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SUMMER 2025, VOLUME 23, NO. 3

**Sharlene Rollins**
RPR
*Manager, Administration*

Perspective

# Dealing with Grief in the Workplace

*What great managers do*

We all deal with the loss of loved ones at various times in our lives. How should we react and behave when someone at work is going through a grieving process?

Often enough, we say and do nothing. We use the excuse of giving them the space they need. In reality, we avoid the uncomfortable feelings as much as possible at work - as if it was some sort of hermetically sealed unit where human emotions are not permitted. The result of that approach is that while we may still feel awkward and uncomfortable, so do the people who are suffering. They end up feeling isolated and alone at a time when they could probably use a friend or a helpful co-worker. So, what can you do or say?

### Give them space but don't ignore them

After a loss or a traumatic event, it is perfectly fine to give a co-worker the time to mourn, grieve or process what's happened. However, you shouldn't ignore them. Acknowledge the loss initially and then step back. As the days and weeks go by, you can let them know that you are there and will be there for them. This may mean making sure that they don't sit alone at lunch or offer to meet them for coffee. You should reach out, check in and see if they are okay.

### Don't patronize them

There are many kind things you can say to a co-worker who is going through a loss. Even simple words like 'I'm sorry" or "Sorry for your loss" are welcome. Make sure that you do not patronize them with platitudes. When you are grieving, the last thing you want to hear is something like 'Everything happens for a reason". Even worse is the attempt that many people make to get the person who is grieving to just move on. People move on when they're ready, not necessarily when we think they should.

### Practice active compassion

One of the best ways to help someone dealing with grief is to practice active compassion. Try to put yourself in their shoes. What would you like someone to say or do? The biggest gift you can give to another person in trouble is your time. Take the time to listen to them when and if they want to talk. You don't even have to say anything - just be there and bear witness to their suffering. Your coworker will never forget you if you can do that.

### Be a supportive employer

If you are a manager, there are some additional ways to help an employee deal with a difficult situation in their life. Can you help by reassigning or rescheduling their work? Is there a way to reduce their workload in the short term while the grief may be still raw? If you have an Employee Assistance Program (EAP), there may be additional support or counselling that you can make available to a grieving employee or their family. There may be times when they need a timeout. Make sure they can have that when needed.

Grief is very difficult, especially in the workplace. Like all other strong emotions, it will pass. Understand that it will pass on its own time and on its own terms. Our job in the workplace is not to try to make the grief go away or pretend it is not happening. Our job is to improve how we help others going through it. Everyone will remember you if you've done well at that.

*Sharlene Rollins is Manager, Administration for IPM [Institute of Professional Management].*

*"My records indicate you've only been working 90 hours a week. If you want to keep your job, I suggest you get off your lazy butt."*

**Nathaly Pascal**
RPR, CMP, RPT
*President*

President's Message

# Better Communications at Work

*Become expert communicators*

I read quite a bit about management and quite frankly, there's not that much new in most of the material. A number of experts find a way to package old ideas into a new framework that helps better explain the process of engaging and motivating employees. One book that I came across recently zeroed in on a key aspect of management - the ability to communicate ideas to employees in such a manner that they will not just listen, but actually hear the message being delivered to them.

That book is called *Supercommunicators* by Charles Duhigg, and he talks about expert communicators who know how to have and lead a conversation, especially at work. Duhigg says that when we talk, we're actually participating in one of three types of conversations: practical (What's this really about?), emotional (How do we feel?) and social (Who are we?). The challenge, in his view, if we want to become better communicators at work, is to know which type of conversation we're in.

So, how do we do that? Duhigg is an author and a journalist who is also a graduate of Yale University and Harvard Business School. He says that we have to ask questions in order to find out. In his research, expert communicators ask 10 to 20 times as many questions as the average person. They don't just ask the usual questions, but deep and probing questions that invite the other person to reveal more of themselves and their core beliefs.

Duhigg also has some practical advice that can be used in workplace conversations. One suggestion is to prepare ourselves before any meeting by writing one sentence about what we would like to get out of the meeting. When a group does this together and shares it at the beginning of the meeting, it becomes a powerful tool for having real conversations that lead to tangible results. The question can be as simple as "What do I want to get out of this meeting?" or "What would I like to learn from others at this meeting?"

Another strategy is to ask better questions. We often go to the standard questions when we start a conversation. For example," Where do you live?" Duhigg says we need to go deeper than that by asking other questions, such as "What do you like about where you live?" That gives us further detail and asks the other person to open up a bit more. It will give us further insight as to what is really important to them. In turn, they invite the other person to ask you more interesting questions and that's when the conversations turn into something bigger and can lead to better relationships.

One final tip from Duhigg is not new. Listen to learn. In his version of active listening, he calls on us as managers to repeat back what someone else says and ask them to confirm what you heard. He calls this 'looping', and it not only leads to better understanding, it can also diffuse a difficult or heated conversation.

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

## INSIDE THIS ISSUE

# 100 Proof: Just Cause and the Balance of Probabilities

How much proof is needed to establish just cause for driving under the influence?

**Tommy Leung**
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Feature

The Alberta Labour Relations Appeal Body's (the "Board") recent decision in *Bulldog Energy Group Ltd v Brown*, 2024 ABESAB 9, once again highlights the stringent requirements an employer must establish to show just cause for termination. Employers must provide compelling evidence to prove, on a balance of probabilities, that the employee breached company policy and the misconduct is so severe that it is incompatible with the employment relationship. Mere allegations or circumstantial evidence may be insufficient.

## Background

The employee flies into Alberta for work and uses a company vehicle for both work and personal purposes.

The employer terminated the employee's employment for just cause for allegedly driving a company vehicle while under the influence. The decision was based on another employee's observations of the employee with a beer bottle in his hand at roughly 10:00 pm at a bar and the company vehicle in the parking lot.

The company vehicle being used by the employee was GPS equipped and showed that the employee was at the bar from 8:52 pm until 1:56 am. There was no direct evidence of impairment, only the evidence of the coworker, and very limited follow up investigation conducted by the employer. The Board found there was insufficient evidence to conclude that the employee was impaired when he left the parking lot at 1:56 am. As such, just cause was not established.

## Takeaways

This decision highlights several important legal principles that are important for employers to consider:

The onus remains on the employer to prove just cause on a balance of probabilities: In this decision, the employer was unable to prove just cause on a balance of probabilities due to a lack of any direct evidence. The Board reminded the employer that the issue was whether the employer had established just cause for "operating a company vehicle under the influence" as set out in the termination letter. This not only highlights the employer's onus to prove just cause, it also demonstrates the importance of clearly setting out the grounds for termination in the termination letter, as the Board and the courts will assess termination based upon those grounds.

Direct evidence may be necessary to prove misconduct: The Board could only conclude that the employee consumed one or more beers, but there was insufficient evidence to determine how many. The Board also focused on there being no direct proof such as observations of the employee's driving, a lack of a breathalyzer test or field sobriety test, accident or police involvement. The Board determined there was insufficient evidence to conclude the employee's state of sobriety when he left the bar and to establish the employee was "under the influence".

Supervisor's Duty to Step In

The employer relied on the testimony of a coworker (who was a supervisor) who saw the employee at the bar with a beer in his hand and a company vehicle outside the bar, but the Board questioned why the supervisor did not take steps to ensure the employee would not drive home after seeing him drinking alcohol and witnessing the work vehicle in the parking lot. The Board thought it would be appropriate for a reasonable supervisor to tell the employee to walk back to camp, or even to take away the vehicle keys. Although this generally applies during work, it is important to remember that every supervisor, as far as it is reasonably practicable for the supervisor to do so, must take all precautions necessary to protect the health and safety of every worker under the supervisor's supervision.

Creating clear policies can simplify unclear situations: The employer in this matter did not have a written policy specifically setting parameters around alcohol consumption. Specifically, the

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Feature cont'd

## 100 Proof: Just Cause and the Balance of Probabilities

*concluded from page 4*

Board stated that there was no policy which addresses a minimum period following drinking before driving, a zero tolerance for any blood alcohol, or a permissible limit lower than 0.08. This is a reminder that employers should set out clear policies, but employers must also be prepared to follow the steps set out in such policies for them to be effective.

Employers must avoid post misconduct condonation through their action or inaction:

The Board also looked to the employer's actions after the incident. For example, the employer continued to employ the employee for 2 weeks after the incident was known to the employer and even allowed him to continue using the company vehicle without restriction following the incident. The employer argued that they needed the time to investigate. However, the only investigation in evidence was checking the GPS records, which was completed on the day of the incident, and there were some communications with the bar owner, but that was completed a few days later. As such, continuing to employ the employee for an extended period and allowing him to use the company vehicle, despite that being the reason for termination undermined any argument that the employer considered the employment relationship to be no longer viable, which is the just cause threshold.

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# Ontario Court Confirms Enforceability of ESA-Only Termination Provision

*Regular reviews of employment contracts are essential*

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Feature

Employers and employees in Ontario have long been permitted to contract out of common law notice entitlements, provided their agreements meet or exceed statutory minimums under the *Employment Standards Act*, 2000 (ESA).

However, in recent years, courts have closely scrutinized termination provisions, leading to increased uncertainty for employers.

The recent Ontario Superior Court of Justice decision in *Bertsch v. Datastealth Inc.*, 2024 ONSC 5593, provides welcome clarity, reaffirming that properly drafted termination provisions will be enforced—even when they limit an employee's entitlements to ESA minimums. The decision also demonstrates how employers can use procedural tools like Rule 21 motions to resolve contractual interpretation disputes efficiently.

## The Legal Context of Termination Clauses

Termination clauses in employment agreements determine the notice period or pay-in-lieu employees receive upon termination. Without a valid termination clause, employees can claim common law "reasonable notice," which can range from a few weeks to two years or more.

To be enforceable, termination clauses must:

- Comply with ESA minimum requirements;
- Be clear and unambiguous to avoid misinterpretation; and
- Exclude language that could lead to outcomes contravening the ESA.

The *Bertsch* decision underscores these principles and highlights how employers can mitigate legal risks through precise contractual drafting.

## Case Summary: Bertsch v. Datastealth Inc.

### Background

The plaintiff, Gavin Bertsch, was terminated without cause after 8.5 months of service with the defendant, Datastealth Inc. His employment contract limited his termination entitlements to ESA statutory minimums and explicitly excluded common law reasonable notice. Upon termination, he received four (4) weeks' pay in lieu of notice—exceeding ESA requirements. Nonetheless, Mr. Bertsch argued that the termination clause was unenforceable and sought twelve months' notice, totaling approximately $300,000.

His employment contract stated:

- Termination entitlements would meet or exceed ESA minimums, including notice, severance and benefits;
- Any ambiguity would default to compliance with ESA standards; and
- The agreement satisfied all common law notice obligations.

Mr. Bertsch claimed the clause was ambiguous because it did not explicitly reference ESA Regulation 288/01 exemptions and allowed termination for cause without notice in cases that did not meet the ESA's "willful misconduct, disobedience, or neglect of duty" standard.

### Employer's Motion

Datastealth Inc. filed a Rule 21 motion, seeking a legal determination of the termination clause's enforceability. The employer argued that the provision was clear, compliant with the ESA, and did not require perfection to be valid.

### Court's Decision

Justice Stevenson ruled in favor of Datastealth Inc., finding the termination clause enforceable. Key takeaways from the decision include:

- **Clarity and Compliance:** The clause was unambiguous and met ESA requirements. Courts will not invalidate a clause based on speculative interpretations that could lead to illegal outcomes.
- **Appropriate Use of Rule 21:** The motion resolved a contractual dispute early in litigation, saving time and costs.
- **Employment Law Considerations:** The court acknowledged the inherent power imbalance in employment relationships but found this irrelevant when a contract's language was sufficiently clear.

The court dismissed Mr.Bertsch's claim, upholding the employer's reliance on the termination clause.

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# Ontario Court Confirms Enforceability of ESA-Only Termination Provision

*...concluded from page 6*

### Lessons for Employers

The *Bertsch* decision reinforces critical best practices for employers when drafting and enforcing termination clauses:

- **Clarity is Key:** Termination provisions must be explicit and free from ambiguity.
- **Fail-safe Language is Beneficial:** Including "fail-safe" provisions that default to ESA compliance can safeguard against potential drafting errors.
- **Leverage Procedural Tools:** Rule 21 motions can efficiently resolve contractual interpretation disputes, minimizing litigation costs.
- **Regular Reviews are Essential:** Given evolving case law, employers should periodically review employment agreements to ensure continued compliance.

### Broader Implications

While *Bertsch* provides reassurance for employers, Ontario courts continue to scrutinize termination clauses closely. This decision confirms that perfection in drafting is not required—what matters most is clarity and legal compliance. To minimize risk, employers should proactively assess their termination provisions, ensuring they are:

- **Clear and unambiguous** to prevent disputes;
- **Compliant with the ESA** and its regulations; and
- **Explicit in stating** that ESA compliance satisfies any common law notice or pay-in-lieu entitlements.

### Final Thoughts

Although this ruling is favorable to employers, Ontario courts will continue to assess termination provisions closely and critically. Employers should regularly review employment agreements to confirm enforceability in light of legal developments. Investing in legal expertise upfront can help prevent costly disputes down the road.

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# "ANY TIME" BUT MAYBE NOT ANY WHERE

*Your termination clauses could be challenged*

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Feature

## Introduction

In 2024, one of the most notable employment law cases was *Dufault v The Corporation of the Township of Ignace*, 2024 ONSC 1029 ("**Dufault**"). This case, within the year it was first heard, made its way up to the Court of Appeal - 2024 ONCA 915, and presently leaves open whether the use of the words "any time" or "sole discretion" in termination clauses renders termination provisions invalid. The Township of Ignace has now confirmed that it has applied for leave to appeal to the Supreme Court of Canada, meaning Dufault will continue to be watched closely in 2025.

## The Summary Judgement – February 16, 2024

In the summary judgement decision by Justice Pierce, the termination provisions of the fixed-term employment contract were found to be in breach of Ontario's *Employment Standards Act, 2000* ("**ESA**") because:

1. the contract incorporated only the common law concept of termination "for cause" rather than the ESA's higher threshold of "wilful misconduct" which requires intentional wrongdoing;
2. the employer calculated the employee's termination entitlements using only base salary instead of the broader concept of "regular wages" as required by the ESA; and most importantly,
3. the contract's "without cause" clause permitted the employer to end the worker's employment "at any time" and at its "sole discretion".

While the first two points were routine, the entire employment law bar took note of this last point, as it was indeed novel to find that wording such as "at any time" and at an employer's "sole discretion" were breaches of the ESA. In her decision, Justice Pierce noted such wording failed to account for those circumstances when termination would be prohibited by the ESA (for example, in the case of reprisal). Consequently, she found that the early termination provisions were unenforceable and the plaintiff, Ms. Dufault, was awarded extensive damages equivalent to the balance owing under her contract.

The decision was appealed to the Court of Appeal.

In the interim, employers began receiving demand letters stating their termination clauses could be challenged due to the inclusion of *"at any time"* and *"sole discretion"* language.

## Court of Appeal's Decision - December 19, 2024

The appeal was then dismissed in its entirety and costs in the amount of $15,000.00 were awarded to Ms. Dufault. The Court's analysis dealt only with the first point of Justice Pierce's decision, affirming that, as in *Waksdale v Swegon North America,* 2020 ONCA 391, since the employment contract's definition of "for cause" violated the ESA by not meeting the higher ESA standard of wilful misconduct, all termination provisions were invalid. As the termination clauses were invalid, the Court affirmed Ms. Dufault's entitlement to damages were correctly based on the balance of the term of her fixed-term employment contract.

The Court expressly declined to comment on whether the words "sole discretion" or "at any time" were problematic:

> […]
> Given our conclusion that the "for cause" termination clause of the employment contract is unenforceable as contrary to the ESA and that, pursuant to *Waksdale*, this renders all of the termination provisions unenforceable… (in) our view, resolution of the issues the appellant raises regarding the "without cause" termination clause should be left to an appeal where it would directly affect the outcome.

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## *"Any Time" But Maybe Not Anywhere*

*... concluded from page 8*

Since this decision, the Township of Ignace has confirmed that it has applied for leave to appeal to the Supreme Court of Canada.

While most of these kinds of applications to the Supreme Court are dismissed, there is a British Columbia Court of Appeal ("BCCA") decision in *Egan v Harbour Air Seaplanes LLP* ("*Egan*") that has also applied for leave dealing with similar issues. In *Egan*, the BCCA upheld the termination of an employee under similar discretionary "any time" language. Given the *Egan* clause was found to be enforceable and the *Dufault* clause was not, in light of the divergent provincial approaches, it is possible the Supreme Court may take this opportunity to weigh in.

### Take Aways for Employers

The employment bar continues to watch *Dufault* with keen interest for good reason; the outcome of this application could have significant implications on the interpretation of termination provisions in employment agreements. For now, it remains critical that employers review their existing employment agreements for legal enforceability for both new and existing hires, including both indefinite and fixed-term contracts. *Dufault* also serves as another important reminder to employers of how risky fixed-term agreements can be, unless very carefully drafted.

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Members Quarterly Staff Writer

# Summer Fridays All Year Round?

*Employee leave arrangements are changing*

There used to be a time when almost everything shut down for the summer as people took their annual two, three or four week vacations. Now, people take breaks all throughout the year and employees are as flexible about the time off as they are about their work schedule, or where they even work. It's more likely to find a deserted office during Fridays in July and August as many staff opt for extra long weekends or 'summer Fridays' as a way to beat the summer heat. The whole 'summer Friday' thing has morphed from a special arrangement that required permission to a tacitly agreed upon perk that employees have come to expect from their organization.

There is still a drop in office attendance during the summer. One recent study in New York City found that there was a definite slump in people actually heading into work, beginning in early July and peaking through August. But the same tracking showed that there was an even bigger slump in office attendance during the winter months, especially between American Thanksgiving and Christmas. Employees are picking and choosing their optimal times to take time away from the formal workspace.

In the US, workers are back to taking up their usual allotment of paid days off after a drop during the pandemic. That pattern remains true in Canada and the latest data shows that the numbers are rising as well. In 2022, an ADP Canada poll found that 29 percent of respondents say they'll take all their vacation time and 75 percent of workers will take time off work over the holidays. That's still a lot of paid vacation time left on the table, in both summer and throughout the year.

But the new theme for workers in both countries appears to be flexibility versus following previous patterns. Many employers are happy to play along, as long as their employees are engaged and productive when they are at work. The standard vacation break has been replaced by a combination of year-round flexible scheduling, working from home and things like meeting-free Fridays and mental health days off throughout the year.

This includes the aforementioned "summer Fridays" that have now morphed into year-round flexible Fridays. It's hard to gather Canadian data on this, but in the US, almost 20% of workers report that their employer offers some version of this benefit, according to a study from Dayforce, a global HR consulting firm. This should not be surprising, since 2022, Friday has consistently been the most popular day to work from home among hybrid workers. They have just moved a pandemic phenomenon into the mainstream.

What is the impact of these changes in leave and vacation patterns? It's probably too early to tell. First of all, the actual research is very limited and secondly, it feels like lots of aspects of work and the working relationship are still in flux post-pandemic. We know that working from home and hybrid work will continue at variable rates for the considerable future because the arrangement seems to be working for everyone - at least for now.

The other thing that is really clear is that flexibility will be the watchword for all types of employer-employee relationships and that will apply to benefits, hours of work and all leave arrangements. Furthermore, it's not limited to summer vacations either. Employees with school-age children need and are asking for additional time off in September and through March break and professional development days. The many different cultures now represented in the workforce have even shifted how employers manage holiday leave. It used to mean looking at a Christmas break or shutting down operations during that festive season. Now some employees are asking for accommodations to celebrate Hannukah or Diwali or other religious events and celebrations.

Moving forward, employers will have to monitor their employees and their workplaces to ensure that they maintain control even as they practice patience and flexibility with their staff when it comes to leave issues. One reason to do this is to ensure that people are not abusing their benefits, but even more importantly might be to ensure that they are taking regular and healthy breaks from work. Some companies do things like team-wide days off where nobody is permitted to be at work or on site. Others create guidelines that provide suggestions for employees to tune out and take time away from work. The truth is that almost anything will work as long as it is flexible, adaptable and agreeable to both parties.

Enjoy your 'summer Fridays' all year long.

*Members Quarterly Staff Writer*

Feature

# Inquiring Minds Want to Know - *Don't overlook the duty to inquire*

**Kyle Allen**
J.D.
*Partner, Brownlee LLP*

Employees are generally expected to inform their employers if they have a disability and/or need accommodation, including providing enough information for the employer to make appropriate work-related adjustments. However, employees do not always proactively request accommodations or share relevant information. Accordingly, when an employee's conduct reasonably indicates they might have a disability or require accommodation, the employer must take the initiative to ask about the situation. This is known as the employer's "duty to inquire".

The duty to inquire includes seeking necessary medical information to understand the employee's needs before subjecting the employee to adverse treatment, such as disciplinary action or termination of employment. This duty to inquire exists to ensure employers do not overlook or ignore potential needs for accommodation when they are aware, or ought to have been aware, of them. If an employer takes adverse action against an employee without discharging a duty to inquire that exists in the circumstances, the employer will be liable for breach of the employee's human rights. Whether or not a duty to inquire exists in a given situation is highly contextual.

To illustrate, here is a simplified case comparison of two Alberta Human Rights Tribunal decisions rendered within a month of one another:

In *Greidanus v Inter Pipeline*, 2023 AHRC 31, the Human Rights Tribunal of Alberta dealt with a complaint by JG, a job applicant who alleged discrimination based on physical disability. JG had applied for a business continuity and emergency management advisor position with Inter Pipeline, which was classified as safety-sensitive and required passing a pre-employment drug test. JG tested positive for cannabis, leading Inter Pipeline to revoke the job offer. JG argued that his use of cannabis was medically necessary due to his physical disabilities, including Hashimoto's disease, and as such that revoking the job offer was discriminatory. The Tribunal determined that JG's complaint had no merit.

JG did not disclose his disability or cannabis use to Inter Pipeline or the drug testing company before the job offer was rescinded, despite being notified that he would be tested for cannabis. The Tribunal found that since the employer had no prior knowledge of JG's disability, they could not have discriminated against him. The duty to inquire into an employee's need for accommodation only arises when an employer is aware or should reasonably be aware of a potential disability.

The Tribunal concluded that JG's disability had no connection to the revocation of the job offer and that the employer acted within its rights, as there were no signs triggering a duty to inquire into JG's disability.

*Calkins v Broadview Homes*, 2023 AHRC 45 involved an employee, JC, who filed a complaint with the Alberta Human Rights Commission alleging discrimination on the grounds of physical and mental disability. JC was terminated by Broadview Homes on July 27, 2017 for performance issues. He contended that the performance issues were linked to his chronic traumatic encephalopathy (CTE), a brain condition impacting cognitive abilities, and as such that his termination of employment was discriminatory. The Tribunal found merit in JC's complaint.

The Tribunal ruled that Broadview Homes should have known or inquired about JC's disability and its impact on his job performance before terminating him. JC had displayed symptoms of CTE that were evident to those around him, including his spouse and colleagues. It was established that, although Broadview Homes was not explicitly aware of JC's CTE at the time of his termination, the company had received multiple complaints about his performance from customers starting in 2016. Despite these complaints, no formal records or specifics were provided, and there were no documented issues before 2016.

The Tribunal emphasized that an employer's duty to inquire about an employee's health issues is triggered when there is a reasonable suspicion that a medical condition could be affecting work performance. In this case, Broadview Homes failed to fulfill this duty. As a result of this finding, the Tribunal ordered Broadview Homes to pay JC $20,000 in general damages for injury to dignity and feelings. Additionally, the company was directed to provide human rights training on the duty to accommodate disabilities to its supervisors, managers and salespersons.

Employers must be vigilant in recognizing potential indicators of an employee's need for accommodation and must fulfill their duty to inquire before taking any adverse actions. By doing so, not only will they minimize the risk of legal repercussions, but also foster a more inclusive and supportive workplace environment.

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*Feature*

# Conscious Communication - *The power of words*

**Eleanor Kibrick**
MSc

Words and thoughts have a profound impact on well-being. Whether in upper management or a new employee, communicating skillfully is essential to further career goals. Being conscious of and responsible for your choice of words and phrases can make a huge difference in how colleagues perceive you and each other. Do they feel engaged or pushed away?

**"Your Body Believes Every Word You Say"** is a book by psychologist Barbara Huberman Levine.

In related research, testing of a subject's physical strength (kinesiology or muscle testing) identified dramatic shifts in physical energy, based on choices of words. Physical strength significantly weakened with negative language and increased with positive. In addition to testing words, testing negative and positive thoughts also affected strength.

Many English language phrases express violence and antagonism. For examples, saying "that's a killer dress you're wearing" or "fighting the war against cancer" or "I would die for chocolate" or "break a leg" are all violent phrases.

### Two powerful words in the English language: I AM

The words I AM can declare negative or positive identities. For example, "I am angry" expresses your identity as being an angry person. A better way would be to say, "I'm feeling angry right now." This implies that your anger is temporary and does not define you.

Another example "I am afraid" implies that your basic nature is fear. Instead, you could say "I am feeling fearful right now and I choose to learn what I need to know."

### BUT negates what is said before and TRY is a weakening word

When, as a manager, you're giving feedback to one of your team members, it's vital to express what you really intend to say. If you say, "Susan, you are such a wonderful team member BUT there's still room for improvement," Susan feels dismayed as she waits to hear what will follow the BUT. Much better and empowering for Susan is to use the word AND. "Susan, you are such a wonderful team member AND there's still some room for improvement." Susan will readily accept your feedback and feel validated.

Trying is NOT doing. Trying indicates a weak commitment, or even no commitment. If you say, "I'll try to meet you for lunch tomorrow," this leaves your friend wondering, unsure. If you want to make plan, commit and say, "I'll meet you for lunch tomorrow at noon."

When we say BUT, we can immediately self-correct with the word AND. This correction reduces anxiety. Instead of saying "I will TRY," be sure you can make a commitment and say, "I will."

It's important to practice catching yourself when you use negative phrases. One effective tool is to put money in a jar each time you use a negative phrase. This can reward you. For example, each month you could then donate the funds to a charity, or you and your colleagues could pool your money and go out for a festive meal.

### Communication includes active listening

With conscious communication, words are not just spoken. Words are also heard. Listening improves professional relationships. When someone is speaking, it's important to be in receptive mode, to really hear what they're saying. For active listening, stay present instead of thinking of your own reply. Then you are really listening. When a person feels heard, a positive connection is made.

The goal of conscious communication is to take responsibility for our spoken words and ultimately, our thoughts. Self-correction works very well as we certainly don't need to be perfect. Practicing sharpens our skills and enhances our 'being present' to ourselves and with others.

Words and thoughts can harm or heal. Language is a key to identifying the core beliefs that run our lives. These beliefs and assumptions may be preventing you from functioning in productive ways. Especially now, when we live in such stressful times, our use of positive words and thoughts can make a difference. Your colleagues, friends and family will be encouraged, making life better.

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*Feature*

# Developing an Accessible Workplace: Making it Better

**Members Quarterly Staff Writer**

Canada has come a long way when it comes to becoming an accessible society. However, there is much more work to be done and many barriers to the full access of people with disabilities into society and the workplace. This is important work because there are more than 6 million Canadians, aged 15 and over, who have a disability.

Improving access for people with disabilities has been a societal and political priority for many years. One key highlight was the Canadian ratification in 2010 of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD). By signing the UNCRPD, the Government of Canada recommitted to furthering the rights of persons with disabilities. What followed was the Accessible Canada Act (ACA) which made a goal to reach a barrier-free Canada by 2040.

The Accessible Canada Act came into force in 2019. It focused on the proactive identification, removal and prevention of barriers to accessibility in 7 priority areas including: employment, the built environment, information and communication technologies (ICT), communication other than ICT, the design and delivery of programs and services, the procurement of goods, services and facilities, and transportation.

It is not by chance that employment leads the priority areas since having a job is one of the best ways for people with disabilities to begin to become full partners in society. It provides economic independence and security as well as a sense of belonging and can be a much-needed boost to anyone's confidence. It is also heading the list of things to work on because there are still many formal and informal barriers that prevent people with disabilities from gaining access to the job market. In fact, less than 60 per cent of working-age Canadians who have a disability are employed, compared to 80 per cent of the general population.

The business case for hiring people with disabilities is a solid one. First of all, they are an available labour pool at a time when many employers are crying out for help at every level. Secondly, they bring unique talents and perspectives. They have already learned to overcome challenges and obstacles placed in their way and they know how to solve problems, because they have to every day. They help diversify the workforce and inclusive businesses have been shown to be up to six times more likely to be innovative and agile. They also have higher than average revenue and profit margins and many increase their market share because they become more attractive to more customers.

Many organizations have already made major steps to improve their accessibility. Now is the time to do more, especially in recruitment and hiring. This may involve things like making accessible parking available closer to the workplace entrance, removing steps and replacing them with ramps with handrails, and ensuring that there is easy access to washrooms, water fountains and employee lunchrooms.

Employers can also widen their job search criteria to make sure that people with disabilities are aware of opportunities within their organization. Some things to consider might be disability inclusion statements in job advertisements, posting job openings on disability-oriented job boards, ensuring that applications are in formats accessible to all people with disabilities and providing reasonable accommodations for applicants to ensure that they are able to fairly compete in any job interview or process.

It is also important to consider how you might conduct the actual interviews. That could mean making accommodations during the process or giving consideration to the whole of the candidate's experience and background. For example, some people may be highly qualified for a technical position but not be able to communicate well. One other tip to make it fairer for people with disabilities to compete is to shed any preconceived ideas or prejudices about what a person with a disability might be capable of. Let them show or tell you.

After a person with a disability comes on board, they may need some physical accommodations to ensure their success at work. They may need a restructured work station or a modified computer with accessible capacity. Most of these accommodations can be provided with minimal cost and your new employee will most likely repay your efforts with an enthusiastic approach to their new job. A quick tour of their new jobsite will reveal any physical barriers that remain. Once these barriers are removed, both they and you can look forward to their ongoing success.

*Members Quarterly Staff Writer*

*Feature*

# Failure to Defend Employment Standards Complaint May Affect Other Forums - *Take Employment Standards complaints more seriously.*

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Feature

Employers often face legal claims or complaints by employees in different forums. An initial claim may be to Employment Standards and then a subsequent lawsuit or other claim is filed. These matters can proceed at the same time, and employers are usually more concerned about the lawsuit than the administrative proceeding. This is not surprising since the lawsuit often has the potential for higher damages. However, it is important that employers take each claim or complaint seriously, as a decision in one can determine the outcome in others.

For instance, a common scenario is that a terminated employee files an Employment Standards complaint followed by a wrongful dismissal lawsuit. The Employment Standards matter will normally be decided long before the lawsuit is concluded. If the employer claims just cause and Employment Standards rules there was not just cause, the employer may lose its ability to claim just cause in the lawsuit. But if Employment Standards rules the termination was for just cause, the employer may be able to dismiss the lawsuit summarily, saving considerable time and resources.

In addition to lawsuits, different proceedings could involve Employment Standards, grievance arbitration, the Labour Board, the Privacy Commissioner, Human Rights, Occupational Health and Safety and other statutory claims.

When considering whether an initial decision is binding upon a subsequent case, the following questions will be asked:

1. **Is the existing decision judicial in nature?** This does not mean the decision must have been made be a judge, but simply by a body capable of exercising judicial authority and making the decision in a judicial manner.
2. **Did the previous proceeding decide the same issue?**
3. **Is the existing decision final?** A final decision includes a decision where there was a right of appeal that was not exercised.
4. **Are the parties the same?** Issue estoppel only applies where the parties subject to the initial decision include the same parties involved in the subsequent proceeding. Thus, a decision on a claim by one employee against an employer will not automatically bind the employer in respect to a claim by a different employee.

## A Recent Case

In the recent decision of *Miciak v Sarah McLachlan School of Music*, the Alberta Human Rights Tribunal (the "**Tribunal**") affirmed that parallel matters adjudicated by Alberta Employment Standards may result in a finding of issue estoppel and the Employment Standards decision being accepted as final and binding in the human rights complaint.

In this matter, Laurelle Miciak filed a human rights complaint against her former employer, Sarah McLachlan School of Music (the "**Employer**"), alleging discrimination in the area of employment practices on the ground of gender under section 7 of the *Alberta Human Rights Act.*

In addition to her human rights complaint, Ms. Miciak also filed two other complaints against the Employer in other forums: an Occupational Health and Safety complaint alleging discriminatory action related to her reporting a health and safety concern and an Employment Standards complaint alleging that she was constructively dismissed and entitled to termination pay.

On the Employment Standards complaint, it was found that the Employer constructively dismissed the employee. It was ordered to provide termination pay. This decision was upheld on appeal, and the Employer did not seek judicial review of this decision (the "**ES Decision**").

## Human Rights Decision

Before the Human Rights Commission, the Director asked the Tribunal to apply issue estoppel and accept, as a finding of fact, the ES Decision that the Employer terminated Ms. Miciak's employment. The Employer was arguing that the employee had resigned.

The Tribunal granted the application finding that Employment Standards, and the Labour Board acting on appeal, routinely make findings of fact as to whether an individual was wrongfully dismissed or resigned. The Tribunal also found there were sufficient procedural safeguards in place, especially considering the fact that the Employment Standards decision was appealed, to satisfy the test for issue estoppel (with no compelling reasons for the Tribunal to not exercise its discretion).

However, despite being bound by the ES Decision that Ms. Miciak's employment was terminated, the Tribunal clarified that the question of whether gender was a factor in the termination remained a live issue as that was not considered in the ES Decision.

## Implications

This decision is instructive for the proposition that issue estoppel can apply to parallel or related human rights and Employment Standards matters. It reinforces the importance of employers taking Employment Standards complaints seriously and advancing their best defence.

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