perspective

Virtual Mentoring

Can it really work?

We all know the benefits of having a mentor. Most of us have had a more experienced employee guide us through particularly difficult portions of our careers and help us navigate a new organization or task. Now that we're more seasoned, maybe it's time to mentor others. Before you think that it's going to be a one-way street with you doing all the giving, think again. There are some real, tangible and maybe even surprising benefits to becoming a mentor.

How important are mentors? When things are normal, they are important supports for both individuals who want to grow and the organization itself. However, when things are tough, they are crucial keys to success. One major concern that employers have these days is how does mentoring work when so many employees are working remotely? Can it really be effective with employees who work from home?

The short answer is that with some modification and extra attention, it can be great for both the mentee and the mentor. The biggest challenge is to break down the physical distance and use technology to maintain your connections.

Make the connection

It will take time to develop a personal relationship with a remote mentee if you haven't had a chance to do that in real time. You may have to work a little harder to break down the natural disconnection that some people feel when they work on their own for an extended period of time. You can accomplish this through regular check-ins using emails, texts or video calls. Even without a formal agenda or plan, this will help build trust and strengthen your working relationship.

When it comes to Zoom or video chatting, you can let people come as they are. That may mean informal dress codes and the occasional pet video bombing a mentoring call. That's just real life for many remote workers. You can try to limit disruptions and distractions, but don't get too upset when they inevitably occur.

Resist the temptation to do everything

Do you remember how everyone wanted to make sourdough bread or try their hand at organic gardening during the pandemic? Many mentees may want to try some completely new things as they work online or from home. While the mentor should encourage their growth, they may also have to keep them focused. If mentees do decide to write their book while working from home, the mentor could help them plan out the steps and get them started. This way they could learn new skills and refine their project planning processes as they plot their best-selling self-help book.

Stay focused on the goal

Even with everything that is happening in these constantly changing times for the workforce, it is crucial that the mentor-mentee relationship stay focused on the main goals that you establish at the beginning of the process. Keep your eyes on the prize, but also recognize that there may be additional stress or pressure. You should build more supports into the process to help the mentee stay on track. The employee may need to talk a bit more about their personal or career challenges. Give them the time and space to do that. You don't have to fix them, but they may need to talk. You will actually become that listening and comforting ear to let them process those feelings and concerns. Keep their expectations within a reasonable limit and build in small wins that give them encouragement to keep working towards their major goals in your partnership.

There are challenges for both mentors and mentees in a remote relationship, but virtual mentoring can work for both of you. As a virtual mentor, you gain an opportunity to build and practice your own leadership skills. You will be a role model to other workers under your wing and you will have the chance to guide them without being encumbered with a formal management or performance appraisal role. It is almost guaranteed that you will become a better leader and manager after your mentoring experience and totally guaranteed if you work hard at it. Mentoring truly is a win-win scenario even in the virtual world.

Brian Faller is Manager, Administration & Special Projects for IPM [Institute of Professional Management].

Nathaly Pascal
RPR, CMP, RPT
President

President's Message

Platitudes- Spare Me

Time to toss the useless cliches

Employees and customers alike have never been as suspicious of platitudes as they are today. People seek sincerity and authenticity. Their BS detector starts acting up like crazy when they encounter another throwaway cliche. In fact, if I read another company mission statement completely lacking in actual substance, I might just throw in the towel myself. In all seriousness, though, we need to fight against the temptation to exist purely in the realm of vapid 'office talk' when justifying our actions or speaking about ways to improve our organizations. The real leaders of tomorrow will be those who walk the walk, not talk the talk.

Just do the work

I know this sounds obvious. However, in today's working climate, you can do a lot to set yourself apart by simply getting stuff done without an endless cycle of meetings to discuss the reasoning behind each action. Yes, it is vital that everyone is on the same page and understands the primary goals and objectives, but every minute you waste spinning platitudinal reasoning for your actions is a minute not spent actually getting the required work done.

Save us from another meeting

Letting your actions speak louder than your words often involves reconsidering how you use (or don't use) other people's time. Consider carefully whether or not what you need to say really requires a meeting or if achieving your goal could be done more effectively by addressing your people individually. You're less likely to produce banal statements or overly general instructions when you're talking one-on-one.

Focus on what makes your company different

Platitudes often end up weaving their way into mission statements or how an organization discusses their 'company culture.' This may seem inevitable, but I don't think it has to be. What makes your organization unique is a serious matter discovered through much employee feedback and deliberation. Importantly, it should also highlight how you're different from similar players in the field.

To do this, you need to be willing to make bold statements, highlight polarizing decisions that you've made and generally prove that you really stand for something. Don't be afraid to emphasize the fact that you decided not to compromise on a particular issue or that you prefer certain collaboration methods over others. This is where things get exciting -- people will actually start waking up and listening to what you have to say.

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

"I'm looking for a workaholic who feels the great job he does is compensation enough."

INSIDE THIS ISSUE

The Season(al) Employee Predicament

You don't want a continuous employment relationship

Kyle Allen
J.D.
Partner, Brownlee LLP

Megan Van Huizen
J.D.
Associate, Brownlee LLP

Feature

As the seasons change, so do many employers' needs for staff. The changing weather or the need for extra hands around the holidays results in employers looking to seasonal employees to round out their staff for a temporary period of time. But what happens when "the season" ends and what rights do these employees have? What many employers may not realize is that if the employment relationship has not been clearly and properly defined by an employment contract at the outset of each season, seasonal employees may be entitled to notice if they are not rehired for subsequent seasons.

Definition of a "Season"

In the employment context, a "season" is typically defined by the temporary nature of the work being offered. The length of the season and amount of work available is often dictated by weather conditions, holidays, and/or consumer demand, all external factors over which the employer has no control over. Therefore, the needs of an employer can ebb and flow during the season or as seasons change, depending on the nature of their workplace.

Seasonal employees are often hired on a fixed term basis. In such cases where seasonal employees are provided with clear fixed term contracts that end on a pre-determined date without any intention of rehire, legal issues are less likely to materialize. However, matters become more complex when employees are hired for "the season" without setting clear expectations as to the duration of the season or what the rights and obligations are of the parties when the season comes to an end. This is especially so in cases where employees are consistently rehired season after season.

Termination Rights and Obligations of Seasonal Employees

Most provincial employment legislation contains special rules for seasonal employees (or fixed term employees more generally). Specifically, on the completion of a fixed season, the employee's employment may come to an end without the need for the employer to provide termination notice. However, despite such legislative provisions, an employee's common law rights must also be considered.

Under the common law, there is a risk that seasonal employees are deemed to be continuous employees where representations have been made by the employer which could constitute a promise or reasonable expectation of rehire the following season. The following examples demonstrate some common representations employers make when hiring and/or terminating seasonal employees at the end of the season that could lead a court to find the relationship was continuous:

- Automatically hiring seasonal employees back every season over a number of years without requiring an application;
- Failing to implement an employment contract;
- Where a contract is in place, failing to include language that clearly sets out the seasonal nature of employment;
- Continuing to provide benefits during the off-season; and
- Providing a return date on the employee's ROE.

If an employer decides not to rehire a seasonal employee in subsequent seasons, and if the employee can convince a Court that their employment relationship was actually continuous in nature, they would be entitled to proper severance pay. Calculation of severance pay entitlement will depend on whether the employee has an enforceable contractual termination clause defining severance pay entitlement, or alternatively, if no enforceable termination clause exists, reasonable notice will be assessed based on the employee's unique circumstances.

It is therefore important to understand that simply calling an employee "seasonal" does not necessarily make it so when it comes to their legal entitlements, even if that employee only works during certain times of the year.

Mitigating the Seasonal Risk

Employers can take proactive steps when seasonal employees are first hired in order to mitigate the risk of creating a continuous employment relationship. We note that employers are not precluded from rehiring the same employees for subsequent seasons, but that in doing so they should clearly outline to the employee in writing that rehire is never guaranteed season-to-season.

continued on page 6

Problem-Solving Skills in the Workplace

The path to finding the right solution

Monika Jensen
Ph.D
Principal
Aviary Group

Ask the Expert

Why are problem-solving skills necessary in the workplace?

It is an essential skill for all levels. Those with good problem-solving skills are valuable and trusted assets in any team – they think of new ideas and improved ways of doing things differently. They make it easier for others to understand something or help save customers time and money.

What are some examples of problem-solving skills at work?

- Correcting a mistake, whether it was made by you or someone else.
- Overcoming a delay through problem solving and communication.
- Resolving an issue with a problematic or upset customer.

What makes a good problem solver?

Excellent problem solvers build networks and know how to collaborate with other people and teams. They are skilled in bringing individuals together and sharing knowledge and information. A critical attribute for great problem solvers is that others trust them.

How do you explain problem-solving skills?

Problem-solving skills are identifying problems, brainstorming and analyzing answers, and implementing the best solutions. We encounter problems frequently in our day-to-day lives.

Problem-solving is the method of understanding and defining the problem, brainstorming a solution, finding substitutes, applying the best solution and making modifications based on the outcome.

Steps in Using Problem-Solving Skills in the Workplace

1: Thoroughly understand the problem

The most vital step in solving a problem is to understand the thoughts behind it. Many employees jump to providing recommendations before truly understanding the problem.

A quick way to gauge your understanding is to verify if you can explain the problem to someone else. Employers will measure your capacity to comprehend issues and solutions effectively if you communicate them plainly.

2: Define the problem

The next step in this process is gathering all the necessary information so that you can begin forming a solution. Do not focus on the solution at this time. Instead, focus on defining the question.

Based on the information you collected previously, start separating the facts from the presumptions. Analyze the formerly used procedures and make specific adjustments based on your policies.

3: Strategize a solution

Now that you have understood the problem and defined it, start strategizing a solution based on your findings. Workplace solutions can be characterized into tactical solutions and strategic solutions.

A tactical solution is a quick fix. There may not be time to do any tests and the whole attitude is doing whatever it takes to deliver with the least effort.

A strategic solution is a long-term fix for an issue. Strategic solutions involve using an all-inclusive series of steps to completely modify how you approach the problem.

While strategy is the action plan that takes you where you want to go, tactics are the individual steps and actions that will get you there. In a business context, this means the specific actions teams take to implement the initiatives outlined in the strategy.

Usually, workplaces adopt the following problem-solving strategies into their policies.

- Use logical reasoning
- Recognize patterns
- Reverse engineer the problem
- Try a different point of view
- Consider worst-case scenarios
- Relate to a more straightforward real-life problem
- Organize or reorganize the data
- Prepare a visual representation
- Take all possibilities into account
- Intelligent guessing and testing

Your goal should be to become fluent in these strategies. Once you can narrow down the problem, you can formulate a plan within minutes without having to write anything down.

4: Find alternate solutions

Keeping the goals and objectives in mind, invite everyone associated with the project to a brainstorming session with you. Making sure that everyone gets equal participation is one of the ways you can exhibit your leadership skills while forging strong workplace relationships.

continued next page...

Ask the Expert cont'd

Problem-Solving Skills in the Workplace

- *The path to finding the right solution*

... continued from page 5

5: Evaluate solutions and document everything

Now that you have found multiple solutions, it's time to evaluate them. You will need to assess each solution based on various factors and list the pros and cons of each alternative you found.

The ability to evaluate solutions quickly ties into your management skills. A manager can quickly measure and implement resolutions based on such factors. Train yourself to find as many likelihoods as possible to analyze solutions effectively.

6: Choose a solution

Your main objective is to find one effective solution out of all the ones provided on the list. The solution you choose hinges on countless factors, which can be one or all of the following:

- Cost-effectiveness
- Duration
- Efficiency
- Practicality
- Company policies and procedures

7: Implement

Implementing a solution does not mean diving in after you have collected the feedback and communicated the answer to everyone involved.

Implement the chosen solution according to the action plan. Then, identify the measurable parameters to track success and failure rates.

Finally, set up communication channels for regular feedback and a contingency plan in case of letdowns.

8: Monitor progress and make modifications accordingly

The last problem-solving step involves actively monitoring how the solution performs in real life and if it meets the end goal for which it was adopted in the first place.

Gauge how the solution functions compared to how you expected it to perform and document all changes. Check the feedback channel for any contradictions or issues that arise during the process.

If any modification further enhances the process, implement it after discussing it with your team.

Monika Jensen is Principal with the Aviary Group and can be reached via email at mjensen@aviarygroup.ca.

Feature cont'd

The Season(al) Employee Predicament

You don't want a continuous employment relationship

... concluded from page 4

Accordingly, we recommend incorporating the following practices into your seasonal hiring:

- Require employees to submit applications for each season, even if they have been hired before;
- Implement seasonal employee fixed-term contracts at the outset of each season that contain clear language setting out the duration of the season, expressly states no guarantee of rehire and includes an enforceable termination clause should the need arise to terminate mid-season;
- Do not include return dates on ROE; and
- Do not continue to pay compensation or provide benefits during the off-season.

Please note the foregoing mitigation strategies more generally apply to new seasonal employment relationships and we recommend seeking out legal advice for dealing with current employees who may already raise the risks noted above.

Kyle Allen is a Partner in Employment and Labour Law with Brownlee LLP in Edmonton. He can be reached via email at kallen@brownleelaw.com.

Megan Van Huizen is an Associate with Brownlee LLP in Calgary and can be reached via email at mvanhuizen@brownleelaw.com.

The Cost of COVID Propaganda

Alberta Court recognizes new tort of harassment

Kyle MacIsaac
LL.B

Partner
Mathews Dinsdale Clark LLP

Caroline Spindler
J.D.

Associate,
Mathews Dinsdale Clark LLP

Feature

The height of the pandemic and accompanying public health measures sparked intense debate across the country. Now that we have returned to the "new normal," we are starting to see the cost of COVID-related propaganda in the courts - literally. A recent decision from the Court of King's Bench of Alberta (2023 ABKB 209) established a new tort of harassment, awarding major damages to a public health inspector who was the target of public health measure pushback.

Alberta Health Services ("AHS") and two (2) public health inspectors employed by AHS sued a proponent of anti-public health measures who was the host of an online talk show and mayoral candidate for the city of Calgary for various tortious claims. AHS and one of the individual plaintiffs brought an action against the defendant for defamation and the other individual plaintiff brought actions against the defendant for defamation, invasion of privacy, assault and "tortious harassment." The defendant used his online talk show, media opportunities and social media as platforms for his conduct against the plaintiffs. The defendant referred to one of the individual plaintiffs, who was the main subject of his attacks, as a "terrorist" and a "criminal" for implementing and enforcing public health measures in response to the COVID-19 pandemic. The defendant also reviewed the individual plaintiff's public social media account and photos she posted to describe her as an "alcoholic." The defendant even went so far as to set out his plans regarding public health measures, and the individual plaintiff, if elected as Mayor, such as: "I am going to come at you with full vitriol and malice,", "…we're taking your houses and bank accounts, you're not getting them back," and "I intend to make this woman's life miserable, I intend to destroy this woman's life like she has destroyed the lives of Calgarians." As a result of the defendant's conduct, the plaintiff did not feel safe when leaving her home and was instructed by police not to allow her children to take the bus to school, which led the plaintiff to install a home security system. The plaintiffs sought a permanent injunction against the defendant, as well as damages.

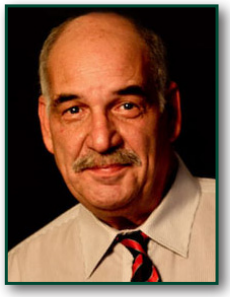
First, the Court considered the defamation claims brought by both AHS and the individual plaintiff who was not the main subject of the defendant's ire. The Court dismissed AHS's defamation claim on the basis that as a public body, the AHS was not entitled to bring such a claim and dismissed the individual plaintiff's claim on the basis that no statements were made about that plaintiff by the defendant that would lower the plaintiff's reputation.

The Court then considered the claims brought by the individual plaintiff who was the main target of the defendant's conduct. With respect to the defamation claim, the Court found that the defendant's repeated claims that the plaintiff was a "terrorist," "alcoholic" and a "criminal" were widely communicated and negatively impacted the plaintiff's reputation. The Court dismissed the plaintiff's claim for invasion of privacy, finding that the information used by the defendant, namely photos of the plaintiff and her family, were publicly available on the plaintiff's social media account and therefore, there was no breach of privacy. The Court also dismissed the plaintiff's assault claim, as the statements made by the defendant did not constitute an imminent threat to the plaintiff.

In considering the plaintiff's claim for "tortious harassment," the Court reviewed existing jurisprudence and current Court processes surrounding harassment and determined that there was a gap in the law that should be addressed. Earlier cases on harassment examined existing related torts such as internet harassment and intentional infliction of mental suffering. However, none of the earlier cases explicitly recognized a stand-alone tort of harassment for the type of conduct exhibited by the defendant in this case. The Court found that the harassing behaviour of the type exhibited by the defendant was coming before the courts regularly and was dealt with through restraining orders, which the Court noted did little to reduce the prevalence. The Court also found that existing related torts were ineffective in addressing the harm from harassment because the elements of the torts were niche and rarely made out by more "run of the mill" harassment that occurs on a day-to-day basis. Ultimately, the Court determined that the current legal landscape did not effectively address the harm from harassment, warranting the recognition of a new tort.

The Court established a four-part test for the tort of harassment. The tort of harassment will be established where a defendant has: engaged in repeated communications, threats, insults, stalking, or other harassing

continued next page...



Brian W. Pascal
1946-2023

IN MEMORIAM

We at IPM (Institute of Professional Management) are mourning the loss of our Founder and President, Brian Pascal. Brian was our mentor and leader and a giant in the HR/Management field. He designed and delivered nationally accredited programs in recruitment, management, training and assessment to tens of thousands across Canada, the US and abroad since 1984. He was a recognized expert in the field of recruitment and management, having appeared on television, in print and online media as well as having presented at numerous conferences and symposiums across Canada over the years.

Brian left us with a legacy that is firmly rooted in the past while solidly looking towards the future. He was a visionary who saw the future and helped us plan for it. Brian will be missed, but helped assemble a very dedicated team who will continue to successfully develop and deliver management training and national publications and grow our professional associations in the coming years.

Feature cont'd

The Cost of COVID Propaganda

- Alberta Court recognizes new tort of harassment

... concluded from page 7

behaviour in person or through other means; that the individual knew or ought to have known was unwelcome; which impugns the dignity of the plaintiff, would cause a reasonable person to fear for their safety or the safety of their loved ones, or could foreseeably cause emotional distress; and caused harm.

In applying the newly formed test to the defendant's conduct, the Court concluded that the defendant's repeated references to the individual plaintiff as a "terrorist", "criminal" and "alcoholic", as well as threats, which the defendant knew or ought to have known were unwelcome, impugned the dignity of the plaintiff and caused her to fear for her safety and the safety of her family and caused harm to the plaintiff, constituting the tort of harassment.

The individual plaintiff who was the target of the defendant's attacks was awarded $300,000 in general damages for defamation, $100,000 in general damages for harassment, and $250,000 in aggravated damages. A permanent injunction was also issued to prevent the defendant from being within 25-50 metres of specific AHS buildings.

This landmark case and the creation of a tort of harassment allows more harassment victims to seek remedies beyond restraining orders and creates a financial disincentive for potential perpetrators, but what does it mean for employers? Employers are no strangers to harassment, which occurs in the more limited contexts of human rights or occupational health and safety complaints, or in wrongful dismissal claims alleging "poisoned" work environments. From a civil liability perspective, employers could be held vicariously liable for the conduct of employees for a wide variety of tortious conduct. With the recognition of this new tort in Alberta at least, employers could see a reduction in human rights and occupational health and safety complaints, which have a more limited scope and reduced potential for compensation, coupled with an increase in vicarious liability claims which could provide plaintiffs with more significant damage awards. Only time will tell how exactly workplaces will be impacted and whether this new tort will be recognized elsewhere in Canada.

Kyle MacIsaac is a Partner with Mathews, Dinsdale Clark LLP and can be reached via email at kmacisaac@mathewsdinsdale.com.

Caroline Spindler is an Associate with Mathews, Dinsdale Clark LLP and can be reached at cspindler@mathewsdinsdale.com.

Worst Mistakes Made in Non-Competition Clauses

Howard Levitt
LL.B.
Senior Partner, Levitt Sheikh LLP

Ask the Expert

Q *What are the biggest mistakes you've seen employers make in non-competition clauses?*

A **1) In Ontario, having these clauses in employee contracts at all, since legislation recently rendered such contracts unenforceable, except for C-suite employees.**

2) Note that this legislation does not impact on existing employee non-competition clauses. Therefore, if you have an employee with a valid clause, under no circumstances, have them sign a new contract. By doing so, you will have just rendered the existing protection that you did have unenforceable. Just keep that old contract.

3) Ensure that the non-competition clause provides very different protection than the non-solicitation clause. The courts have made it clear that if the non-solicitation clause provides adequate protection, no non-competition clause will be enforceable.

4) Do not have a clause with a geographic area or duration. An agreement, or part of an agreement, may be considered a non-compete agreement whether or not it is time-limited or geographically restricted. Therefore, if a non-compete agreement has no geographic restriction, it is still considered a non-compete agreement and is still enforceable.

5) Lengths of non-competition for your various level of employees. If everyone has, for example, a one-year non-competition restriction, the court will say that you did not put your mind to it as the reasonable protection you require is, in reality, different for different categories of employees. As a result, again, it will be unenforceable for everyone.

6) Ensure you have a clause stating that if any portion of the contract or clause is unenforceable, the remainder will still be enforceable. Otherwise, having a non-competition clause or even a portion that is weak would invalidate the entire clause

7) Put your mind to the protection you need. If you give yourself too much protection in the type of non-competition, the length of non-competition or the area of the non-competition, the court will render the entire clause invalid and you'll have no protection at all.

Always remember that even an invalid non-competition clause can be useful because you generally don't know for certain that it will be unenforceable until a judge says so. Few employees wish to take that chance.

Howard Levitt is Senior Partner with Levitt Sheikh LLP in Toronto and can be reached via email at hlevitt@levittllp.com.

IPM Accreditation Programs

USB Flash Drive Mixed-Media packages now available for distance learning options for IPM's

- **Professional Recruiter** Program
- **Professional Manager** Program
- **Professional Trainer** Program

Working from home?
All IPM programs are self-study!

Are other colleagues interested in taking the program?
We'll allow up to nine others to share the main package.

For complete details and order form, visit our website at **www.workplace.ca** *(click on Training)*

IPM Associations Members Quarterly Newsletter is now All Digital

Do you see an article you would like to download and share with your colleagues?

All articles are in PDF format which makes it easier to select and email the link or the article to be shared with your team.

Be sure to bookmark https://www.workplace.ca/newsletter/newsletter.html

Complete index, individual article PDF's and archived issues are all there.

Discipline and Safety are a Dangerous Mix

Disciplinary action complaints in Alberta

Tommy Leung
J.D.

Senior Associate, Borden Ladner Gervais LLP

Feature

Introduction

When discrimination is mentioned, the term is often associated with discrimination based upon a human rights protected ground. However, there are other discriminatory actions that can put employers in danger of complaints.

Under section 18 of the Alberta *Occupational Health and Safety Act* (the "Act"), "No person shall take any disciplinary action against a worker by reason of that worker acting in compliance with this Act, the regulations, the OHS Code or an order issued under this Act.", where "disciplinary action" means any action or threat of action by a person that does or would adversely affect a worker with respect to any terms or conditions of employment.

If an employer breaches this section, an employee can pursue what was previously called "discriminatory action complaints" (now renamed as disciplinary action complaints) under section 19 of the Act.

The Process

An employee has 180 days from the date of the contravention to file the complaint. An officer may refuse to investigate a complaint if in the officer's opinion, the complaint is without merit or is frivolous, trivial, vexatious, filed with improper motives or otherwise an abuse of process. If refused, the employee will be notified in writing, and the employee can ask the Occupational Health and Safety Director to review the refusal decision. The Director can then confirm or revoke the officer's refusal or assign the complaint to a different officer.

If the complaint proceeds, the investigating officer will first establish that (1) the employee was complying with a requirement under the Act or an order and the employer took disciplinary action against the employee.

Once established, the officer will generally offer the option for a voluntary resolution between the parties. If that fails, the officer will continue with the investigation process and ask the employer to provide information to support that the disciplinary action was for a reason other than compliance with the Act.

The onus is on the employer to establish that the disciplinary action was for a reason other than compliance with the Act, and there is a presumption in favour of the employee that the disciplinary action was taken against the employee because the employee acted in compliance with this Act.

An officer will then prepare a written report of the complaint, the investigation and the officer's findings. If a contravention is established, the officer can do one or more of the following:

- cease the disciplinary action;
- reinstate the worker to the worker's former employment under the same terms and conditions under which the worker was formerly employed;
- pay the worker not more than the equivalent of wages and benefits that the worker would have earned if the worker had not been subjected to disciplinary action;
- remove any reprimand or other reference to the matter from the worker's employment records;
- take other measures to prevent recurrence.

Non-Occupational Health and Safety Reason for Discipline

Although the following decision was decided under the previous iteration of the Act, it is still helpful in illustrating the factors that an officer considers.

Appellant and Alberta, Re, 2022 CarswellAlta 1826 was a Disciplinary Action Complaint Appeal decision that upheld the Officer's decision to dismiss the Employee's complaint. The complaint involved a clash between an Employee with a history of alleged inappropriate behaviour and her refusal to work due to mold issues at her worksites.

The Employee's employment was terminated based on her inappropriate behaviour and the Employee alleged her employment was terminated for reporting and refusing dangerous work.

The Officer found that the Employer established that it terminated the Employee's employment for a non-OHS reason, which was the Employee's continued inappropriate behaviour towards supervisors and co-workers. The Officer referenced multiple examples provided by the Employer of inappropriate behaviours by the Employee and evidence from the Employer of its steps to provide personal protective equipment to mitigate the Employee's potential exposure to mold. The Officer found, in particular, that the evidence of attempts to provide personal protective equipment established the Employer took the Employee's health and safety concerns seriously and was willing to cooperate.

Takeaways

Remember that the onus is on the employer to prove the disciplinary action is for a non-OHS reason. Because of that, it will be important for employers to maintain proper records to establish the actual reason for discipline.

As well, when an employee raises issues regarding health and safety at the workplace, it will be crucial for the employer to address these concerns and document measures taken to show that the employer took the employee's OHS concerns seriously. Not only because an employer has a duty to do so, but also because this will help support the position that any discipline was for a non-OHS reason.

Tommy Leung is a Senior Associate with Borden Ladner Gervais LLP and can be reached at toleung@blg.com.

Deliberate and Intentional Misconduct

Termination for Just Cause in Ontario

Dan Palayew
LL.B.
Partner, Borden Ladner Gervais LLP

Odessa O'Dell
J.D.
Partner, Borden Ladner Gervais LLP

Feature

Introduction

Termination for just cause has come under repeated fire in Ontario in recent years. In *Park v Costco Wholesale Canada Ltd.*, 2023 ONSC 1013 ("Park"), the Ontario Superior Court of Justice held that the deliberate and intentional conduct of an employee amounted to wilful misconduct, meeting the test for just cause for summary dismissal.

Background

Mr. Park was employed for approximately 20 years with Costco Wholesale Canada Ltd. ("Costco"). He was an Assistant Buyer and 43 years old at the time his employment was terminated for cause.

His position did entail management responsibilities such that he was subject to Costco's Standard of Ethics for Managers. His employment agreement also included a section pertaining to cause for termination, which included, "wilful damage or destruction of Company property, equipment, merchandize or property of others" as well as insubordination.

During the course of his employment, Mr. Park had developed a cloud-based website for the toys department. It was not disputed that the website was the property of Costco.

By Spring 2015, Mr. Park was no longer working for the toy department. His supervisor learned that he could no longer access the website. He requested that Mr. Park restore his access, and transfer ownership of same to Costco. Rather than doing so, Mr. Park deleted the website in its entirety, because he was "furious" as to what he felt was a lack of communication on management's part regarding their intention to make use of the website.

An exchange of emails followed wherein not only did Mr. Park not do as requested, but he was not forthcoming about the deletion, and was disrespectful towards management. Despite this, Costco was able to restore the website on its own. When management advised Mr. Park that the site had been restored, Mr. Park proceeded to delete the website a second time.

An internal IT investigation was undertaken by Costco, which ultimately lead to the termination of Mr. Park's employment for cause.

Following the termination of his employment, Mr. Park commenced a wrongful dismissal action against Costco, claiming that he was entitled to 24 months of pay in lieu of notice, inclusive of health and pension benefits. He also claimed damages for an alleged breach of his human rights on the basis of disability, as well as bad faith and aggravated damages.

The Decision

The Honorable Madam Justice Robin M. Ryan Bell found that Mr. Park had indeed engaged in wilful misconduct under the ESA such that Costco was justified in terminating his employment for cause.

The Court reiterated that in order to determine whether Mr. Park's misconduct was sufficient serious to warrant dismissal, which can be measured as follows (all set out by the Supreme Court in McKinley v BC Tel, 2001 SCC 38):

i. *Did the misconduct violate an essential term of the employment contract;*

ii. *Did the misconduct breach the faith inherent to the work relationship; or*

iii. *Was it fundamentally inconsistent with Mr. Park's obligations to Costco.*

Justice Ryan Bell found that Costco was justified in the termination of Mr. Park's employment on any of the three measures. In short, the misconduct was found to be incompatible with the fundamental terms of the employment relationship.

There were four acts of misconduct found at trial. These included the two occasions where Mr. Park had intentionally deleted the website, which he had admitted. The Court held that the intentional deletion of the website amounted to damage or destruction, contrary to the terms of Mr. Park's employment agreement.

Additionally, it was held that there was misconduct on the part of Mr. Park in the nature of the communications with management regarding the website – the first in that Mr. Park was not initially forthcoming about when the website had been deleted, and second, that the language used by Mr. Park was insubordinate and disrespectful.

The Court ultimately found that Mr. Park's multiple, clearly intentional misconduct amounted to wilful misconduct such that he was not entitled to damages for wrongful dismissal under the *Ontario Employment Standards Act*, 2000 (the "ESA").

Takeaways for Employers

While termination for cause has always been a challenging issue for employers in Ontario, it arguably became even more complicated after the Ontario Court of Appeal upheld *Wakdsale v Swegon North America Inc.*, 2020 ONCA 391.

Park not only reiterates that employers can still successfully terminate employment for cause, but also provides some helpful guidance as it relates to the legal analysis required to justify just cause, as well as the type of (repeated) actions that may provide employers with the basis to proceed.

Despite this, employers are generally encouraged to seek legal advice when considering whether termination for cause is an option. While *Park* provides comfort that the Ontario courts may still side with employers on the issue of cause, the failure to successfully establish cause can lead to additional exposure and damages.

Dan Palayew is Partner/Regional Leader, Labour & Employment Group with Borden Ladner Gervais LLP and can be reached at dpalayew@blg.com.

Odessa O'Dell is a Partner with Borden Ladner Gervais LLP and can be reached at oodell@blg.com.

Dealing with Addiction in the Workplace

The impact on workplace safety

Charmaine Hammond

President
Hammond International Inc.

The impacts of addiction on workplace health and safety are significant and many. In addition to impaired judgment and reduced reaction times, associated impacts can include increased risk of injury to the impaired employee and co-workers, as well as potential incidents that can cause damage to buildings and equipment or even harm to the public.

Addiction can also impact productivity, damage workplace relationships, lead to greater absenteeism, workplace violence and increased stress to name a few. When it comes to addictions, it is important to recognize that there may also be employees who are impacted by their loved one's addiction. The stress of living with this situation can negatively affect their work and, of course, there may be employees who are coming to work under the influence of drugs and/or alcohol - or using these substances while on the job, which puts everyone at risk.

What is Naloxone?

As the opioid crisis continues to rise across Canada, we are seeing different unions and associations taking notice. In some provinces such as Ontario, new legislation that came into force on June 1 requires employers to make a Naloxone kit available wherever there is a risk of a worker experiencing an opioid overdose. This is creating some confusion and has identified the need for additional training for leaders, union stewards, safety coordinators and HR professionals.

In a recent conversation with Candace Plattor and Mike Russo on a webinar about addiction and its impact on workplace safety, both concurred that having clearly laid out policies and procedures is important, and so is training for employees and managers. For workplaces in Ontario that have made naloxone available, these are requirements. Naloxone is a medication that is administered to someone who has overdosed on opioids. It can quickly but temporarily reverse the effects of an opioid overdose in order to allow time for medical help to arrive. Sometimes more than one dose of Naloxone will need to be administered. It can restore normal breathing within 2 to 3 minutes in a person whose breath has slowed, or even stopped, as a result of opioid overdose. However, it is not always effective and does not work on overdoses caused from other narcotics.

Training and Other Considerations

"It's very important to be aware of and to understand the risks, as well as which organizations would be required to have Naloxone on site, as it might apply only to specific workplaces," states Mike. Candace expanded on this stating, "When you've got somebody who overdoses, they will fall down right in front of you, and they may actually be dead. This can be very jarring and extremely traumatic to anyone present. When you give Naloxone to somebody you're trying to bring back from the overdose, a lot of things can happen physically for that person. They can jolt, hit you, kick you, vomit and spit on you. They're not in control of themselves. This is why training about addictions, how to properly administer Naloxone and ensuring aftercare and counselling support for all involved is imperative. The impact can be traumatic – especially in cases where the Naloxone does not work and the person dies."

Mike is passionate about helping workplaces reduce the risk of injuries and illnesses so they can support a healthy and safe workplace. Candace is a strong advocate for providing training in workplaces to help workers and leaders really understand addiction and the vital differences between ***enabling*** and ***helping*** to ensure that employees get the education and counselling support they need to be able to deal effectively with this very difficult situation.

A few questions to think about:

- What training, if any, does your organization provide about addiction and addictions in the workplace? Do you know the signs to look out for? Do you know how to navigate conversations where you are concerned about an employee and possible addiction?
- Are you aware of what your province's health and safety requirements are, as they relate to making Naloxone available?
- If your organization is required to have Naloxone available, do you have a documented procedure that describes who in your organization will have charge of the kit, how frequently you will inspect the kit, and the names of people trained to administer it, in addition to other requirements?

Other Strategies to help

Candace adds "It is also important for organizations to review their policies around how they deal with addiction and impairment at work and to ensure

continued on page 15

Feature

Hiring a Remote Worker Living Outside Ontario?

Employers beware of these pitfalls

Jennifer Philpott
J.D.

Associate
Goulart Workplace Lawyers

Patrick Watson
J.D.

Associate
Goulart Workplace Lawyers

Feature

Remote work continues to be a commonplace work arrangement in the post-COVID-19 world. During the COVID-19 pandemic, many individuals living in Ontario left urban centres for rural parts of Ontario and some left the province altogether. To that end, employers may be considering allowing employees to continue working remotely from other provinces or recruiting employees located outside of Ontario. However, there are important considerations that employers must be aware of before continuing or entering into such an employment relationship in order to avoid serious pitfalls.

Governing Employment Standards Legislation and Taxes

Employers should be aware of which employment legislation governs the employment relationships with their employees. In Canada, the law of the province or territory where an employee lives and performs work governs the employment relationship. For example, in Ontario, the *Employment Standards Act, 2000* ("ESA") applies to work performed in Ontario, or where the work is performed inside and outside Ontario, but the work performed outside Ontario is a continuation of the work performed inside Ontario.

Understanding which legislation is applicable is important because there may be fundamental differences in an employee's minimum wage, termination entitlements, overtime, hours of work, vacation and public holiday entitlements. For example, in *Shu Zhang v. IBM Canada Limited*, 2019 CanLII 79641, the Ontario Labour Relations Board held that an employee working for an Ontario-based company but who lived and worked from British Columbia was not entitled to statutory severance pay. The Board found that the ESA governed the employment relationship when it commenced, as the employee was resident and working in Toronto at the time. However, the ESA ceased to apply when he relocated to British Columbia where he worked remotely.

Employers must also be sensitive to tax and withholding issues, which are location-specific. As each province determines its own tax rates on employments, employers' withholding tax obligations could change based on where their employees are working.

Workers' Compensation Premiums

Employers should be aware that all workers' compensation boards in Canada are signatories to the Interjurisdictional Agreement on Workers' Compensation ("IJA"), which aims to regulate the payment of premiums and workers' compensation benefits, to avoid any duplication of employer premiums on workers' earnings, and to determine from which jurisdiction a worker may claim benefits.

Health and Safety Considerations

Employers have a duty to ensure a healthy and safe remote working environment for their employees. Under the Ontario *Occupational Health and Safety Act,* 1993 ("OHSA"), workplace is defined as any premise or place where a person performs work in their course of their employment for the employer. Employees working remotely also have obligations under OHSA to take reasonable care of their health and safety, cooperate with the employer's health and safety practices and procedures, and inform the employee if they cannot fulfill any said practices or procedures. There is an obvious challenge for employers in meeting their obligation where an employee is working remotely from another province or territory.

Constructive Dismissal Claims

Many employers mistakenly believe that they can unilaterally recall remote workers working from another province/territory to the employer's office without issue. However, doing so may lead to claims of constructive dismissal. Constructive dismissal occurs where an employer unilaterally changes a fundamental condition of the employment relationship, which effectively terminates the employee's employment. In the context of recalling a remote worker to the employer's office, it is possible that an employee could claim constructive dismissal on the basis that the employer had condoned their working from another province or territory.

Steps Employers Should Take Before Hiring Remote Workers

Employers can take steps before hiring remote workers in other provinces to safeguard against these aforementioned pitfalls.

A well-drafted employment agreement may help mitigate the

continued next page...

Feature cont'd

Hiring a Remote Worker Living Outside Ontario?
Employers beware of these pitfalls

... continued from page 14

risk of possible legal issues and unnecessary litigation. In order to ensure legal compliance with employment standards legislation, employers should ensure that all employment agreements with remote workers have a provision requiring the employer to approve any changes to the worker's geographical location. That way, if the worker is considering making such a change, they are obligated to disclose it to the employer first.

To reduce the possibility of a constructive dismissal claim, an employer should include an express provision in a remote worker's employment agreement giving the employer the right to unilaterally terminate the remote work arrangement at any time and recall the employee to the employer's workplace. As best practice, employers should institute a workplace policy on remote work that clearly states that remote working arrangements are at the discretion of the employer.

Employers should also consider whether home inspections, including virtual inspections, to assess workplace health and safety are practicable or appropriate. Given that remote working arrangements have less employer supervision, it is important for employers to maintain regular communication with employees working remotely to ensure their health and safety and compliance with employer guidelines.

Proactively instituting these provisions and policies also benefits remote workers by reducing ambiguity and clearly outlining both employer and employee obligations in the remote working arrangement.

Jennifer Philpott is an Associate with Goulart Workplace Lawyers and can be reached via email at jphilpott@goulartlawyers.ca.

Patrick Watson is an Associate with Goulart Workplace Lawyers and can be reached via email at pwatson@goulartlawyers.ca.

Feature cont'd

Dealing with Addiction in the Workplace - *The impact on workplace safety*

... concluded from page 13

training about addiction is provided. In this way leaders can feel prepared and supported to know the signs of addiction and how to appropriately deal with it in a way that helps (such as treatment) and does not enable the employee to remain in active addiction - especially at the workplace."

Resources: Candace Plattor is an Addictions Therapist in private practice in Vancouver where she specializes in working with family and other loved ones of people who are struggling with the ravages of addiction. Candace has clients worldwide. A former opioid addict herself, she now has more than 35 years clean and sober. For more than 30 years, she has helped both families and the addicts they love understand their dysfunction behaviours and make healthier life choices. Candace is a professional speaker and the author of *Loving an Addict, Loving Yourself: The Top 10 Survival Tips for Loving Someone with an Addiction.* Visit https://lovewithboundaries.com/ to learn more.

Mike Russo is a Health and Safety Consultant at WorkBright™ and provides consulting and develops training that reduces the risk of injuries and illnesses. WorkBright™ helps keep employees healthy, safe and productive and businesses in compliance with the law. Mike previously worked with the Infrastructure Health & Safety Association for over 13 years where his department developed some of the largest health and safety training courses in Canada. Visit www.workbright.ca to learn more.

Charmaine Hammond is President of Hammond International Inc., a professional speaker, consultant and facilitator working with organizations to reset resilience, rebuild culture and repair workplace relationships and trust. She specializes in dispute resolution, workplace collaboration and helping teams work better together. Visit https://charmainehammond.com/ to learn more.

Members Quarterly is published by the Institute of Professional Management as a news source for members across Canada belonging to the Association of Professional Recruiters of Canada, the Canadian Management Professionals Association, the Canadian Association of Assessment Specialists and the Canadian Professional Trainers Association. There are no fees for subscriptions. RPR, CMP, RAS, RPT, HR Today®, Recruiting Today®, Supervision Today® and Workplace Today® are the intellectual property of the Institute of Professional Management. Readers can address letters, comments and articles to IPM at info@workplace.ca. Publication Mail Registration No.40016837. Return undeliverable Canadian addresses to IPM, Ste 2210, 1081 Ambleside Drive, Ottawa, Ontario, K2B 8C8 Internet: http://www.workplace.ca Email: info@workplace.ca Phone: (613) 721-5957 or 1-888-441-0000 Fax: 1-866-340-3586.

Go For It!

IPM ASSOCIATIONS

We've already reserved your designation…

RPR
Registered Professional Recruiter

RPT
Registered Professional Trainer

CMP
Canadian Management Professional

Institute of Professional Management
2210-1081 Ambleside Drive, Ottawa, Ontario, K2B 8C8
Tel: 613-721-5957 Toll Free: 1-888-441-0000 www.workplace.ca