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SUMMER 2020 VOLUME 18, No. 3



Nathaly Pinchuk
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Two Traits for Top Performers: Optimism and Adaptability

Is YOUR glass half full?

Over the past months, we've experienced the COVID-19 crisis which has affected everyone on a global basis, not just those in Canada or across North America. This scenario has never happened before and there was no "rule book" on how to manage the workforce.

As we try to become more agile in our organizations and manage better, I found that two personality traits stand out for top performers: Optimism and Adaptability.

Most of us have now experienced the full range of emotions from fear, depression and grief to anxiety and panic. We hear sad stories daily of how those around us have been impacted by this pandemic. At one point, it is necessary to come to terms with the reality of the situation, do the analysis and find ways to move towards a better future.

You can either be an optimist or a pessimist — which one works best? Those who have walked around with a black cloud over their heads for most of their lives are not looking towards developing any path of improvement or how to reach more positive outcomes at the best of times. If 'the glass was half empty' before, what happens now?

That's where optimism plays such an important role. You will move faster and further in a forward direction being an optimist with "the glass half full"

attitude. To be blunt, you'll not only succeed but possibly exceed your expectations and those around you!

Let me share with you some conversations that I've had in the past few months. A senior manager with 20 years' experience in a prominent organization with only a few years before retirement found out that she'd been terminated. She went through the initial shock and the seven stages of grief and believes that she can overcome this in spite of the odds. Rather than obsess in the misery of it all, she reaches out to explore what skills she can obtain to expand her horizon and eventually find a job in another related field. She develops a full strategic plan on what she needs to move ahead with the professional development and update her resume for the post-COVID-19 job search.

A department manager reaches out to us because his employer laid off 30% of its workforce, moved those left to work out of their homes and he feels this entire operation will fail. He asks for suggestions to help him manage his team telework but he knows this new way of working is doomed. Where do you go when "the glass is half empty"? The first thing is to try to change the mindset but that is not an easy process. He must understand that with the attitude he has, he will not be able to hide it from his employees regardless of what he says or does. He is also

not in the position to help others move forward as he's not looking in the same direction. Once he understood, some concrete suggestions were made with the hopes that he'll move along the right path.

Being an optimist will help you in every aspect of your life. Not only will it help you become a better and more successful person, it will motivate and uplift those around you. It has also proven to help overcome major hurdles in life such as life-threatening illness and job loss to name a few. Having lived through this crisis I've learned how important it is to see "the glass as half full".

As the saying goes, "When life gives you lemons, make lemonade."

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

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At one point, it is necessary to come to terms with the reality of the situation, do the analysis and find ways to move towards a better future.

Perspective



Brian W. Pascal
RPR, CMP, RPT
President

President's Message

Perseverance: Better than Intelligence?

Look for it in new employees

Some of the greatest victories in sport and on the battlefield have been achieved by persevering against all odds. The world of work is full of many failed attempts before an eventual success. One of the best-known examples of perseverance is the inventor Thomas Edison. After a multitude of failures to create an electric light bulb, he was apparently asked if he was ready to give up. His reply was "I haven't failed, I've identified 10,000 ways that don't work."

The value of perseverance can never be underestimated. Now some HR experts believe that it may be even better than intelligence as a trait to look for in new hires. There's no question that brains will take you a long way at work and we all love those best and brightest new recruits. But the research is starting to show that those who show passion plus perseverance and the ability to push through difficult challenges might actually outperform the smartest people in the room.

This may be because those highly intelligent people have learned to get by on their brain-power alone. They do extremely well in school and university because those systems are highly structured and less complex. But when they get into the workplace and face adversity

(which is the new norm), they retreat because they lack the confidence or resiliency to work through the many challenges to reach a solution. In fact, they often get frustrated and give up or avoid certain tasks.

This also shows up when a new employee is asked to learn a new skill or process, or to do things the 'way we've always done them' at your organization. That's not easy for anyone. Those who have learned to persevere in other aspects of their lives will find a way to keep going until they get it. One more thing that favours perseverance over intelligence is that your brain is almost useless when it comes to managing stress and anxiety. In fact, in many cases, it causes more problems to think about something and only makes you more anxious. The quality that people with high perseverance have is that they are less likely to panic when it gets difficult because they have learned to stick with it until it starts getting easier.

Maybe we should be testing for perseverance as well as intelligence when we hire new employees. Albert Einstein once said, "It's not that I'm so smart, it's just that I stay with problems longer."

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



"I don't know which one of you keeps turning up the air conditioning, but you'd better stop!"

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Tom Ross
Q.C.

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How to Manage a Remote Workforce

As COVID-19 has made many employees and employers used to working from home, we can expect this will continue for many workplaces after the crisis is over. There are benefits to both employers and employees from telecommuting. There are also issues that should be considered with such arrangements.

Eligibility

Employers should establish clear criteria about who qualifies to work remotely, including the type of work that qualifies, the employee's ability to work at home, set up an office, maintain confidentiality and the level of productivity required.

Employers should be mindful of human rights obligations and take a flexible and reasonable approach to telecommuting-related accommodation requests, which should be examined on a case-by-case basis. A case where the employer failed to reasonably consider an employee's request to work remotely is *Devaney v. ZRV Holdings Limited*, where Ontario's Human Rights Tribunal found the employer discriminated against an architect for denying his accommodation request to work remotely for care of his ailing mother.

Work Expectations

Clear expectations should be set regarding the type and quality of work the employee is expected to perform remotely and how work performance will be managed. It should be made clear that regular work hours are to be maintained, that attendance at virtual work meetings may be required and that even though employees will be working from home, the employer has the right to and will supervise them.

Work Equipment

Employers should ensure their remote workers have the

proper work equipment and be clear whether employees who use their personal device for work-related purposes will be compensated for any related costs. Employers should maintain a list of equipment provided for telecommuting purposes.

Work Space

A telecommuting policy should outline any physical work space requirements and ensure employees will work in a proper work environment. Telecommuted work must be safe and free from hazards.

Location

The telecommuting policy should state the location where employees are to work; whether they are only permitted to work in their homes or may work elsewhere. Without clarification on this point, an employee may take the position s/he may work from various locations outside of the home as was the case in *Ernst v. Destiny Software Productions Inc.* In this case, a Vancouver software company hired Ernst to market its software allowing him to work remotely in Calgary. The agreement did not specify the location where Ernst was to work. While working, Ernst moved to Mexico, taking the position he could work remotely from there. This led to his termination and an unsuccessful wrongful dismissal lawsuit. BC's Supreme Court found the employee's unilateral move to Mexico and refusal to return to Canada were unacceptable and constituted just cause for termination. To avoid ambiguity, employers should reserve the right to determine an employee's remote workplace location.

Confidentiality and Insurance

To ensure employees protect sensitive and confidential information while working remotely, employers should consider security issues regarding the employee's location, use of

confidential information, computer access and technology. Employers may need to implement additional cyber-security measures.

A telecommuting policy should address insurance requirements such as home insurance coverage and potential damage or loss.

Working Remotely and Constructive Dismissal

A telecommuting policy should address how and when telecommuting may end and examine whether working remotely constitutes a fundamental employment term. If it is a fundamental employment term, an employer cannot unilaterally change this term significantly without running a risk of constructive dismissal. A reminder of this principle is found in Ontario case of *Hagholm v. Coreio Inc.*, where the employee successfully sued her employer after it cancelled her previous ability to work from home 3 days per week.

To address this issue, the telecommuting policy should clearly state that the ability to telecommute is a privilege, that employer has the discretion to modify, end or revoke a telecommuting arrangement with an employee, and that working remotely is not a fundamental term of employment.

Documentation

Employers should ensure they clearly communicate expectations in a telecommuting policy or written document, including work expectations, hours of work, supervision, use of confidential information, ownership of work equipment and termination or amendments to the arrangement.

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Voluntary Retirement Precludes Claim of Ongoing Loss of Earnings

Accommodated employee can't have it all

It wouldn't be a stretch to say that most employees welcome retirement when the time comes. However, many employees may not contemplate the impact voluntary retirement might have on their lives, particularly in relation to workplace injuries.

In *Vautour v Workplace Health, Safety and Compensation Commission*, 2019 NBCA 82 (CanLII), the New Brunswick Court of Appeal considered the impact of retirement in the context of the workers' compensation regime. The workers' compensation regime is a no-fault scheme funded by employers which provides benefits to employees who are injured in workplace accidents and provides immunity from lawsuits arising from those accidents for workers and employers.

The appellant, Wendy Vautour, was employed as a court stenographer. Ms. Vautour developed bilateral elbow tendonitis. As a result, Ms. Vautour filed a workers' compensation claim which was accepted. Ms. Vautour was put off work, received earning replacement benefits, completed a number of medical examinations and treatments and was moved to an accommodated position which was suitable in relation to her medical restrictions. A little over a year later in October 2017, Ms. Vautour was again put off work due to tendonitis and her claim was re-opened as a result of a recurrence. During that time, Ms. Vautour applied for retirement leave effective December 1, 2017. In September 2018, the Workplace Health, Safety and Compensation Commission (the "Commission") advised Ms. Vautour that her

earning replacement benefits would cease effective December 1, 2017, as she had applied for retirement leave effective that date and there were no medical reports supporting ongoing disablement.

Ms. Vautour appealed the Commission's decision to the Workers' Compensation Appeals Tribunal (the "Tribunal"). The Tribunal upheld the decision of the Commission, finding that the employer had properly accommodated Ms. Vautour and that her loss of earnings benefits ended upon her voluntary retirement as she chose to retire rather than seek further accommodation, thus ending any earnings loss.

Ms. Vautour appealed the Tribunal's decision to the New Brunswick Court of Appeal. Ms. Vautour argued that the Tribunal misinterpreted various provision of the *Workers' Compensation Act* (the "Act") including the meaning of "loss of earnings" and "suitable occupation"; failed to consider the merits of the case; reversed the burden of proof; and breached its duty of procedural fairness. She also argued that the Tribunal applied the wrong test for disablement when it determined that she had been suitably accommodated by the employer and ignored relevant medical evidence. The crux of Ms. Vautour's reasoning was that because the Commission re-opened her claim due to a recurrence and she was paid loss of earnings benefits, in the absence of any medical evidence to the contrary, her disablement was ongoing. Ms. Vautour alleged that she retired because she was unable to work without pain.

The New Brunswick Court of Appeal rejected Ms. Vautour's arguments, noting that Ms. Vautour retired before seeking further accommodation from her employer; failed to produce any evidence to rebut the Commission's contention that she had been appropriately accommodated by her employer; and there was no further medical evidence that indicated her disability continued beyond December 1, 2017.

Ms. Vautour's assertion that retirement was due to her inability to work without pain was not supported by any medical evidence and her decision to retire was voluntary, which relieved the Commission from any further responsibility to pay for benefits or to proceed further with her claim. Ms. Vautour also failed to provide any evidence to support her position that she had not been appropriately accommodated when she made the decision to retire. The Court dismissed the appeal and confirmed that loss of earnings benefits are not paid to employees like Ms. Vautour, who have been appropriately accommodated, have available employment and choose to retire. In this particular case, retirement may not have been all it was cracked up to be.

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Feature



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Moving beyond the “Dear Sirs”— It’s Your Obligation

Incorporate inclusive language into workplace vernacular

Expressions such as “Dear Sirs” or “Chairman” are outdated, exclusive and should not be used in today’s workplace.

Employers are required to provide employees with a workplace that is free from harassment and discrimination. Legislation such as the *Human Rights Code* and the *Occupational Health and Safety Act* as amended by Bill 168 is designed to ensure that employers take these responsibilities seriously.

Language in the workplace continues to evolve as employers better understand their legal obligations and as workplaces become more diverse.

Not only is language changing, but how an employer communicates with its diverse workforce is evolving. This includes verbal and written communications, the breadth of which is significant and can include: job advertisements, communications to employees, images on company intranets and websites, meetings, emails, brochures and publications.

Some Canadian public sector employees have published guidelines and handbooks to help employees to communicate in a more inclusive manner. They point out that ideas and practices based upon the norms of the dominant culture can result in experiences of exclusion and discrimination for employees from diverse backgrounds. Inclusive communication, by contrast, recognizes diversity.

Here are some important points to consider:

Apply gender neutral language

Back in the day, collective agreements only referred to men. In the 1990s, there was a trend to include a clause stating that the reference to “males” and “men” also referred to “females” and “women”.

Today, we go beyond that and should remember to refer to the position and not the gender. The point is to not re-gender, but to de-gender. Some examples include:

- “foreperson” rather than “foreman”
- “the best person for the job” rather than “manning the desk”
- “workforce” or “staff” rather than “manpower”
- “chair” or “chairperson” rather than “chairman”
- “server” instead of “waitress” or “waiter”
- “artificial” or “manufactured” rather than “manmade”

Don’t assume sexuality

Don’t assume the sexuality of your employees. The law in this area is growing rapidly. In 2012, “gender identity” and “gender expression” were added as prohibited grounds to the *Human Rights Code*. A couple of years ago, employees may not have known the meaning of “gender fluid”, “cisgender”, “trans” or what the letters in the LGBTQ+ spectrum stood for, but today these words are part of our workplace vernacular.

Some tips:

- Refer to “spouses” or “partners” rather than “husband and wife” or “boyfriend and girlfriend”
- Considering having employees identify their preferred pronouns (he/him, she/her, they/them) in their email signature line

Personal identifications

Prior to last year’s federal election, the media reported that Jagmeet Singh, the leader of the federal NDPs, was called “Jimmie” while growing up because it was easier to pronounce and sounded “less weird”.

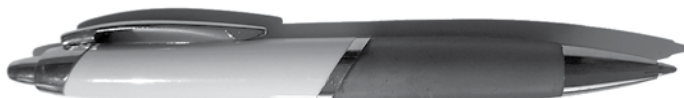
Being inclusive in the workplace requires that all employees correctly identify one another without resorting to nicknames, shortening or “anglicizing” names. It is important not to have a surprised reaction to a name that is diverse. Practice, practice, practice saying an employee’s name to make sure it’s pronounced correctly.

When referring to an employee’s racial, religious or ethno-cultural group, remember the principle that it’s the person before the country, location or creed. Therefore, it’s “person from Pakistan” rather than “Pakistani”, or “person from the Jewish community” rather than “Jew” or “Jewish person”.

Abilities/Disabilities

There has been a significant transformation in the language that is used to address employees with disabilities. Instead of using negative or value-laden terms that emphasize the severity of the disability, such as “poor” or “victim”, there is a focus on the person rather than the

continued next page...



Feature

"Dear Sirs"

... concluded from page 6

disability. Accordingly, it is "a person who has schizophrenia" rather than "the schizophrenic", "employee with a hearing impairment" rather than "deaf" or "an employee with a disability" rather than "handicapped employee" or "disabled employee".

Similarly, when referring to employees who require supportive devices, use objective descriptors such as "a person who uses a wheelchair" rather than "wheelchair bound".

Visual Representation

There is immediate visual response when seeing an organization's communications. About 10 years ago, a prominent legal magazine was criticized for only putting white men on its covers rather than

reflecting the diversity of licensees.

When preparing communications, recognize the diversity of your workplace and be mindful of portraying the following:

- males, females, trans, gender fluid
- person using mobility devices
- different ages
- different cultural backgrounds
- different colours
- same gendered couples
- people with different physical, intellectual and linguistic abilities

A final consideration is whether employees presented in pictorial materials are shown in different and non-traditional occupations and different levels of authority.

Take away

Using inclusive language in the workplace is not hard, but it takes mindfulness, awareness and practice to choose communications that are inclusive. Let's work on inclusive language and make sure the "Dear Sirs" remains a greeting of the past.

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Get Started



Ron Pizzo
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Thriving in the Post COVID World: Start with Shared Purpose

Creating nimble and adaptable organizations

What do you want your organization to look like after this pandemic? The way to the future must include a nimble approach to adapting and managing change while at the same time creating an environment that speaks to security and stability. Are you managing this challenge?

Stephen Covey, in his book *The 7 Habits of Highly Effective People*, unveiled a management matrix with four quadrants. Quadrant I deals with matters that are urgent and important: dealing with crisis management, pressing problems and deadline-driven projects. Quadrant II looks at matters that are not urgent but important and includes such activities as relationship building and recognizing new opportunities. Since this pandemic hit, the managers and leaders I have worked with are stuck in Quadrant I. They are overwhelmed and don't even think about Quadrant II. Quadrant II activities are the ones that create the path for increasing your organization's ability to be nimble and adaptable.

When a sports team ends its season, the team's attention turns to the next season. Coaches know that the players are the ones on the field of play executing the game plan. What the players achieve determines whether the next season is a success or failure. A coach can have the best playbook, the most innovative and effective game plan, but if he or she does not have the team to execute that plan, the playbook is of little use.

A coach also knows that the effectiveness of the team is not just a function of talent. Success

in sports is determined by how well the team pulls together and works together. The annals of sports lore are riddled with stories of highly talented teams that have failed to achieve and teams with little talent that rose to meteoric heights. An Olympic example, the "Miracle on Ice" is a true story about a group of US college students that defeated the four-time defending Soviet Union gold medalist hockey team, a team with among the best hockey players in the world.

Dr. Matthew Lieberman, one of the world's foremost authorities on the study of social neuroscience wrote a book *Social: Why our Brains are Wired to Connect*. In his chapter on 'The Business of Social Brains', after reviewing the evidence, concluded:

The assumption that productivity is about smart people working hard on their own has been masking the fact that individual intelligence may only be optimized when it is enhanced through social connections to others in the group. Social connections are essentially the original internet, connecting different pockets of intelligence to make each pocket more than it would otherwise be by itself.

When a coach plans for the upcoming season, the coach recognizes that the game plan, though important, is not enough. The game plan has to match up with the players on the team. The team has to buy into the system and team goals. Each team member has to understand his or her role on the team and know that that role is worthwhile and important for achieving team goals. Team members have to be appreciated for what they do.



Ultimately, the team, players and coaches have to buy into a shared team identity.

Quadrant I activities are those activities that create the game plan. The work you do in Quadrant II determines whether that plan succeeds or fails. Covey wrote, 'start with the end in mind.' When you know the end, the way forward becomes clearer.

Does your team have a sense of its shared purpose? Has that shared purpose been committed to paper in simple and straightforward language for everyone to understand? Did you involve the entire group or team in creating the shared purpose? A group functions best when its members clearly understand its purpose, perceive the purpose as worthwhile, understand each other's role and feel appreciated. When people share a plan and know what is important, the path forward in uncertain times is clearer. So, for Quadrant II work, start here — shared purpose.

Ron Pizzo is a lawyer, certified coach and facilitator. He works with Pink Larkin in Halifax as a labour lawyer and as a workplace restoration facilitator. He can be reached via email at rpizzo@pinklarkin.com

Feature



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Diamonds are Forever — Termination Provisions Fade

The “Changed Substratum Doctrine” still shines bright

Many employers choose to include a contractual termination provision in an employment agreement as a means of avoiding common law reasonable notice requirements and creating certainty in the amount of termination notice that may be required. However, the important question is whether or not that contractual notice provision will stand the test of time. Legislation may change, which can render a termination provision non-compliant with the law. More importantly, even if legislation does not change, the sands of time may change the employment relationship and may trigger what is often called the “changed substratum doctrine”. Under this common law doctrine, if employees develop new skills, change roles or are promoted, where their status and responsibilities have significantly changed from the time of their original employment agreement, the contractual notice period in that original employment agreement may no longer be enforceable. As a result, the employer will be exposed to common law reasonable notice upon termination without cause as if the termination provision had never existed. Unlike the unenforceable termination provision, this doctrine remains ever-present and was recently reaffirmed in a Court of Queen’s Bench of Saskatchewan decision.

The Facts

In *McKercher v. Stantec Architecture Ltd.*, 2019 SKQB 100, the employee was hired by the company in 2006 as a staff architect with an annual salary of slightly more than \$62,000 per year. The original employment agreement provided that if

the company terminated the employee’s employment other than for just cause, the employee would receive two (2) weeks’ notice or pay in lieu of notice during the first two (2) years of employment increasing by one (1) week for each additional completed year of employment to a maximum of three (3) months’ notice or pay in lieu of notice or the minimum notice of termination (or pay in lieu of notice) required by applicable statutes, whichever was greater.

Throughout his 11-year employment with the company, the employee was promoted multiple times and he most recently held the role of Business Centre Sector Leader earning an annual salary of \$134,004. Throughout the employee’s promotions, the company and the employee never entered into a new agreement with updated terms or reaffirmed the original employment agreement.

The employee’s employment was ultimately terminated without cause and the employee was provided with the contractual maximum of 3-months pay in lieu of notice. The employee brought a wrongful dismissal claim seeking compensation based on common law reasonable notice.

The Decision

The court found in favour of the employee and granted summary judgment for wrongful dismissal based on common law reasonable notice of 12 months.

There was no doubt that the employee’s status and responsibilities had substantially changed throughout his employment, moving from staff architect to sector leader.

Further, the court did not find any evidence that it would have been clear to the employee that the original termination provision was meant to apply to the promoted roles. As a result, the court found that the changed substratum doctrine applied, rendering the original termination provision unenforceable, and awarded the employee compensation based on a common law reasonable notice of 12-months, including the benefits he would have received during that time and the bonus he would have earned over the same period.

The Lesson for Employers

Simply having a termination provision that prevents common law reasonable notice from applying does not mean that it will last in perpetuity. We strongly recommend that when an employee’s responsibilities and status have significantly changed (i.e. through promotions), employers should enter into a new employment agreement with the employee that contains an enforceable termination provision, or ensure the employee provides written acknowledgment that the original termination provision continues to apply.

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Feature

Workplace Investigations: Avoid Costly Mistakes

What every employer should know

According to the 2017 publication 'Harassment and Sexual Violence in the Workplace — Public Consultation: What We Heard' (ESDC), 60% of workers have experienced harassment at the workplace, 30% sexual harassment and 21% experiencing workplace violence.

75% of workers who had experienced any of the above only reported the most recent incident and 41% said no attempt was made to resolve the issue. What's wrong with this picture?

Given the above statistics, it is safe to say that most organizations have had their share of issues and they are not alone in that regard. What will set you apart as an employer is how you choose to manage these problems when they arise. There are financial and reputational impacts on employers who do not take complaints seriously and /or investigate where appropriate.

Individuals (sole proprietor) can face a fine of no more than \$100,000.00, a prison term of not more than 12 months or both.

Corporations could face a maximum fine of \$1,500,000.00 upon conviction.

The consequences of not conducting an appropriate investigation are palpable.

Under the OHSA, if an employer becomes aware of an instance of harassment (or the potential for harassment), they are required to conduct an "appropriate" investigation into the allegation brought to their attention by either the supervisor or the Complainant employee. However, employers are also required to conduct investigations (or at minimum,

preliminary inquiries into allegations) stemming from anonymous complaints.

Further, it is important for employers to appreciate that the OHSA provides authority to workplace inspectors under s. 55.3(1) to order employers to hire an impartial investigator to investigate at their own cost.

Prior to commencing an investigation, there are several considerations to contemplate before proceeding. Have allegations been raised that could amount to a prima facie case, if true? Should the Respondent remain in the workplace during the investigation, be relocated or placed on an administrative leave pending the investigation? What steps need to be taken to preserve the integrity of the investigation such as ensuring confidentiality is maintained throughout the process? Who is best qualified to investigate the complaint? Would a third-party investigator be the most effective option to investigate the complaint under the circumstances? Is there a need to maintain privilege?

At this point, you might consider bringing in a third-party investigator. These investigators have specific experience and understand the process required to satisfy an adjudicator or judge's higher standard of needs. Involving a third-party will also bring with it the degree of thoroughness required to keep the investigation defensible should it become a litigation action against the employer.

An internal investigator may not appear as impartial if he/she is a senior member of the organization being investigated. Also, your internal investigator must still work with the respondents in the future and this

The consequences of not conducting an appropriate investigation are palpable.

may cause greater tension in the workplace.

Investigations should follow Natural Justice and Procedural Fairness. Procedural Fairness is a concept in law that is concerned with the process relied upon to come to a decision as opposed to the correctness of the decision. Procedural Fairness requires the decision-maker to follow a fair and proper process to arrive at their decision. The fundamental basis of natural justice is predicated on the underlying belief that the substance of a decision is more likely to be fair if the procedures through which that decision was made were just.

The relevant principles of Natural Justice include: the right to adequate notice, the right to be heard and the right to an impartial decision-maker free from bias.

Conducting a credible workplace investigation requires strict adherence to the processes outlined in the governing legislation (the OHSA or the Human Rights Code). A thorough yet impartial investigation is the cornerstone of developing a credible and defensible investigation.

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Managing the Unknown Back-to-Work Climate

Start planning now for the new normal

You got the memo, email or the phone call telling you to come back to work on Monday. Now what? Are track pants and jeans nixed?

Are you excited, anxious, scared or worried? Probably all of these emotions are coming up for you. Or are you saying to yourself (a new habit): *'finally, I get to see my colleagues.'*

What will the first day back be like in the field? As a manager, what should you say? What should your employees expect of you? Will it be business as usual? Normal or a new normal? These questions spin around all of our minds as we anticipate that day.

The good news is that many of the same principles and tools we use in workplace restoration may be applied.

Start with calming over-anticipation

- Stress may increase your anxiety so be proactive in lowering stress levels.
- Thinking, *'There is nothing I can do, and that feels horrible?'* Remember that you are not helpless.
- Change your negative thoughts from 'what if' to a positive 'how do I?'
- Unfollow negative social media channels or even those stuck in the same thought space. Mute toxic messages. Minimize or stop watching the news.
- Visit with friends via Zoom, Skype or WhatsApp.
- Take advantage of this time. Have you said, *'I wish I had more time to spend with my family, exercise, meditate or clean out those drawers...?'* Guess what? Wish granted!

Move into preparing for what you do know now

It may seem far away now, but getting your workplace to be a place where employees are happy to return to work starts with planning now.

Systematic and progressive work will create an environment where people are eager to communicate with their colleagues, feel empowered to bring forth new ideas and give their best every day and into the future.

Remember that anytime significant changes take place in the workplace, relationships may have been strained or fragmented. Teams may find they are no longer able to work well together. Restoration helps to restore good relations.

So start working on the following before the 'return to workplace' call arrives.

Improve role clarity

It is natural for an employee to feel challenged because another employee was doing "their" work. Another common scenario includes two employees blaming each other for work that was not done, each thinking the other was responsible. Clarifying roles through improved job descriptions, procedures, flow charts and planned discussions between employees and management can address these issues.

Enhance your policies

Review current policies and consider implementing companion policies to address the new normal. Consider developing a Positive Workplace Policy.

Physical Layout

Recognizing that social isolating is considered a mental

trauma, look at your office configuration. Do you need to provide more space for people or more privacy? Can you accommodate that at the workplace or provide work-at-home alternatives?

Brush up on your managerial people skills

Change Management The fear and uncertainty associated with change can lead to competitiveness, gossiping, negativity and other team dysfunctions. Adopt good change management practices and consider engaging a change management professional for coaching. Excellent people skills include:

- Involving employees from the outset of any change initiative, not only to give them a voice but also to enable them to prepare for the different working environment;
- Frequently communicating, even (or especially) when you may not have an answer;
- Supporting staff to understand how the modification will affect them;
- Showing your sincerity – do not pretend that something negative will be a positive automatically; and
- Giving employees time to adapt to the new change.

Remember that this time is a moment to reflect, rebuild and reconnect. Dealing with the unknown back-to-work climate requires energy, flexibility and stamina. Start preparing now so you will have the tools and skills you and your team need to succeed.

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Feature

Termination Clauses Take Another Hit

Make sure your template clauses are enforceable

The termination clause has always been the subject of much litigation in Ontario. Consequently, employers are always adapting their template termination provisions to keep up with an evolving body of case law.

The Ontario Court of Appeal (“ONCA”) recently dealt employers another challenge when it comes to drafting enforceable termination clauses, this time, attacking the “saving language” that employers often incorporate into termination clauses as a way to avoid having them found to be void.

The Facts

The employee, Noah Rossman, was advised that his employment was being transferred from DAI Inc. to Canadian Solar Solutions Inc. (“CSSI”) in 2010. Following the transfer, Mr. Rossman and CSSI subsequently entered into two employment agreements, one in 2010 and the second in 2012.

In 2014, after three years of employment with CSSI, Mr. Rossman’s employment was terminated on a without cause basis. He was 33 years of age and earning a salary of \$82,500.00 per year, in addition to benefits and a bonus plan.

He commenced an action for wrongful dismissal.

The Termination Clause

Both of Mr. Rossman’s employment agreements contained the same termination clause, included the following language:

9. Termination of Employment

9.01 The parties understand and agree that employment pursuant to this agreement may be terminated in the following manner in the specified circumstances:

...

c) by the Employer, after the probation period, in its absolute discretion and for any reason on giving the Employee written notice for a period which is the greater of:

i) 2 weeks, or

ii) In accordance with the provisions of the *Employment Standards Act* (Ontario) or other applicable legislation, or on paying to the Employee the equivalent termination pay in lieu of such period of notice. The payments contemplated in this paragraph include all entitlement to either notice of pay in lieu of notice and severance pay under the *Employment Standards Act* Ontario. In the event the minimum statutory requirements as at the date of termination provide for any greater right or benefit than that provided in this agreement, such statutory requirements will replace the notice or payments in lieu of notice contemplated under this agreement. The Employee agrees to accept the notice or pay in lieu of notice as set out in this paragraph as full and final settlement of all amounts owing by the Employer on termination, including any payment in lieu of notice of termination, entitlement of the Employee under any applicable statute and any rights which the Employee may have at common law, and the Employee thereby waives any claim to any other payment or benefits from the Employer. Benefits shall cease 4 weeks from the written notice.

The Court Proceedings

According to the courts, the problem with the termination clause in Mr. Rossman’s employment agreements was two-fold.

The courts found that the saving language included in the clause provided that Mr. Rossman would receive the “minimum statutory requirements” upon termination, and yet, the termination clause also limited his entitlement to four weeks of benefits upon termination. Notably, the ESA provides for notice of termination for up to eight weeks, and it is well established that benefits must be continued for that period of time.

Motion for Summary Judgement

In a Motion for Summary Judgement, the judge held that the termination clause was void and unenforceable. First, he held that the fact that the portion of the clause, which stated that benefits would cease four weeks from the written notice was ambiguous and an attempt to contract out of the minimum ESA standards which calls for benefit continuation of a maximum of eight weeks. Secondly, the judge held that the saving language did not “cure” the rest of the termination clause.

Consequently, the termination clause was found to be void and unenforceable.

Mr. Rossman was granted partial summary judgement and was awarded pay in lieu of reasonable notice for five months. CSSI appealed the decision.

The Appeal

The ONCA upheld the partial summary judgement in December 2019, agreeing that the termination clause was void and unenforceable.

They began with an analysis of contractual interpretation in the context of employment law. In doing so, the ONCA

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Termination Clauses Take Another Hit

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reinforced the vulnerability of employees and the remedial nature of the ESA, thus reaffirming that where a termination clause can be interpreted in more than one way, they must be interpreted in a manner that gives the greater benefit to the employee.

With respect to the termination clause at issue, the ONCA determined it to be void at the outset given that the benefits portion of the provision contravened the ESA. This is particularly interesting given, as CSSI argued, that in the case of Mr. Rossman, the termination clause provided him with an extra week to which he was not entitled under the ESA and thus constituted a greater benefit (under the ESA, Mr. Rossman was only entitled to three weeks' of benefits). The ONCA

rejected this argument on the basis that the mere fact that the termination clause had the potential to contravene the ESA was sufficient to render it void.

Finally, the ONCA held that the termination clause was ambiguous and that this could not be rectified by the clause's saving language because the benefits portion of the provision was not "forward-facing" and did not expressly provide for an intention to conform with the ESA with respect to the benefits requirement.

Takeaways for Employers

Notwithstanding the fact that saving language has previously been supported by the ONCA, Rossman is yet another reminder that termination provisions must not, even inadvertently, attempt to contract

out of an employer's obligations under the ESA. Indeed, meticulously drafted termination clauses are more important than ever.

Additionally, Rossman provides a warning that even where the issues identified by the court in the termination clause have no impact on the employee in question, the saving language cures the clause of those issues.

In light of constantly evolving case law on this issue, it is recommended that employers regularly review their template termination clauses and have them vetted by their legal counsel.

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Become a More Mindful Leader

Use mindfulness skills to boost your effectiveness

Mindful leadership practices help leaders strengthen their focus, lead in the moment and develop the qualities leaders need today. These qualities include openness, compassion, emotional intelligence, resilience and more. In the process, they become more effective leaders.

Mindfulness research also confirms that key benefits are strongly aligned with leadership effectiveness. These include:

- better attention, working memory, focus and executive functioning capacity
- deeper empathy and compassion
- improved emotional resilience
- reduced stress

So, what is mindfulness? What does it mean to be a mindful leader?

One of my favorite definitions of mindfulness comes from Mindful.org: 'Mindfulness is the basic human ability to be fully present, aware of where we are and what we're doing and not overly reactive or overwhelmed by what's going on around us.'

When leaders cultivate their capacity for present moment awareness without judgement or emotional reactivity, they enhance their leadership. For some, it's the ability to stay focussed throughout the day, while others find it helps them manage emotions. Mindful leadership also helps leaders be more open to others and fully present in the conversations so vital to effective communications, relationships and leadership success.

What's the good news? Mindful skills and competencies can be cultivated and every leader can develop proven practices that support their



growth. These may range from the introduction of simple, everyday ways of being more mindful to deep immersions into meditation practice. Leaders who integrate mindful practices into their leadership report personal and professional benefits that enhance their leadership success.

How do you recognize a mindful leader?

You can recognize a mindful leader by their calm, measured and consistent ways of leading — especially in the face of difficult situations. Look closely and you may see them pausing, ever so briefly, to consider how (or if) they will respond to a situation. In doing so, they lead from choice typically in full alignment with their values and principles.

You will also see them modelling vital leadership skills such as the following. Each of these skills can be cultivated through mindfulness:

Awareness: Through mindfulness, leaders can deepen their self-awareness, the most vital of leadership skills. They learn to be aware of their thoughts, emotions, actions and also the impacts each of those may be having on their leadership. For example, being aware when

thoughts are wandering unproductively (perhaps second-guessing a well-considered decision), then returning focus (and energy) to the present moment.

Self-Management: Mindful leaders use their self-awareness to tune in to their emotions when situations may provoke an emotional response enabling them to respond thoughtfully rather than reacting. This is especially important for leaders when they're under pressure and challenged to maintain an even keel.

Focus: Focus allows leaders to lead in the moment giving their full attention to the matter at hand. Mindful leaders do this well, whether engaged in a conversation, solving complex problems or shifting nimbly when circumstances warrant. Their focussing skills also come with the ability to pay attention to what may be arising around them or within them, and being aware of potential distractions or emotions without getting caught up in them.

Better Listening: Mindful leaders listen deeply and actively enabling them to hear and better understand what those around them are saying or wanting to say. By listening in ways that invite genuine conversations, mindful leaders build more meaningful connections.

Better Decision-Making: Through mindfulness, leaders bring an open and objective lens to their relationships and work. They are open to others and to other ideas even when they differ widely from their own. In the absence of judgement (about themselves, their ideas and perspectives, as well

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Become a More Mindful Leader

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as those of others), they engage in an honest exchange about possibilities, potential impacts and the best path forward. This leads to better decision-making often leading to better outcomes for all.

Are you ready to lead in the moment?

When I coach leaders, I often weave mindful practices and learning into our work. Why? Mindful leaders are more effective leaders. They lead from choice with a deep and enduring awareness of self. Through self-awareness, they are in touch with their thoughts,

emotions, actions and impacts. When those impacts influence their leadership negatively, they self-correct. Mindful leaders also develop strong focussing and listening skills enabling them to connect deeply with others. They make better decisions too.

Though it takes regular practice to develop strong mindfulness skills, there are many proven, easy-to-learn ways to do it. Mind-body practices such as yoga and Pilates are a great way to begin paying attention to your breath and deepening your focussing skills. Meditation and reflective

practices provide another option, including training programs specializing in mindful leadership practice. Search the web and you'll find a host of opportunities to introduce you to the power of leading in the moment.

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