

IPMA ASSOCIATIONS

MEMBERS QUARTERLY



News, Updates and Events



Association of
Professional Recruiters
of Canada



Canadian
Professional Trainers
Association



Canadian
Association of
Assessment Specialists



Canadian
Management Professionals
Association

Find us on:



Visit www.workplace.ca to follow us.

SPRING 2023 VOLUME 21, No. 2



Nathaly Pinchuk
RPR, CMP
Executive Director

Ergonomics for Everyone

The right to a safe workspace

Working from home can really be great. What about your health while working at home? Have you noticed that your back and shoulders ache after being hunched over your computer all day? What is with that pain in your wrist? Has your eyesight gotten worse recently?

If the answer to any of these questions is yes, then you are probably not working in a correct ergonomic fashion. This means your work environment may not be designed to fit your body's needs. The Canadian Centre for Occupational Health and Safety defines ergonomics as the science of "fitting the job to the worker". They say that includes designing workspaces, processes, equipment and tools to fit the employee.

This works in a regular office space, but what about your home office or kitchen? The law in Canada says that you still have a right to an ergonomically safe working space, even at home. Also, employers have a responsibility to ensure that the remote office setup of their employees is safe. Why are ergonomics important? A well-designed workspace can reduce the risk of injury, including musculoskeletal injuries. Working safely when it comes to ergonomics can also reduce muscle strain and aches that can be minor now but become serious problems later.

Even if you have been doing it for a few years, it's never too late to make your workspace safer. Your body will thank you for it. What should you keep in mind while setting up a home office? Look at your 'desk' and chair, your computer equipment and

how it's set up, and also how you are actually sitting while you work. You might consider getting some new equipment, but you can also make improvements to what you use now to make it more suitable.

Desk

Your home office desktop may be your kitchen table. That's fine, as long as it is not too high. Your table should also be strong enough to bear the weight of any equipment placed on it. Your 'desk' should allow you to fit your knees, feet and thighs comfortably below it. If any body part is pressed tightly up against the table, it will likely cause you harm. You may need to consider using another space or buying an actual desk that meets your body's needs.

When seated, your keyboard and mouse should be at elbow height. Test this by sitting at your table and holding your arms naturally at your sides. Then bend your elbows and hold out your arms as if you were typing. Does that feel right? If not, you will have to make some adjustments. If it's too low, use some books or a wooden box to raise your work surface. If it's too high and you are reaching, use a cushion to sit on.

Chair

The best chairs are the adjustable office chairs, but if you don't have one, work with what you have. Whatever type of chair you use, it should support your spine's natural S-shape. The kitchen chair you've used doesn't do that which is probably why your back hurts. Sitting the right way will help to correct some of this, but you may still

need to put a rolled-up towel or pillow in the small of your back to get the shape and support you need.

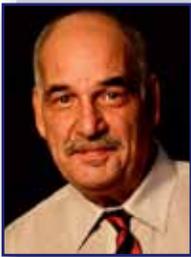
When you are sitting at your desk, your feet should be flat on the floor. Sit up as straight as you can and don't tilt from side to side. If you need more height, you should consider wearing flat shoes or using a footrest, a step stool or even a few large books to put your feet on.

Computer Setup

Your keyboard and mouse (if you use one) should be at the same height so that you are not reaching forward. Don't grip the mouse but glide it gently and keep your wrist straight while using it. This helps reduce the risk of repetitive strain injuries. You may already have done this, but reduce or eliminate any glare to avoid eye strain and fatigue. You can also get an anti-glare screen for your monitor.

Here's a test to see if your screen is at the right level. The top line of text on your screen should be at eye level. If it isn't, adjust your monitor. If you are using a laptop or non-movable screen, you can stack books underneath to achieve the desired height. This next tip is crucial no matter where you work. Follow the 20/20/20 rule. Take a 20-second break every 20 minutes and then look about 20 feet away. This will also reduce the stress and strain on your eyes.

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



Brian W. Pascal
RPR, CMP, RPT
President

President's Message

Learning from Young People

Bridging the young-old divide

The modern workplace can be a difficult landscape to navigate. With Baby Boomers, Gen Xers, Millennials and Gen Zers all together under one roof (or the digital equivalent), things are bound to get messy. Each group brings value and a unique set of experiences to the table, but there can be tension when it comes to bridging the young-old divide.

It is traditionally understood that those newer to their positions stand to learn something from those who have been around the block a few times. Although this certainly remains the case, there is an ever-increasing skill set that older workers can learn from new hires. I like to think of it as a two-way street. While we have a lot to offer, veteran business executives can also benefit from the knowledge of younger professionals.

The most obvious and arguably the most important is the younger employees' naturally advanced understanding of new technology. Even better, they're not afraid of it! The times we live in require a willingness to embrace change as it happens. Those work veterans stubbornly clinging to old operating systems or methods of collaboration will soon find themselves left behind if they haven't already been.

When it comes to the new technology, younger workers either know how to use it or are comfortable learning it. In addition, like most people with a skill, they're typically happy to pass it on. We'd be foolish not to take advantage of this.

Young people also intuitively understand how to nurture a diverse workplace. Say what you will about 'woke culture', but the fact of the matter is that the world and workforce are evolving. It's time we sat up and listened to the many voices and opinions that have been ignored for too long. The broader perspectives held by young people can help open older workers' eyes to the times that are definitely changing.

Finally, young people are overwhelmingly willing to take risks and think outside of the box. They weren't given any clear-cut path to success in the same way that older generations were, which has caused them to be entrepreneurial and experimental in their thinking. As a result, they are eager to distinguish themselves from their peers and expand their skill set in new and exciting ways. Likewise, they might not have the same degree of respect for existing corporate hierarchies and processes. But then again, if you ask me—that might not be such a bad thing.

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



"That large, rolled up newspaper is a reminder -- mess up in this office and you'll pay the price."

INSIDE THIS ISSUE

PERSPECTIVE

Nathaly Pinchuk 2

PRESIDENT'S MESSAGE

Brian Pascal 3

FEATURES

Golden Vacation or Faded Opportunity

Tommy Leung
Emma Morgan 4

Invest in Retention, not Resignation

Colin Fetter
Bonnie Hu 7

Conflict of Interest and Confidentiality Clauses...

Dan Palayew
Odessa O'Dell 11

Seasons Change but Workplace Harassment Remains

Kyle MacIsaac
Caroline Spindler 12

Plan to Succeed

MQ Staff Writer 13

Resilience is a Leadership Superpower

Michelle Lane 14

The Connection Between Feedback, Trust and Conflict

Michelle Phaneuf 15

ASK THE EXPERT

From Team Member to Boss. Now What?

Gail Boone 5

10 Biggest Mistakes in Employment Contracts

Howard Levitt 9

Golden Vacation or Faded Opportunity

Awarding vacation pay during notice periods



Tommy Leung
J.D.

Senior Associate,
Borden Ladner
Gervais LLP



Emma Morgan
J.D.

Associate,
Borden Ladner
Gervais LLP

Feature

When a termination occurs, taking a vacation is likely not top of mind for either the employer or the employee. However, if the employee is entitled to common law reasonable notice, the general principle is that the employee is entitled to compensation and benefits the employee would have earned during the reasonable notice period. So, would this principle also include vacation pay accrual during the notice period?

For provincially regulated employees in Alberta, whether vacation pay should be awarded during the notice period is governed by two competing lines of case law:

1. One line of cases states: **If the employee could have chosen** whether to take vacation, the employee is **not entitled** to vacation pay during the notice period. To rebut this presumption, evidence that the employer **prohibited** the employee from taking vacation is required;

2. The other line of cases states: **If the employee could have chosen** whether to take vacation, the employee is **entitled** to vacation pay during the notice period. To rebut this presumption, evidence that the employer **required** the employee to take vacation is required.

No Vacation Pay if employee could have chosen to take vacation

The leading decision on the issue of awarding vacation pay during the notice period is *Bagby v. Gustavson International Drilling Co.*, 1980 ABCA 227. The *Bagby* decision suggests that even if there is evidence that the employee did not historically take his vacation, it did not mean that the employee could not have taken vacation during the notice period.

Specifically, the Alberta Court of Appeal in *Bagby* stated that, "The argument seemed to be that Mr. Bagby often did not take his vacation in which event he was given five weeks' salary in lieu of it. We do not know whether, had he not been dismissed, that would have been the case. In any event, he did not work during the time in question but is receiving pay in lieu of notice. There is no justification for doubling this amount for the five weeks of vacation."

Vacation Pay if employee could have chosen not to take vacation

However, in *Tanton v. Crane Canada Inc.*, 2000 ABQB 837, the court stated that, "[...] I did not have evidence before me that suggested that the

Plaintiff would have been compelled to take his vacation on some sort of regular basis. If it were his option whether to take vacation or not, then a notice period given to him would, in my view, be one that he could choose to work out to the end of it without taking vacation, and then receive the earned vacation money as well."

The *Tanton* decision appears to change the presumption discussed in *Bagby*. Instead of presuming that if the employee had the choice over whether to take vacation, they would not be entitled to vacation pay during the notice period, *Tanton* is presuming that if the employee had the choice over whether to take vacation, they would be entitled to vacation pay during the notice period.

Mixed Developments

The court then followed *Tanton* in *O'Donnell v. Soldan Fence and Metals (2009) Ltd.*, 2015 ABQB 764, and found the employee was entitled to vacation pay during the notice period despite evidence that he typically took his vacation. The court in *O'Donnell* stated, "The evidence is that Mr. O'Donnell typically took his vacation but, following *Tanton*, absent evidence that Mr. O'Donnell was *obliged* to use up his vacation, he is entitled to it over the notice period."

Most recently, *Nixdorf v. Broadstreet Properties Ltd.*, 2017 ABQB 132 and *Hunsley v. Canadian Energy Services LP*, 2020 ABQB 724, returned to following *Bagby*. The court in *Hunsley* discussed both *Bagby* and *Tanton*, and ultimately concluded that, "the Employee Handbook makes it clear that it was the employer's option whether vacation entitlement could be carried over and when vacation could be taken. There is no reason to infer that because Ms. Hunsley had previously been permitted to defer vacation and was paid out banked vacation at her dismissal, she would have been entitled during working notice to defer her vacation entitlement in favor of monetary compensation... I find there is no entitlement to compensation for additional vacation entitlement accrued over the notice period."

Based on the most recent decisions, it appears the law in Alberta has returned to the presumption that if the employee had a choice over whether to take vacation, the employee would not be entitled to vacation pay during the notice period.

continued on page 6



Gail Boone
MPA, CEC

Next Stage Equine
Facilitated Coaching

ASK the EXPERT

You are the New Boss of your Former Teammates: Now What? *Critical success factors*

Q | *You've just become the new manager of the team you left behind. What are some critical success factors early in the appointment to ensure positive relationships and continuing success?*

A | *First, know yourself. Learn as much as possible about how you lead before making the shift. Develop your self-awareness, social and emotional intelligence. Managing your responses to challenging situations will be necessary, especially in the early days when everyone is trying to figure out the nuances of the new reporting relationship. Understand that everyone will be watching what you say and do to take their cues on what to expect and how to show up.*

Have a clarifying conversation with your new boss. Ideally before you begin the role, have a conversation with your new boss to understand their expectations. Ask what's working, what needs to be shifted, what processes are redundant and what they would like to see started. Establish a regular meeting schedule to discuss your transition and how things are evolving.

Understand your role has shifted. Overnight you've moved from subject matter expert to assuming responsibility for the team's performance outcomes. Take time to figure out what that means and how you will avoid the temptation to do it yourself because you know how and it might be quicker than asking someone else.

Don't try to be everyone's friend. You will have had different relationships with coworkers as a team member. Figure out how those relationships will need to shift. Discover your bias—no more lunches with your 'bestie' to the exclusion of everyone else. Make sure not to ignore the one(s) with whom you did not spend as much time or see eye to eye. Be careful not to default to trying to be friends with everyone.

Host individual conversations to establish relationship contracts. This discovery time is about building relationships. All work gets done through relationships. When they are strong and

positive, the team is solid. Talk to everyone individually and then together as a group. Ask each team member what they need from you, tell them what you need from them and ask how you will get back on track if one or the other's needs are not being met.

Talk about the culture of the team.

Celebrate the positive and name what needs to shift. Culture is often seen and felt but not named. Name it. Work with the team to identify the necessary behaviour to create the workplace where people want to be. Ensure individual and team skill development on the requisite behaviours.

Be clear about performance expectations.

Help each team member understand what they need to do to align with the organization's mission and vision. Ask them how they like to receive feedback and establish a regular check-in schedule. Don't wait until something goes off the rails to have a conversation. Once you've talked to everyone individually, have a meeting with the entire team to review.

Address performance challenges early. It's not uncommon to discover a team member's performance challenges early into your new role. You may not have known of these challenges before. Please don't wait for it to get better on its own. It won't. Address it in an authentic and respectful way, allowing you both to discover something new. Make sure you ask and understand what is required to help the employee be successful.

Establish positive relationships with your new peer group - other managers. Learn from managers who have higher positivity and productivity outcomes. Ask questions and watch how they do things to discover what aligns with your preferred leadership style. Ask them to share their biggest learnings as they transitioned to the new manager role.

Find a mentor and hire a coach. The mentor is someone who has been there and done that. They function as the trusted advisor, whereas the coach functions as the thinking partner whose role is to enable you to discover your full potential.

Pay attention to your needs outside the workplace. Everyone brings a packed bag to the workplace. All of what we experience, think and

continued next page...

You are the New Boss of your Former Teammates: Now What?

Critical success factors

... concluded from page 5

feel as a result of the other hats worn outside work comes to work. Be sure to have a balance that includes plenty of 'me time' - things that fill you up and counter the demands of everyday life.

Appreciate that this will take time. The shift from being the one doing to the one leading the doing can be a positive experience when the leader does the work to set themselves and others up for success. It doesn't happen by itself. When it

goes well, it is rewarding for everyone involved. Eventually, all will find a new rhythm especially if the approach is of good intent.

Gail Boone is an Executive Coach and Owner of Next Stage Equine Facilitated Coaching and can be reached via email at gailboone@ns.sympatico.ca.



Association of Professional Recruiters of Canada



Canadian Professional Trainers Association



Canadian Association of Assessment Specialists



Canadian Management Professionals Association



Join as an Associate Member of any of IPM's four professional associations

Membership fee is \$175 per year.

Benefits include:

- ✓ Online subscription to Workplace Today® Journal, the Canadian Journal of Workplace Issues, Plans & Strategies (worth \$119)
- ✓ Access to timely information all in one place, www.workplace.ca
- ✓ Free access to Workplace Library
- ✓ Members Quarterly Newsletters Online
- ✓ Members' special discounts on IPM programs and services
- ✓ Connect with our rapidly growing network of over 2,600 senior human resource and management professionals now!

Details: www.workplace.ca
 Click on **Join IPM's Associations...**

Golden Vacation or Faded Opportunity

Awarding vacation pay during notice periods

... concluded from page 4

Takeaways for the Employer

Despite what appears to be a return to the *Bagby* principle, one option for employers to reduce the uncertainty over whether vacation pay would be awarded during the notice period is to set out an enforceable termination provision that explicitly addresses the employee's entitlement during the common law reasonable notice period, including vacation pay.

Alternatively, an employer should at a minimum reconcile both the *Bagby* and *Tanton* decisions by regularly requiring employees to use their vacation entitlements and have policies that clearly state that

the employer will require its employees to use their vacation entitlements subject to the advance notice requirements set out in the *Alberta Employment Standards Code*.

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

Emma Morgan is an Associate with Borden Ladner Gervais LLP and can be reached via email at emorgan@blg.com



Colin Fetter
LL. B.
Partner,
Brownlee LLP



Bonnie Hu
J.D.
Associate,
Brownlee LLP

Feature

Invest in Retention, not Resignation

Keep your Training and Development Agreements enforceable

As of March 2023, Alberta's unemployment rate was reported at 6%, compared with 11.90% in September 2020. Accordingly, employers in Alberta are working with a tight labour market. Faced with labour shortages spanning multiple industries, employers must explore incentives that will attract and retain their workforce. Ideally, such incentives would not only benefit the employee, but also bring long-term value to the employer.

One incentive is to subsidize employee training and development opportunities that are relevant to the employer's business.

Training and Development as a Tool for Recruitment and Retention

In addition to a competitive salary and benefits package, employees value learning opportunities to enrich their skills repertoire and advance their career. As such, offering subsidized training and development opportunities would give an employer a competitive advantage over other employers vying for the same talent pool.

Employees with access to appropriate training and development programs ("TDPs") are also likely to deliver long-term benefits to the employer. Not only will these employees be more productive in their roles, but overall employee morale is likely to improve when employees feel equipped for success and confident in what they are doing. This latter benefit in turn reduces employee burnout, absenteeism and turnover.

To maximize the long-term value of subsidized TDPs, an

employer may consider conducting a comprehensive survey to gauge employees' professional interests as well as any skill gaps that management identifies. Regular performance reviews with a career development plan component also assist in gathering the required information to tailor and prioritize TDPs for employee retention.

The Value of Training and Development Agreements

But what if an employer incurs thousands of dollars' worth of training and development expenses, only for the employee to leave for other employment a short while later? Where several employees choose to "enrich and ditch", an employer could suffer significant financial losses as it would need to recruit and retrain replacement employees.

To protect its investment in employee training and development, the most efficient solution would be to have employees sign a Training and Development Agreement (a "TDA") prior to authorizing any employer-paid courses. A TDA is a written contract between the employer and an employee that sets out the conditions of any TDPs that the employer subsidizes.

Important clauses to include in a TDA include:

- The types of TDPs authorized and/or criteria for which certain courses, conferences or workshops would be eligible for financial assistance;
- The maximum limits for employer financial assistance;
- Any time off work to be granted for training and whether such time off would be with or without pay;

- The need for prior authorization in writing from appropriate supervisors;
- What happens if the employee fails to successfully complete a TDP; and
- The employee's obligations to diligently pursue training and to repay TDP costs upon resignation or termination for just cause.

Ensuring Enforceability of Repayment Clauses

Although it would be open to an employer to recover TDP costs through a civil claim, the resources to do so often exceed the cost of the TDPs subsidized. It is therefore preferable to deduct TDP amounts from the employee's last pay cheque as enabled by section 12(c) of Alberta's *Employment Standards Code*. Specifically, section 12(c) permits an employer to deduct from the earnings of an employee a sum of money that is personally authorized in writing by the employee.

While an employer may be tempted to include a catchall clause stating that an employee must repay "all debts owing" to the employer upon resignation or termination for just cause, the same is insufficient to satisfy the written authorization requirement in section 12(c). Instead, the deduction of TDP amounts must be drafted in clear and specific terms about what is to be repaid, when it is to be repaid, and how it is to be repaid.

Further, the repayment amount must be reasonable and proportionate to the loss suffered by the employer. Otherwise

continued next page...

Invest in Retention, not Resignation

... concluded from page 7

stated, the repayment amount must not be a “penalty” designed to punish an employee for leaving their employment. If a repayment amount is deemed a penalty, the repayment clause will be unenforceable.

One option to ensure that the repayment amount is not viewed as a penalty is to utilize a sliding scale model in the TDA: the longer that an employee has remained with an employer following the completion of a course or workshop, the less

that employee must repay at resignation or termination for just cause. This is because the longer that the employee stays following the completion of a TDP, the more likely it is for the employer to have extracted value from that TDP.

A well-designed employee TDP, coupled with adequate protection from a TDA, can not only overcome challenges associated with the current tight labour market but also bring substantial long-term dividends

for employers in any labour climate. Why not invest in retention?

Colin Fetter is a Partner and Practice Group Leader in Employment and Labour Law with Brownlee LLP in Edmonton. He can be reached via email at cfetter@brownleelaw.com.

Bonnie Hu is an Associate with Brownlee LLP in Edmonton and can be reached via email at bhu@brownleelaw.com.

IPM ASSOCIATIONS MEMBERS QUARTERLY NEWSLETTER IS GOING ALL DIGITAL



Going forward, our Newsletter will be a digital-only edition, same as our Workplace Today® Journal.

To better serve our members, access all the information you need easily to make informed decisions and share with your colleagues.

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

Nothing to download. Complete index, individual article PDFs, archived issues all there for you 24/7



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

ASK the Expert

10 Biggest Mistakes in Employment Contracts

What makes them unenforceable?

Q | *Enforceable employment contracts eliminate wrongful dismissal claims but few contracts are actually enforceable. Why is that?*

A | *Here are the biggest mistakes employers make in implementing and administering employment contracts.*

1) Timing

This is the first thing any employee's lawyer will look for in seeing whether your contract can be set aside. The contract has to be agreed to as part of the offer of employment. If your employee can prove that the essential terms are already agreed to such as salary, position, etc. before they ever agreed to the contract, the contract will be unenforceable. It is for this reason that contracts provided and signed on the first day of work are unenforceable. This is because by the time the employee showed up, the terms of employment obviously had already been agreed to.

2) Changing contracts without providing anything in return

This often occurs annually or simply when the employer wants to add something new to the contract such as a non-competition, confidentiality or termination provision to an existing contract without a new one. In return for any term damaging to an employee's interest like one of those to be enforceable, the employee must receive something in return. That "something" is called consideration. It does not have to be

very much—even a dollar will do.

3) Concealing the punitive provision

The Supreme Court of Canada decision *Matthews v Ocean Nutrition Canada Ltd.*, in which I acted, made clear that any punitive provision must be clearly brought to the employee's attention. It cannot be buried in the contract or it will not be enforceable.

4) Giving employees a genuine choice to accept the new contract

Even if an employee receives consideration for a change to their contract with a punitive term, the employee still must have a genuine choice whether to accept that new contract with that new term or continue under the previous terms.

5) Duress

This comes into play more in agreeing to severance than in signing a new contract. After all, the employee does not have to accept that job on those terms and give up what they already have. However, if an employee is offered the job and told to sign immediately or the offer is withdrawn, some courts could well find that to constitute duress. For that reason, you want to provide the employee with a reasonable timeframe to sign. If they do then choose to sign immediately, it is not a problem. Make sure the time to sign is stipulated in writing so there's no debate later.

6) Sign or else you will be fired

If you have an existing employee and rush an imprudent contract on that employee making it clear that they cannot keep their job if they do not sign, that contract will not be enforceable.

7) *Waksdale and its children*

This decision of the Ontario Court of Appeal and various cases expanding it since then have made clear that if any provision of the employment contract could possibly, at any time in the future, become unenforceable by violating a provision of the Employment Standards Act, then the entire termination provision will be unenforceable. The most common instance is permitting termination without severance or notice for cause when, under the Employment Standards Act, you can only pay no severance if there is wilful misconduct and some causes, such as gross incompetence, are not willful. If the provision permitting termination for cause without any payment is in the contract, even the severance provisions of the contract, which might otherwise be enforceable and compliant with the ESA, will be rendered unenforceable. Another common example is the contract not providing for benefit continuance after termination in the termination provision. Since the ESA requires such continuation, that renders the entire termination provision unenforceable. It does not matter if the ESA is in fact complied with. The contract is unenforceable if it does not provide terms which are compliant through the lifetime of prospective employment.

8) "Savings provisions" generally do not work

If a contract is written in a manner to be unforeseeable but has a term that, notwithstanding anything else in the contract, the employer will comply with the ESA, the court will generally find the contract unenforceable because of ambiguity.

continued next page...

10 Biggest Mistakes in Employment Contracts

... concluded from page 9

9) Be careful with particular provisions

There are particular provisions such as non-competition clauses which have their own unique rules for enforceability. Keep in mind that in Ontario, new employment contracts cannot contain such provisions unless it is for a C-Suite executive.

10) ILA- Independent Legal Advice

An employee does not have to get independent legal advice for a contract to be enforceable. However, if they are not even given that opportunity, a court might render the contract unenforceable. It is wise to put into the letter with the contract that the employee is encouraged

to obtain independent legal advice and provided time to do exactly that.

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

Philip H. Gennis, J.D., CIRP, LIT
Senior Principal



SPERGEL

Insolvency • Restructuring • Consulting

msi Spergel Inc., Licensed Insolvency Trustees

Direct Tel/Fax: (416) 498-4325 | Cell: (416) 457-4773

pgennis@spergel.ca | www.spergel.ca

505 Consumers Road, Suite 200, Toronto, Ontario M2J 4V8

Member of **ICIN** The Independent Canadian Insolvency Network

Gail R. Boone CEC, PCC, EFC

Next Stage, Equine Facilitated Coaching

36 Stage Road, Enfield, Nova Scotia Canada

(902) 497-8650

gailboone@ns.sympatico.ca

nextstageefc.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)



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



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

Feature

Conflict of Interest & Confidentiality Clauses can Threaten Termination Provisions

Employers must be mindful of any termination-related language in an employment contract

The Ontario Superior Court of Justice has provided employees with yet another angle of attack against the already-vulnerable termination clause. Since the infamous decision in *Waksdale*, we have seen plenty of cases where the Court has rendered a termination clause void due to an inadequate “for cause” provision. However, in *Henderson v Slavkin et al*, 2022 ONSC 2964, the Court held that the conflict of interest and confidentiality clauses in an employment agreement could have the same effect.

Facts

The plaintiff, Rose Henderson, was a receptionist at the oral surgery dental offices of her employers, Drs. Slavkin and Kellner. She had accumulated thirty years of service before her employment was terminated on April 30, 2020, after six months of working notice.

At issue in the litigation was whether or not the new employment agreement was offside the Ontario *Employment Standards Act, 2000* (the “ESA”), which would entitle Ms. Henderson to significant common law reasonable notice.

The Decision

There were three clauses in her employment agreement that Ms. Henderson argued contravened the ESA:

- 1) The without cause termination clause;
- 2) The conflict of interest clause; and
- 3) The confidentiality clause.

Interestingly, the Court did find that the without cause clause was enforceable such that it limited Ms. Henderson’s entitlements to those minimally required by the ESA.

The conflict of interest clause set out limitations to Ms. Henderson’s behaviour, contractually defining a conflict of interest in the context of the employment relationship. It clearly stipulated that engaging in the enumerated behaviour would not only amount to a breach of the employment contract, but also provided the employer with cause for termination without notice or pay in lieu of notice.

The *Termination and Severance of Employment*, O.Reg. 288/01 (the “Regulation”) clearly provides that only employees guilty of wilful misconduct, disobedience, or wilful neglect of duty may be terminated without any notice or pay in lieu of notice. The Court in *Henderson* held that the conduct listed in the conflict of interest clause was overly broad, unspecific and ambiguous. Because of this, the Court found that an employee would have difficulty determining what specific conduct could lead to termination without notice or pay in lieu. As such, the Court held that the clause was invalid, having

failed to meet the narrow exception provided for in the Regulation.

Finally, the Court held that the confidentiality clause in Ms. Henderson’s employment agreement was also in breach of the Regulation. In short, the confidentiality clause stipulated that Ms. Henderson could be terminated without notice or compensation in the event that she disclosed confidential information. However, the Court held that it was possible that there could be disclosure in a manner that did not meet the exception set out in the Regulation – that is, it was possible that a disclosure was not wilful. Consequently, the Court found that this clause was also in breach of the Regulation, and therefore void.

The Outcome

As a result of the Court’s analysis of the conflict of interest and confidentiality clauses, Ms. Henderson’s employment agreement was held to be in breach of the ESA and the Regulation. Consequently, the agreement was held to be invalid, and the Court determined that Ms. Henderson had been wrongfully dismissed, and thus entitled to 18 months of notice.

Takeaways for Employers

In our view, the *Henderson* decision highlights how cautious employers must be in drafting employment agreements in their entirety. It is clear that the Court will not simply assess the validity of the termination clause, but rather will also look to other provisions, particularly those with implications for the employee on termination of employment.

The *Henderson* decision also demonstrates how stringently the principles around differentiating between the two types of “cause” will be applied across the board. Here, the Court was clear that the conduct contemplated in the conflict of interest and confidentiality clauses would not necessarily fall under the purview of wilful misconduct, disobedience, or wilful neglect such that no notice would be required pursuant to the Regulation.

Without question, employers continue to find themselves in an increasingly pro-employee jurisdiction. The Court in *Henderson* has demonstrated, yet again, how challenging it has become to limit employees’ entitlements on termination. Employers should regularly have their termination clauses – and employment agreements generally – reviewed by counsel to ensure they reflect the most current state of law on the issue.

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.

Seasons Change but Workplace Harassment Remains

Employers cannot afford to turn a blind eye



Kyle MacIsaac
LL.B.
Partner
Mathews Dinsdale
Clark LLP



Caroline Spindler
J.D.
Associate,
Mathews Dinsdale
Clark LLP

Unfortunately, workplace harassment is always a hot topic. The #MeToo movement further ignited a proverbial flame that was already burning in workplaces across the country. Although workplace harassment is not new, it is nevertheless a topic worth discussing.

Workplace harassment can trigger legal obligations for employers from all avenues from human rights obligations, to health and safety obligations, to constructive dismissal claims. The risks of failing to address workplace harassment issues or turning a blind eye are numerous.

Harassment is generally defined as engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome. Just because you “didn’t mean it like that” or it was “just a joke”, does not mean it was not harassment. Also, just because someone does not object to the behaviour, doesn’t mean it is not unwelcome. Harassing behaviour often occurs repeatedly, but one instance of harassing behaviour can constitute harassment depending on the circumstances. Harassment is like a shape-shifter: it takes many forms. Yelling, spreading rumors, derogatory name calling, “cat-calling”, sharing inappropriate images or GIFs, making inappropriate gestures, isolating someone, as well as manipulation and bullying can all be forms of harassment. Anything that is recognized as offensive, embarrassing, humiliating, demeaning or unwelcome, is likely harassment.

Human rights legislation prohibits not only discrimination, but harassment on the basis of certain protected characteristics including race, religion, age, disability, sexual orientation, and sex amongst others. Human

rights legislation in certain jurisdictions also expressly prohibits sexual harassment.

Occupational health and safety legislation prohibits harassment and workplace violence and imposes obligations on employers to take certain steps in relation to both in order to mitigate against these health and safety risks. Occupational health and safety legislation imposes a general duty on employers to take every precaution reasonable in the circumstances to ensure the health and safety of those in the workplace, not just employees. Additionally, workplace harassment can trigger workers’ compensation claims impacting employer premiums and resulting in lost time.

Another way in which workplace harassment can impact workplaces is through wrongful dismissal claims. Workplace harassment can create a “poisoned work environment”, leaving the door open for claims of constructive dismissal. The change from a positive work environment to a hostile one effectively results in the employer’s intention to no longer be bound by the employment agreement.

Despite all of the risk associated with workplace harassment, there are steps employers can take to protect the workplace and employees. Best practices to address workplace harassment

include keeping an open mind about complaints. Take action and ask questions with a view to gathering information to assist in understanding the issues and addressing any inappropriate behaviour. Common mistakes in addressing workplace harassment include: failing to act on a complaint or information about harassment, or failing to act promptly, which includes an investigation into the harassment; errors in the investigation process such as failing to speak with everyone who may have information about the harassment; and failing to take steps to address the harassment and prevent future occurrences. Ensure that you have policies and procedures in place to address workplace harassment and provide clear expectations around behaviour. In addition, ensure that training is provided on the policies and procedures to employees at every level of the organization. Awareness of legal obligations and implications regarding workplace harassment can have a huge impact on the work environment and the company’s bottom line.

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.

Feature

Aviary Group
We soar above the rest...

Monika B. Jensen PhD
MEDIATOR WORKPLACE INVESTIGATOR
TRAINER FACILITATOR COACH

TEL: 905-683-9953
FAX: 905-683-9912
MJENSEN@AVIARYGROUP.CA
WWW.AVIARYGROUP.CA

Plan to Succeed



Members
Quarterly
Staff Writer

Succession planning for small- er organizations

Succession planning is important, not only for large corporations but for small organizations as well. Large or small, succession planning must be on your to-do list so that you can maintain your success and build for the future. In fact, many experts think that it is more crucial to have succession planning in smaller organizations because there are fewer people to carry on and carry out the mandate if something happens to one of the owners or leaders.

The case for succession planning

The principles of succession planning are to ensure that you have the capacity and the ability to carry out your organization's mission, to continue to provide services and to meet the business goals of the organization. It is a particularly important time to think about succession planning because we are undergoing one of the largest out-migrations of senior managers in history. The impact has been a bit muted because some older leaders are deciding to stay at work longer, but that is simply postponing the eventual need for a new management cadre.

Many large organizations have seen the future loss of the baby boom executives and have active leadership development plans in place. But many smaller and mid-sized organizations simply do not have the resources to devote to such an exercise. One study a few years ago by accounting firm Deloitte found that only 17 per cent of smaller and family-owned companies surveyed had a formal leadership succession strategy in place. The other 83 per cent are putting their organizations at risk and the loss of one senior executive could have a very damaging impact on their organization.

Start right now, but take your time

If you don't have a formal succession plan in place, you really should get started. Keep in mind that you need to be level-headed and not panic. An emergency occurs when the building is on fire. You have a problem that will not become a crisis unless you ignore it. Succession planning is not done in weeks or months - it needs to be mapped out and implemented over several years.

The starting point is to assess your situation today before you start thinking about tomorrow. Take a look at your current leadership and organizational structure and see if they meet your existing needs based on your strategic plan, goals and objectives, or priority programs and projects. Conduct a thorough and honest evaluation of the executive team and make an assessment of when they would likely leave or retire. Ask them what their plans are. You need to know.

Who's in the bullpen?

Once you have an initial assessment of your leaders, you can look at who might be in the feeder system to replace them and/or have the capacity to move up in the organization. Develop a profile for all existing staff so that you know whom you can call if your starting pitcher needs relief. Who could be trained or mentored to fill gaps? Which ones may be good candidates for an executive development program?

If you don't have that capacity internally, it's better to recognize that now and come up with some outside recruitment strategies. This will take both time and resources since every other organization in your field is likely engaged in the same task of finding the new pool to fill your talent pipeline.

Make a plan and stick to it

Now that you know your strengths and weaknesses, you can begin to implement your succession plan. This plan should

include both an internal and external component. Internally, you will need a combination of training and development for your existing staff. At the same time, you will need to be actively out there in the labour market, recruiting more experienced people into your organization.

You also need to have supports in place to ensure that both the internal candidates and those you bring into the organization can succeed in their new roles. That should involve the active participation of the current leadership team to make a smooth transition into the corporate suite. It is one thing to designate a successor. It's quite another to ensure their continuing success.

Watch out for potholes on the road to success

Sometimes the best laid succession plans do not succeed. Be prepared to adjust your plans as required. The most common pitfall is to make assumptions about aspects of the plan or to allow personalities to trump principles. This will require HR professionals who are leading the plan to remain calm when, for example, executives change their mind about giving up the reins of power. They may claim that the people replacing them are not as qualified as them and they may be right. However, the plan must go on.

The other main failing of succession planning, particularly in smaller organizations, is that everybody gets shifted off course by the problems of today. Unless someone can clearly steer the succession plan ship on its path or mission, the future leaders and future solutions will never appear. Put your succession plan in writing. Get the senior leadership to formally sign on. Remember to keep everyone in the organization on the course that you've set. There will surely be smoother waters ahead.

Members Quarterly Staff Writer

Feature

Resilience is a Leadership Superpower - *How to build yours*



Michelle Lane

Leadership
Effectiveness Coach
and Facilitator,
Vibrant Leaders

When it comes to leadership skills, resilience is the superpower every leader needs to develop.

Resilience is the skill that helps you work effectively with a wide range of life and leadership challenges. Specifically, the challenges you face in times of uncertainty, stress, volatility, and change -- times like now.

Though we are essentially in a post-pandemic recovery period, challenges and curveballs have become the norm in our personal and professional lives, especially for leaders. This new normal creates the kind of volatility and stress in which resilience – the ability to bounce back from setbacks – allows you to function effectively and even to thrive.

What is Resilience?

Amit Sood, MD, the Executive Director of the Global Center for Resiliency and Well-Being defines resilience as ‘your ability to withstand adversity and bounce back and grow despite life’s downturns.’

Resilience is not a ‘trait’ that you do, or do not, have. Rather, it is a combination of thoughts, behaviours, actions and more that form a powerful set of skills. This set of skills - what I like to call your superpowers - can be learned and developed, just like the process of building your physical muscles. Resilience can also be strengthened with focus and practice.

As you boost your resilience quotient, you strengthen your ability to work with challenges in constructive ways, recover your leadership equilibrium and continue to lead well.

For leaders everywhere, resilience is a skill you can count on to boost your effectiveness in every aspect of your personal and professional life.

Can Resilience be learned?

YES! Effective leaders build from every experience and invest in developing a deep well of resilience in the process.

Some leaders, for example, have learned to harvest insights and learned from setbacks and failures. Others have developed a practice of appreciation, shining a light on the silver linings they see

when they reframe adversity. Just like putting money in the bank, they can then draw strength from their resilience ‘account’ when they need it most.

Your THOUGHTS are the foundation of your resilience, so I encourage you to start your skill-building there. Here are two specific ways to do it:

#1 Focus on the Present

One of the most powerful ways to be more resilient is to focus your thinking on the present -- especially if you’re inclined to ruminate incessantly on the past. Challenging though it can be to tame your wandering thoughts and stay in the moment when setbacks happen, doing so helps you avoid the more destructive patterns of doomsday thinking that can shut you down and compromise your ability to respond effectively.

When you focus on the present, you can fully appreciate the challenge you are facing with clarity and concentration. For example, you can discern what is real (and not), as well as appreciate how it may or may not affect you.

Staying present will also equip you to distinguish what is within your control, helping you focus your energy most productively. The result? You will be able to lead with greater clarity and concentration as you consider how to lead through the issue at hand.

Leadership Resilience Exercise:

Pay attention to your thoughts and challenge yourself to stay present. Look and think clearly about what is real now, in the present moment. Write it down to center yourself and move forward.

#2 Find the Positive in Your Challenging Moments

Reframing your thoughts to bring a positive perspective to each challenging situation is an equally powerful way to build your resilience. When challenging moments happen, pay close attention to your thought patterns. Ask yourself the following questions.

- Are your thoughts typically positive or negative?
- How do you tend to see yourself in them?

- Do you see yourself overwhelmed and unable to move forward?
- Are you more inclined to see yourself challenged but undaunted by the situation?

It can be easy to get caught up in doomsday thinking and negative emotions that derail your leadership effectiveness. Instead, challenge yourself to pause and name the negative thinking pattern. Then regroup and reframe your thoughts.

For example: What insights can you appreciate from each experience? How might those insights serve you in future?

When you challenge yourself to focus on (and in) the present moment and adopt a more positive, constructive mindset, you will be able to avoid the kind of knee-jerk, potentially emotional reactions that will not serve you as a leader. Instead, you will be well positioned to consider and choose the most constructive and appropriate response.

Leadership Resilience Exercise:

Look closely at your typical thought patterns especially if your default is negative and invite yourself to consider a more positive, constructive frame of mind. Challenge yourself to do this each day for a week and notice what happens when you reframe your thoughts.

Why is Resilience such an important leadership skill?

Setbacks, even outright failures, are inevitable for every leader. The more resilient you are, the easier it becomes to rebound – and the faster your recovery time.

When you focus your thoughts on the present and practice reframing your negative thoughts, you will be able to respond thoughtfully rather than reactively when challenges or setbacks occur. In the process, you will be building superpower skills that boost your resilience and effectiveness in all aspects of your leadership.

Michelle Lane is a leadership effectiveness coach and consultant with more than 35 years of diverse leadership experience in the public, private and non-profit sectors. Michelle can be reached at mlane@vibrantleaders.ca.



Michelle Phaneuf
P.Eng., ACC
Partner, Workplace
Fairness West

Feature

The Connection Between Feedback, Trust and Conflict

High trust is the key ingredient

Creating a *culture of feedback* is a phrase we often hear in workplaces. This is because each of us needs feedback in order to grow and employee growth is essential for effective organizational growth. Organizations may be spending a large amount of their budget on leadership training to ensure leaders are learning skills and tools to provide feedback effectively. I've noticed that even when these tools are used appropriately, feedback does not always land successfully and defensiveness rears its head. When defensiveness is present, growth is not. This is most likely because trust plays an important role in feedback.

We witness strong defensiveness when feedback is provided in situations when trust is low, say for example between a leader and employee. As a neutral third party, I'm sometimes viewed as a more trusted person, especially if an employee is in conflict with their leader. I could repeat the same feedback word for word and it was well accepted coming from me, with little defensiveness created. This can be frustrating for the feedback provider and upon further exploration, the recipient will often acknowledge that they are unaware of the dynamic. In general, the success of giving feedback has little to do with the ability of the speaker and more to do with the level of trust or quality of the working relationship. When employees and their leaders are in conflict, the working relationship may be damaged and trust is likely low.

I've discovered a four-square grid created by John Spencer (<https://spencerauthor.com/why-trust-is-vital-to-peer-feedback/>), an educator who looked at student peer feedback (positive/negative) and levels of trust (high/low). The squares are labeled Affirmation, Flattery (positive feedback with high and low trust respectively) and Critical Feedback and Hating (negative feedback with high and low trust respectively). The grid reflects that with low trust, negative feedback could be seen as hating, creating a very defensive reaction. Mutual or high trust is vital for critical or meaningful feedback. Employees' defenses will be less pronounced if someone they trust is involved and they are able to hear the feedback that will help them change and grow. If trust is low, positive feedback may not be seen as authentic and viewed as flattery or insincere. With those whom employees place high trust in, positive feedback can create a true sense of affirmation. How many of us have remembered positive feedback from a trusted leader years after it was given?

John Spencer also explored the level of trust in conjunction with the type of feedback given in a continuum style range. He summarized that the level of trust increases as the feedback becomes more personal. The level of trust needs to be high (far right of the continuum) when the feedback type is about factors that have deep meaning to employees like values or character. This feedback cuts to the core of who they are, their identity and beliefs.

Defensiveness will be high if trust is low. Less trust may be required to provide feedback on an employee's actions or the concrete behaviours that a leader has observed. This might include issues such as communication style, interactions with others and the specific undertakings during a project. As we move further down the trust continuum (to the left) we come to ideas, perhaps specific ideas regarding the processes being used within an important work project. Less trust may be required to provide feedback in this area. On the far-left end of the continuum, requiring the least amount of trust is providing feedback on an employee's creative work. This could look like the specific products they have created, but it may also include any kind of work that they are doing on a project.

As a leader, awareness of the link between trust and feedback as indicated in this grid and continuum are important when providing feedback, especially if the working relationship is not strong or there is a conflict situation. Time, energy and appropriate budgets will be needed to focus on restoring the working relationship and rebuilding trust before feedback can be effective for all.

Michelle Phaneuf is Partner at Workplace Fairness West and can be reached via email at phaneuf@workplacefairnesswest.ca.

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. RPP, CMP, RAS, RPT, HR Today®, Recruiting Today®, Supervision Today® and Workplace Today® are the intellectual property of the Institute of Professional Management. © Copyright 2023. All Rights Reserved. Written and printed in Canada. No part of this newsletter may be copied or transmitted by any means, in whole or in part, without the expressed written permission 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